

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.

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IN THE DISTRICT COURT

284TH JUDICIAL DISTRICT

OF

MONTGOMERY COUNTY, TEXAS

**PETITIONERS’ FIRST AMENDED ORIGINAL PETITION;
REQUEST FOR DECLARATORY JUDGMENT AND SUPPLEMENTAL TEMPORARY
AND PERMANENT INJUNCTIVE RELIEF;
APPLICATION FOR ABATEMENT;
APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTIVE RELIEF;
ACTION TO DETERMINE TAKING; AND
PETITION TO INVALIDATE GOVERNMENTAL ACTION**

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LAKE CONROE ASSOCIATION,
SUSANNE MITCHELL ALLEN, AND
ROBERT FERRANTE**

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NOW COME, the Lake Conroe Association (“LCA”), Susanne Mitchell Allen, and Robert Ferrante (all together “Petitioners”), filing this their Petitioners’ First Amended Original Petition; Request For Declaratory Judgment and Supplemental Temporary and Permanent Injunctive Relief; Application for Abatement; Application for Temporary and Permanent Injunctive Relief; Action to Determine Taking; and Petition to Invalidate Governmental Action 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(c)(2)&(d), Petitioners seek monetary relief of \$250,000 or less and non-monetary relief and a demand for judgment for all other relief to which Petitioners deem themselves justly entitled. For irreparable damages that cannot be measured by any certain pecuniary standard, Petitioners continue to seek non-monetary relief.

3. Pursuant to Tex. R. Civ. P. 54, all conditions precedent to this lawsuit have occurred.

II. EXHIBITS

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

- C. Exhibit C, Texas Water Dev. Bd., “Volumetric and Sedimentation Survey of Lake Conroe, June – August 2010 Survey” (July 2012), *available at* http://www.twdb.texas.gov/hydro_survey/conroe/2010-08/Conroe2010_FinalReport.pdf.
- D. Exhibit D, Affidavit of Charles Gilman, Jr., Dir. of Water Res. & Flood Mgmt., SJRA, *Vicente Medina*, et al. v. SJRA, Cause No. 1123430, Harris County, County Civ. Ct. at Law No. 1 (July 31, 2019).
- E. 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 (Mar. 11, 2020).
- F. Exhibit F, Tex. Water Comm’n Certificate of Adjudication No. 10-4963 (Feb. 25, 1987) & TCEQ Amendment to Certificate of Adjudication, Certificate No. 10-4963A (July 20, 2010).
- G. Exhibit G, Press Release, SJRA, “SJRA Board of Directors Recommends Renewing Flood Mitigation Strategy” (Feb. 25, 2020).
- H. 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/>.
- I. Exhibit I, Affidavit of Hector Olmos, P.E. CFM, *Vicente Medina*, et al. v. SJRA, Cause No. 1123430, Harris County, County Civ. Ct. at Law No. 1 (July 31, 2019).
- J. Exhibit J, TWDB, “Lake Conroe (San Jacinto River Basin),” at www.twdb.texas.gov/surfacewater/rivers/reservoirs/conroe/index.asp.
- K. 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/>.
- L. 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” (Apr. 10, 2018), *available at* http://www.sjra.net/wp-content/uploads/2018/05/FNI_Lake-Conroe-Dam-Gate-Operations-Modification-Analysis_20180410.pdf.
- M. 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 (June 15, 2018).
- N. 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 (June 4, 2018), *available at*

<https://www.hcfcd.org/Portals/62/Harvey/immediate-flood-report-final-hurricane-harvey-2017.pdf>.

- O. Exhibit O, Letter from Ryan Londeen, PE, Bleyl Eng., to Kevin Lacy, LCA (Feb. 14, 2020).
- P. Exhibit P, SJRA Application to TWDB, “FIF Abridged Application: Lake Conroe – Lake Houston Joint Reservoir Operations Study” (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.
- Q. 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); “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); & Letter from Veronica R. Osegueda, Div. Mgr., Water Res., Houston Water Planning, to Kathy Alexander, Water Availability Div., TCEQ (Mar. 13, 2019).
- R. 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>.
- S. Exhibit S, E-mail from Jace Houston, Gen. Mgr., SJRA, to Jace Houston [Bd. Members] (May 29, 2020, 9:48 a.m.).
- T. Exhibit T, Letter from Carlos Rubinstein, Principal, & Herman R. Settemeyer, P.E., Partner, RSAH₂O, to Erich Birch, Birch, Becker & Moorman, LLP (June 29, 2020).
- U. Exhibit U, Jordan Austin, SJRA, “Lake Conroe Rules and Regulations,” DOCK LINE MAGAZINE (Lake Conroe Ed.) 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>.
- V. 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>.
- W. Exhibit W, Affidavits of Susanne Mitchell Allen, Robert Ferrante, Melanie Clement, Daniel Krueger, & Matthew P. Newsom.
- X. Exhibit X, E-mail from Jace Houston, Gen. Mgr., SJRA, to Lloyd Tisdale, Bd. Member, SJRA (June 20, 2020, 1:45 p.m.) & E-mail from Yvonne W. Forrest, Dir.,

Houston Water, to Chuck Gilman, Dir. of Water Resources, SJRA, & Greg Olinger, Coastal Water Auth. (May 29, 2020, 8:59 a.m.).

- Y. Exhibit Y, Affidavits of Dale R. Elliott, P.E., James W. Newport, & William Paul Waits, P.E.
- Z. Exhibit Z, Defendant's [SJRA] Motion for Summary Judgment, *George Wickham, II, et al. v. San Jacinto River Auth.*, Cause No. 96-03-01039-CV, Montgomery County Dist. Ct., 221st Jud. Dist. (Apr. 30, 1996).
- AA. Exhibit AA, Defendant's [SJRA] Supplement to and Brief in Support of Motion for Summary Judgment, *George Wickham, II, et al. v. San Jacinto River Auth.*, Cause No. 96-03-01039-CV, Montgomery County Dist. Ct., 221st Jud. Dist. (Aug. 9, 1996).
- BB. Exhibit BB, Tex. Bd. of Water Eng'rs, Permit to Appropriate Public Waters of the State of Texas, No. 1962 (June 9, 1960); Tex. Water Comm'n, Permit for Extension of Time Issued to San Jacinto River Authority, No. 1962-A (June 18, 1962); Tex. Water Comm'n, An Order Amending Permit No. 1962 of the San Jacinto River Authority (Aug. 31, 1965); & Tex. Water Comm'n, Amendment to Permit to Appropriate State Water, Permit No. 1962-B (July 22, 1968).
- CC. Exhibit CC, Ralph A. Wurbs, "Assessing Water Availability under a Water Rights Priority System," 127 J. OF WATER RES. PLANNING & MGMT. 235 (July/Aug. 2001).
- DD. Exhibit DD, SJRA "Lake Conroe Division Application" for Permit No. 3300, Applicant: Kurt Allen (pertaining to a private boat slip) (May 8, 2013).
- EE. Exhibit EE, SJRA Flowage Easement (Oct. 9, 1973), as recorded in the real property records of Montgomery County, Tex.
- FF. Exhibit FF, Letter from Warren D. Samuelson, P.E., Mgr., Dam Safety Section, TCEQ, to Bret Raley, Div. Mgr., Lake Conroe Div., SJRA (Apr. 24, 2017).
- GG. Exhibit GG, Dep't of Pub. Works & Eng'g, City of Houston, "Request for Approval of the 2008 Operations and Maintenance Budget for the San Jacinto River Authority" (May 28, 2008).
- HH. Exhibit HH, Tex. S. Comm. on Agric., Water & Rural Affairs, "Interim Report: 2017 Hurricane Harvey Response to the 86th Legislature" (Nov. 2018).

III. PARTIES

4. **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.

5. LCA possesses standing to assert its claims identical to the standing that could be asserted by its Members.² LCA possesses standing to challenge Respondents’ statutory applications both because LCA has demonstrated that the Seasonal Lake Lowering Program (“SLLP”) presents actual or imminent injury to at least one of its Members and because LCA has demonstrated that the Respondents’ statutory applications are invalid; and therefore, all LCA Members face the actual and imminent burden of improper statutory constructions that the statutes were intended to prevent.

6. “[T]he United States Supreme Court has noted that ‘for the purpose of determining the scope of [an association’s] rights as a litigant, the association “and its members are in every practical sense identical”’ and the modern concept of associational standing emerged out of this explanation.” *Tex. Dep’t of Ins. v. Tex. Ass’n of Health Plans*, 598 S.W.3d 417, 421 (Tex. App.—Austin 2020) (citing *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996) (quoting *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 459 (1958))).

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

² “The certificate of formation or bylaws of a cooperative association may state whether and the conditions under which voting rights or other membership rights are granted to a subscriber of the cooperative association.” TEX. BUS. ORG. CODE § 251.153(b).

7. The Austin Court of Appeals continued:

Since 1993, the general doctrine of standing in Texas law has included the associational standing test as articulated by the United States Supreme Court:

[A]n association has standing to sue on behalf of its members when “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”

Id. at 423 (quoting *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993)

(quoting *Hunt v. Wash. St. Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)).

Applying this same logic to the sovereign immunity context, we conclude that because an association’s “rights as a litigant” are “in every practical sense identical” with “its members,” an association that can satisfy associational standing requirements to challenge a rule ... would also be alleging that the rule or its threatened application interferes with or impairs the rights or privileges of the plaintiff, even if those rights or privileges are of the association’s members.

Id. at 421-22.

8. On April 16, 2021, the Supreme Court of Texas issued its opinion addressing whether the Texas Propane Gas Association (“TPGA”) possessed standing to challenge hundreds of regulations enacted by the City of Houston, which were alleged to be enacted in a manner inconsistent with the Texas Natural Resources Code. *See Tex. Propane Gas Ass’n v. City of Houston*, 64 Tex. Sup. Ct. J. 751, 2021 Tex. LEXIS 302, at *18 (Apr. 16, 2021) (citing plaintiff’s pleadings). The Court further examined whether TPGA could challenge regulations enacted ““that deviate substantially and irrationally from the rules adopted by’ the State [and thereby] burden the industry.” *Id.* The TPGA Court concluded:

We disagree with the dissent that TPGA has standing to assert its claim “on the theory that, if all the regulations are invalid, they are all invalid for the same reason”. TPGA has standing not merely because there is one reason that the regulations are invalid, but because of what that reason is: that the City lacked the

authority to adopt the regulations without State approval. TPGA has standing to challenge regulations it claims the City had no authority to enact.

Id. at *4. “[A]s a practical matter, it seems likely that the members of the Texas Propane Gas Association face injury or threatened injury from most—if not all—of Houston’s LPG regulations.” *Id.* at *23.

9. LCA presents pleadings and statements contained within affidavits³ by the following LCA Members:

- a. Petitioner Susanne Mitchell Allen is a Member;
- b. Affiant Melanie Clement is a Member;
- c. Affiant Matthew P. Newsom is a Member;
- d. Affiant Dale R. Elliott, P.E. is a Member;
- e. Affiant James W. Newport is a Member; and
- f. Affiant William Paul Waits, P.E. is a Member.

10. **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 Ms. Allen to pay monies to mitigate erosion and repair her boat dock.

11. **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

³ The Affidavits of Susanne Mitchell Allen, Melanie Clement, and Matthew P. Newsom are attached hereto as Exhibit W, and the Affidavits of Dale R. Elliott, P.E., James W. Newport, and William Paul Waits, P.E. are attached hereto as Exhibit Y.

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 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.

12. **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.

13. **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, 1937.⁴ 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.

14. Petitioners present prior testimony, prior judicial pleadings, and prior judicial admissions from the following present or former SJRA personnel and contractors:

- a. Affidavit of Charles Gilman, Jr., on behalf of the SJRA as Director of Water Resources and Flood Management and as related to SJRA's Gate Operations Policy and the operation of Lake Conroe Dam.⁵

⁴ 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"].

⁵ Exhibit D, Affidavit of Charles Gilman, Jr., Dir. of Water Res. & Flood Mgmt., SJRA, *Vicente Medina, et al. v. SJRA*, Cause No. 1123430, Harris County, County Civ Ct. at Law No. 1 (July 31, 2019) [hereinafter "Gilman Affidavit"].

- b. Affidavit of Hector Olmos, P.E., CFM, Principal and Vice President of the water and engineering firm of Freese and Nichols, engineer assigned to SJRA, Lake Conroe, and the Lake Conroe Dam, including the SJRA Gate Operations Policy, since 2009.⁶
- c. Affidavit of James R. Adams, General Manager of SJRA as of 1996.⁷

IV. JURISDICTION

15. District courts possess inherent powers to examine allegations of violations of the provisions of the Texas Constitution. *See Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Envtl. Quality*, 307 S.W.3d 505 (Tex. App.—Austin 2010).

16. The declaratory and injunctive relief requested is within the jurisdictional powers of this Court pursuant to Tex. Civ. Prac. & Rem. Code § 37.003, Uniform Declaratory Judgments Act (“UDJA”).

17. 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 2022.⁸ The unlawful acts sought to be enjoined were also committed on prior occasions.

⁶ Exhibit I, Affidavit of Hector Olmos, P.E., CFM, *Vicente Medina, et al. v. SJRA*, Cause No. 1123430, Harris County, County Civ. Ct. at Law No. 1 (July 31, 2019) [hereinafter “Olmos Affidavit”].

⁷ Exhibit Z, Defendant’s [SJRA] Motion for Summary Judgment [hereinafter “SJRA MSJ in *Wickham*”] at attached Affidavit of James R. Adams, Gen. Mgr., SJRA, *George Wickham, II, et al. v. SJRA*, Cause No. 96-03-01039-CV, Montgomery County Dist. Ct., 221st Jud. Dist. (Apr. 30, 1996).

⁸ Exhibit G, Press Release, SJRA, “SJRA Board of Directors Recommends Renewing Flood Mitigation Strategy” (Feb. 25, 2020) [hereinafter “SJRA Feb. 25 Press Release”].

18. Section 37.011 of the 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.

19. 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).

20. Pursuant to the Private Real Property Rights Preservation Act, Tex. Gov’t Code ch. 2007, the SJRA is an agency in the executive branch of Texas government. *See* TEX. GOV’T CODE § 2007.002.

21. Pursuant to Tex. Gov’t Code § 2007.021, this Court has jurisdiction over Petitioners’ Action to Determine Taking against the SJRA. This Action to Determine Taking was filed within one hundred eighty (180) days of the commencement of the “Spring strategy” for the SLLP, April 1, 2021.⁹ *See* TEX. GOV’T CODE § 2007.021(b).

22. Pursuant to Tex. Gov’t Code § 2007.044, this Court has jurisdiction over Petitioners’ Suit to Invalidate Governmental Action against the SJRA. *See* TEX. GOV’T CODE § 2007.044.

⁹ *Id.* ¶ 3 at 1.

V. VENUE

23. The requested declarations and enforcement of rights pertain to real properties and natural resources, public and private, located in Montgomery County, Texas.¹⁰

24. 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.

25. 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.

26. This Action to Determine Taking is filed with a District Court of Montgomery County, Texas, the county where the private real property affected by governmental action is located. TEX. GOV'T CODE § 2007.021(a).

27. This Suit to Invalidate Governmental Action is filed with a District Court of Montgomery County, Texas, the county where the private real property affected by governmental action is located. TEX. GOV'T CODE § 2007.044(b).

VI. EXCEPTIONS TO, AND WAIVERS OF, IMMUNITY

28. **State entities cannot be immune from suit when they act contrary to the requirements of the Texas Constitution because provisions of the Texas Constitution are excepted from the general powers of government. This means that the Texas legislature and**

¹⁰ “[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.*

judiciary can never immunize state actors against constitutional requirements. When a private citizen has a particularized injury, that citizen is authorized to bring a non-immune suit to declare or enjoin violations of the Texas Constitution both for herself and for the public.

29. In addition, when the Constitution authorizes damages, the petitioner may seek to hold the state entity liable. Unlike general constitutional provisions, Article I, Section 17 provides a textual entitlement to compensation in its limited context. Thus, violations of Article I, Section 17 entitle a claimant with standing to seek not only equitable and injunctive relief but also damages.

30. The UDJA is a proper remedy to resolve constitutional violation claims.

31. **The UDJA provides a waiver of sovereign immunity for equitable suits seeking to resolve a justiciable controversy as to the valid construction, interpretation, clarity, or determination of any statutory question or legislative enactment. The UDJA also provides a waiver of sovereign immunity when a governmental entity is a necessary party to these suits.**

32. For Petitioners' claims, the UDJA provides a waiver of sovereign immunity for attorneys' fees.

33. **The Texas Tort Claims Act ("TTCA") expressly waives immunity for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." TEX. CIV. PRAC. & REM. CODE § 101.021(2).**

34. Imminent personal injury may be resolved by abatement, injunction, or declaratory relief.

35. **Texas Water Code § 11.093(a) impliedly waives immunity for waste as a public nuisance.**

36. **Sovereign immunity to suit and liability is waived and abolished for Petitioners' Action to Determine Taking and Suit to Invalidate Governmental Action against the SJRA. TEX. GOV'T CODE § 2007.004(a).**

VII. NATURE AND FACTS OF LAKE CONROE DAM

A. THE CONSTRUCTION AND OPERATION OF THE LAKE CONROE DAM

37. Lake Conroe was artificially constructed by impounding water behind the Lake Conroe Dam. The State of Texas recognizes impounded lakes as “natural watercourses.”¹¹

38. 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.¹² “The lake 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.”¹³

39. Lake Conroe was built in the early 1970s as a partnership between the City, the SJRA, and the Texas Water Development Board (“TWDB”) as a water supply reservoir for the region.¹⁴ Lake Conroe “was planned and 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.”¹⁵

¹¹ See, e.g., *see Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 826 (Tex. 2012) (“The City of Corpus Christi was using natural watercourses—the Nueces River and Lake Corpus Christi—to transport its water 118 miles from its wells to the point where it withdrew the water for use.”). The dam forming the current Lake Corpus Christi was completed in 1958, making it one of the largest artificial bodies of water in Texas. Tex. Parks & Wildlife, “Lake Corpus Christi State Park – History,” at https://tpwd.texas.gov/state-parks/lake-corpus-christi/park_history.

¹² Exhibit B, SJRA, “History of Lake Conroe,” at <https://www.sjra.net/lakeconroe/history/> [hereinafter “History of Lake Conroe”].

¹³ *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 & Sedimentation Survey of Lake Conroe”], available at http://www.twdb.texas.gov/hydro_survey/conroe/2010-08/Conroe2010_FinalReport.pdf.

¹⁴ Exhibit G, SJRA Feb. 25 Press Release, *supra* note 8.

¹⁵ Exhibit B, History of Lake Conroe, *supra* note 12.

40. Lake Conroe is primarily a water supply reservoir, and Conroe Dam and Lake Conroe are operated by the SJRA.¹⁶ 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.¹⁷

41. While Lake Conroe was constructed as a "water-supply reservoir, and not a flood-control facility,"¹⁸ 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,"¹⁹ in effect reducing the uncontrolled flow of floodwaters into the West Fork of the San Jacinto River during major rain events.

B. PERMITS AND CERTIFICATES OF ADJUDICATION

42. By Permit No. 1962, granted May 4, 1960, by the Texas Board of Water Engineers, the Lake Conroe reservoir was allowed to be constructed and required to be "equipped with a regulating gate for the purpose of permitting the free passage of the normal flow through the dam at all times and the passage of those waters to which the Board may determine lower appropriators are entitled."²⁰ Permit No. 1962 further states: "Before acquiring any right to divert water hereunder, the permittee shall file with and have approved by the Board the following: . . . (4) The place and purpose of use of water so diverted."²¹ Permit No. 1962 continues:

This permit is granted with the reservation and upon the condition that the permittee will fully comply with the terms, conditions and provisions hereof; by

¹⁶ Exhibit C, Volumetric and Sedimentation Survey of Lake Conroe, *supra* note 13, at 1.

¹⁷ Exhibit A, SJRA Act, *supra* note 4; *see also* Exhibit G, SJRA Feb. 25 Press Release, *supra* note 8.

¹⁸ Exhibit D, Gilman Affidavit, *supra* note 5, ¶ 6 at 2.

¹⁹ 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 12.

²⁰ Exhibit BB, Tex. Bd. of Water Eng'rs, Permit to Appropriate Public Waters of the State of Texas, No. 1962 at 2 (June 9, 1960).

²¹ *Id.*

the acceptance of this permit, the permittee agrees to be bound by the enumerated terms, conditions and provisions. Failure on the part of the permittee to comply with such terms, conditions and provisions will subject this permit to forfeiture and cancellation, to which the permittee agrees by acceptance of the permit.

The Board finds and concludes that the granting of this permit as herein recited is not detrimental to the public welfare, and that each term, condition and provision herein contained be and is a prerequisite to the granting of this permit and is necessary for the administration of the water resources of this State. It is also expressly provided that the permittee, its successors and assigns, and any beneficiary hereunder, shall comply with the law and all the rules, regulations and orders of the Board of Water Engineers formulated by it pursuant to law.²²

The SJRA further acquired amendments to Permit No. 1962, Permit No. 1962-A and Permit No. 1962-B.²³

43. 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.²⁴

44. The Lake Conroe Dam involves the maintenance, operation, and use of the Lake Conroe reservoir pursuant to Certificate of Adjudication and Amendment Nos. 10-4963 and 10-4963A, granted pursuant to the right recognized under Permit No. 1962-B. The complete certificates are on file in the Information Resources Division of the Texas Commission on Environmental Quality (“TCEQ”).²⁵

²² *Id.* at 3.

²³ See Exhibit BB, Tex. Water Comm’n, Permit for Extension of Time Issued to San Jacinto River Authority, No. 1962-A (June 18, 1962); Tex. Water Comm’n, An Order Amending Permit No. 1962 of the San Jacinto River Authority (Aug. 31, 1965); & Tex. Water Comm’n, Amendment to Permit to Appropriate State Water, Permit No. 1962-B (July 22, 1968).

²⁴ 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).

²⁵ Exhibit F, Certificate of Adjudication No. 10-4963, *supra* note 24; Exhibit F, Certificate No. 10-4963A, *supra* note 24; Exhibit C, Volumetric and Sedimentation Survey of Lake Conroe, *supra* note 13, at 4.

45. Certificate of Adjudication 10-4963 applies a Special Condition to the water rights recognized, stating: “Owners shall maintain a suitable outlet in the aforesaid dam authorized herein to allow the free passage of water that the owners are not entitled to divert or impound.”²⁶

46. Certificate of Adjudication 10-4963A establishes the total volume of annual impoundment and diversion from the reservoir. “WHEREAS, the priority dates for this right are January 12, 1959 for the impoundment of 380,430 acre-feet of water and the diversion and use of the 100,000 acre-feet of water, and June 28, 1965 for the impoundment of an additional 49,830 acre-feet of water”²⁷ Certificate No. 10-4963A also provides:

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 recycling and reuse of water, or prevent the pollution of water, so that a water supply is made available for future or alternative uses. . . .”²⁸

47. Certificate of Adjudication and Amendment Nos. 10-4963 and 10-4963A 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.²⁹

48. “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.

²⁶ Exhibit F, Certificate of Adjudication No. 10-4963, *supra* note 24, § 5.B. at 2.

²⁷ Exhibit F, Certificate No. 10-4963A, *supra* note 24, at 1.

²⁸ *Id.* at 2.

²⁹ *Id.* § 1.A. at 2; *see also* Exhibit F, Certificate of Adjudication No. 10-4963, *supra* note 24, § 2.A. at 2.

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).

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

50. 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).

51. “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).

52. “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).

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

C. POLICIES AND OBLIGATIONS

54. The TCEQ has informed the SJRA:

The general rule in this country is that the operator of a dam may permit floodwaters to pass through the dam in an amount equal to the inflow, but will be liable if any excess amount is discharged. This is the reason the gate operation procedures as prepared by your engineer must be followed every time the gates are operated.³¹

55. TCEQ’s letter to SJRA also stated:

We would not recommend pre-release based on whether forecasts. Meteorologists cannot precisely predict how much it is going to rain or exactly where it is going to rain. If pre-release from a reservoir was started based on a prediction of rain upstream of a dam and the rain actually fell downstream of the dam on top of the

³⁰ “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;
- (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 30 TEX. ADMIN. CODE § 297.1(1).

³¹ Exhibit FF, Letter from Warren D. Samuelson, P.E., Mgr., Dam Safety Section, TCEQ, to Bret Raley, Div. Mgr., Lake Conroe Div., SJRA (Apr. 24, 2017).

water that was released, the dam owner could be liable for causing any flooding and **water supply would have been wasted.**³²

56. The SJRA and its contracted engineers have described the SJRA's policies and obligations under the permits and certificates of adjudication.

57. In its Motion for Summary Judgment in *George Wickham, II, et al. v. San Jacinto River Authority*, SJRA argued: "Moreover, as a matter of policy to pre-release water without notice of anticipated excessive rainfall would be a waste of the State's natural resources and would impair the intended function of the Lake, to serve as a water supply and conservation reservoir."³³

58. In that same case, James R. Adams, a former General Manager of SJRA, testified via affidavit regarding the design and function of Lake Conroe:

The Lake was designed and functions as a water conservation and storage reservoir. It serves as a water supply source for the City of Houston and numerous residents and businesses in the southeast Texas area. To fulfill its responsibilities to supply water and to downstream water rights holders and users, the Authority seeks to maintain the Lake at a capacity of 430,260 acre-feet, which is equivalent to a normal pool level of 201 feet mean sea level ("msl") and is the level authorized by the Permit.³⁴

59. SJRA continued its argument: "[T]he Authority must endeavor to capture and conserve water flowing into the Lake until the 201-foot msl level is reached in order to honor its water supply contract obligations as well as downstream water rights."³⁵

60. With regard to the 201' above mean sea level (msl) conservation pool level, SJRA stated:

The Authority maintains the Lake at 201 feet msl, consistent with the Authority's Permit, downstream water rights and uses, and the primary function of the Dam. That decision was made when the Authority sought and obtained a permit to construct the Lake and Dam. The Authority in operating Lake Conroe as a water

³² *Id.*

³³ Exhibit Z, SJRA MSJ in *Wickham*, *supra* note 7.

³⁴ *Id.* at Affidavit of James R. Adams, Gen. Mgr., ¶ 9 at 3-4 (no date) [hereinafter "Adams Affidavit"]

³⁵ Exhibit Z, SJRA MSJ in *Wickham*, at 3.

supply and conservation reservoir does not pre-release water. As a practice, it stores water to meet the water supply needs of the City of Houston and residents and businesses in the region and passes through water above 201 feet msl. With regard to Lake operations, the Authority has no duties imposed by law relating to flood control.³⁶

61. In an affidavit in another case, Charles Gillman, Director of Water Resources and Flood Management for SJRA testified:

[I]n 2010, the SJRA hired Freese and Nichols, Inc. to create a Gate Operations Policy that would accurately calculate how much water the SJRA should release through the gates at the Lake Conroe Dam based on inflows into the Lake and lake level. The Gate Operations Policy was created with the same goals in mind: to reduce flow in the river, pass floodwaters through the gates at the Dam safely, provide water to downstream customers and protect the structural integrity of the Dam's earthen embankment and gates.³⁷

62. The San Jacinto River Authority, Lake Conroe Gate Operating Policy produced as an exhibit to the Motion for Summary Judgment in the *Wickham* case shows that when Lake Conroe is at an elevation of 201' above msl or lower, no gate opening should occur.³⁸

63. "The Lake and the Dam were not designed to be and do not function as a flood control facility. The Lake is maintained at or as close to 201 feet msl as possible to ensure a dependable water supply."³⁹

64. The City owns two-thirds of the water rights in Lake Conroe; SJRA owns the other one-third.⁴⁰ The City may call for the release of water from Lake Conroe for the City's permitted use at any time.⁴¹ 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.⁴²

³⁶ *Id.* at 17.

³⁷ Exhibit D, Gilman Affidavit, *supra* note 5, ¶ 16 at 3.

³⁸ Exhibit Z, SJRA MSJ in *Wickham*, *supra* note 7, at Exhibit C, SJRA, Lake Conroe Gate Operating Program, CONGO, User's Manual, at 7.

³⁹ Exhibit Z, *supra* note 7, at Adams Affidavit ¶ 10 at 4.

⁴⁰ Exhibit B, History of Lake Conroe, *supra* note 12.

⁴¹ *Id.*

⁴² *Id.*

65. The *Wickham* Court expressly stated:

It is undisputed that Lake Conroe functions as a water storage reservoir for the City of Houston, other residential areas, and a variety of surrounding business enterprises. Neither Lake Conroe nor its Dam was designed to function as a flood control facility, but simply exists **to maintain a level of water** so as to supply its customers with a previously contracted amount of water.

Wickham v. San Jacinto River Auth., 979 S.W.2d 876, 878 (Tex. App.—Beaumont 1998)

(emphasis added).

D. THE SEASONAL LAKE LOWERING PROGRAM

66. Despite all of the policies and obligations discussed above, the SJRA recently began releasing water from Lake Conroe in anticipation of potential, future downstream flooding (*i.e.*, pre-releasing water) without regard to any notice of anticipated excessive rainfall.

67. Starting in 2018, the SJRA and the City adopted the 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.⁴³

68. 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.⁴⁴

69. 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.”⁴⁵ “The strategy of temporarily creating capacity in Lake Conroe on a seasonal basis began in 2018

⁴³ 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/>.

⁴⁴ Exhibit G, SJRA Feb. 25 Press Release, *supra* note 8, at 1.

⁴⁵ *Id.*

to provide flood mitigation benefits for regional downstream constituents in both Montgomery County and Harris County by catching rainfall and runoff in Lake Conroe.”⁴⁶

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

- 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 (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.⁴⁷

E. NORMAL GATE OPERATION PLAN

71. The SJRA's Normal Gate Operations Plan accounts for scenarios of harmful, excess water, when non-permitted, diversion releases become authorized.

72. In a Press Release issued in August 2017, the SJRA stated:

To pre-release water at a reasonably safe rate (so that it doesn't cause flooding downstream), it would take weeks to accomplish enough drop in lake level to have any hope of buffering a major storm event.

If we did try to pre-release in advance of a storm, we would be artificially filling the river downstream and adding water to Lake Houston. If the heavy rains fell in other watersheds (which is highly likely given the relatively small size of our

⁴⁶ *Id.*

⁴⁷ *Id.*

watershed), then we would have pre-filled the west fork of the river and Lake Houston, which could exacerbate downstream flooding problems.

If we pre-released and ended up not receiving significant rainfall in our watershed, then we would have drained critical supplies of stored water from Lake Conroe.

Meteorologists simply cannot precisely predict how much and exactly where it is going to rain with enough notice (several weeks) to allow a safe pre-release from a reservoir.

Dam operators strictly adhere to gate operating protocols designed by their engineers, and pre-releasing is inconsistent with those protocols for the reasons stated above.⁴⁸

73. Lake Conroe is impounded by the Lake Conroe Dam, which is an earthfill structure with a length of approximately 11,800 feet.⁴⁹

74. The SJRA is required to create and submit a Gate Operation Plan to the TCEQ. “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).

75. “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).

a. Lake Conroe’s normal “conservation capacity” is at an elevation of 201' above NGVD 29⁵⁰ (equal to msl for the Gulf of Mexico).⁵¹

⁴⁸ “SJRA: No Water Pre-release from Lake Conroe before Harvey Hits,” THE COURIER OF MONTGOMERY COUNTY (Aug. 24, 2017) (quoting SJRA, Press Release (issued on or about Aug. 24, 2017)), at <https://www.yourconroenews.com/neighborhood/moco/news/article/SJRA-No-water-pre-release-from-Lake-Conroe-11956870.php#photo-13892953>.

⁴⁹ Exhibit I, Olmos Affidavit, *supra* note 6, ¶ 8 at 2.

⁵⁰ “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>.

⁵¹ Exhibit J, TWDB, “Lake Conroe (San Jacinto River Basin),” at www.twdb.texas.gov/surfacewater/rivers/reservoirs/conroe/index.asp.

- b. The “normal pool elevation” of the lake is 201' above msl.⁵²
- c. Lake Conroe is “officially full” at 201' above msl.⁵³
- d. The base condition (*i.e.*, **the current gate operation plan**) operates Lake Conroe at 201' above msl.⁵⁴

76. 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.⁵⁵

77. 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.⁵⁶

78. Hector Olmos, P.E., CFM, Principal and Vice President of SJRA’s water and engineering consultant, Freese and Nichols, Inc., stated via affidavit in *Vicente Medina, et al. v. SJRA*:

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. 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.⁵⁷

⁵² Exhibit I, Olmos Affidavit, *supra* note 6, ¶ 5 at 2.

⁵³ 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/>.

⁵⁴ 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.

⁵⁵ Exhibit I, Olmos Affidavit, *supra* note 6, ¶ 13 at 3.

⁵⁶ *Id.* ¶ 14 at 3.

⁵⁷ *Id.* ¶ 11 at 2.

79. 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.

80. 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.⁵⁸

81. 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

⁵⁸ 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 Env’tl 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 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).

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.⁵⁹ The dredging was completed in September 2019.⁶⁰ The SLLP as implemented has become a regular, seasonal approach to addressing potential future downstream floods.

82. 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.⁶¹

83. 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 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.

⁵⁹ Exhibit L, Freese & Nichols Tech. Memo., *supra* note 54, 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).

⁶⁰ 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/>.

⁶¹ Exhibit L, Freese & Nichols Tech. Memo., *supra* note 54, at 1.

- 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.⁶²

84. 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.

F. WASTE AND FRAUD BY ARTIFICE AND DEVISE

85. 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.

Governmental agencies, or bodies corporate such as Fresh Water Supply Districts, under our statute, are commonly referred to by courts as quasi municipal corporations, for the reason that they are constituted by the legislature to exercise, in a prescribed area, a very limited number of corporate functions, and they are said to be “low down in the scale or grade of corporate existence.” The powers of such districts are measured by the terms of the statutes which authorized their creation, and they can exercise no authority that has not been clearly granted by the legislature.

Tri-City Fresh Water Supply Dist. No. 2 v. Mann, 135 Tex. 280, 285, 142 S.W.2d 945, 948 (1940).

86. 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.

87. 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.

⁶² *Id.* at 12 (emphasis added).

88. “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).

89. 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).

90. “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).

91. “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 TCEQ.⁶³

⁶³ 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.

92. “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).

93. “[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.

94. 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.

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

96. 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.

97. 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 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.

98. 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).

G. THE SLLP PRE-RELEASES HAVE NO BENEFICIAL PURPOSE

99. Further, there is no evidence that the lake lowering conducted through the SLLP is “beneficial,”⁶⁴ even if “flood control” during “normal operating conditions” were somehow permitted.

100. 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.

101. 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.”⁶⁵ The Freese and Nichols analysis also concluded that for a rainfall event greater than the 500-year event—*i.e.*,

⁶⁴ “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.

⁶⁵ Exhibit L, Freese & Nichols Tech. Memo., *supra* note 54, 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.*

another Hurricane Harvey-type storm—Lake Conroe, artificially lowered by the SLLP, “could potentially increase the flood hazard downstream.”⁶⁶

102. The 2018 Harris County Flood Control Harvey Summary Report found the benefits of lowering Lake Conroe to be negligible.⁶⁷

103. 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).⁶⁸

104. SJRA expressly admits that flood control, other than the mere presence of Lake Conroe in the course of the river, is not within its government-mandated powers. “The River Authority asserts that the release of water from Lake Conroe during Hurricane Harvey was not for a public purpose because, as noted in *Wickham*, its government-mandated powers do not include functioning as a flood control facility.” *San Jacinto River Auth. v. Burney*, 570 S.W.3d 820, 837 (Tex. App.—Houston [1st Dist.] 2018).

105. A recent Texas Supreme Court decision examined property owners’ Texas Government Code Chapter 2007 statutory takings claims against SJRA. *San Jacinto River Auth. v. Medina*, Cause Nos. 19-0400, 19-0401, 19-0402, 2021 Tex. LEXIS 299, at *54 (Apr. 16, 2021). The property owners’ pleadings included claims that SJRA’s flood releases from Lake Conroe were made far-below the dam structure’s allowable limits (up to 207' above msl) during and in

⁶⁶ “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.*

⁶⁷ 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>.

⁶⁸ Exhibit O, Letter from Ryan Londeen, PE, Bleyl Eng., to Kevin Lacy, LCA at 5 (Feb. 14, 2020).

response to Hurricane Harvey. The Texas Supreme Court ruled that SJRA was not able to establish as a matter of law that its flood control releases from Lake Conroe during Hurricane Harvey were reasonable and necessary for the purposes of addressing “a grave and immediate threat to life or property” or “a real and substantial threat to public health and safety.” *Id.* at *48 & *55. In examining the Plaintiffs’ statutory property takings claims, the Court stated: “The property owners’ pleadings thus put at issue whether it was reasonable or necessary for the River Authority to release the floodwaters as it did.” *Id.* at *54. The Court identified:

The property owners further maintain that the River Authority knew it was unnecessary to release water as it did to “prevent a grave and immediate threat to” the dam and its floodgates because Lake Conroe had the capacity to store additional floodwaters until Harvey passed. In this regard, they note the existence of a flowage easement, which allows the River Authority to store water up to 207 feet above mean sea level “during storm events.” The recorded easement “notif[ies] landowners that any structures below this elevation are subject to being flooded.”

According to the pleadings, Lake Conroe’s water or pool level did not reach 207 feet above mean sea level during the storm. After the water reached its highest level of 206.24 feet, the River Authority began releasing water at record flow rates, reducing the pool level by about three and one-half feet over forty-eight hours and allegedly causing devastating flooding downstream. The property owners thus complain that the River Authority did not use all available capacity to store floodwaters during Harvey, even though it could have done so without threatening the dam’s structural integrity. They submit that, as with the allegations regarding rainfall and flow rates, a reasonable person could conclude that the River Authority did not have a reasonable good faith belief that it was necessary to release water as it did to prevent a grave and immediate threat to life or property, based on their pleadings.

Id. at *50-51.

106. Petitioners remind this Court that the City’s attorney, in the Hearing on the City’s Plea to the Jurisdiction, repeatedly stated that the City’s joint-operation of the SLLP is “intentional.”⁶⁹ The SJRA’s attorney, in the Hearing on the SJRA’s Plea to the Jurisdiction,

⁶⁹ The City’s counsel made these statements while arguing that Tex. Water Code § 11.093(a) is not applicable.

repeatedly stated that the SJRA’s recommendation of the SLLP, and appurtenant releases thereto, are “intentional,” and therefore, do not constitute negligent operation of waterworks.⁷⁰ Therefore, the conduct complained of by Petitioners is not “negligent operation,” but an intentional and unauthorized nuisance due to a defectively designed and implemented Gate Operation Plan that arises to the level of a taking. The SLLP is an intentional, unauthorized activity.

107. Prior to heavy precipitation in late December 2020, the SLLP had reduced the daily lake levels to drought-like levels for almost two years.

108. 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 timeframes⁷¹. 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.

109. 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

⁷⁰ The SJRA’s counsel made these statements while arguing that Tex. Water Code § 11.093(a) is not applicable.

⁷¹ 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.*

releases from Lake Houston, must also be optimized to ensure that water supply is not unnecessarily released from either reservoir.”⁷²

H. SLLP RELEASES ARE FALSELY REPORTED UNDER “MUNICIPAL USE”

110. 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.”⁷³

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

112. 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).⁷⁴ The City categorized the use for those releases as “municipal/domestic,”⁷⁵ but as discussed, state law and TCEQ rules do not include flood reduction as a municipal/domestic use. For 2018, seasonal releases from Lake Conroe were 18,265 acre-feet.⁷⁶

113. Houston has also categorized pre-storm releases from Lake Houston for flood control purposes as a “municipal/domestic” use.⁷⁷

⁷² *Id.* at 5 (emphasis added).

⁷³ 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.

⁷⁴ Exhibit Q, 2019 WUR, *supra* note 73; *see also* Exhibit Q, Osegueda Letter, *supra* note 73.

⁷⁵ Exhibit Q, 2018 WUR, *supra* note 73; *see also* Exhibit Q, 2019 WUR, *supra* note 73.

⁷⁶ Exhibit Q, 2018 WUR, *supra* note 73.

⁷⁷ Exhibit Q, Osegueda Letter, *supra* note 73.

114. Reconciliation of the water data shows that Houston exceeded the volume of its allocated water rights through diversions associated with the SLLP in 2019.⁷⁸

115. 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.⁷⁹ 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.⁸⁰

116. 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.⁸¹

⁷⁸ 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>.

⁷⁹ Exhibit F, Certificate of Adjudication No. 10-4963, *supra* note 24, § 3.B at 2.

⁸⁰ 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 Conrail® 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&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 Conrail® 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=2019-05-25%2023%3A59%3A59&bin=86400&range=Custom%20Range&markers=false&legend=true&refresh=off&show_raw=true&show_quality=true.

⁸¹ Exhibit T, Letter from Carlos Rubinstein, Principal, & Herman R. Settemeyer, P.E., Partner, RSAH₂O, to Erich

117. The SJRA and the City are directly breaching their agreement with the public of the State of Texas, as enforced by the TCEQ: “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, provisions, conditions, limitations and restrictions embodied in such water right.” 30 TEX. ADMIN. CODE § 297.59(c).

118. 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.

I. THE SLLP BREACHES DUTIES TO ENACT CONSERVATION

119. The SLLP violates the duty to engage in conservation intended to benefit the public.

120. “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).

121. 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

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.

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 recycling and reuse of water, or prevent the pollution of water, so that a water supply is made available for future or alternative uses. . . .⁸²

122. 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.⁸³

123. As recently as mid-April 2021 a drought map released by the United States Drought Monitor identified most of Montgomery County as “Moderate Drought,” with parts of eastern Montgomery County categorized as “Severe Drought.”⁸⁴ Most of Harris County was characterized as “Abnormally Dry,” with parts of northern Harris County characterized as “Moderate Drought.”⁸⁵ Although recent rains have alleviated the immediate drought conditions, this underscores the importance of preserving waters collected in the Lake Conroe reservoir during spring rains, as its design purpose is to ensure water availability during drought conditions, which can start at any time.

124. 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 amount of water allowed, otherwise future drought conditions will be exacerbated.

⁸² Exhibit F, Certificate No. 10-4963A, *supra* note 24, § 2.

⁸³ 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>.

⁸⁴ U.S. Drought Monitor Map, “Texas,” valid Apr. 13, 2021 (Apr. 15, 2021), *available at* <https://droughtmonitor.unl.edu/Maps/MapArchive.aspx>.

⁸⁵ *Id.*

Water drained during the spring lowering period of the SLLP is water that will never be available for use.

VIII. THE NATURAL WATERCOURSE AND LAKE PROPERTY

A. LAKE CONROE SUBSTITUTED ARTIFICIAL IMPROVEMENTS OVER NATURE

125. Much of the real property that is now adjacent to Lake Conroe, previously, in its unaltered, natural state, contained surfaces, boundaries, and borders, which were dry, or free from regular flows of surface water or accumulations of state water.

126. The impoundment of water creating the Lake Conroe reservoir subjected these real properties to potential water elevation up to 207' above msl.

127. The inflow of water into Lake Conroe, and thus the maintained constant level, is predictable. The Water Availability Modeling (“WAM”), conducted by the TCEQ’s predecessor agency, the TNRCC, stated that the “volume reliability” for Lake Conroe is 96.8% as of 2001.⁸⁶

128. The constant water level of 201' above msl, and the natural and fairly predictable fluctuations therefrom, caused the permanent substitution of:

- a. Water boundaries in lieu of soil or open boundaries;
- b. Water as a lateral support in lieu of soil-specific lateral support;
- c. Ingress/Egress to real property by traverse of Lake Conroe in lieu of traditional roads and drives;
- d. Placement and reliance on canals and laterals in lieu of fences and dividers; and
- e. Reliance on direct-access lake and canal water in lieu of water supply infrastructure.

⁸⁶ Exhibit CC, Ralph A. Wurbs, “Assessing Water Availability under a Water Rights Priority System,” 127 J. OF WATER RES. PLANNING & MGMT. 235, 241 (July/Aug. 2001).

129. Thus, the present and future owners of lake-adjacent property began investing in, and maintaining, real property under the expectation that Lake Conroe would persist as a permanent body of water, and further, that its maintenance and Dam operation would continue pursuant to the specific statutory and permitted directives imposed upon the City and the SJRA.

130. Examples of expectation-backed investments include the construction of docks, boat ramps, and lake-related businesses. Property owners and the public also purchased boats and recreational equipment.

131. Many lake-adjacent properties experience conditions of erosion and lateral support, which are specific to water, and thus, the constant lake level became the basis of bulkheads, erosion mitigation measures, and special modes of access (*e.g.*, ramps). All of these property conditions are now altered by and through the unauthorized SLLP. In sum, the City and the SJRA have removed the artificial lateral supports to lake adjacent properties by regularly (and more permanently) lowering the water elevation of Lake Conroe. The properties without water support are now in the situation where the property owners are required to make considerable expenditures to compensate for altered property conditions, and these owners would have been better off had the artificial supports had never been made.

132. Alternatively, Lake Conroe may have existed for a period long enough to be considered a state of nature. If such is the case, the SJRA and the City have removed the natural lateral and property support of Lake Conroe by and through lowering water levels pursuant to the SLLP.

133. Petitioners and other property owners adjacent to Lake Conroe also experience a loss of land surface by and through subsidence and erosion of property boundaries. The SJRA

continues to argue that these property owners still maintain title to their land, while refusing to acknowledge that the title becomes less and less valuable as the uses of the surface are destroyed.

B. SJRA RELEASES ARE CONSTRAINED BY PUBLIC POLICY

134. The SJRA requires structures within the boundaries of its control to be permitted, such as boat ramps and docks.

135. For example, Petitioner Susanne Mitchell Allen’s private boat slip is permitted by the SJRA.⁸⁷

136. Permit No. 3300 states:

The Licensee shall indemnify and hold harmless the San Jacinto River Authority for any damages, costs and charges to which Licensee may be subject or which Licensee may have to pay by reason of any injury to any person or property, or loss of life or property, suffered or sustained by any person whatsoever arising out of the activities here permitted; Licensee shall, at his own expense, assume the defense of all claims and actions for damages arising out of any such injuries by third persons, and shall pay all judgments that may be rendered on such actions. The Authority does not take any responsibility for protecting the Licensee’s property nor guarantee that said property will not be used by other persons in the absence of Licensee. It being expressly intended that the Authority assumes no responsibility for the conduct of the activities herein permitted which shall be at the sole risk of the Licensee.⁸⁸

137. The SJRA has stated that damages caused to real property and structures by the SLLP cannot be recovered because such damages have been waived and released by provisions such as those found in Permit No. 3300. However, the SJRA fails to explain how these provisions are expected to apply to waive and release damages caused *by the SJRA*, either from negligence or intentional conduct.⁸⁹ “Under the express negligence doctrine, ‘parties seeking to indemnify the

⁸⁷ Exhibit DD, SJRA “Lake Conroe Division Application” for Permit No. 3300, Applicant: Kurt Allen (pertaining to a private boat slip) (May 8, 2013).

⁸⁸ *Id.*

⁸⁹ SJRA also fails to acknowledge that the only damages addressed on the face of the Permit are those damages resulting from water levels above 201' above msl, not damages resulting from artificially-lowered lake levels:

indemnitee from the consequences of its own negligence *must express that intent in specific terms*. Under the doctrine of express negligence, the *intent of the parties must be specifically stated within the four corners of the contract.*” *Hamblin v. Lamont*, 433 S.W.3d 51, 56 (Tex. App.—San Antonio 2013) (emphasis in original) (quoting *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987). “[O]nly an indemnity provision specifically stating an intent to indemnify the indemnitee for the indemnitee’s intentional torts should be enforceable against the indemnitor for the indemnitee’s intentional acts.” *Id.* at 57.

C. SJRA FLOWAGE EASEMENTS ARE CONSTRAINED BY LEGISLATIVE AUTHORITY, PUBLIC POLICY, AND THE INTENDED PURPOSE OF LAKE CONROE

138. An example of the flowage easement language obtained by the SJRA is found in the real property records of Montgomery County, Texas:

It is understood and agreed by GRANTOR and GRANTEE that, whether specifically described above or not, this conveyance covers all land below elevation 207.00 feet, mean sea level, and all of the land on any island or islands created by the inundation, by water, of the land owned by GRANTOR in the survey or surveys above referred to, and no further claim shall be made for payment for land situated below said elevation 207.00 feet, mean sea level, contour and such islands as may be created.

Except as herein expressly prohibited, GRANTOR shall have the right to use the above-described land jointly with GRANTEE, but it is especially understood and agreed that GRANTOR assumes all risks of loss or damage to GRANTOR’S crops, structures or property thereon in any way arising or resulting

Licensee has been informed and understands that the San Jacinto River Authority has secured flowage or flood easements, and in some cases waiver and release of damages agreements, around the perimeter of the Lake Conroe reservoir above 201 elevations, mean sea level. Licensee agrees and shall at all times comply with and be subject to the provisions, requirements, limitations, restrictions, and relinquishments of rights as contained in such flowage or flood easements and waiver and release of damage agreements.

Id.

from the construction, maintenance or operation of the above-mentioned dam and reservoir.

This conveyance is made to consummate a negotiated sale of the above described property and rights in lieu of condemnation proceedings and the consideration paid to GRANTOR includes and covers all damages and claims which GRANTOR might have asserted in condemnation proceedings.⁹⁰

139. The SJRA argues that the above-listed provisions demonstrate that the SJRA has previously provided compensation for property damages caused by Lake Conroe, and thus, cannot be subject to claims of takings.

140. The flowage easement described is expressly limited to SJRA's activities "arising or resulting from the construction, maintenance or operation of the above-mentioned dam and reservoir."⁹¹

141. First, the Courts of Texas and the public have already recognized that a lake can have an intended function of maintaining a constant level. For example, the Texas Supreme Court has stated: "The reservoir was not constructed to control floods but to supply water. Consistent with its intended function, the District keeps the reservoir as full as possible at a level only two feet below the overflow point." *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 550 (Tex. 2004).

142. SJRA expressly admits that flood control, other than the mere presence of Lake Conroe in the course of the river, is not within its government-mandated powers. "The River Authority asserts that the release of water from Lake Conroe during Hurricane Harvey was not for a public purpose because, as noted in *Wickham*, its government-mandated powers do not include functioning as a flood control facility." *Burney*, 570 S.W.3d at 837.

⁹⁰ Exhibit EE, SJRA Flowage Easement at 3&5 (Oct. 9, 1973), as recorded in the real property records of Montgomery County, Tex.

⁹¹ *Id.* at 5.

143. As discussed above, the SJRA does not possess any legal duties or legislative authorization relating to flood control, and further, Lake Conroe is intended to be maintained at a constant level. Thus, even if the SJRA successfully argues that the flowage easement objectively releases any Lake Conroe Dam operation activity, such an easement could only have been obtained by fraud.

144. Therefore, when the SJRA negotiated to purchase the flowage easement, it intentionally failed to disclose that it intended to deviate the “maintenance or operation” of Lake Conroe Dam outside the scope of its authority and outside the scope of the intended function of Lake Conroe. Thus, the flowage easement was obtained by fraud.

We have found no cases in which an inverse condemnation action was used to complain that a deed was obtained fraudulently and did not reflect the parties’ prior agreement. Article I, § 17 of the Texas Constitution prohibits the taking of property by a governmental entity without adequate compensation or consent. Thus, the fraudulent taking of a person’s property by a governmental entity without adequate compensation or consent constitutes inverse condemnation. In the present case, this would apply to the portion of property interest that Smith contends was not bargained for or paid for but was obtained by fraud.

Smith v. Harrison County, 824 S.W.2d 788, 792 (Tex. App.—Texarkana 1992).

145. The SJRA’s claims that their flowage easements prevent takings claims are further weakened by the repeated, permanent nature of the SLLP and because property owners did not have foreknowledge that the SLLP would modify the authorized lake operations. Other cases have held that the temporary nature of easement enforcement is a factor for consideration:

The evidence shows that by using the flowage easements, the Water District intentionally caused water to physically invade the Landowners’ property. However, considering the minimal amount of time (only four times in twenty years) during which the easements affected use and enjoyment of the Landowners’ property, the limited nature of the interference with the use and enjoyment, the Landowners’ productive use of the property in the interim, and the Landowners’ prior knowledge of the easements, we hold that the easements do not constitute a “taking” under the Texas Constitution. In our opinion, proof evidencing the mere

enforcement of an existing easement does not rise to the level of a “taking” under these circumstances. *See Arrington v. Mattox*, 767 S.W.2d 957, 958 (Tex. App.—Austin 1989), *cert. denied*, 493 U.S. 1073, 110 S. Ct. 1119, 107 L. Ed. 2d 1026 (1990) (holding no taking occurred where court was merely enforcing an already existing public easement).

Bennett v. Tarrant County Water Control & Improvement Dist. No. 1, 894 S.W.2d 441, 448 (Tex. App.—Fort Worth 1995) (internal citations omitted).

146. Public policy scrutinizes the SJRA’s use of its flowage easements because *the SLLP is not necessary* for the SJRA to carry out its intended purpose. As stated before, the SJRA does not have any flood control purpose instilled by the state. *See, e.g., id.*, at 447 (“Accordingly, public policy strongly favors the Water District’s use of the flowage easements when reasonable and necessary to carry out its purposes. For these reasons, we hold the Water District’s flowage easement is valid.”).

147. The flowage easements contemplated between parties in Montgomery County and the SJRA are rationally based upon, and objectively designed for, temporary and emergency additional impoundments (*i.e., raising the elevation*) of water up to 207' above msl, not for permanent seasonal lowering. As stated on behalf of the SJRA: “SJRA has a flowage easement around the lake that allows [SJRA] to temporarily store water in the Lake Conroe reservoir up to a lake level of 207 feet above msl.”⁹²

148. **The Supreme Court of Texas prohibits the expansion of the purpose stated within an easement after-the-fact.**

The purpose of the easement cannot expand, but under certain circumstances, the geographic location of the easement may. *Compare Marcus Cable Assocs.*, 90 S.W.3d at 701 (preventing easement holder from expanding purpose of maintaining electric transmission or distribution line to also include cable-television lines regardless of fact that lines could be run on exact same geographic location) with *Godfrey v. City of Alton*, 12 Ill. 29, (1850) (recognizing that a public

⁹² Exhibit D, Gilman Affidavit, *supra* note 5, ¶ 10 at 2.

easement for a public landing on specific waterway is necessarily “inseparable from the margin of the water, however that may fluctuate”).

Severance v. Patterson, 370 S.W.3d 705, 736 (Tex. 2012) (Medina, J., dissenting) (“[S]ee also RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.1 (2000) (providing that an easement ‘should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding the creation of the servitude, and to carry out the purpose for which it was created’).” *Id.* at 737 (Medina, J., dissenting).

149. Justice Medina continued:

In resolving conflicts among the parties to servitudes, the public policy favoring socially productive use of land generally leads to striking a balance that maximizes the aggregate utility of the servitude beneficiary and the servient estate. Socially productive uses of land include maintaining stable neighborhoods, conserving agricultural lands and open space, and preservation of historic sites, as well as development for residential, commercial, recreational, and industrial uses. Aggregate utility is generally produced by interpreting an easement to strike a balance that maximizes its utility while minimizing the impact on the servient estate.

Id. at 748 (quoting Restatement (Third) of the Law, Property (Servitudes) § 4.10, cmt. b) (Medina, J., dissenting).

D. HAZARDOUS EFFECTS

150. 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.”⁹³ 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.

⁹³ Exhibit U, Jordan Austin, SJRA, “Lake Conroe Rules and Regulations,” DOCK LINE MAGAZINE (Lake Conroe

151. The seasonal lake releases under the SLLP have caused various persisting hazards, which continue to subject Petitioners and the public to imminent threats of personal injury.

152. One of the effects of the SLLP is that the lowered lake surface causes portions of Lake Conroe to become shallow, in and among various water hazards and sandbars. These conditions threaten injury to those who use the lake for recreational, transportation, and travel purposes.

153. Some areas of the lake are too shallow to safely operate boat slips, ramps, and docks. Thus, persons and businesses relying on the lake for recreation, travel, and transportation are unable to safely traverse into and out of the waterway.

154. The New Waverly Fire Department is constrained in providing emergency fire services when it is unable to procure water directly from the lake surface and/or canals in order to fight fires in and among neighborhoods along the north shore of Lake Conroe and in the national forest. The lowered lake surface continues to undo the investments in emergency services made by the lakeside community.

E. WASTE IS A PUBLIC NUISANCE AND REQUIRES HEIGHTENED SCRUTINY

155. “[W]e reiterate that the preservation of our natural resources is an issue of constitutional dimension. *See* TEX. CONST. art. 16, § 59 (stating that ‘the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto’).” *Exxon*

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>.

Corp. v. Miesch, 180 S.W.3d 299, 318 (Tex. App.—Corpus Christi 2005), *aff'd in part, rev'd in part*, 348 S.W.3d 194 (Tex. 2011).

156. “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).

157. In 2005, the 3rd Court of Appeals held that, “all water rights[] must be exercised reasonably—in a manner that does not harm other waterfront owners or the general public—and in accordance with the State’s police power regulations.” *Cummins*, 175 S.W.3d at 52.

158. “[T]he release of water to assure sufficient reservoir capacity to prevent a downstream flood, may cause the waste of water because it is more than all downstream users can use.” *Lower Colo. River Auth. v. Tex. Dep’t of Water Res.*, 638 S.W.2d 557, 573 n.10 (Tex. App.—Austin 1982) (emphasis added), *rev’d on other grounds*, 689 S.W.3d 873 (Tex. 1984) “The legislature also recognized the important principle of beneficial use. No person is granted the right to waste water by not using it.” *Lower Colo. River Auth.*, 689 S.W.2d at 882 (citing *In re Adjudication of the Water Rights of the Upper Guadalupe River Basin*, 642 S.W.2d 438 (Tex. 1982); *Tex. Water Rights Comm’n v. Wright*, 464 S.W.2d 642 (Tex. 1971)).

159. In 1978, the Supreme Court recognized a new basis of recovery in subsidence cases: that a **wasting of water causing the loss of lateral support** is an additional basis for damages to real property.

It appears that the ownership and rights of all landowners will be better protected against subsidence if each has the duty to produce water from his land in a manner that will not negligently damage or destroy the lands of others.

Therefore, if the landowner’s manner of withdrawing ground water from his land is negligent, **willfully wasteful**, or for the purpose of malicious injury, and

such conduct is a proximate cause of the subsidence of the land of others, he will be liable for the consequences of his conduct.

Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 30 (Tex. 1978) (emphasis added). Likewise, the City and the SJRA's willfully wasteful SLLP should be subjected to a higher judicial scrutiny when weighed against the legal interests of lakeside property owners.

160. The Supreme Court of Texas' 2004 holding in *Sheffield Development Company v. City of Glenn Heights* indicates that the Supreme Court considers constitutional takings to be more evident in the face of illegitimate government purposes. *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 674 (Tex. 2004) ("If Sheffield were correct, we think the lack of a legitimate purpose alone would make the rezoning a taking, just as it would have in *Mayhew*"). This case involves the combined effect of governmental actions that are illegitimate both through waste of public resources and by Respondents' unauthorized deviation from the intentional design and operation of Lake Conroe to maintain a constant level.

According to Jace Houston, the San Jacinto River Authority oversees Lake Conroe in Montgomery County which is a water supply reservoir and has no flood control aspects. The lake is designed to operate at full lake level and the operational guidelines have limited discretion during flood episodes. There is no option to hold the water in Lake Conroe, as it cannot act as a flood control reservoir.

Pre-release of water as a flood control strategy is not generally a policy for the SJRA as any release would burden Lake Houston and the city systems.⁹⁴

161. Finally, the SJRA admits that the Lake Conroe dam results in a nuisance and/or taking when a property owner is worse off as a result of the dam's presence. Thus, property owners surrounding Lake Conroe would be better off if they had designed their real property improvements and/or lateral support under an expectation of no reservoir, or a non-constant level

⁹⁴ Exhibit HH, Tex. S. Comm. on Agric., Water & Rural Affairs, "Interim Report: 2017 Hurricane Harvey Response to the 86th Legislature" 48 (Nov. 2018) (summarizing oral testimony received from Jace Houston, General Manager of the SJRA, during an October 16, 2017 public hearing of the Committee on Agriculture, Water and Rural Affairs of the Texas Senate).

reservoir, rather than designing them for a constant level reservoir that is now being used as a non-constant level reservoir.

Like Lake Conroe, the lake in Key Sales Co. was a constant level lake that did not serve as a flood control facility, though downstream owners may have enjoyed incidental flood control benefits from the operation of the lake and dam. Just prior to the flood event, the level of the lake was slightly below the certificated level of 360 feet msl. Throughout the event, the operator opened the gates to maintain the reservoir at 360 feet msl. As in the instant case, a substantial amount of rainfall occurred directly on top of the lake.

The court noted that in the absence of the dam, at least 55,000 cfs would have flowed downstream, resulting in flooding of plaintiff's property. Due to the storage capacity of the dam, less water was passed downstream during the first day of the flood, but more water was passed downstream during the third day of the flood than would have resulted under natural conditions. The court noted that plaintiff was no worse off because of the presence of the dam.

. . . . The court further held that the owner had no obligation either to pre-release water from the reservoir where it had no reasonable basis to anticipate the excessive rainfall that occurred during the event and required it to reduce the pond level below the standard operating level.⁹⁵

F. UNAUTHORIZED OR UNLAWFUL ACTIVITIES HOLD LESS WEIGHT AGAINST LEGAL PROPERTY INTERESTS

162. “As expressed in the age-old principle of *sic utere tuo ut alienum non laedas*, all property owners have a general duty to not use their own property in a manner that injures the rights of others.” *Scott v. West*, 594 S.W.3d 397, 401 (Tex. App.—Fort Worth 2019); *see also Orient Ins. Co. v. Daggs*, 172 U.S. 557 (1899) (“‘*Sic utere tuo ut alienum non laedas*,’ is of universal and pervading obligation. It is a condition upon which all property is held.”); *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 590-91 (Tex. 2016) (noting that the law of

⁹⁵ Exhibit AA, Defendant's [SJRA] Supplement to and Brief in Support of Motion for Summary Judgment, *George Wickham, II, et al. v. San Jacinto River Auth.*, Cause No. 96-03-01039-CV, Montgomery County Dist. Ct., 221st Jud. Dist. at 28 (Aug. 9, 1996) (internal citations omitted).

nuisance balances property owners' rights to use their property as they choose "in any lawful way" against their duty not to use it in a way that injures another); *Gulf, C. & S.F. Ry. Co. v. Oakes*, 94 Tex. 155, 58 S.W. 999, 1000-01 (1900) (noting that under this general duty, one may not intentionally or negligently "cast earth or other substance from his own ground on a neighbor's," but also noting that restricting a lawful use of property requires a balancing of interests).

163. The Supreme Court of Texas previously described the duty of property owners with regard to the future creation or use of natural waterways. The Court described this duty as a duty to ensure that structures and real improvements are made with regard to their usefulness against lawful future activities of state water.

In fact, it may be said that the initial duty of the appellant at the very time it built its structures . . . was to do so in such a way as "not to unnecessarily impair" their "usefulness" at that time or at any subsequent time when the state or its citizens might undertake to use the streams in a lawful manner

Chicago, R. I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1, 123, Tex. 432, 446, 73 S.W.2d 55, 63 (1934). The same examination applied to the SLLP suggests that property owners do not have an affirmative duty to guard their property against unauthorized or unlawful diversions of water.

164. Further, in 2001 the 10th Court of Appeals discussed that the Tarrant Regional Water District argued against a taking as a matter of law because the flooding tied to its flowage was "only temporary or sporadic . . . tied to rainfall." *Tarrant Reg'l Water Dist. v. Gragg*, 43 S.W.3d 609, 619 n.16 (Tex. App.—Waco 2001). The City and the SJRA, in this case, have acknowledged that the SLLP is now being enacted in a seasonal manner without being tied to rainfall.

G. THE CITY AND THE SJRA ARE “COMMON ENEMIES” OF THE PETITIONERS

165. In 1972, the 9th Court of Appeals in Beaumont examined ongoing lateral support damages between adjacent property owners and held that the actual proximate cause of their damages was a “common enemy,” being the creator of the adjoining lake.

We would apply the “common enemy” doctrine to the situation before us even though we find no mention of this doctrine in the laws of this state. The Supreme Court of California discusses this doctrine at length in *Katenkamp v. Union Realty Co.*, 6 Cal.2d 765, 59 P.2d 473, 476-477 (1936), recognizing the right of defense against the inroads of the sea as a common enemy. It is stated that every owner of land exposed to the sea may erect reasonable defenses for the protection of his land from the inroads of the sea. However, even though the landowner has the right to protect himself, he is not entitled to be protected by others against the common enemy. In the case before us, the common enemy was the wave action and plaintiffs had the legal right to erect reasonable defenses to protect their land.

Carpentier v. Ellis, 489 S.W.2d 388, 390 (Tex. Civ. App.—Beaumont 1972).

166. In 2019, the Fort Worth Court of Appeals stated:

While a successor landowner cannot be held liable for subsidence caused by a predecessor’s removal of the natural lateral support for adjoining land, other jurisdictions addressing the issue have generally held that a successor landowner is liable for subsidence that results when the successor removes or allows to deteriorate the artificial support a predecessor supplied to replace natural support. See *Gorton v. Schofield*, 311 Mass. 352, 41 N.E.2d 12, 13-15 (Mass. 1942) (explaining the policy behind holding successor landowners liable for maintaining artificial support); see also *Klebs v. Yim*, 54 Wash.App. 41, 772 P.2d 523, 527 (1989) (holding that plaintiffs did not meet their burden of proof to hold the defendant successor landowner liable under the right of lateral support for rebuilding the retaining wall supporting their property); *Noone v. Price*, 171 W.Va. 185, 298 S.E.2d 218, 222 (1982) (summarizing the “weight of authority” from other jurisdictions holding that “when an actor who removes natural lateral support substitutes artificial support to replace it, such as a retaining wall, the wall then becomes an incident to and a burden on the land upon which it is constructed, and subsequent owners and possessors have an obligation to maintain it”); Restatement (Second) of Torts § 817 cmt. k; 1 Am. Jur. 2d *Adjoining Landowners* § 54 (1962), Westlaw (database updated June 2019); cf. *Pecanty v. Miss. S. Bank*, 49 So. 3d 114, 120-22 (Miss. Ct. App. 2010) (stating that landowners are not strictly liable for subsidence from either the removal of natural support of a predecessor in title or the failure of the predecessor’s defectively designed and constructed retaining wall but noting that “the weight of authority suggests” that successor landowners may

have a duty to maintain a properly-built retaining wall), *cert. denied*, 49 So. 3d 1139 (Miss. 2010). Our opinion in *Vecchio* did not address this question. *See Vecchio*, 833 S.W.2d at 301-02.

Scott, 594 S.W.3d at 407 n.15 (some emphasis added).

167. The 9th Court of Appeals in Beaumont has discussed the federal government's opinion that lake lowering for flood control can have adverse impacts on recreation and other activities.

During the 2003, [the Federal Energy Regulatory Commission] declined another request made by the residents who live downstream of the Toledo Bend Reservoir to amend the regulations governing SRA-T's operation of the Project to allow the Project's mission to include lowering the reservoir level and pre-releasing water for the purpose of mitigating the damages that result during floods. In a letter dated November 24, 2003, FERC stated:

The Toledo Bend Dam was not designed as a flood control dam. Review of historical flood-flow data indicates that the construction and operation of the Toledo Bend Dam has not increased the incidence of downstream flooding. In some flood events, the dam has been beneficial by delaying the flood flows by temporarily storing a portion of the flood inflow in the reservoir. The ability of the project to pre-release flow to obtain significant reservoir storage in anticipation of high inflows is severely limited by the downstream development, particularly [in] Deweyville, Texas. Therefore, to obtain flood control benefits, operation of the project would need to be changed to permanently lower the project reservoir level to provide flood control storage. Significantly lowering the reservoir to the extent necessary to provide appreciable flood control benefits would adversely impact the established reservoir recreation activities and power development.

Waller v. Sabine River Auth. of Tex., Cause No. 09-18-00040-CV, 2018 Tex. App. LEXIS 10010, at *5-6 (Tex. App.—Beaumont Dec. 6, 2018).

IX. CONCERT OF ACTION AND AIDING AND ABETTING

168. The City's waste of water from the Lake Conroe reservoir is a result of the City's specific calls for water from its two-thirds of the water in Lake Conroe pursuant to the SLLP, which is then discharged through the waterworks and the Lake Conroe dam.⁹⁶

169. By joint design and planning, the SJRA is acting in concert with, and aiding and abetting, the City. Affiant Daniel Krueger states: "Both Houston and SJRA evade lead responsibility for the [SLLP]—SJRA recommends to Houston and Houston requests of SJRA; Houston reports to TCEQ, but SJRA includes the data on their website."⁹⁷

170. The SJRA is further in privity with the City for all alleged wrongful permit requests and/or requested SLLP diversions because the SJRA continues to contract with the City pursuant to a May 9, 1968 contract that acknowledges the City's two-thirds share in the Lake Conroe reservoir waters, and because the SJRA continuously seeks reimbursement from the City for a proportionate share of operating and maintenance expenses.⁹⁸

X. ECONOMIC DAMAGES

171. The economic 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;

⁹⁶ See, e.g., Exhibit X, E-mail from Jace Houston, Gen. Mgr., SJRA, to Lloyd Tisdale, Bd. Member, SJRA (June 20, 2020, 1:45 p.m.) ("They [Houston] can call for their water anytime, and we would have to send it."); Exhibit X, E-mail from Yvonne W. Forrest, Dir., Houston Water, to Chuck Gilman, Dir. of Water Resources, SJRA, & Greg Olinger, Coastal Water Auth. (May 29, 2020, 8:59 a.m.) ("Houston Water is requesting SJRA to lower Lake Conroe to 200' msl by June 2.").

⁹⁷ Exhibit W, *supra* note 3, Affidavit of Daniel Krueger at ¶ 11 at 3 (Mar. 30, 2021).

⁹⁸ See, e.g., Exhibit GG, Dep't of Pub. Works & Eng'g, City of Houston, "Request for Approval of the 2008 Operations and Maintenance Budget for the San Jacinto River Authority" (May 28, 2008).

- b. Loss of lateral support, causing collapsed bulkheading from persistently unbalanced pressures due to low water levels;
- c. Reduced access to boat ramps and docks, resulting damage to grounded boats, and rental fees to store boats that cannot access docks;
- d. Shallow canals that require dredging and refurbishment;
- 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. Loss of investments made in reliance upon a lawful and consistent lake level during normal operations; and
- i. Dredging of canals and private property to provide lake access.

172. 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, Matthew P. Newsom,⁹⁹ Dale R. Elliott, P.E., James W. Newport, and William Paul Waits, P.E.¹⁰⁰ The estimated costs, including already expended costs and estimates for needed work, are in the millions of dollars.

173. Pursuant to Tex. Civ. Prac. & Rem. Code § 37.009, for the relief of declarations and supplemental injunctive relief, Petitioners request an award of “costs and reasonable and necessary attorney’s fees as are equitable and just.”

⁹⁹ Exhibit W, *supra* note 3, Affidavits of Susanne Mitchell Allen, Robert Ferrante, Melanie Clement, Daniel Krueger, and Matthew P. Newsom.

¹⁰⁰ Exhibit Y, *supra* note 3, Affidavits of Dale R. Elliott, P.E., James W. Newport, and William Paul Waits, P.E.

XI. NON-ECONOMIC DAMAGES AND NON-PECUNIARY LOSSES

174. The non-economic effects, or the effects not yet capable of being calculated by any pecuniary standard, 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, *et cetera*, striking submerged objects;
- c. Greater risk of accidents and injury to persons caused by increasingly beached or damaged boat ramps, docks, and lake canals;
- d. Reduced access to boat ramps and docks, including resulting damage to grounded boats;
- e. Greater risk of accidents and injury to persons and property caused by reduced access to firefighting water reserves located in lake canals; and
- f. Reduced recreational purpose.

XII. CAUSES OF ACTION

A. UDJA DECLARATIONS – Against the City and the SJRA

175. **UDJA.** Pursuant to Tex. Civ. Prac. & Rem. Code § 37.003, Petitioners request the following declarations as to the SJRA and the City, involving the following constructions, interpretations, clarifications, and determinations of valid statutory readings; constitutional violations; and imminent personal injuries:

- 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;
- c. The SLLP, 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);
- d. By waste of state water, the SLLP is a violation of TEX. CONST. art. XVI, § 59(a);
 - i. Petitioners possess particularized injuries distinct from the general public sufficient to assert standing to declare the SLLP to be a violation of public rights, including, but not limited to, loss of safe or viable ingress/egress to the lake for travel to their lake-adjacent properties, damage to their personal property interests and investment-backed

expectations, and exposure to increased risk of non-extinguishable fire.

Public rights are being damaged by waste and by public nuisance.

e. By rising to the level of a constitutional taking, the SLLP is a public nuisance which violates TEX. CONST. art. I, § 17(a);

ii. Petitioners possess particularized injuries distinct from the general public sufficient to assert standing to declare the SLLP to be a violation of public rights, including, but not limited to, loss of safe or viable ingress/egress to the lake for travel to their lake-adjacent properties, damage to their personal property interests and investment-backed expectations, and exposure to increased risk of non-extinguishable fire.

Public rights are being damaged by waste and by public nuisance.

f. By rising to the level of a constitutional taking, the SLLP is a private nuisance which violates TEX. CONST. art. I, § 17(a);

g. **TTCA.** The SLLP subjects Petitioners and the public to imminent personal injury derived from hazards on, within, and near Lake Conroe;

h. **TTCA.** The SLLP subjects Petitioners and the public to imminent personal injury derived from interfering in fire fighters' access to emergency water supply.

176. 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).

177. The City's and the SJRA's intentional waste¹⁰¹ of reservoir water from Lake Conroe is a public nuisance created by governmental functions for which governmental entities are not immune, for a public use. The City's and the SJRA's waste of Lake Conroe water unlawfully invades the rights of Petitioners in their use and enjoyment of state water. The proper relief of this public nuisance is abatement pursuant to the Petitioners' request for injunctive relief.

178. 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).

179. The City and the SJRA's enactment and operation of the Lake Conroe Dam is inextricably intertwined. The City and the SJRA knew that specific damage was substantially certain to result from its conduct in enacting and operating under the SLLP, and that their actions would necessarily cause physical damage to certain private and public properties and yet determined that the benefit to the public outweighed the harm caused to the public, Petitioners,

¹⁰¹ Water "waste" is defined as "[t]he diversion of water if the water is not used for a beneficial purpose; the use of that amount of water in excess of that which is economically reasonable for an authorized purpose when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. Waste may include, but not be limited to, the unreasonable loss of water through faulty design or negligent operation of a water delivery, distribution or application system, or the diversion or use of water in any manner that causes or threatens to cause pollution of water. Waste does not include the beneficial use of water where the water may become polluted because of the nature of its use, such as domestic or residential use, but is subsequently treated in accordance with all applicable rules and standards prior to its discharge into or adjacent to water in the state so that it may be subsequently beneficially used." 30 TEX. ADMIN. CODE § 297.1(58) (emphasis added).

and these properties. The City and the SJRA intentionally performed affirmative acts that resulted in a physical taking of specific property for public use. For this reason, the public nuisance sought to be abated rises to the level of a constitutional taking under Tex. Const. art. I, § 17(a). Petitioners, and members of the LCA, have suffered diminutions in the use, enjoyment, and value of their private property and of the public property held in trust for the public by the state. Petitioners', and the members', private and public property rights have been taken by the City and the SJRA for public use.

180. In enacting and operating under the SLLP, the City and the SJRA have performed a constitutional taking under Tex. Const. art. I, § 17(a), for which Petitioners' requested declaratory and injunctive relief should be granted. Petitioners, and members of the LCA, have suffered diminutions in the use, enjoyment, and value of their private property and of the public property held in trust for the public by the state. Petitioners', and the members', private and public property rights have been taken by the City and the SJRA for public use. To the extent that Petitioners' taking damages are capable of being reduced to a pecuniary standard, Petitioners seek compensation. To the extent that the SJRA or the City alleges any contractual indemnification or release for property damages, any such indemnity or release provisions are void as a matter of public policy as against the SJRA's intentional conduct, absent required,¹⁰² explicit language.

181. The Legislature expressly waived governmental immunity for Petitioners' causes because Petitioners allege they are being subjected to imminent personal injury by and through the conditions and use of Lake Conroe and the Lake Conroe Dam, including, but not limited to, exposure to water hazards and sand bars while traversing the lake surface; exposure to increasingly

¹⁰² “[O]ly an indemnity provision specifically stating an intent to indemnify the indemnitee for the indemnitee’s intentional torts should be enforceable against the indemnitor for the indemnitee’s intentional acts.” *Hamblin*, 433 S.W.3d at 57.

unstable or beached access points such as canals, docks, and boat ramps, and by loss of local firefighting access to canal water previously used to fight fire conditions in neighborhoods and the national forest. “A governmental unit in the state is liable for: . . . (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.” TEX. CIV. PRAC. & REM. CODE § 101.021.

182. Accordingly, and additionally, the Legislature expressly waived governmental immunity for Petitioners’ causes against the City for waterworks and dams and reservoirs. TEX. CIV. PRAC. & REM. CODE § 101.0215.

183. Petitioners seek to stop and prevent the City’s waste of waters from the Lake Conroe reservoir which are obtained by means of opening the gates of the Lake Conroe Dam. The Lake Conroe reservoir is a part of the municipal system of waterworks, and the lake and dam are clearly a dam and reservoir, as contemplated by state statute..

(a) A municipality is liable under this chapter for damages arising from its governmental functions, which are those functions that are enjoined on a municipality by law and are given it by the state as part of the state’s sovereignty, to be exercised by the municipality in the interest of the general public, including but not limited to:

* * *

(11) waterworks;

* * *

(19) dams and reservoirs....

TEX. CIV. PRAC. & REM. CODE § 101.0215(a)(11)&(19) (emphasis added).

A. ABATEMENT OF WASTE UNDER THE TEXAS WATER CODE – Against the City and SJRA

184. **Tex. Water Code § 11.093(a)**. Petitioners request a declaration and injunction against the SJRA and the City declaring that the Lake Conroe SLLP, as the term is referenced by

the SJRA and the City, is a waste of state water and therefore a public nuisance, and thus, the SLLP shall be abated.

185. The SLLP is of faulty design by wasting state water and is thus statutorily authorized to be abated, including a statutory waiver of immunity:

(a) A person¹⁰³ who permits an unreasonable loss of water through faulty design or negligent operation of any waterworks¹⁰⁴ using water for a purpose named in this chapter commits waste, and the commission may declare the works causing the waste to be a public nuisance. The commission may take the necessary action to abate the nuisance. Also, any person who may be injured by the waste may sue in the district court having jurisdiction over the works causing the waste to have the operation of the works abated as a public nuisance.

TEX. WATER CODE § 11.093(a) (emphasis added).

186. The Water Code expressly acknowledges that prior common actions persist:

Policy Regarding Waters of the State

(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.

Effect on Other Law

This chapter does not exempt a person from complying with or being subject to other law.

TEX. WATER CODE § 7.005.

Remedies Cumulative.

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,

¹⁰³ “Person” is defined to “include[] corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.” TEX. GOV’T CODE § 311.005(2).

¹⁰⁴ “Waterworks” is defined as “the system of reservoirs, channels, mains, and pumping and purifying equipment by which a water supply is obtained and distributed (as to a city).” “Waterworks,” Merriam-Webster.com at <https://www.merriam-webster.com/dictionary/waterworks> (accessed Apr. 5, 2021).

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.

B. FINDING OF LAW OF CONSTITUTIONAL TAKING – Against the City and the SJRA

187. Pursuant to TEX. CONST. art. I, § 17(a), Petitioners request a determination and declaration that the SLLP has caused a Taking against Petitioners’ private real and personal property interests, and in connection therewith, of their business and investment interests, and Petitioners seek an injunction against the SLLP for damages that are not capable of being reduced to a pecuniary standard.

188. For damages capable of being reduced to a pecuniary standard, Petitioners seek compensation for constitutional takings.

189. ***Solely against the SJRA.*** If the SJRA flowage easements are determined to be valid as applied to the SLLP, the Petitioners seek compensation for the expansions of the stated purposes within their flowage easements, or alternatively, compensation for SJRA’s procurement of the flowage easements by fraud.

C. TEX. GOV’T CODE CHAPTER 2007 – Solely Against the SJRA

190. **Suit to Invalidate Governmental Action.** Pursuant to Tex. Gov’t Code § 2007.044, Petitioners request a declaration as to the SJRA that the SLLP requires a takings impact assessment and is therefore void until a takings impact assessment is prepared according to the State of Texas Attorney General’s “Texas Private Real Property Rights Preservation Act Guidelines,” promulgated under Tex. Gov’t Code § 2007.041(a). Petitioners request an award of reasonable and necessary attorneys’ fees and court costs pursuant to Tex. Gov’t Code § 2007.044(c).

191. **Action to Determine Taking.** Pursuant to Tex. Gov't Code § 2007.024(a) and (b), Petitioners request a declaration as to the SJRA that the SLLP has caused a Taking and an Order against the SJRA to rescind the SLLP, together with a fact finding that determines the monetary damages suffered by Petitioners. Petitioners request an award of reasonable and necessary attorneys' fees and court costs pursuant to Tex. Gov't Code § 2007.026(a).

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

192. 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.

193. 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.

194. Petitioners' application for a Temporary Injunction is 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 constitutional and statutory violations of law and the likelihood that Respondents will otherwise refuse to comply with the terms of Petitioners' requested Declarations even if granted.

195. Petitioners seek a temporary injunction, 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 Tex. Admin. Code § 299.44.

196. Upon a final trial on the merits, Petitioners request that the Court grant the Petitioners' Application for Permanent Injunction as pleaded herein.

XIV. RULE 193.7 NOTICE

197. 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.

XV. PRAYER

WHEREFORE, Petitioners request that the Court grant Petitioners' Request for Declaratory Judgment and Supplemental Temporary and Permanent Injunctive Relief; Application for Abatement; Application for Temporary and Permanent Injunctive Relief; Action to Determine Taking; and Petition to Invalidate Governmental Action, and request that the Court set a hearing on the Application for Temporary Injunctive Relief as pleaded herein. Upon final hearing hereof,

Petitioners request that they have a declaratory judgment terminating this controversy, and a permanent injunction as pleaded herein against Respondents, and such other relief as they may show themselves justly entitled.

Petitioners request damages and expenses of:

- a. Costs of court and reasonable and necessary attorneys' fees for declaratory judgments;
- b. Costs of court and reasonable and necessary attorneys' fees for Action to Determine Taking;
- c. Costs of court and reasonable and necessary attorneys' fees for Suit to Invalidate Governmental Action; and
- d. Compensation for constitutional Takings.

Respectfully submitted,

WARD LAW FIRM

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

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

CERTIFICATE OF SERVICE

I certify that pursuant to the Texas Rules of Civil Procedure, a true and correct copy of the foregoing document was delivered to the following counsel and promptly filed with the Clerk of this Court via TexFile ECF on this the **27th day of May, 2021**:

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City Attorney
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/s/ David A. Ward, Jr.
David A. Ward, Jr.

STATE OF FLORIDA

§
§
§
§

COUNTY OF Monroe

UNSWORN DECLARATION OF KEVIN LACY

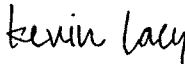
Dennis

My name is Kevin _____ Lacy. I am at least 21 years of age, of sound mind, and capable of making this unsworn declaration. I am the President of record for Lake Conroe Association and am authorized to make this unsworn declaration on behalf of Lake Conroe Association. I am familiar with and have personal knowledge of the facts stated herein and they are true and correct.

The facts stated in PETITIONERS' FIRST AMENDED ORIGINAL PETITION; REQUEST FOR DECLARATORY JUDGMENT AND SUPPLEMENTAL TEMPORARY AND PERMANENT INJUNCTIVE RELIEF; APPLICATION FOR ABATEMENT; APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTIVE RELIEF; ACTION TO DETERMINE TAKING; AND PETITION TO INVALIDATE GOVERNMENTAL ACTION are true and correct and within my personal knowledge, except as otherwise stated therein.

Further, affiant sayeth naught.

DocuSigned by:



C4872436235B4A4

Kevin Lacy
President
Lake Conroe Association

Dennis

MY NAME IS KEVIN _____ LACY, MY DATE OF BIRTH IS

April 30, 1958

, AND MY ADDRESS IS

6775 Kingston Cove Lane

willis, TX 77318

, U.S.A. I DECLARE UNDER

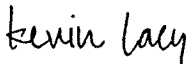
PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Monroe

Executed in _____ County, State of Florida, on the 27th day of May,

2021.

DocuSigned by:



C4872436235B4A4

Declarant, Kevin Lacy