

**Reversed and Rendered and Opinion filed October 16, 2025.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-23-00923-CV**

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**SAN JACINTO RIVER AUTHORITY, Appellant**

**V.**

**THOMAS E. AND BETH F. ROSS, ET AL., Appellees**

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**On Appeal from the 152nd District Court  
Harris County, Texas  
Trial Court Cause No. 2017-58385**

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**OPINION**

During Tropical Storm/Hurricane Harvey in 2017, the San Jacinto River Authority released water from its Lake Conroe reservoir into the West Fork of the San Jacinto River. Before us is the latest of several cases in which downstream property owners allege that the River Authority's action caused or worsened flooding on their properties. At issue is whether the trial court erred in denying the River Authority's plea to the jurisdiction challenging appellees' statutory property takings claims under Government Code chapter 2007. After reviewing the extensive

record, we conclude that the River Authority has established conclusively that the reasonable good faith exclusion in Government Code section 2007.003(b)(7) applies, and that appellees have not created a fact question on that jurisdictional issue. Consequently, the River Authority has no liability under the statute, the Legislature has not waived the River Authority's governmental immunity, and the trial court lacks jurisdiction. We reverse and render judgment dismissing appellees' statutory takings claims.

## **I. Background**

The San Jacinto River Authority ("SJRA") is a conservation and reclamation district created in 1937 as a political subdivision of the State of Texas.<sup>1</sup> SJRA's responsibilities include "storing, controlling, and conserving storm and floodwaters of the San Jacinto River and its tributaries."<sup>2</sup> SJRA constructed an earthen dam across the West Fork of the San Jacinto River, which created Lake Conroe. SJRA operates and maintains the lake and the dam.

Harvey began as a tropical wave off the west coast of Africa, developed into a tropical storm, and then weakened back to a tropical wave. Harvey then re-formed off the coast of Mexico, developed into a tropical depression on August 23, 2017 and rapidly intensified into a Category 4 hurricane. After making landfall near Port Aransas on August 25, it re-entered the Gulf and moved easterly. As Harvey moved inland again near Houston, its forward motion slowed to near five miles-per-hour. Though downgraded to a tropical storm, rain bands on the eastern side of the

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<sup>1</sup> *San Jacinto River Auth. v. Medina*, 627 S.W.3d 618, 621 (Tex. 2021) (citing Act of May 12, 1937, 45th Leg., R.S., ch. 426, § 1, 1937 Tex. Gen. Laws 861, 861 (creating the San Jacinto River Conservation and Reclamation District)). The District was renamed the "San Jacinto River Authority" in 1951. Act of May 14, 1951, 52nd Leg., R.S., ch. 366, § 1, 1951 Tex. Gen. Laws 617, 617.

<sup>2</sup> *Medina*, 627 S.W.3d at 621 (citing Act of May 12, 1937, 45th Leg., R.S., ch. 426, § 3(c), 1937 Tex. Gen. Laws 861, 862).

circulation of Harvey brought heavy rain for several days. Severe flash flooding occurred throughout Harris and Montgomery Counties.

On August 27, 2017, SJRA began releasing stormwaters from Lake Conroe into the West Fork of the San Jacinto River. These releases continued for several days and reached a peak flow rate of about 80,000 cubic feet per second (cfs) for about fifteen hours. Outflows through the dam must travel approximately thirty hours over thirty-eight miles to reach I-69—roughly the western border of Kingwood and Humble. Most of the appellee property owners live in Kingwood or Humble. Water released from the dam converges with several tributaries and other watercourses before reaching I-69.

Many homeowners and businesses throughout the Kingwood and Humble areas suffered devastating flooding during Harvey. The appellees/plaintiffs in the present case (the “Property Owners”)<sup>3</sup> sued SJRA in Harris County district courts,<sup>4</sup> alleging that its release of water from Lake Conroe during Harvey inundated their properties with water and caused substantial damage. They asserted takings claims under both the Texas Constitution, *see* Tex. Const. art. I, § 17, and the Private Real Property Rights Preservation Act, codified as chapter 2007 of the Texas Government Code (“Chapter 2007”). *See* Tex. Gov’t Code § 2007.021. The constitutional takings claims are no longer a part of this dispute because the Harris County Courts at Law have exclusive jurisdiction over those claims.<sup>5</sup> The Property Owners’ statutory takings claims under Chapter 2007 are the only claims at issue for purposes

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<sup>3</sup> A complete list of the appellees’ names is attached to this opinion as an appendix.

<sup>4</sup> The Property Owners’ multiple lawsuits were consolidated into one case.

<sup>5</sup> *See San Jacinto River Auth. v. Dennis*, No. 14-18-00174-CV, 2021 WL 4270030, at \*1 (Tex. App.—Houston [14th Dist.] Sept. 21, 2021, no pet.) (mem. op.); *San Jacinto River Auth. v. Ray*, No. 14-19-00095-CV; 2021 WL 2154081, at \*1 (Tex. App.—Houston [14th Dist.] May 27, 2021, no pet.) (mem. op.); *San Jacinto River Auth. v. Ogletree*, 594 S.W.3d 833, 839-40 (Tex. App.—Houston [14th Dist.] 2020, no pet).

of this appeal.

SJRA initially sought to dismiss the claims of at least some Property Owners under rule 91a. Tex. R. Civ. P. 91a. The trial court denied this motion. On interlocutory appeal, we held that those plaintiffs sufficiently pleaded viable statutory takings claims sufficient to overcome a rule 91a motion. *San Jacinto River Auth. v. Brocker*, No. 14-18-00517-CV, 2021 WL 5117889, at \*8 (Tex. App.—Houston [14th Dist.] Nov. 4, 2021, no pet.) (mem. op.).

SJRA subsequently filed a plea to the jurisdiction asserting that it retains its governmental immunity, which deprives the trial court of subject matter jurisdiction over the statutory takings claims. The Property Owners acknowledge that SJRA is a political subdivision of the state generally entitled to governmental immunity. But they asserted that the Legislature expressly waived SJRA’s governmental immunity from suit and liability in Chapter 2007. *See* Tex. Gov’t Code § 2007.004(a) (waiving immunity to suit and liability to extent of liability created by this chapter). The district court denied SJRA’s plea, and SJRA timely appealed. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8).

## **II. SJRA’s Appellate Complaints**

SJRA asserts that the trial court erred in denying its plea to the jurisdiction because:

- (1) Chapter 2007 does not apply because as a matter of law the exclusion from section 2007.003(b)(7) applies;
- (2) Chapter 2007 does not apply because as a matter of law the exclusion from section 2007.003(b)(13) applies;
- (3) The Property Owners’ claims must be dismissed for lack of causation because the undisputed evidence “proves as a matter of law” that the Property Owners’ homes would have flooded during Harvey even if SJRA had released no water at all from Lake Conroe;

- (4) The Property Owners’ constitution-based takings claims under Chapter 2007 are barred by immunity because the Property Owners have not raised a fact issue whether SJRA “significantly changed flooding characteristics that occurred despite similar circumstances so that it can be inferred that the reservoir was to blame”;
- (5) The Property Owners cannot prove a taking because SJRA passed through less water from Lake Conroe at the height of the storm than it received;
- (6) The Property Owners have produced no evidence raising a fact question on their claims for market value takings under section 2007.002(5)(B);
- (7) To the extent that the Property Owners base their claims on the construction of the Lake Conroe Dam and the decision not to build a bigger dam with more capacity, Chapter 2007 does not apply to those claims because that chapter applies only to governmental actions “first proposed on or after September 1, 1995”; and
- (8) The undisputed evidence shows that SJRA did not intend to take the Property Owners’ property directly and that SJRA did not know that “specific property damage was substantially certain to result.”

### **III. Standard of Review**

Subject matter jurisdiction is necessary to a court’s authority to decide a case, *City of Houston v Rhule*, 417 S.W.3d 440, 442 (Tex. 2013), and is properly raised in a plea to the jurisdiction. *City of Waco v. Kirwan*, 298 S.W.3d 618, 621 (Tex. 2010). Because subject matter jurisdiction is a question of law, we review the trial court’s ruling de novo. *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). The trial court may not weigh the merits of the plaintiff’s claims but must consider only the pleadings and the evidence pertinent to the jurisdictional inquiry. *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002).

Governmental immunity from suit will defeat a trial court’s subject matter jurisdiction. *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018). In its plea, SJRA challenged the existence of jurisdictional facts with evidence, so we

consider all the evidence submitted by the parties necessary to resolve the jurisdictional issues raised. *Miranda*, 133 S.W.3d at 227. Our standard of review generally mirrors that of a traditional summary judgment. A defendant that files a plea to the jurisdiction has the initial burden of meeting the summary judgment standard of proof for its assertion that the court lacks jurisdiction. *Texas Health & Human Services Comm’n v. Pope*, 674 S.W.3d 273, 281 (Tex. 2023). If it does so, the plaintiff must then “show that a disputed material fact exists regarding the jurisdictional issue.” *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012). When a fact issue exists, the plea to the jurisdiction should be denied. *Id.* If the plaintiff fails to raise a fact question on the jurisdictional issue or the relevant evidence supporting the defendant’s assertion is undisputed, the plea to the jurisdiction must be granted as a matter of law. *Id.* In determining whether a genuine and material fact issue exists, we take as true all evidence favorable to the plaintiff and indulge every reasonable inference and resolve any doubts in the plaintiff’s favor. *Miranda*, 133 S.W.3d at 228.

#### **IV. Applicable Legal Principles**

##### **A. Statutory Interpretation**

SJRA’s first issue requires us to interpret and apply parts of Chapter 2007. Courts must apply statutes as written and refrain from rewriting text that lawmakers chose. *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009). When a statute does not define a word or phrase, we apply its ordinary meaning unless a different or more precise definition is apparent from the context. *See Railroad Comm’n of Tex. v. Gulf Energy Expl.*, 482 S.W.3d 559, 568 (Tex. 2016). We strive to effectuate all statutory terms, and we presume that a statute’s every word or omission was purposeful. *See Dunham Eng’g, Inc. v. Sherwin-Williams Co.*, 404 S.W.3d 785, 789 (Tex. App.—Houston [14th Dist.] 2013, no pet.). “As a

general principle, we eschew constructions of a statute that render any statutory language meaningless or superfluous.” *City of Dallas v. TCI W. End, Inc.*, 463 S.W.3d 53, 57 (Tex. 2015).

## **B. Chapter 2007**

Passed in 1995, the Private Real Property Rights Preservation Act authorizes lawsuits by private property owners to determine whether a governmental action of a political subdivision results in a “taking under this chapter.” Tex. Gov’t Code § 2007.021(1). “Taking” is defined to include (1) governmental actions compensable as a taking under the state or federal constitutions, or (2) less intrusive governmental actions that cause a reduction of at least 25 percent in market value of the affected property. *Id.* § 2007.002(5); *San Jacinto River Auth. v. Medina*, 627 S.W.3d 618, 622 (Tex. 2021). The Property Owners allege statutory takings claims based on both types of takings. If successful in obtaining a “takings” determination by the factfinder, property owners are entitled to a judgment invalidating the governmental action resulting in the taking, including a fact finding determining the monetary damages suffered as a result of the taking, and an award of attorney’s fees and costs. *See Medina*, 627 S.W.3d at 625 (citing Tex. Gov’t Code §§ 2007.006(a), 2007.021, 2007.023(b) 2007.024(b), 2007.026(a)). Significantly, however, even if a property owner secures a damage finding, Chapter 2007 does not obligate the governmental entity to pay those damages. *Id.* at 625-26; Tex. Gov’t Code § 2007.024(c).<sup>6</sup>

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<sup>6</sup> Damages are payable only if the governmental entity chooses to pay them. “A governmental entity may elect to pay the damages as compensation to the private real property owner who prevails in a suit or contested case filed under this subchapter. Sovereign immunity to liability is waived to the extent the governmental entity elects to pay compensation under this subsection.” Tex. Gov’t Code § 2007.024(c). In *Medina*, the supreme court clarified that Chapter 2007 applies not only to regulatory actions but to physical invasions of property that constitute a taking, and that declaratory relief is available even if the governmental entity does not elect to pay damages.

Governmental immunity protects political subdivisions from suit and liability absent the state’s express waiver. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 93 (Tex. 2012). Chapter 2007 waives that governmental immunity “to the extent of liability created by this chapter.” Tex. Gov’t Code §§ 2007.004(a), .021(a). Though Chapter 2007 allows liability for regulatory and physically invasive government actions, the act expressly excludes many categories of governmental acts. SJRA relies on two of them, but we find one dispositive.

As part of its first issue, SJRA argues that Chapter 2007 does not apply to government actions taken in certain emergency situations, such as:

- (7) an action taken out of a reasonable good faith belief that the action is necessary to prevent a grave and immediate threat to life or property; . . .

Tex. Gov’t Code § 2007.003(b)(7). According to SJRA, it had a reasonable good faith belief that its discharges from Lake Conroe were “necessary to prevent a grave and immediate threat to life or property” posed by Harvey. For that reason, SJRA argues, it has no liability under Chapter 2007 and is therefore immune.

Our resolution of this issue depends on the exclusion’s meaning, but we have not been directed to any appellate court opinion construing section 2007.003(b)(7) in a plea to the jurisdiction or summary-judgment context.<sup>7</sup> SJRA asserted the same exclusion in *Medina*, a prior appeal involving many of the same parties now before us. At that stage of the proceedings, however, the high court considered section

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*Medina*, 627 S.W.3d at 622. While this is undoubtedly true, for successful plaintiffs under Chapter 2007 who pray only for money damages, the difference between a pyrrhic victory and practical one may be nothing more than the governmental entity’s goodwill.

<sup>7</sup> Among available appellate court opinions we have located, it appears that Harvey-related lawsuits may be the first time Chapter 2007 has been invoked in a non-regulatory scenario where claimants allege a taking of property caused by a governmental dam operator’s release of water during a storm event.

2007.003(b)(7) in the context of a rule 91a dismissal motion based solely on the pleadings, as opposed to a plea to the jurisdiction based on evidence. *Medina*, 627 S.W.3d at 628-31. The question was whether the Property Owners’ pleadings conclusively established the exclusion. The court held they did not. *Id.* at 631.<sup>8</sup> The court, however, neither analyzed section 2007.003(b)(7)’s general meaning nor applied the exclusion to evidence. *Id.* (“We hold only that the property owners’ pleadings do not conclusively establish either statutory exception, which is what Rule 91a demands.”).

Chapter 2007 does not define the words used in section 2007.003(b)(7), so we look to their ordinary meanings.

1. “Action”

Chapter 2007 does not apply to a governmental entity’s “action” in the specified circumstances. *See* Tex. Gov’t Code § 2007.003(b)(7). We construe the term “action” as referring to the challenged act or acts put into issue by the plaintiffs’ pleading. Here, the Property Owners alleged that SJRA’s release of stormwater in accordance with its gate operations policy caused their damages.

2. “Reasonable Good Faith”

For the exclusion to apply, the governmental entity must have taken the action at issue with a reasonable good faith belief that it was necessary to prevent a grave and immediate threat to life or property. The definition of “good faith” is key to interpreting this phrase. As in *Medina*, however, the parties have not briefed the meaning of “good faith” in the context of Chapter 2007. *See Medina*, 627 S.W.3d at 631.<sup>9</sup>

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<sup>8</sup> We held similarly with respect to a subset of plaintiffs. *Brocker*, 2021 WL 5117889, at \*1.

<sup>9</sup> “The parties have not briefed the meaning of good faith in the context of this statute, and we

Good faith has been defined as “[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing ..., or (4) absence of intent to defraud or to seek unconscionable advantage.” *Gulf Energy*, 482 S.W.3d at 568 (citing *Good Faith*, BLACK’S LAW DICTIONARY 808 (10th ed. 2009)). Webster’s defines good faith as “a state of mind indicating honesty and lawfulness of purpose”; “belief in one’s legal title or right”; “belief that one’s conduct is not unconscionable or that known circumstances do not require further investigation”; and “absence of fraud, deceit, collusion, or gross negligence.” *Id.* (citing WEBSTER’S THIRD NEW INT’L DICTIONARY 978 (2002)).

Given these common understandings, we think that good faith as used in section 2007.003(b)(7) requires honesty in fact and absence of improper motive. Therefore, the governmental entity’s evidence must show at a minimum that its appropriate decisionmakers subjectively believed that the action at issue was necessary to prevent a grave and immediate threat to life or property.

Examining the Legislature’s use of “good faith” in other statutory contexts, the Supreme Court of Texas has often declared the term to include an objective component in addition to a subjective component. *See, e.g., Janvey v. GMAC, L.L.C.*, 592 S.W.3d 125, 129 (Tex. 2019) (construing good faith affirmative defense under Texas Uniform Fraudulent Transfer Act as including both subjective and objective components); *Wichita Cty. v. Hart*, 917 S.W.2d 779, 786 (Tex. 1996) (combining “honesty in fact” with “reasonableness” to define good faith under the Whistleblower Act). On the other hand, the high court has in other statutory areas confined the term to a subjective element. *See Gulf Energy*, 482 S.W.3d at 568-69

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accordingly express no opinion on the subject.”

(interpreting good faith affirmative defense in Natural Resources Code section 89.045). In *Gulf Energy*, the court rejected the commission’s call to import an objective reasonableness element into Natural Resources Code section 89.045, which does not expressly reference reasonableness. *Id.* at 569. “Had the Legislature intended to place an objective limitation on the term in contravention of its ordinary meaning,” the court observed, “it could have done so.” *Id.* at 568.

Here, the Legislature did precisely that, by inserting the word “reasonable” just before “good faith” in section 2007.003(b)(7), thereby making a “more precise definition” apparent. *Id.* Thus we may readily conclude from the statutory text the Legislature’s clear intent that the governmental entity’s subjective good faith belief must also be objectively reasonable for the exclusion to apply. Demanding objective reasonableness is sensible in this context because SJRA’s decisions regarding whether, when, and how much water to release from Lake Conroe during a storm event are inherently discretionary and involve deliberation and judgment.<sup>10</sup> *See id.* at 569 (contrasting good faith in the official immunity context).

Accordingly, we conclude that “reasonable good faith” in section 2007.003(b)(7)—as applied to a dam operator such as SJRA—means that the governmental entity believed that the challenged action was necessary to prevent a grave and immediate threat to life or property, and that its belief was objectively reasonable under the circumstances when viewed from the perspective of a reasonable dam operator.

### 3. “Necessary”

The word “necessary” typically includes something that is essential or needed

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<sup>10</sup> The Property Owners agree that SJRA “had discretion regarding the timing and amount of water releases.”

for some purpose. *See Southwestern Bell Tele., L.P. v. Emmett*, 459 S.W.3d 578, 584 (Tex. 2015) (citing WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 1283-84 (1996 ed.); BLACK’S LAW DICTIONARY 1192 (10th ed. 2014)).

4. “Grave and Immediate”

In this context the plain and ordinary meaning of “grave” is “likely to produce great harm or danger” or “significantly serious.” *See Grave*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/grave>; *State v. Best*, 745 A.2d 223, 231 (Conn. Ct. App. 2000) (relying on dictionary definition of “grave” as meaning “very serious; dangerous to life”). “Immediate” means “near to or related to the present” or “of or relating to the here and now.” *See Immediate*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/immediate>; *Texas Employers Ins. Ass’n v. Duree*, 798 S.W.2d 406, 409 (Tex. App.—Fort Worth 1990, writ denied) (stating that “Black’s Law Dictionary defines ‘immediate’ as follows: ‘[p]resent; at once; without delay; not deferred by any interval of time. In this sense, the word, without any very precise signification, denotes that action is or must be taken either instantly or without any considerable loss of time. . . .’”).

## V. Discussion

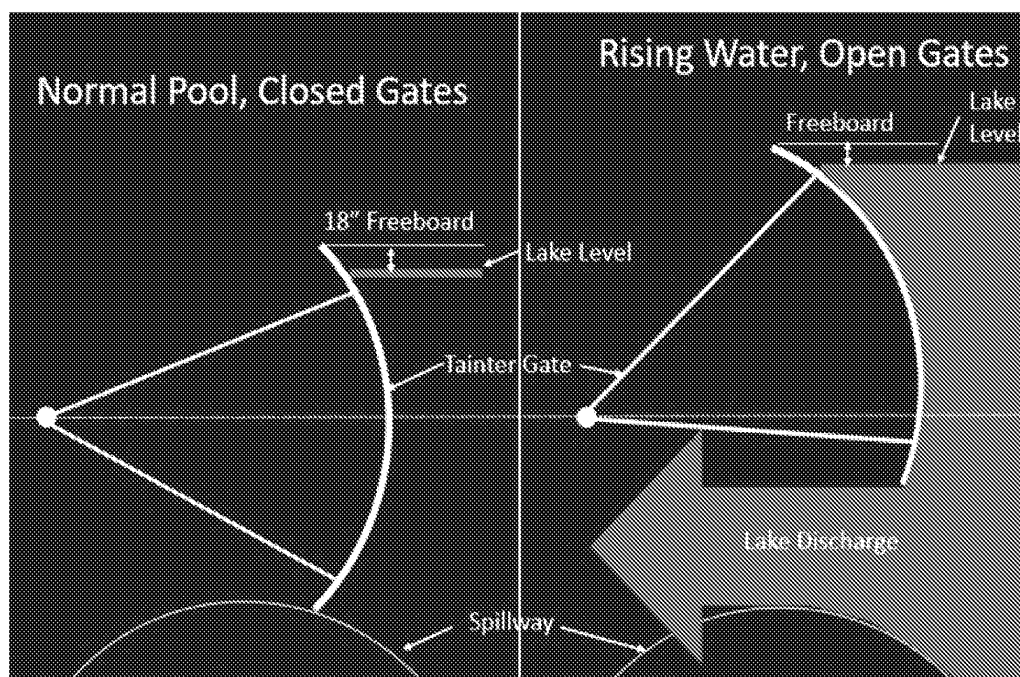
### A. SJRA’s evidence

Mindful of these definitions, we now consider whether the record establishes the exclusion, looking first to the evidence presented by the movant, SJRA.

1. Hector Olmos, P.E., CFM

SJRA attached to its plea the affidavit of Hector Olmos, P.E., CFM. He is a principal and vice president of Freese and Nichols, Inc., an engineering firm hired

by SJRA. In that capacity, Olmos has worked with SJRA since 2009, addressing various issues relating to Lake Conroe and the dam. His activities included consulting services in dam operations, development of and updates to the SJRA gate operations policy (“Gate Policy”), and development of and updates to the SJRA emergency action plan. Olmos stated that the normal pool elevation of Lake Conroe is 201 feet above mean sea level (“msl”). Water released from the lake must flow through five tainter gates, each measuring 40 feet by 30 feet. Olmos explained how tainter gates work; each is shaped like a slice of pie, and may be rotated up or down. When raised, the gates allow lake water to drain under them into the river. He included the following illustration:



The gates have a maximum elevation of 202.5 feet above msl when closed and a maximum elevation of 210 feet when open. If the lake’s surface level rises above 202.5 feet and the dam gates have not been raised, water would spill uncontrolled over the gates, which could jeopardize their structural integrity.

Further, the gates cannot be opened if enough water flows over them such that the weight and pressure of water damages the gate apparatus or makes the gate too heavy to be lifted.

Olmos stated that his company provided various consulting services to SJRA, including input regarding dam operations and protocols, hydrology analysis, water supply consulting, regulatory compliance counseling, and raw water supply master planning, among other services. SJRA engaged Freese and Nichols to develop a Gate Policy for the dam in compliance with all applicable rules for gate operations. The Gate Policy is targeted, in part, to address protocols and operations during rainfall events. Freese and Nichols prepared a Gate Policy in 2010, but modified it in April of 2017 to “better optimize and balance the lake levels and releases from the dam.” The Gate Policy consists of a written set of guidelines and a spreadsheet that performs calculations to recommend gate operations based on lake level and estimated inflows.

Olmos described Probable Maximum Flood (“PMF”) as the flood magnitude that may be expected from the most critical combination of meteorological and hydrologic conditions that are reasonably possible for a given watershed. According to Olmos, Texas law requires that the spillway be sized and operated in a manner that allows the passage of the PMF without overtopping the dam. The Gate Policy sets forth three gate opening recommendations for each entry in the spreadsheet during a rainfall event, reflecting a minimum, a target, and a maximum gate opening, which can all safely pass the PMF event without overtopping the gates or the dam.

Olmos explained that, several years after the 2010 Gate Policy was adopted, Freese and Nichols met with SJRA staff to receive feedback, refresh SJRA on the Gate Policy procedures, provide clarification on the intent of some of the procedures, and provide additional guidance to improve the results of the spreadsheet. Various

scenarios of gate operations were evaluated for storm events of different magnitude that occurred in 2015 and 2016, as well as storm events used for evaluation of dams, such as the PMF, and the 100-year storm. He said that the updated 2017 version of the Gate Policy adopted the scenario that resulted in the most significant improvement from an operational and flood risk balancing between the areas upstream and downstream of the dam. Among the operational criteria and goals of the Gate Policy is to protect the integrity of the dam.

The Gate Policy recommends releasing water through the gates so that the maximum rate of release from the gates in response to a flooding event does not exceed the maximum rate of inflow into Lake Conroe during the event. The Gate Policy was also designed to ensure that the dam's gates are operated consistently across various scenarios, contemplating different inflow quantities.

SJRA followed the Gate Policy (as updated in 2017) during Harvey. At 6:00 a.m. on August 26, 2017, the lake level was 200.40 feet above msl. According to Olmos, approximately 11,690 acre-feet of water flowing into the lake from Harvey rainfall was detained by the dam until the lake level reached normal elevation of 201 feet above msl. The first Harvey-related release of stormwaters occurred at 12:15 a.m. on August 27, 2017, when the lake level was 0.04 feet above normal pool elevation (201.04 feet). According to SJRA, the initial volume of water released was 529 cfs compared to an inflow of 13,777 cfs.

During Harvey, the lake reached a peak elevation of 206.23 feet above msl. SJRA computed the maximum rate of inflow into Lake Conroe and the maximum rate of outflow to be 129,065 cfs and 79,141 cfs, respectively. Thus, during Harvey, the peak outflow never exceeded peak inflow. Olmos averred that operating the gates in accordance with the Gate Policy reduced the peak flow that would have otherwise occurred by approximately 37%. Ultimately, SJRA released less water

from the lake than what drained into it.

Even with the releases, the lake level as measured at the dam reached 203.24 feet above msl at 3:00 p.m. on August 27, 2017. Had SJRA not raised the gates by 2 gate-feet, increasing the top of the gates to approximately 204.84 feet above msl, the water level would have risen and flowed over the top of the gates, likely causing gate failure and a catastrophic water release.

## 2. Jace A. Houston

Jace A. Houston was SJRA's general manager as of 2021. At that time, he had been employed by SJRA for thirteen years.

In his affidavit, Houston discussed SJRA's goals when releasing water from the lake, which include providing water to downstream customers, reducing the natural water flow during a storm event, passing floodwaters through the dam as safely as possible, and protecting the structural integrity of the dam's earthen embankment and gates. With these objectives in mind, SJRA hired Freese and Nichols in 2010 to create a Gate Policy in the form of a computer program that would calculate as accurately as possible how much water SJRA should release through the dam during a storm event. SJRA also instructed Freese and Nichols to develop the Gate Policy to ensure that, when releasing water, the peak outflow from the dam never exceeded peak inflow into the lake over the course of a storm event. SJRA gave Freese and Nichols this instruction intending that its Gate Policy comport with applicable legal authority, including *Wickham v. San Jacinto River Authority*, 979 S.W.2d 876 (Tex. App.—Beaumont 1998, pet. denied).<sup>11</sup>

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<sup>11</sup> In *Wickham*, property owners in the Kingwood area sued SJRA for inverse condemnation after an "unprecedented rain event" in October 1994. *Wickham*, 979 S.W.2d at 878. Like the Property Owners here, the plaintiffs in *Wickham* alleged that SJRA's water release from Lake Conroe during that storm event caused their properties to flood. The trial court granted summary judgment in SJRA's favor. Affirming, the Beaumont Court of Appeals held that SJRA established its

Houston also averred that Freese and Nichols updated the Gate Policy in 2017 to “make the program more efficient for the Dam operators,” while still maintaining the core goals discussed above. During Harvey, SJRA released water from the lake in amounts equal-to or less-than those set forth in the Gate Policy. More particularly, Houston said that peak inflow to the lake was 129,065 cfs, whereas peak outflow through the dam was 79,141 cfs, and Houston supported his assertions with an exhibit showing a record of actual inflows and outflows during the relevant period.

3. Mark E. Forest

SJRA also relied on the declaration of Mark E. Forest, a hydrology expert and professional engineer. Citing the National Hurricane Center, Forest stated that Hurricane Harvey and Hurricane Katrina were the costliest tropical cyclones on record. He said that Harvey produced significant rainfall within the San Jacinto River watershed during the five day period between August 25 to August 29, 2017. The amount of rainfall varied in depth, duration and temporal patterns, with the greatest rainfall amounts experienced in the eastern part of the watershed with depths of approximately 46 inches. Average depths of rainfall varied from 20 to 30 inches during that same period within the watershed contributing to Lake Conroe.

Forest simulated a model of the flooding that would have occurred had no water been released from Lake Conroe during Harvey. (He clarified that such a model was purely hypothetical because it would have been physically impossible for the dam to have retained all inflows without collapsing.) Under this hypothetical scenario, the lake level would have reached 213.6 feet above msl, exceeding the top of the dam by about three feet. Such overtopping, Forest said, would have

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entitlement to summary judgment on the “taking” element of the inverse condemnation claims, and the plaintiffs failed to raise a genuine and material fact question. As part of its reasoning, the court noted SJRA’s evidence showing that the maximum release of stormwater from the lake never exceeded the volume of water entering the river. *Id.* at 883.

compromised the integrity of the dam embankment and created the potential risk of dam failure, which would have been “far more consequential to the downstream reach compared to the observed event.”

#### 4. Dr. Philip Bedient

Finally, SJRA attached excerpts from the deposition of the Property Owners’ expert, Dr. Philip Bedient. Dr. Bedient has a Ph.D. in Environmental Engineering Sciences, an M.S. in Environmental Engineering, and a B.S. in Physics. He is a professor of Engineering at Rice University. He teaches and performs research in surface water hydrology, groundwater hydrology, floodplain analysis, flood prediction systems, coastal resiliency and disaster management, and storm water quality.

Dr. Bedient agreed that water overtopping the gates could result in gate failure. He was not aware of any engineer that would recommend allowing gates like those in the Lake Conroe dam to be overtopped. He also agreed that one of SJRA’s intentions in developing the Gate Policy has always been to make sure any releases would not cause or contribute to downstream flooding beyond what would have occurred under natural conditions. He agreed that SJRA followed the Gate Policy during Harvey.

#### **B. SJRA met its burden to establish the exclusion.**

To begin with, the gravity and immediacy of the threat posed by Harvey was apparent even before the storm made landfall. Governor Abbott declared a state of disaster in Harris County (and later in Montgomery County) on August 23, 2017, two days before Harvey came ashore.<sup>12</sup> Once Harvey hit the Houston area, it brought

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<sup>12</sup> <https://gov.texas.gov/news/post/Disaster-Proclamation-Issued-For-30-Texas-Counties-in-Anticipation-Of-Tropical-Depression-Harvey-Making-Landfall> (“I, GREG ABBOTT, Governor of the State of Texas, do hereby certify that Tropical Depression Harvey poses a threat of imminent

unprecedented heavy rainfall. Average rainfall during the storm varied from twenty to thirty inches within the watershed contributing to Lake Conroe. The lake elevation reached a record 206.23 feet above msl within about thirty-one hours after SJRA began releasing water. The inflow into the lake reached such a level that water would have overtopped the gates by about three feet had SJRA not opened them, which could have resulted in dam failure and a catastrophic release of water into an already swollen river.

Uncontroverted evidence filed by the Property Owners further buttresses the urgency Harvey presented.<sup>13</sup> For example, according to the Harris County Flood Control District's final report, the four-day rainfall totals over the Kingwood area were likely to occur at best once every 2,000 to 5,000 years, and possibly only once every 5,000 to 20,000 years. Harvey flooded an estimated 154,170 homes county-wide, the largest and most devastating house flooding event ever recorded in Harris County. Thirty-six flood-related deaths resulted, and 60,049 residents were rescued. Statewide, Harvey resulted in the largest number of fatalities from a landfalling hurricane since 1919. The West Fork of the San Jacinto River water levels surpassed those recorded in October 1994 by three to four feet. Lake Conroe reached a new record pool elevation, surpassing the previous record elevation of 205.60 feet set in October 1994. *See Wickham*, 979 S.W.2d at 881 (noting record Lake Conroe level of 205.60 feet msl reached in October 1994).

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disaster, including severe flooding, storm surge. . . . THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby declare a state of disaster in the previously listed counties based on the existence of such threat.”); [https://gov.texas.gov/uploads/files/press/Additional\\_Texas\\_Counties.pdf](https://gov.texas.gov/uploads/files/press/Additional_Texas_Counties.pdf). Disaster declarations carry the force and effect of state law. Tex. Gov’t Code § 408.012. To the extent it is necessary to take judicial notice of these declarations, we do.

<sup>13</sup> When a plea to the jurisdiction challenges jurisdictional facts based on evidence, we consider all relevant evidence, including undisputed evidence, submitted by the parties. *See Tex. Dep’t of Crim. Justice v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020) (citing *Miranda*, 133 S.W.3d at 228).

The above evidence shows that Harvey was “significantly serious” and “likely to produce great harm or danger.” Additionally, the rain accumulated at such a rate and volume that the threat was “near to or related to the present.” Thus, applying the definitions referenced above, we conclude that Harvey presented a grave and immediate threat to life or property. *See generally City of San Antonio v. Hartman*, 201 S.W.3d 667, 672-73 (Tex. 2006) (concluding that the extent of flooding established “emergency situation” as a matter of law under Tort Claims Act).

Next, we must determine whether SJRA presented evidence that it believed that releasing water in accordance with its Gate Policy was necessary to prevent the threat posed, and if so, whether its belief was objectively reasonable.

SJRA’s general manager, Jace Houston, explained SJRA’s intent and objectives when deciding water releases during storm events, which include preserving dam integrity, reducing the natural flow of water in the river during a storm event as compared to what would have occurred under natural conditions, and compliance with applicable legal authority. The Gate Policy was developed to be consistent with and further these objectives. Olmos confirmed that Freese and Nichols created and modified the Gate Policy in conformance with rules applicable to gate operations, to protect dam integrity, and to ensure that the maximum rate of release in response to a flooding event did not exceed the maximum rate of flow into the lake during the event. It is undisputed that SJRA in fact followed its Gate Policy during Harvey.

We conclude the above evidence demonstrates SJRA’s honesty in fact in developing and following the Gate Policy during the storm. The Gate Policy was designed to reduce downstream flooding as compared to what would naturally occur, to comport with applicable laws, and to ensure the dam did not fail and cause catastrophic destruction downstream. Dr. Bedient did not dispute that SJRA’s stated

intent and goals in developing the Gate Policy were in fact SJRA's true motivations. Nor did he question Olmos's assertion that Texas law requires that a spillway be sized and operated to allow passage of the PMF without water overtopping the dam.

We also conclude that SJRA proved its subjective belief was objectively reasonable. Generally, a governmental entity's actions taken with intent to comply with valid laws and legal authority are objectively reasonable. *See, e.g., City of Houston v. Newsome*, 858 S.W.2d 14, 18 (Tex. App.—Houston [14th Dist.] 1993, no writ) (concluding that officers' compliance with state laws and police department policy was objective good faith); *Aacen v. San Juan Cnty. Sheriff's Dep't*, 944 F.2d 691, 701 (10th Cir. 1991) (holding officers' compliance with constitutional state law was objectively reasonable); *Ogle v. Ohio Civil Serv. Employees Ass'n, AFSCME, Local 11*, 397 F. Supp. 3d 1076, 1087 (S.D. Ohio 2019), *aff'd*, 951 F.3d 794 (6th Cir 2020). Neither Dr. Bedient nor any other witness testified that the 2017 Gate Policy was unreasonable or that no reasonable dam operator could have believed that the 2017 Gate Policy was appropriate, reasonable, or consistent with applicable laws. And no other evidence before the trial court established that any of the gate policies SJRA developed and utilized during its existence was unreasonable or in violation of any applicable and valid laws or rules.

SJRA created a Gate Policy that was intended to minimize threats to life and property and to comply with applicable rules and legal authority. Adhering to that policy during a storm emergency is objectively reasonable. We hold that the evidence is sufficient to prove that SJRA took the challenged action out of a reasonable good faith belief that it was necessary to prevent a grave and immediate threat to life or property.

### **C. The Property Owners' evidence**

The Property Owners filed substantial evidence in response to SJRA's plea,

but we focus on the evidence pertinent to the section 2007.003(b)(7) exclusion.

They rely heavily on Dr. Bedient. In his declaration, Dr. Bedient described how SJRA's Gate Policy developed and changed over time. He explained that, beginning in 1990, SJRA's Gate Policy provided that, for a lake elevation exceeding 201.5 feet above msl, SJRA used the smallest calculated gate opening that would keep the estimated peak reservoir level below a target elevation. Additionally, outflows were limited to a maximum of 75% of the current inflow or past peak inflow from the current storm, whichever was higher. This allowed for releases to exceed inflows so long as the releases were still lower than the past peak inflow during that storm event. However, such releases were not to "contribute to flooding downstream on the receding limb of inflows by not exceeding such inflows." Dr. Bedient referred to this Gate Policy as the "1990 GOP."<sup>14</sup>

The 1990 Gate Policy was in place during the October 1994 storm event, which resulted in widespread flooding throughout north Harris County, setting records in certain areas. The estimated peak inflow to Lake Conroe during the October 1994 storm event was about 180,000 cfs, and the lake reached a then-record peak elevation of about 205.60 feet above msl.<sup>15</sup> SJRA released a peak outflow of about 33,000 cfs. Still, significant flooding occurred in the Kingwood area during this storm event, resulting the *Wickham* lawsuit.

After the *Wickham* decision, SJRA directed Freese and Nichols to develop a Gate Policy such that the peak outflow rate would not exceed the peak inflow rate, while maintaining SJRA's goal to reduce the natural flow in the river downstream

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<sup>14</sup> Dr. Bedient referred to the gate operations policy by the acronym, "GOP." For consistency, we use "Gate Policy."

<sup>15</sup> Some evidence states that the then-record peak elevation was 205.58 feet above msl; other evidence states the then-record peak elevation was 205.60 feet above msl, which is the former number rounded to the nearest one-hundredth.

during a storm. Freese and Nichols developed what Dr. Bedient refers to as the “2010 Gate Policy.” Under the 2010 Gate Policy, lake water elevations were recorded at recommended intervals, and a spreadsheet calculates the average inflow rates based on the lake level inputs. Based on real-time lake level changes, the spreadsheet computes an estimated inflow rate, and with the current gate opening, generates recommended minimum, target, and maximum gate openings. Total estimated discharge through the gate openings is also provided in the spreadsheet. The 2010 Gate Policy superseded the 1990 Gate Policy.

In April 2017, Freese and Nichols made “minor revisions” to the 2010 Gate Policy to give the operator more flexibility in the gate operations.

Describing events during Harvey, Dr. Bedient said peak inflow into Lake Conroe was reported by SJRA as 130,000 cfs, whereas peak outflow was approximately 80,000 cfs. The lake elevation reached a maximum level of 206.23 feet above msl. Flooding during Harvey reached approximately 500-year levels in the Kingwood area.

Dr. Bedient evaluated the dam’s operation during the storm and its effects on downstream flooding. He began by summarizing the various hydrologic and hydraulic computer models Forest discussed in his affidavit, namely: (1) a model evaluating what actually happened during Harvey; (2) a model comparing what would have happened during Harvey if Lake Conroe was hypothetically capable of storing all stormwaters such that SJRA released no water during the storm; and (3) a model showing what would have happened if the only water flowing downstream below the lake was the actual water released by SJRA with no other contributions from other waterways. Dr. Bedient also considered what would have happened during Harvey had no dam been built.

Dr. Bedient prepared two additional model scenarios. First, he modeled the

extent of downstream flooding if during Harvey SJRA capped its releases at about 60,000 cfs (as contrasted with the actual maximum release rate of about 80,000 cfs). Dr. Bedient explained that such a model would represent the pre-2010 Gate Policy, which limited releases to no more than 75% of peak inflow, not including the direct rainfall on the lake. Dr. Bedient referred to this scenario as “Mod X1.”

Second, Dr. Bedient modeled the extent of downstream flooding that would have occurred under Mod X1, with the additional restriction that the releases would also be capped so that they would never exceed inflows. He referred to this model as “Mod X2.” Under Mod X2, Dr. Bedient essentially examined what would have occurred if during Harvey SJRA had not followed the so-called “*Wickham* rule”—ensuring *peak* outflows never exceeded *peak* inflows—but instead restricted outflows *at all times* to never exceed current inflows.

Dr. Bedient compared the different models and determined among other things that:

- Comparing the actual flood levels to the hypothetical scenario if SJRA had released no water from the lake during Harvey, the actual releases “caused around 2-4 feet of additional flood levels along the West Fork and less than that along other waterways, such as the East Fork and around Lake Houston. This increase in flooding is directly due to the Lake Conroe releases by SJRA during Harvey....”
- Comparing the actual flood levels to the Mod X1 and Mod X2 models, had SJRA followed its pre-2010 Gate Policy, rather than its 2010/2017 Gate Policy, “there would have been less water being released from the dam and therefore less flooding downstream on Plaintiffs’ properties.”

Dr. Bedient’s opinions and conclusions relevant to this issue included criticisms of *Wickham*<sup>16</sup> and an explanation that downstream flooding would have

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<sup>16</sup> Dr. Bedient opined that “a policy that the peak outflow does not exceed the peak inflow will not guarantee that downstream flooding will not be increased.” He said one reason for this is because SJRA’s method of calculating peak inflow—which includes the amount of rain falling on the lake

been less during Harvey if SJRA had followed its pre-2010 Gate Policy with the other restrictions Dr. Bedient proposed in his Mod X1 and Mod X2 models. In his words, “[t]he flooding or exacerbated flooding or flood effects, damage and destruction of each of the Plaintiffs’ properties as identified herein would not have occurred under the same Harvey rainfall conditions if SJRA had followed its original pre-2010 gate operating procedures, based on the modified runs using [Forest’s] modeling.”

**D. The Property Owners did not create a genuine issue of material fact.**

The Property Owners proffer several reasons why fact questions exist whether SJRA reasonably and in good faith believed that releasing water as it did was necessary to prevent a grave and immediate threat to life or property.

1. There is no fact question that Harvey posed grave and immediate threat.

First, the Property Owners contend that Harvey was not a true “emergency,” noting that much of the heaviest rainfall occurred outside the Lake Conroe watershed and that, according to Dr. Bedient, Harvey’s size while over the Lake Conroe watershed was “closer to a hundred years” storm.<sup>17</sup> They observe that the rainfall totals and peak inflow into the lake during the October 1994 storm both exceeded

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surface—inflates the actual inflow rate, thus allowing SJRA to release higher volumes of water yet still claim that peak outflow was well below peak inflow. In his opinion, a more accurate calculation of peak inflow during Harvey was about 100,000 cfs, as opposed to SJRA’s calculation of 130,000 cfs.

<sup>17</sup> The parties dispute whether Harvey qualified as a 100-, 500-, 2,000-, 5,000- or 20,000-year storm. Dr. Bedient testified in deposition that the amount of rain over Conroe was closer to a hundred-year storm, but he acknowledged that flooding in the Kingwood area (where most of the Property Owners live) reached approximately 500-year levels. According to the Harris County Flood Control District’s final report on which the Property Owners rely, the peak rainfall over the Kingwood area reached 5,000- to 20,000-year levels. These quibbles are immaterial to our disposition because, even assuming Harvey was only a 100-year storm event over Conroe, it was nonetheless sufficiently severe over all relevant areas to constitute a grave and immediate threat, as we have explained.

Harvey totals.<sup>18</sup> That the 1994 storm brought three inches more rain than the twenty inches Harvey caused over several days does not mean that Harvey presented no threat or emergency. Falling from a three-story building is life-threatening even though falling from ten stories is more so.

Accepting the Property Owners' facts as true, we agree with SJRA that they have not created a genuine issue of material fact that the threat to life or property posed by Harvey does not qualify as grave and immediate, notwithstanding Harvey's rainfall totals relative to the October 1994 storm.

2. SJRA's intent to avoid upstream flooding does not raise a fact question.

Next, the Property Owners argue that SJRA released water as it did to prevent flooding upstream along the lake and thus avoid breaching its upstream lakeside flowage easements, which allow it to store water up to a level of 207 feet above msl. The lake level during Harvey peaked at 206.23 feet. According to the Property Owners, SJRA released water as it did "solely to keep the lake level below 207 feet and within its flowage easements" and thus protect itself from takings lawsuits by upstream property owners. The Property Owners cite statements by Jace Houston that in fact SJRA intended to keep the lake level within the upstream flowage easements.

Releasing water as it did to keep the lake level below its flowage easement reflects SJRA's intent to comply with applicable legal obligations. The Property Owners' contrary argument not only fails to credit SJRA's legal constraints governing its actions at the time but goes so far as to suggest that SJRA could not have acted in reasonable good faith *unless* it allowed the lake level to exceed 207 feet. To be sure, it is possible to conceive circumstances so dire that breaching

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<sup>18</sup> Rainfall of 23.42 inches in October 1994 versus 20.60 inches during Harvey; 180,000 cfs peak inflow in 1994 versus 130,000 cfs during Harvey.

upstream flowage easements like these may be necessary or unavoidable, but honoring them certainly is not evidence of an absence of good faith.

3. The Property Owners' "downstream flood effects" argument does not raise a fact question.

The Property Owners next urge that a fact question exists because there is evidence that SJRA did not consider downstream flood effects in following the 2017 Gate Policy. For this proposition, they cite the deposition of Bret Raley, who was the Lake Conroe Division Manager and the person in charge during Harvey when Jace Houston was not on site. Raley acknowledged that during Harvey, unlike when an earlier version of the Gate Policy was effective, releases were not made only when it was determined that such releases would not "create flooding conditions downstream." But it was never SJRA's intent to develop a Gate Policy that could meet all stated goals and yet ensure that flooding conditions downstream were not created. As Olmos explained, the 2017 Gate Policy "adopted the scenario that resulted in the most significant improvement from an operational and flood risk balancing" between upstream *and downstream* areas. Dr. Bedient acknowledged that one of the Gate Policy's purposes at least since 2010 has been to *reduce* or *minimize* the natural flow of floodwaters downstream during a storm event. Dr. Bedient never disputed that this goal was in fact incorporated into the 2017 Gate Policy, and he did not opine that such a goal was unlawful or unreasonable because it failed to ensure that any releases during a storm event did not "create" flooding downstream. Raley's deposition fails to create a genuine issue of material fact.

In addition to Raley's deposition, the Property Owners assert that "Raley even sent a pre-Harvey email stating that when high inflows are involved, 'you almost don't care what the downstream effects are.'" Raley wrote this email four years before Harvey, and he was discussing a non-Gate Policy procedure that was not

activated during Harvey.<sup>19</sup> This email is not material to whether SJRA acted in reasonable good faith by implementing its 2017 Gate Policy during Harvey.

4. It was not unreasonable for SJRA to rely on *Wickham*.

The Property Owners argue that it was not reasonable for SJRA to follow *Wickham*, which they say was decided incorrectly. To them, “[i]mplementing and following the 2017 [Gate Policy] to shield SJRA (SJRA believed) from downstream takings liability with almost no constraints on releases and refusing to use all available storage capacity conclusively establishes the releases were not made with a reasonable good faith belief they were necessary to prevent a grave and immediate threat to life or property.” They emphasize that this court has declined to follow *Wickham* in the rule 91a context. *See Brocker*, 2021 WL 5117889, at \*7.

These contentions cannot support a fact question on whether SJRA acted in reasonable good faith. SJRA was a party to *Wickham*; it prevailed. The supreme court denied review, and the Beaumont Court of Appeals has remained faithful to that opinion.<sup>20</sup> Though our court has not adopted the so-called *Wickham* rule, the Supreme Court of Texas has not addressed *Wickham*, and it was not unreasonable or in bad faith for SJRA to rely on that opinion in forming its 2010 Gate Policy and 2017 Gate Policy. Although Dr. Bedient concluded that SJRA’s development and implementation of its 2017 Gate Policy increased the Property Owners’ flooding

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<sup>19</sup> SJRA calls this procedure an “Emergency Action Plan,” or EAP. Raley said that the dam’s EAP was never activated during Harvey because the dam was never in danger of breaching. Raley added that the dam was not in danger of breaching during Harvey because SJRA followed the 2017 Gate Policy.

<sup>20</sup> That court has at least twice relied on *Wickham*’s holding and reasoning in inverse condemnation cases to conclude that river authorities releasing water during storm events (including SJRA) were entitled to judgment as a matter of law. *San Jacinto River Auth. v. Ackley*, No. 09-22-00109-CV, 2024 WL 4510601 (Tex. App.—Beaumont Oct. 17, 2024, no pet.) (mem. op.); *Sabine River Auth. v. Hughes*, 92 S.W.3d 640, 642 (Tex. App.—Beaumont 2002, pet. denied) (evidence showed that inflow into reservoir exceeded peak outflow).

damages, and that using the pre-2010 Gate Policy would have resulted in less downstream flooding, he did not identify any respect in which the 2017 Gate Policy failed to comply with *Wickham* or any other valid and applicable law or rule.<sup>21</sup>

5. There is no fact question that releasing stormwater as SJRA did was necessary.

Next, the Property Owners contend that following the 2017 Gate Policy was not *necessary* to prevent water from overtopping the gates, because the lake had capacity to hold more water without breaching the dam. But this argument inherently rests on an unduly restrictive meaning of the word “necessary.” As mentioned, “necessary” could mean something that is either “essential” or “indispensable”—as the Property Owners appear to construe it—or it may mean merely “needed for some purpose.” See *Emmett*, 459 S.W.3d at 584. Black’s defines “necessary and proper” as “appropriate and well adapted to fulfilling an objective.” Black’s Law Dictionary 1052 (7th ed. 1999); see also *Hilco Elec. Co-op., Inc. v. Midlothian Butane Gas Co., Inc.*, 111 S.W.3d 75, 82-83 (Tex. 2003) (Hecht, J., concurring).

Although the Property Owners concede that releasing some amount of water was essential to protect the dam, they suggest that following the 2017 Gate Policy was not indispensable to achieve that goal because SJRA could have used the pre-2010 Gate Policy and accomplished the same result with less downstream flooding. In hindsight, that may or may not be true; but given that preventing dam failure is the overriding priority of dam operators,<sup>22</sup> that a dam operator must admittedly

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<sup>21</sup> Even accepting Dr. Bedient’s alternative calculation of peak inflow during Harvey as about 100,000 cfs—instead of SJRA’s calculation of 130,000 cfs—the peak inflow still exceeded the undisputed peak outflow of about 80,000 cfs. Thus, even accepting Dr. Bedient’s view, SJRA’s peak discharge was consistent with *Wickham*.

<sup>22</sup> Dr. Bedient conceded “the No. 1 priority” in operating a dam is to prevent dam failure, and to prevent water from flowing over the top of the floodgates “you have to raise the gates” and release water downstream. Had the tainter gates not been opened, “more than 4 feet . . . would have gone

exercise discretion in determining when and how much water to release to prevent damage under weather conditions like Harvey, and that dam operators cannot be expected to predict rainfall with certainty, a more relaxed definition of “necessary” is appropriate here. We conclude therefore that section 2007.003(b)(7)’s reference to “necessary” means at most that SJRA’s acts must have been taken out of a reasonable good faith belief that the action would accomplish the purpose of preventing a grave and immediate threat to life or property. There is no fact question that SJRA implemented the 2017 Gate Policy for that purpose.

The Property Owners argued in the trial court that a reasonable person could conclude SJRA knew the dam could withstand much higher inflow rates and much lower outflow rates because it had done so during the October 1994 rainstorm. In other words, SJRA could have released less water than it did and still followed the *Wickham* rule. We think this insufficient to raise a fact question under the reasonable good faith exclusion. There is more than one reasonable way to operate a dam, and operators cannot be expected to be omniscient. Crediting the entirety of Dr. Bedient’s declaration, his main point is that less downstream flooding would have occurred had SJRA used its pre-2010 Gate Policy instead of its 2017 Gate Policy, but absent evidence that either is unreasonable, the choice between them cannot be said to be lacking in good faith.<sup>23</sup> Facing a severe weather threat like Harvey, SJRA like any dam operator must decide on a course of action based on the information at hand and the reasonable assessments of it. The failure to achieve the least amount of flooding possible, or the choice of one reasonable course of action over another reasonable option, does not remove that act from section 2007.003(b)(7)’s purview.

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over the tainter gates uncontrolled.”

<sup>23</sup> While he did not explicitly say so, Dr. Bedient’s reliance on the pre-2010 Gate Policy as the basis for his core conclusions indicates he believed the pre-2010 Gate Policy was reasonable.

The issue is whether devising and implementing the 2017 Gate Policy as it did during Harvey was outside the scope of reasonable action for a dam operator. We hold it was not. The decision of whether, when, and how much, water to release was discretionary, and the Property Owners have not presented evidence that the amount released was so extreme as to be objectively unreasonable.

## **VI. Conclusion**

Under the applicable standard of review, we conclude the evidence proves conclusively that the section 2007.003(b)(7) exclusion applies. Thus, Chapter 2007 does not apply to SJRA's challenged act of releasing water from Lake Conroe in accordance with its 2017 Gate Policy. In this context, for there to be a waiver of SJRA's governmental immunity as to the Property Owners' claims, Chapter 2007 must apply. Because it does not, the trial court erred in denying SJRA's plea to the jurisdiction. To the extent SJRA argues this point under its first issue, we sustain the first issue. We need not and do not address the remainder of the first issue or any of SJRA's other appellate complaints. We reverse the trial court's order and render judgment dismissing with prejudice the Property Owners' statutory takings claims under Chapter 2007. We emphasize that our ruling reaches no further than the Property Owners' statutory takings claims and does not affect their constitutional takings claims pending elsewhere.

/s/ Kevin Jewell  
Justice

Panel consists of Chief Justice Christopher and Justices Jewell and McLaughlin.

## Appendix

### Complete List of the Appellees' Names

Andres Abdala, Maria Abdala, Jack Absher, Karen Absher, Todd Allen, David Andrews, Brenda Andrews, Charles J. Argento, Katharine Argento, Aris Antoniou, Mayer Assolin, Dr. Merrimon W. Baker, Paul W. Barker, Diana E. Barker, Richard C. Barker, Trina Barker, William Basham, Marian Basham, Robert L. Beasley, Kimberly S. Beasley, Deamon Beeman, Paula S. Beeman, Marly Berne, Nicholas L. Braden, Corbert Bocker, Cynthia Bocker, Bruce Brown Jr., Cynthia G. Brown, Tobin J. Brown, Janet Diaz, Kristofer D. Buchan, Melissa Buchan, Joseph R. Burbano, Linda S. Burbano, Brandon Burgess, Diane Burgess, Robert E. Burkhalter, Michael A. Burney, Ginger R. Burney, James W. Caldwell, Kristen A. Caldwell, Harry Carpenter, Velda Carpenter, Charles A. Casey, Maureen S. Casey, Amanda Castleberry, Bryan Castleberry, Debbie Castleberry, Frank Castleberry, Emile Centeno, Tina Centeno-Lewis, Michael W. Chamberlain, Lydia Chamberlain, Armando Chavez, Peter Clarke, Patricia Clarke, Michael F. Composto, Gudlang L. Composto, Rosario Composto, Donna Composto, William R. Cordill, Deborah L. Cordill, Shannon E. Crawford, Ronald Charles Crossman, Halene Crossman, Clifton B. Currin, Jr., Deborah H. Currin, John M. Daniel, Carolyn F. Daniel, Casey Davis, Terri Davis, James A. Davitt, Kim L. Davitt, Anibal De Jesus, Hilda De Jesus, Roswell Dixon, Petrina S. Dixon, Kenneth B. Dominique, Mary J. Dominique, George Dreisbach, Gayle Dreisbach, John Duhon, Joan Duhon, Juanita Duncan, Clyde Duncan, Sr., Richard M. Engel, Brenda Engel, Jeff Ensley, Anne Ensley, John Faulkinberry, Laurie D. Faulkinberry, Andrew W. Ferguson, Marion A. Ferguson, Bradley D. Forsberg, Lori-Lynn Forsberg, Barbara Freeman, John R. Freeman, Joe S. Gazzana, Julie A. Gazzana, Evelyn Gilder, Peggy J. Glaze, Stephen L. Goodwin, Diane F. Goodwin, Joyce S. Gould, Brian E. Groom, Beverly A. Groom, Elpida Rechelle Gryparis, Ernest Hauser, Beverly Hauser, John O. Heard, Kathryn Heard, Edmond I. Hewitt, Jr., Mary Sue Hewitt, John Hite, Louise Hite, Vicki H. Hitzhusen, William J. Hitzhusen, Carl R. Hoppes, Carmelita Hoppes, John Hoppes, Allie Horton, Kevin Horton, Thornton House, Barbara House, Richard B. Hughey, Karen N. Hughey, Humble, Inc., Kurt V. Huseman, Debbie L. Huseman, Sandra L. Ingram, Richard Ireland, Eleanor Ireland, Rebecca W. Johansen, Cathy Jordan, John Jordan, Dorte Kampfner, Grant James Thompson Keillor, Alison Margaret Keillor, Shawn Kelly, Gregory S. Kendrick, Amy L. Kendrick, Christopher Kethan, Leslie Kethan, Mary Lynn Koenig, Richard Kreger, Vicki Kreger, Vance Kreider, Nathan Kroeker, Genevieve Kroeker, William E. Lange, Jennifer Wood Lange, John J. Lavezzari, Gail Lavezzari, Judy F. Leday, Wallace J. Leday, Neil Leuck, Alan Lovelace, Sidonia Lovelace, Raymond Little, Holly Little, Robert Karl Mabesoone, Claudia

Jean Mabesoone, Steven Malkey, Kathryn Malkey, Louise T. Mann, Paul Matejowsky, Mariah Matejowsky, Eva R. Meredith, Robert C. Miles, Sherry K. Miles, Joseph L. Nolan, Mary K. Nolan, Lori McDowell, Frank McDowell, Vicente Medina, Ashley Medina, Christi Medlock, Gene Medlock, David L. Miller, Sally T. Miller, Joseph C. Mire, Barbara Molaison, Richard Molaison, William J. Napier, Jr., Christine D. Napier, Karen Nelson, John C. Nicholson, Rachel C. Nicholson, Jeff Norris, Lizzette Norris, Northshire Investments, Jack L. Nowlin, Linda S. Nowlin, Julia Ann Paul, Justin D. Payne, Nicol S. Payne, John F. Pearce, Linda C. Pearce, Maria Gabriella Perez, DDS, Klaus M. Pistorius, Susan Pistorius, Kevin Pope, Karen Pope, Toby A. Potter, Kacy A. Potter, Deborah Prucha, Individually and as Co-Trustee of the Prucha Living Trust UTD September 16, 2005, Matthew Prucha, Individually and as Co-Trustee of the Prucha Living Trust UTD September 16, 2005, Manfred Quentel, Ursula Quentel, James L. Revel, Louise Revel, Duncan R. Rhodes, Kelly A. Rhodes, Marjorie Ricks, Richard Ricks, Hubert Roberts, Steven J. Ronan, Patricia W. Ronan, Stacy Roney, As Independent Executor of the Estate of Nancy Parrigin, Deceased, Thomas E. Ross, Beth F. Ross, Bernard F. Ryan, Cecilia M. Ryan, Jack Saint John, Charles W. Sandford, Karen Sandford, Syed Shah, Barry L. Shepherd, Becky A. Shepherd, Azhar Sindhu, Ricky Smart, David Sparks, Jennifer Sparks, Ralph Spears, Judy Spears, Billy W. Staggs, Shirley L. Staggs, Andrea Statum, Michael Statum, Dana M. Stegall, Danny C. Stegall, Brenda Stephens, Mark Stephens, Olga Strong, Edward D. Strong, Vickie Sullivan, Todd R. Sumner, Kimberly A. Sumner, Ronald Sunker, Ruth Sunker, Ross Taylor, Mark D. Temple, Tracy C. Temple, Texan Live Media, LLC, Sunil Thakur, Shubha Thakur, James Steven Thomas, June Carol Thomas, Darrel D. Tickner, Deanita Tickner, Andrew T. Timura, Mary P. Timura, Jill Tischbein, Heng Train, Hok Train, Kathryn Troutman, Frantisek Uncajtyk, Eric Vogl, Lisa Vogl, Dianna Marlen Watson, Charles H.F. Wherry, Diane S. Wherry, Brian White, Eric White, Richard B. Wilson, Janet G. Wilson, Rodney M. Wolf, Nancy L. Wolf, Douglas H. Woodul, Mary S. Woodul, Robert C. Young, Sheryl L. Young.