



**2017**  
**ANNUAL CONFERENCE  
AND MEETING**  
FOUR POINTS BY SHERATON • MERIDEN

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# **Is Intentional Flooding by the Government a Taking?**

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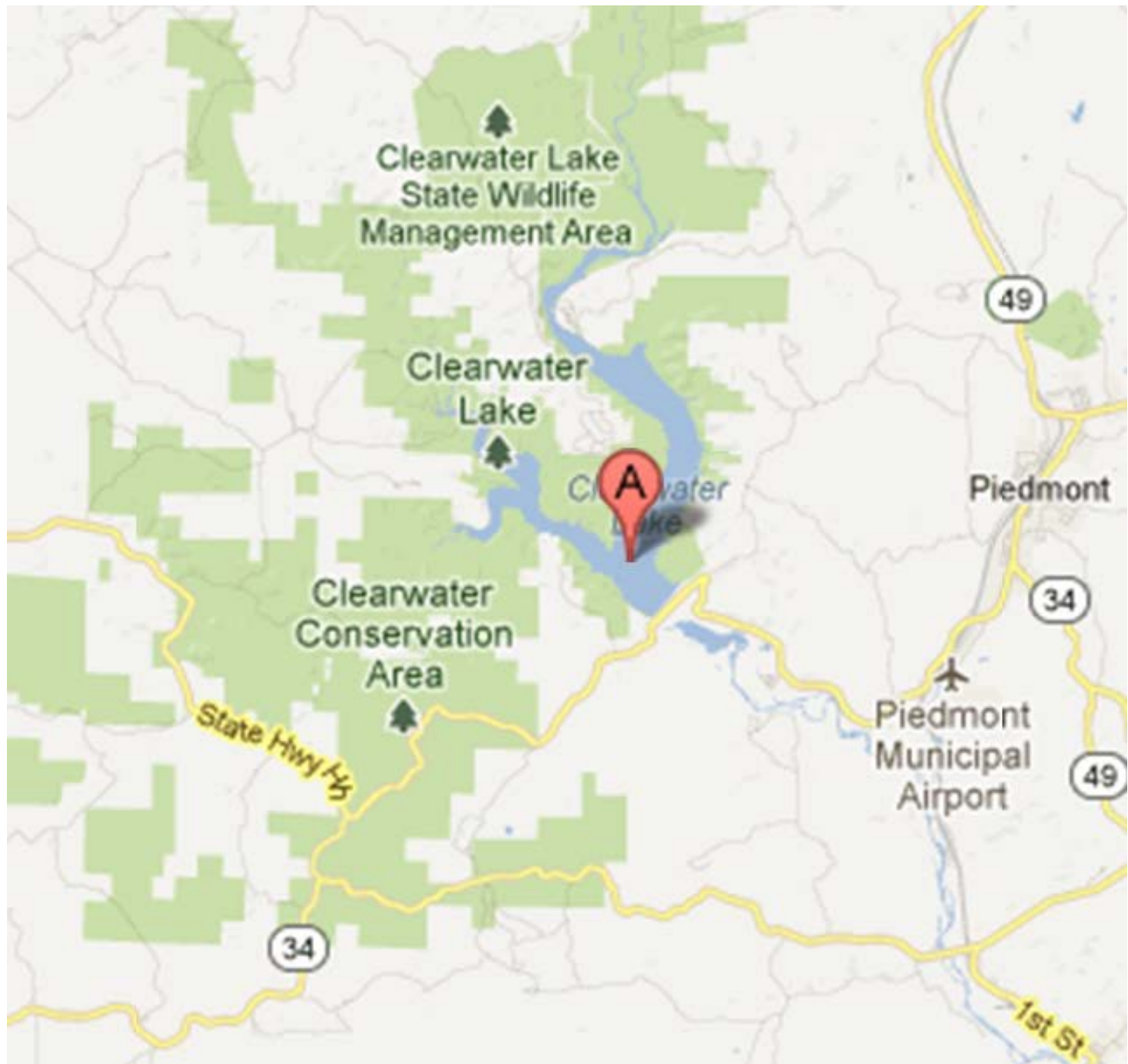
# Arkansas Game & Fish Commission v. United States

(US 2012)

- Flooding physical taking case



*Black River Wildlife Management Area*



# Clearwater Dam

Missouri





Little Rock Engineer District  
Clearwater Dam Site, Black River  
Looking southwest from Station 1+24.97 along axis of dam before construction.  
October 16, 1940, 8:40 a.m.

Piedmont, Missouri  
File C.D. 16

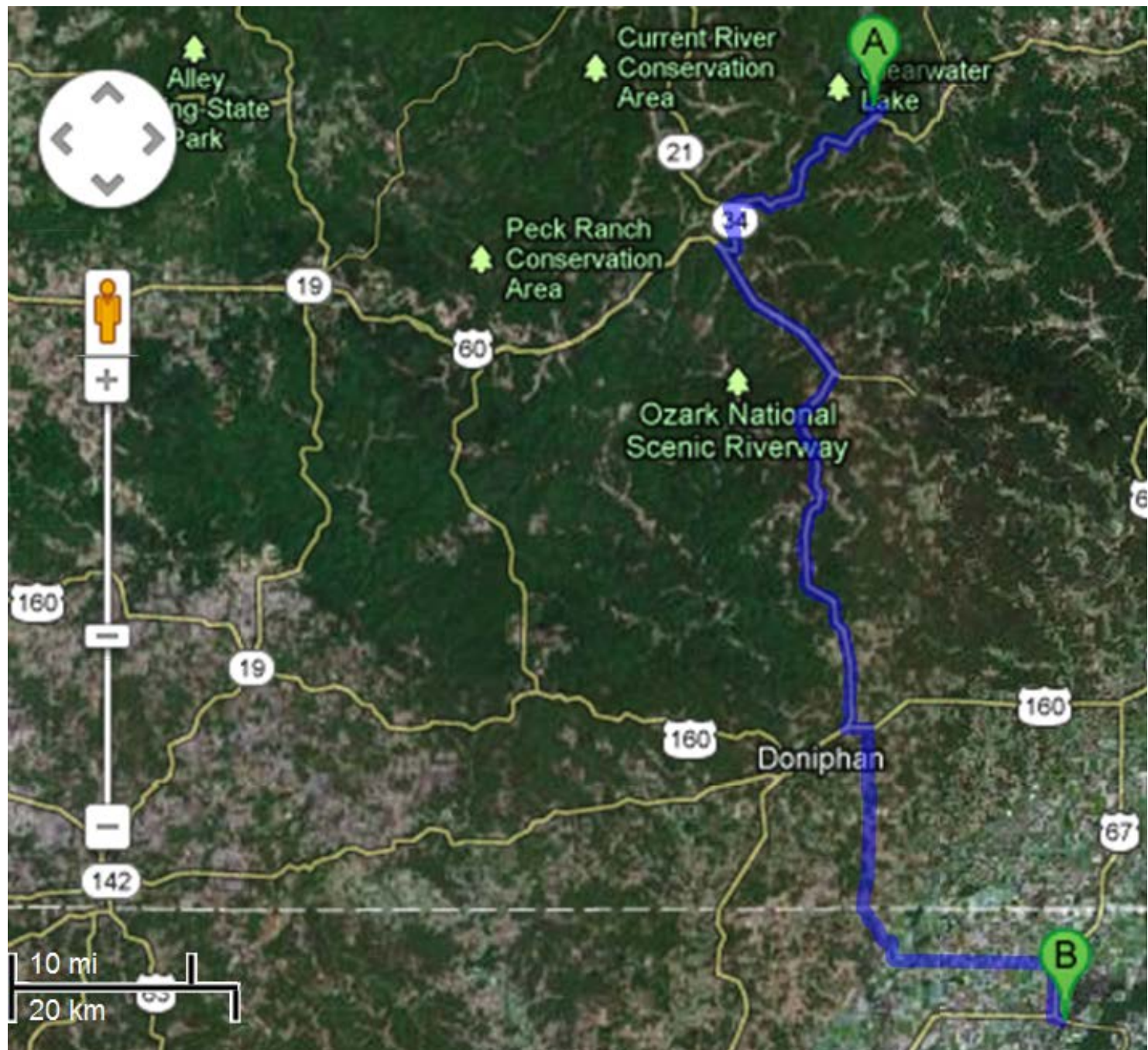


CORPS OF ENGINEERS, U. S. ARMY, LITTLE ROCK DISTRICT, LITTLE ROCK, ARKANSAS  
CLEARWATER DAM, BLACK RIVER, PIEDMONT, MISSOURI

View along upstream face of dam showing tower and spillway from Piedmont Park access road.  
28 May 1949

FILE: R.D. 132<sup>6</sup>

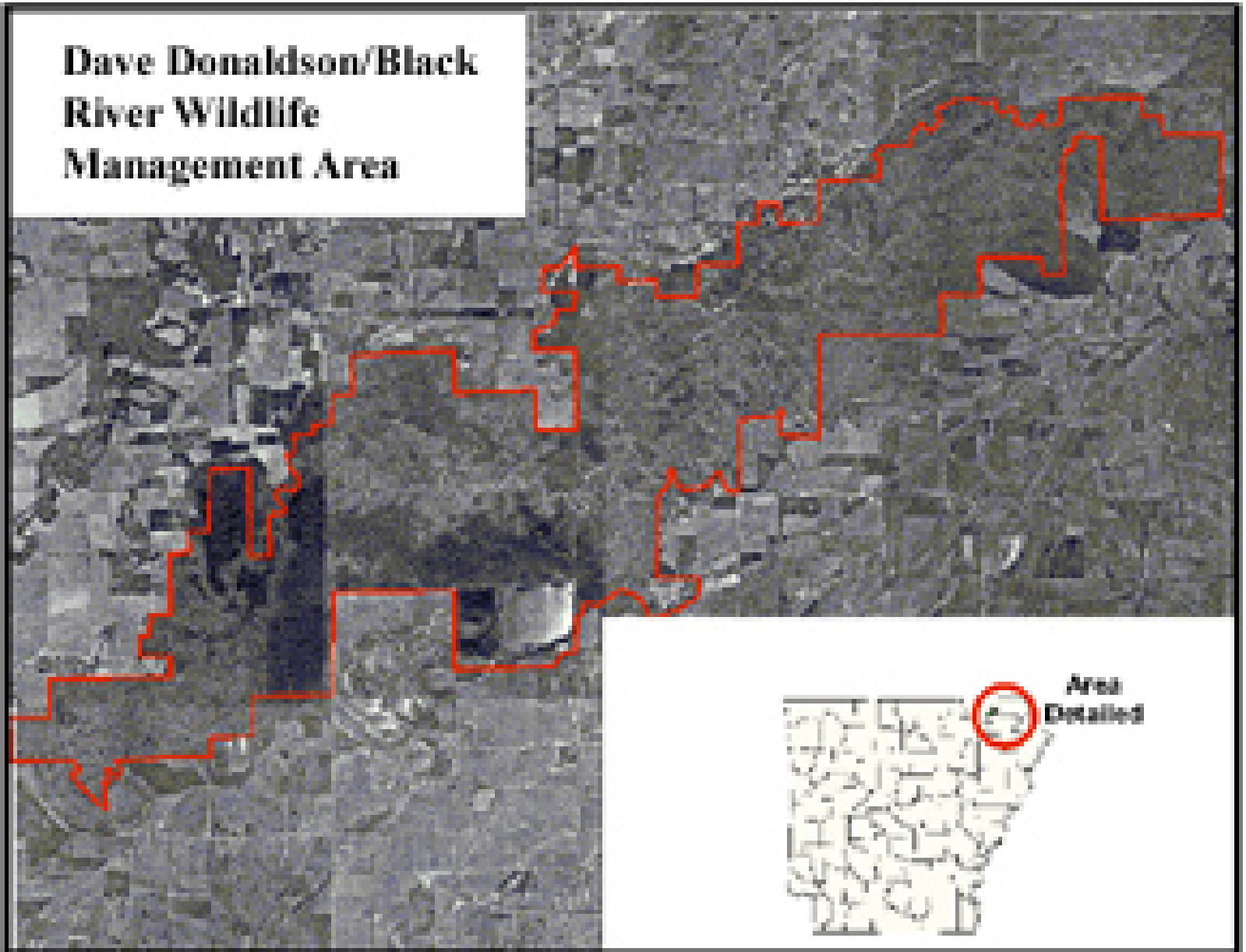








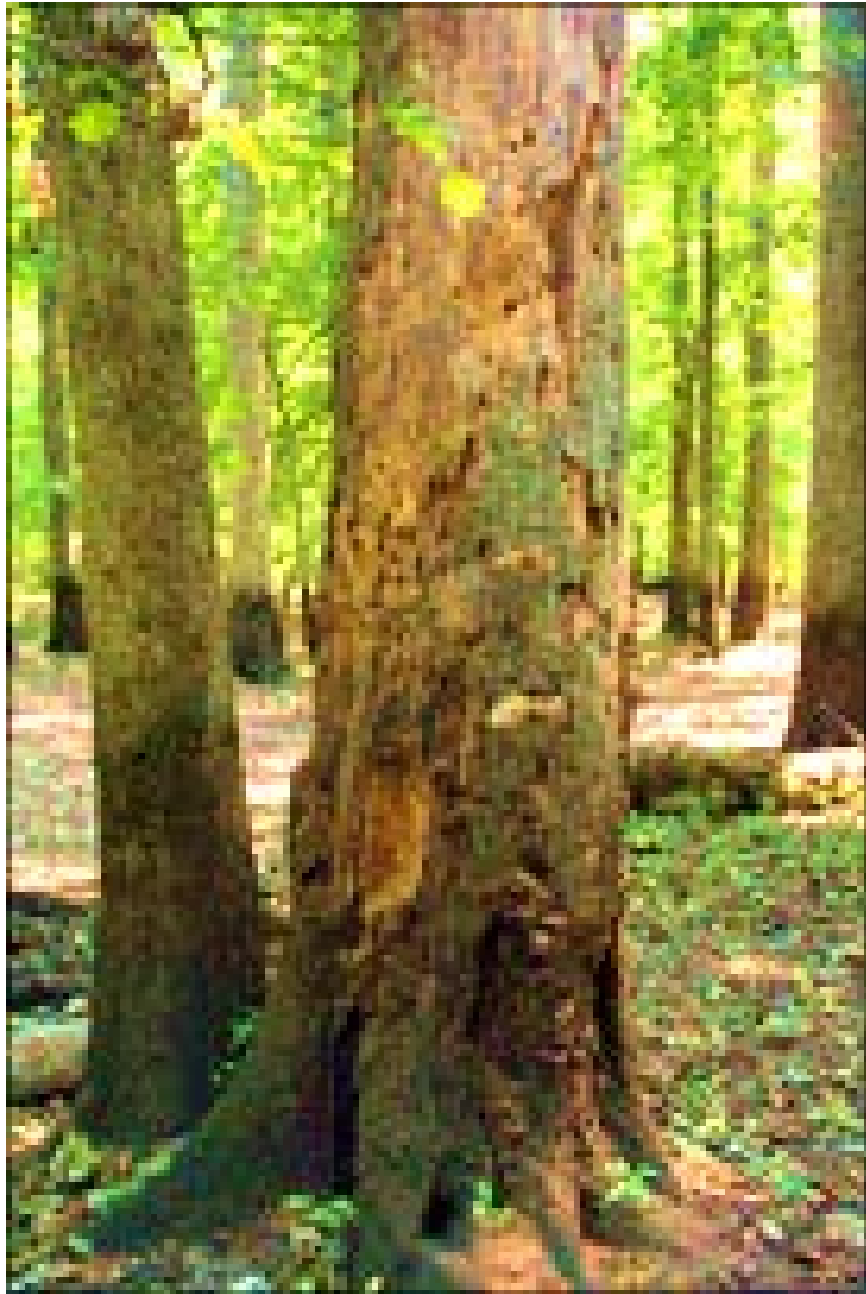
**Dave Donaldson/Black  
River Wildlife  
Management Area**











## **11-597 ARKANSAS GAME & FISH COMMISSION V. UNITED STATES**

DECISION BELOW: 637 F3d 1366

LOWER COURT CASE NUMBER: 2009-5121, 2010-5029

### **QUESTION PRESENTED:**

Petitioner Arkansas Game & Fish Commission, a constitutional entity of the State of Arkansas, sought just compensation from the United States under the Takings Clause of the Fifth Amendment for physically taking its bottomland hardwood timber through six consecutive years of protested flooding during the sensitive growing season. The Court of Federal Claims awarded \$5.7 million, finding that the Army Corps of Engineers' actions foreseeably destroyed and degraded more than 18 million board feet of timber, left habitat unable to regenerate, and preempted Petitioner's use and enjoyment. The Federal Circuit, with its unique jurisdiction over takings claims, reversed the trial judgment on a single point of law. Contrary to this Court's precedent, a sharply divided 2-1 panel ruled that the United States did not inflict a taking because its actions were not permanent and the flooding eventually stopped. The Federal Circuit denied rehearing *en banc* in a fractured 7-4 vote. The question presented is:

Whether government actions that impose recurring flood invasions must continue permanently to take property within the meaning of the Takings Clause.

# Lessons Learned



- Possible answers to important questions:
  - Is flooding a physical invasion or *Penn Central*-type taking?
  - Are temporary invasions compensable?



# Unanimous for Arkansas, but...

“We have recognized, however, that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, **the Court has recognized few invariable rules in this area.**”

# Arkansas Wins on Remand

- Duration
- Causation
- Foreseeability
- Severity
- Reasonable Investment-Backed Expectations



# **Hurricane Harvey Hits Houston**

- **Landfall August 25<sup>th</sup>**
- **40-52 inches of rain**
- **Many homes near Barker and Addicks dams were not initially flooded**
- **August 27<sup>th</sup> at 2 AM government opened the floodgates because cracks began to appear and pressure needed to be released**
- **Many otherwise safe homes were flooded as a result**

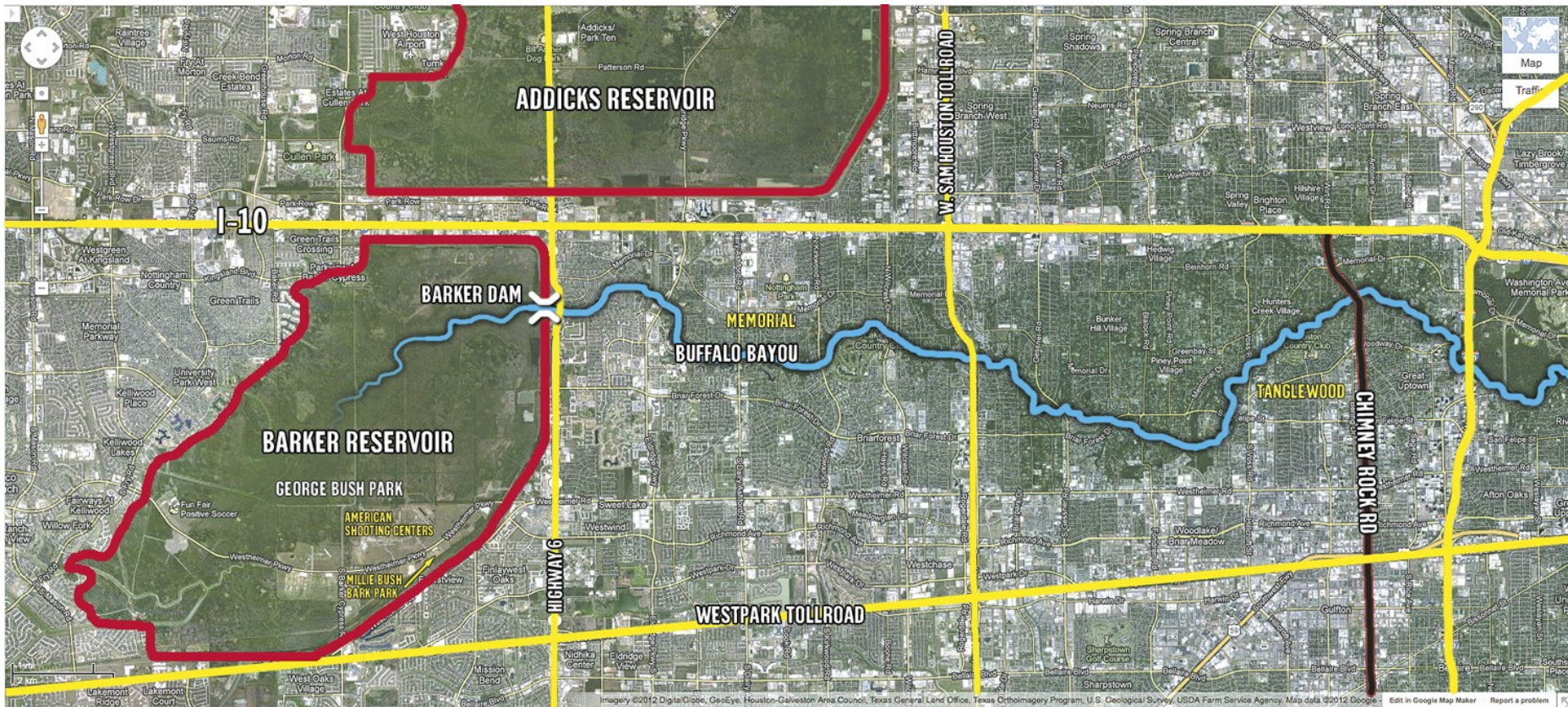


Rescue worker Adam Caballero carries CaroLine Kirkpatrick through an Omni Hotel as mandatory evacuation orders went into effect after the Addicks Reservoir overflowed. (Robert Gauthier / Los Angeles Times)



*David J. Phillip, AP*

Gaston Kirby, right, and Juan Minutella leave Kirby's flooded home in the aftermath of Hurricane Harvey, Monday, Sept. 4, 2017, near the Addicks and Barker Reservoirs, in Houston.



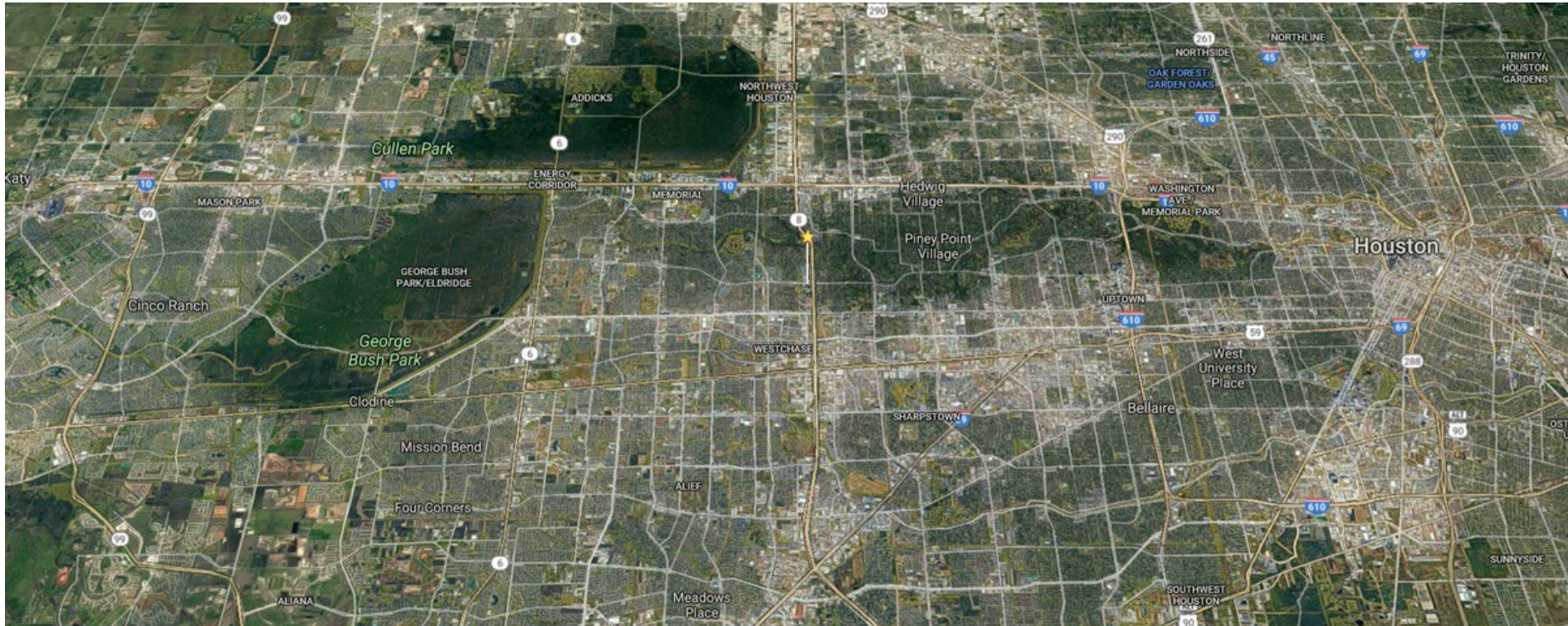
Imagery ©2012, DigitalGlobe, GeoEye, Houston-Galveston Area Council, Texas General Land Office, Texas Orthoimagery Program, U.S. Geological Survey, USDA Farm Service Agency, Map data ©2012 Google, Edit in Google Map Maker, Report a problem



Photo: Michael Claglo, Staff



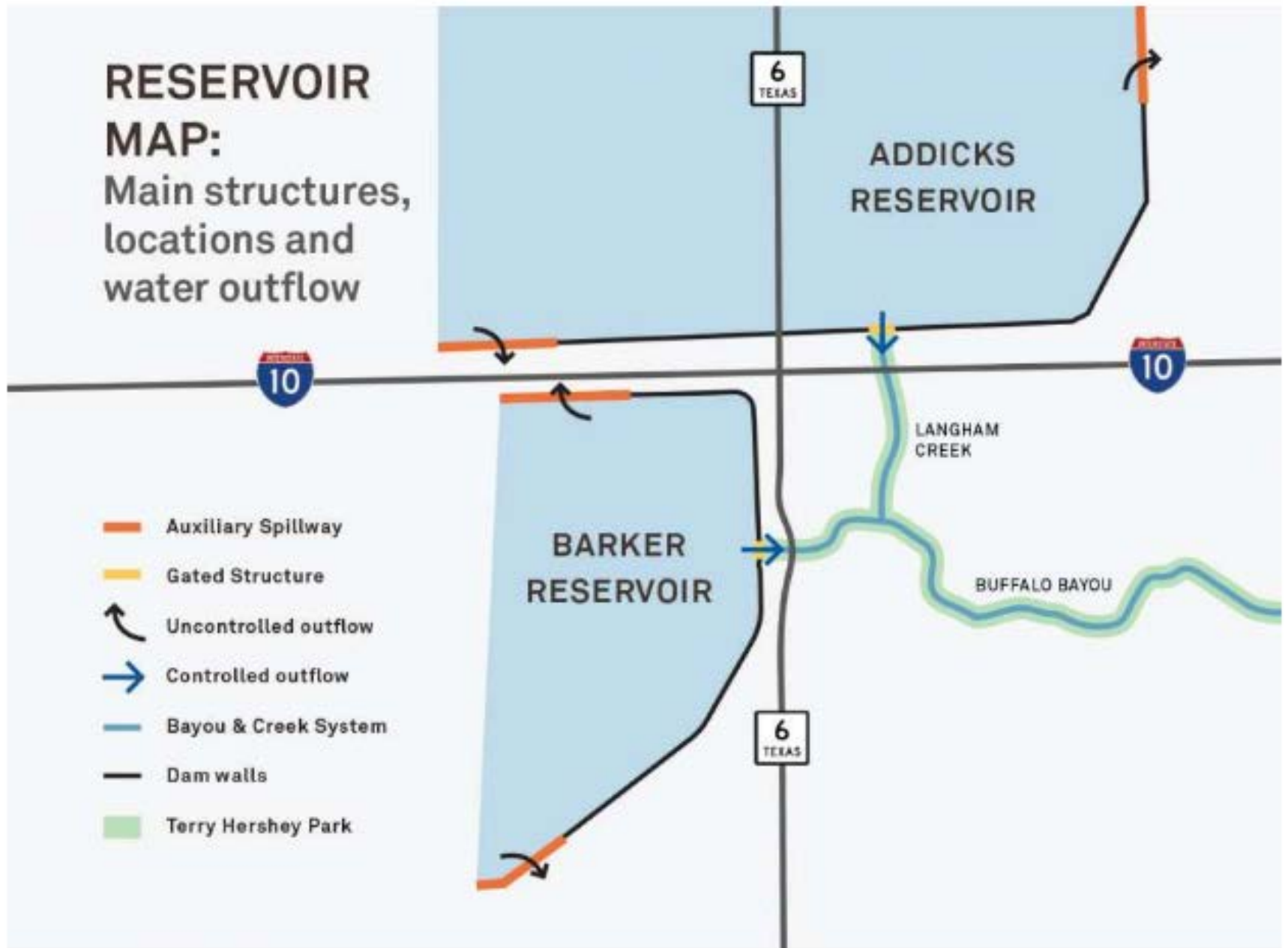
The gated water control structure at Barker Reservoir, photographed in 2016.



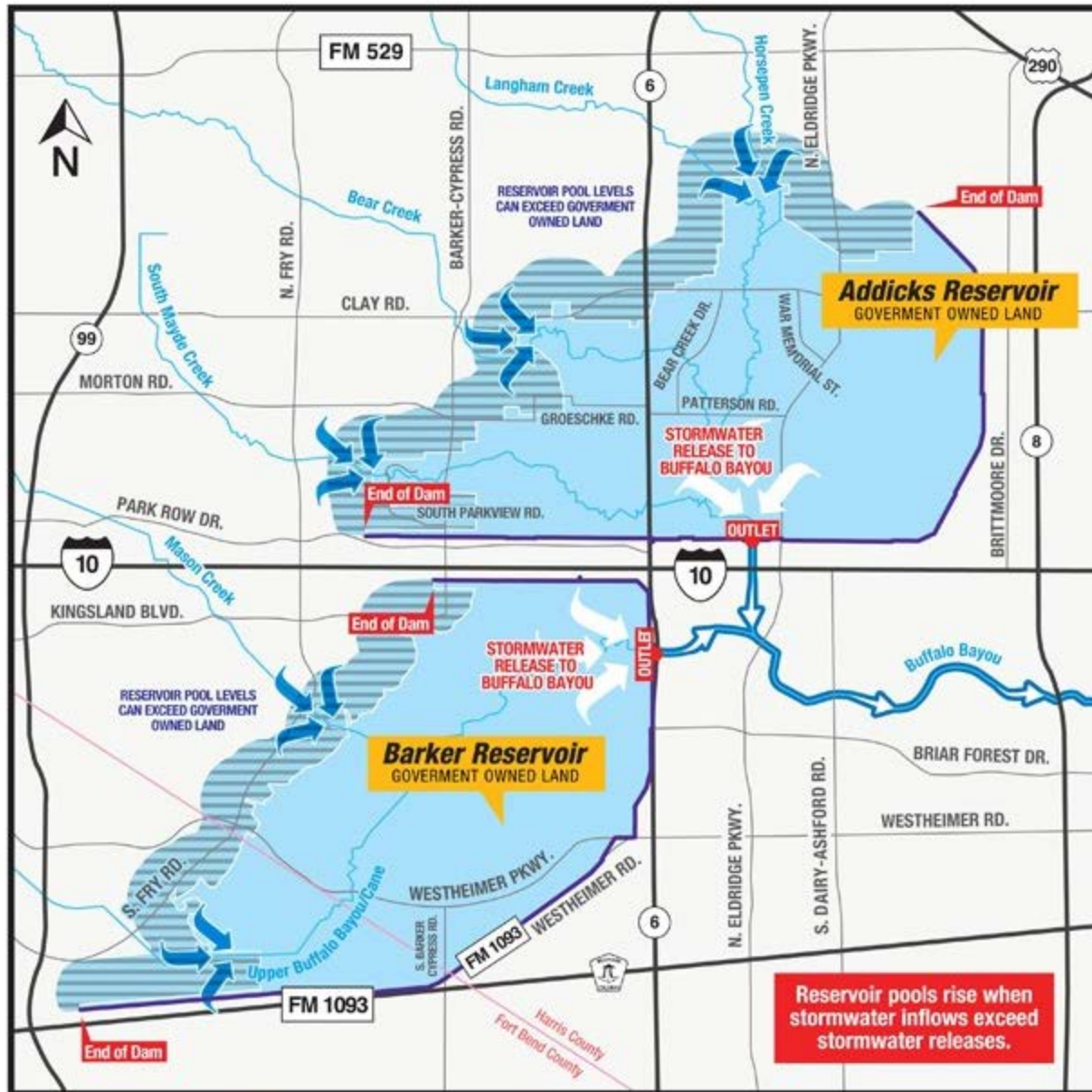


# RESERVOIR MAP:

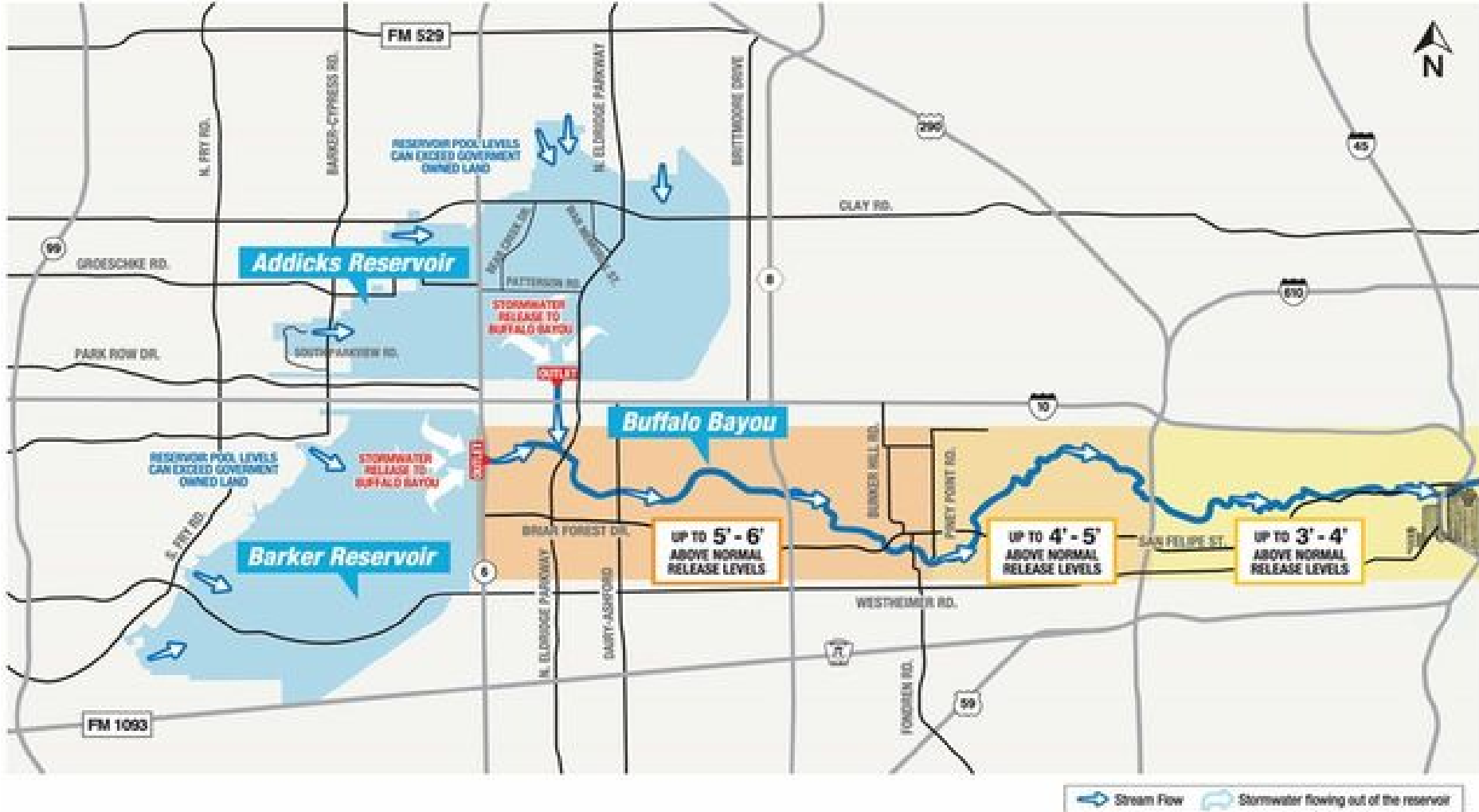
Main structures,  
locations and  
water outflow



WATER FLOW BEHIND THE RESERVOIRS; AND WATER RELEASES INTO BUFFALO BAYOU



→ Stormwater inflow to reservoir    
 → Controlled Stormwater flowing out of the reservoir    
 → Stream Flow    
 — Dam    
 ▨ Potential Inundation Outside Government Owned Land



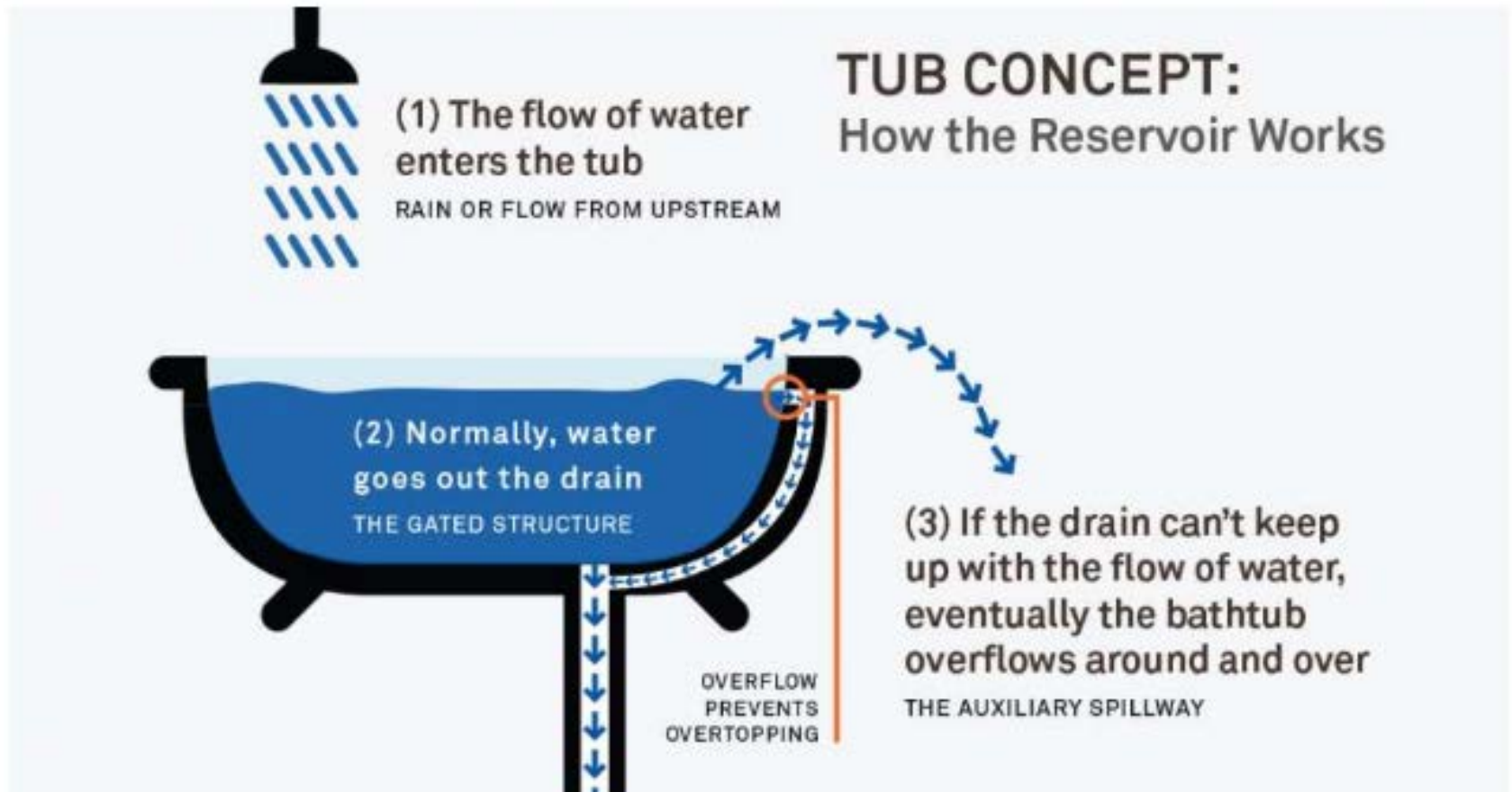
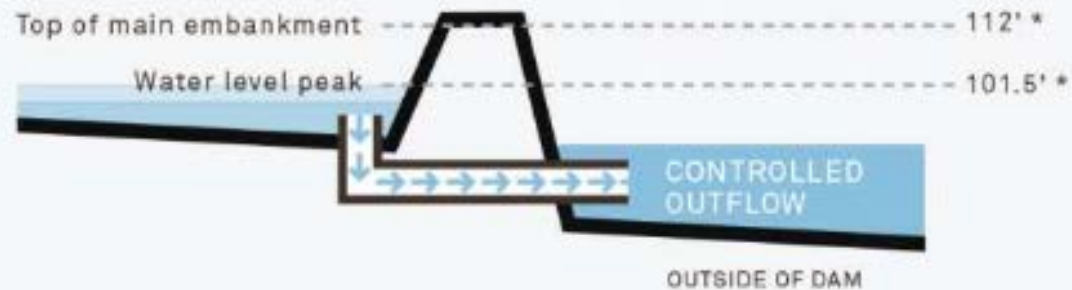


Photo: Evan O'Neil

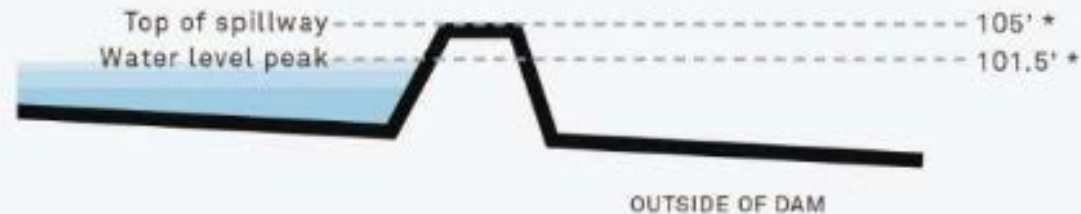


# BARKER RESERVOIR: Gated structure and auxiliary spillway details

## GATED STRUCTURE



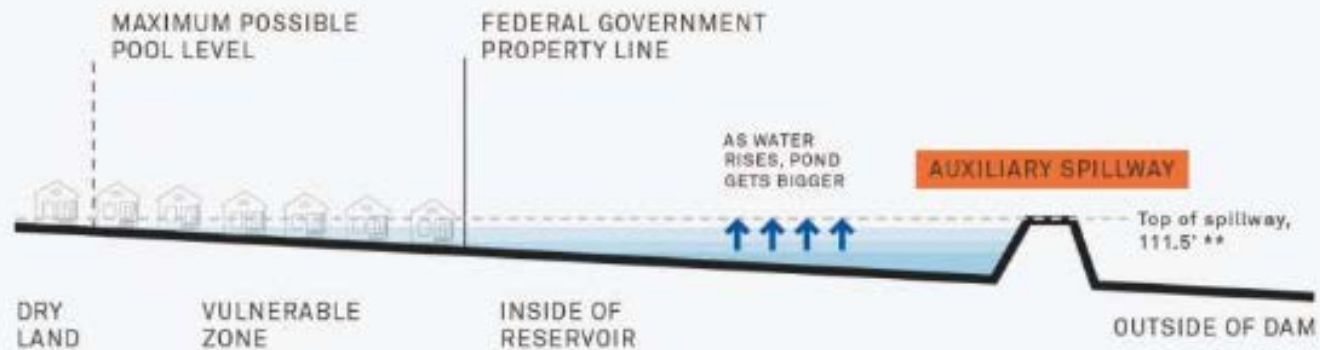
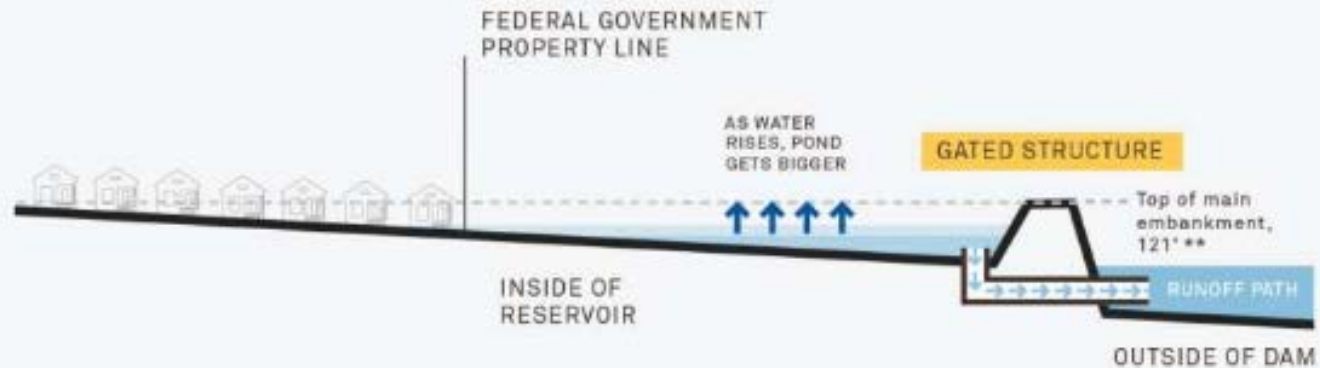
## AUXILIARY SPILLWAY



\* Numbers are from Barker Reservoir

# ADDICKS RESERVOIR: In context with adjacent land

DIAGRAM NOT TO SCALE



\*\* Numbers are from Addicks Reservoir

Photo: Evan O'Neil



# **Evidence that May Prove Important**

- **Opening gates would flood homes**
- **Government reasonably certain of the impacts**
- **Mandatory evacuations issued before gates opened**
- **Mayor and other officials acknowledged harm would come**

**Link for materials:**

**<https://tinyurl.com/CAFM-2017>**