

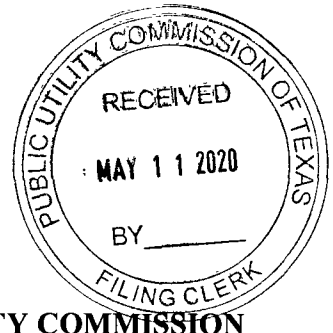


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DOCKET NO. 50404

**PETITION OF STERLING DEASON
O'DONNELL AND DARWIN DEASON,
CO-TRUSTEES OF THE STERLING
DEASON O'DONNELL DD 2012 TRUST
UNDER AGREEMENT OF THE DD
2014-B GRANTOR RETAINED
ANNUITY TRUST TO AMEND
MARILEE SPECIAL UTILITY
DISTRICT'S CERTIFICATE OF
CONVENIENCE AND NECESSITY IN
COLLING COUNT BY EXPEDITED
RELEASE**

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**PUBLIC UTILITY COMMISSION
OF TEXAS**

**PETITIONER'S BRIEF IN SUPPORT OF FINDING OF
ADMINISTRATIVE COMPLETENESS**

Sterling Deason O'Donnell and Darwin Deason, co-trustees of the Sterling Deason O'Donnell DD 2012 Trust under agreement of the DD 2014-B Grantor Retained Annuity Trust (the "Petitioner") files this Brief in Support of Finding of Administrative Completeness and in support thereof, respectfully shows as follows:

I. Procedural Status

On January 2, 2020, Petitioner filed its petition (the "Petition") for expedited release of approximately 260.372 acres of property (the "Property") from Marilee SUD's water Certificate of Convenience and Necessity ("CCN") No. 10150 in Collin County, under Texas Water Code §13.2541(b) and 16 Texas Administrative Code §24.245(l).

On February 11, 2020, Marilee SUD ("Marilee") filed its Response to the Petition (the "Response"), asserting that it provides "service" to the Property; and that the Property is not eligible for decertification because the Public Utility Commission of Texas (the "Commission")

previously denied decertification of other adjoining property now currently owned by Petitioner (the “Other Land”).

On April 8, 2020 Petitioner replied, with accompanying proof, that there is no service to the Property. In addition, Petitioner argued that the denial of a previous landowner’s petition for expedited release of the Other Land from Marilee’s CCN has no bearing on this proceeding. Marilee filed its Surreply to Petitioner’s Reply on April 16, 2020 asserting that the application of res judicata and collateral estoppel should result in the Petition’s denial. As set forth below, Marilee is not entitled to summary disposition of the Petition under the doctrines of res judicata or collateral estoppel; and Petitioner is entitled to a finding of administrative completeness as recommended by Commission staff¹.

II. Argument and Authority

As a general matter, the doctrines of res judicata and collateral estoppel are affirmative defenses that bar the re-litigation of claims or issues previously litigated. *See Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). These legal defenses are not available to “deny” the Petition. Instead, for Marilee to prevail in a summary disposition based on an affirmative defense, it must prove each element of its defense as a matter of law, leaving no issues of material fact. *See FDIC v. Link*, 361 S.W.3d 602, 609 (Tex. 2012). Marilee has not met this burden.

A. Res Judicata

The elements of the defense of res judicata are: 1) final judgment; 2) the same parties; and 3) the same claims. *See Citizens Ins.v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007). Here,

¹ Commission staff filed its recommendation that the Commission be found administratively complete on May 11, 2020.

Marilee provides scant factual support for its defense and fails to meet its burden on each element of res judicata.

First, the petition in Docket No. 46866 was resolved on summary disposition without hearing and disposed of a single issue – whether the petitioner could sufficiently demonstrate that it was not receiving service from Marilee. This is not at issue in this matter as the Property is distinct from that involved in Docket No. 46866. As such, the propriety of decertifying the Property has not been previously or finally adjudged.

The parties in the two proceedings are, likewise, not the same. Marilee acknowledges that Petitioner is different than that in Docket No. 46866 but argues that the parties are in privity with one another. Marilee mistakenly, and without evidence, asserts that privity exists through a familial trust associated with Patricia Miller Deason, as indicated by the common last name of the prior petitioner and the co-trustees of Petitioner. To the contrary, the trust owns the entirety of the Property, which was purchased at an arm's length transaction by the co-trustees to the trust.

Finally, the claims are not the same. The instant Petition requests decertification of a 260.372 acre tract of land from Marilee's CCN. It does not include, in its request, 5.308 acres of adjacent land to which Marilee provides service. As such, this not the same request, or claim, made in Docket No. 46866. Marilee argues the claims are the same because they are related in time. The separate petitions were filed approximately three years apart and after the Property had been sold. Moreover, the Commission has held that "the time that the petition is filed is the only relevant time period to consider when evaluating whether a tract of land is receiving water under TWC § 13.254(a-5)." *HMP Ranch, Ltd* Petition for Expedited Release; Docket No. 45037. Based on that holding, any prior action regarding the Property and associated with a

separate petition is irrelevant. Accordingly, the prior action can have no preclusive effect on the Petition.

B. Collateral Estoppel

While Marilee asserts that the Petition should be “denied” under collateral estoppel, it does not directly address the elements in its Surreply, and, instead offers an unsupported conclusion regarding collateral estoppel. Clearly, Marilee cannot meet its burden for summary disposition of this matter based on this defense. To invoke collateral estoppel, a party must establish: (1) the same facts sought to be litigated in the second suit were fully and fairly litigated in the first suit; (2) those facts were essential to the judgment in the first suit; and (3) the parties were case as adversaries in the first suit. *See Sysco Food Servs. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994).

As more fully set forth above, different facts apply in Docket No. 46866 and the instant Petition. Specifically, the two petitions involve different property. Additionally, the two petitions involve different parties. Therefore, the Petition cannot be “denied” on collateral estoppel grounds.

III. CONCLUSION

WHEREFORE, Petitioner respectfully requests that the Commission deny any requests for “denial” of the Petitioner contained in Marilee’s Surreply and issue an order finding that the Petition is administratively complete.

Respectfully submitted,

COATS ROSE, P.C.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served on the following attorney of record on or before May 11th, 2020 in accordance with 16 Tex. Admin. Code § 22.74(c).

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