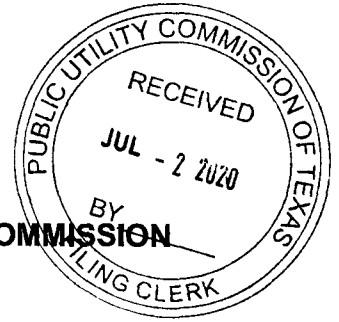


DOCKET NO. 50404



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
COLLIN COUNTY BY EXPEDITED
RELEASE

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PUBLIC UTILITY COMMISSION

OF TEXAS

**MARILEE SPECIAL UTILITY DISTRICT'S
OBJECTION TO COMMISSION STAFF'S RECOMMENDATION
ON FINAL DISPOSITION**

COMES NOW, Marilee Special Utility District ("Marilee") and files this Objection to Commission Staff's Recommendation on Final Disposition filed on June 26, 2020, Item 23 in this Docket (the "Recommendation"). In support thereof, Marilee respectfully shows the following:

I. OVERVIEW

On January 2, 2020, 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 ("Petitioner") filed a petition to decertify 260.372 acres of real property (the "Property") from Marilee's certificated water service territory, Certificate of Convenience and Necessity (CCN) No. 10150 (the "Petition"), pursuant to Texas Water Code (TWC) § 13.2541(b)¹ and 16 Texas Administrative Code (TAC) § 24.245(l).

¹ TWC § 13.254(a-5), amended by Acts 2019, 86th Leg., ch. 688 (S.B. 2272), § 4.

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In the Recommendation, Commission Staff ignores the fact that the Property is receiving water through “committed facilities”—specifically, Marilee’s three active meters along with the waterlines and facilities that provide water to the three active meters—under the various executed service agreements and invoices for the water usage. Additionally, Commission Staff cites *Petition of City of Midlothian* and the subsequent appeal of CCN holder Mountain Peak Special Utility District² as the basis for recommendation that the Petition be granted; however, Commission Staff fails to distinguish important facts of those cases with this Petition.

In *Mountain Peak Special Util. Dist. v. Pub. Util. Comm'n of Texas*, No. 03-16-00796-CV, 2017 WL 5078034, at *5 (Tex. App. Nov. 2, 2017), the Court held: “...receiving water service” is a “fact-based inquiry requiring the Commission to consider whether the [utility] has facilities or lines committed to providing water to the particular tract *in furtherance of its obligation to provide water to that tract pursuant to its CCN* (Emphasis added).”

II. ARGUMENT AND AUTHORITY

Denial of the Petition is proper, as the Property is receiving water service, and there are “committed facilities” in place, in furtherance of Marilee’s obligation to provide water pursuant to its CCN. Marilee is currently supplying water to the Property through the three active meters under various service agreements, waterlines and facilities providing water to such meters.

Most importantly, the Commission has already determined Marilee has committed facilities or lines providing water service to the Property, performed actions and/or

² Commission Staff’s Recommendation on Final Disposition, Item 23 at 4-5 (June 26, 2020).

supplied things to the Property, as the previous landowner Patricia Miller Deason in the 2017 Petition also carved out the land where the three active meters exist, as further provided in this Objection.

A. Not Only Does The Property Currently Receive Water Service, But Marilee Has Also “Committed” Facilities To The Property Under *Crystal Clear*.

In the Recommendation, Commission Staff points to *Crystal Clear*, where the Court found that the CCN holder was not currently providing water service to the subject property as there were waterlines or facilities constructed to serve the greater area and the facilities were not committed to serving the tract of land.³ The facts of the *Crystal Clear* case also include that “there was ‘one abandoned, empty meter box on the eastern portion of the property which [the CCN Holder] itself classifies as inoperative.’”⁴

Conversely, Marilee currently provides water to the Property through three *active* meters, the location of which was provided in Marilee’s Response and included the waterlines supplying water to the meters and invoices for the current water usage from the meters.⁵

1. *Former landowner Deason also carved out land where meters serve the Property in her 2017 Petition for decertification.*

In several filings of this docket, Marilee has provided that the Commission previously found Marilee provided water to the Property when the Commission denied the 2017 decertification petition filed in Docket No. 46866 (the “2017 Petition”) by former landowner Patricia Miller Deason (“Deason”), through the same three active meters and

³ Id. at 4.

⁴ *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 134 (Tex.App.—Austin 2014, pet. denied).

⁵ Marilee’s Response to Petition, Item 9 at 3-5, Exhs. A-E (Feb. 11, 2020).

waterlines.⁶ In the 2017 Petition, Deason *also* carved out the areas where the three meters are located⁷ (the “Excluded Land”).

In addition to the three active meters, Marilee had provided further evidence that Marilee has facilities or lines committed to providing water to the Property and performed acts and/or supplied things to the Property by submitting several executed service agreements for water service to tracts of land that included the Property.⁸

2. Commission still found Marilee has facilities and lines “committed” or “used” to provide water to the Property under Crystal Clear.

The Commission denied the 2017 Petition finding that the three active meters located on the Excluded Land, various waterlines on and adjacent to the property supplying water to the meters, and the executed service agreements and invoices for water usage was evidence that Marilee has committed facilities or lines providing water service to, and performed acts and/or supplied things to, the Property where the three active meters are located, and also the Property and was receiving water service from Marilee “as defined by the courts”,⁹ including *Crystal Clear* which was decided three years prior to the 2017 Petition.

3. Marilee also “commits” to providing water service to the Property under the service agreements.

Unlike *Crystal Clear*, Marilee currently, actively and actually provides water to Property through the three active meters, in which Marilee contractually obligated itself to

⁶ *Id.* See also Marilee’s Surreply to Petitioner’s Reply, Item 15 (Apr. 16, 2020) and Marilee’s Response to Administratively Complete Petition, Item 22 (Jun. 19, 2020).

⁷ See Petition of Patricia Miller Deason to Amend Marilee Special Utility District’s Certificate of Convenience and Necessity in Collin County by Expedited Release, Docket No. 46866, Item 1 at Exh. B (Feb. 21, 2017).

⁸ See Marilee’s Response to Petition for Expedited Release, Docket No. 46866, Item 7 (Mar. 15, 2017).

⁹ Order, Docket No. 46866, Item 19 at 6 (May 19, 2017).

provide water service to the Property through the various service agreements for those meters, in which the tracts under the service agreements contain the Property. This includes capacity and Marilee's waterlines and facilities used to provide water to the meters.

Attached to this Objection as Exhibit A, the affidavit of Eddy Daniel, P.E., the consulting engineer for Marilee, provides that Marilee has committed facilities and currently provides water to the Property through three active meters (Meters #309, #721, and #1528), 8" waterline, 2" waterline, 4" waterline, and 6" waterline transmitting water to those meters from Marilee's facilities, specifically the existing water wells (Well #5) and elevated tank, Well #3, Well #6, and Pump Station #2 (the "Facilities"). Marilee is currently constructing a new water well (Well #7) east of the Property to be completed approximately within 30-60 days, and—along with the Facilities—Well #7 is also committed to providing retail water service to the Property through the existing 8" waterline.

B. Marilee Continues To Provide Water Service And "Commit" Waterlines and Facilities After The Property Was Conveyed.

Marilee has continued to provide water service to the three meters since the Commission's findings in 2017.¹⁰ If the Commission found in 2017 that Marilee was actually providing and also "committed" to providing water service to the Property (*despite* the fact that Deason carved out areas where the meters are located, i.e. the Excluded Land, in her 2017 Petition), and Marilee has *continued* to provide water service to the same three active meters, then how can Marilee no longer have waterlines or facilities "committed" to providing water service to the Property?

¹⁰ Marilee's Response to Petition, Item 9 (Feb. 11, 2020).

The service agreements obligate Marilee to provide water to the three active meters. Neither Deason, Petitioner (who now owns the Property and carved out adjacent lands) nor tenants occupying the property¹¹ have requested any additional usage or changed usage where Marilee hasn't actually provided or is no longer committed to providing water service to the Property. The Property continues to receive water service from Marilee through the three active meters, waterlines, and Facilities, as Marilee is obligated and has committed to serve those meters in accordance with service agreements.

C. The Petition Should Be Denied, As Factors and Evidence Of Current Water Service To The Three Active Meters Are Distinguished From *Petition of City of Midlothian and Mountain Peak*.

Commissioner Staff cites Docket No. 44394, where the Commission granted the petition by landowner City of Midlothian for expedited release when 6.7 acres was “carved out” of the petitioner’s land containing a sewer lift station and 1” waterline; subsequently, the Third Court of Appeals of Texas agreed with the Commission’s decision,¹² finding that the mere existence of facilities located on or near the property does not constitute that the facilities are committed to serving the property and determining whether “water facilities are *committed to serving* the property” was also required.¹³

In that case, however, the Commission found evidence that 6.7 acres removed from the petition was 1) platted for a subdivision adjacent to the subject property, 2) the

¹¹ See Marilee’s Response, Item 9 at 2-4, Exhs. B-D (Feb. 11, 2020) (showing Petitioner’s ownership to property where the active meters lie but current water invoices billed to tenants).

¹² See Commission Staff’s Recommendation on Final Disposition, Item 23 at 4-5 (June 26, 2020), (referring to the *Petition of City of Midlothian* and the subsequent appeal by the CCN holder, Mountain Peak Special Utility District).

¹³ *Mountain Peak Special Util. Dist. V. Pub. Util. Comm’n of Tex.*, No. 3-16-00796-CV, 2017 WL 5078034 at *4 (Tex.App.—Austin No. 2, 2017).

lift station was constructed at the expense of the developer of the subdivision, 3) 1" waterline connected to the lift station ran to the subdivision, and 4) there were no written agreements, meter or billing for the delivery of any water on that 1" waterline to the petitioner's subject property; therefore, it was reasonable that the lift station and 1" waterline on the 6.7 acres were committed to or installed for the purpose of providing water service to the adjacent subdivision, not the subject property.¹⁴ Additionally, there was "evidence in the record that the existing water lines did not have the present physical capacity to provide sufficient water to serve the needs of the [decertified property] when developed" as the CCN holder was going to require the construction of over \$450,000 worth of improvements to receive water service as requested by petitioner.¹⁵

The Commission considered all relevant factors and evidence together when the *Petition of City of Midlothian* was granted; however, Staff's Recommendation alludes that the Commission should grant decertification simply because Petitioner has carved out land where facilities existed, without considering the differences in facts and evidence of the Petition in this Docket and the *Petition of City of Midlothian*.

1. Marilee Installed Meters For The Purpose of Providing Water Service To The Three Active Meters On Tract Of Land That Include The Property.

At the time Marilee installed the three active meters to provide water service to the various tracts which include the Property, it is evident that Marilee's actions of installing the meters and providing water thereto through the waterlines and facilities, as provided in Exhibit A, were for the purpose of providing water under the service agreements.

¹⁴ See Id. at *4-5 (Emphasis added) (summarizing the contents of affidavits filed in Docket No. 44394).

¹⁵ Id. at *8.

The Third Court of Appeals of Texas stated that “[c]arving out the land they are located on from the property they serve does not mean that those lines or facilities are not taken into account when determining whether the property for which decertification is requested is ‘receiving water service’ for the purposes of section 13.254(a-5).”¹⁶ In *Petition of City of Midlothian*, the accumulation of the facts and evidence presented led the Commission to find that the lift station and the 1” waterline were installed for the purpose of providing service to the adjacent property, in addition to the fact that there was no meter or agreement for service to the subject property related to 6.7 acre “carved out” land.

Here, conversely, the Commission *has already considered* Meters #309, #721, #1528, connected to Marilee’s 8”, 2”, 4” and 6” waterlines serving the Property and Excluded Land, in addition to service agreements, water invoices, and other factors and evidence. Moreover, the Commission *has also found that Marilee has committed facilities or lines providing water service to the Property* in the 2017 Petition, even when Deason “carved out” land where the three active meters were located (the Excluded Land).¹⁷ There has been no change in circumstances since the 2017 Petition other than a conveyance of the Property and Excluded Land from Deason to a trust.

As the Excluded Land and the Property *currently* receive water service from Marilee through the *same* three meters and 8”, 2”, 4” and 6” waterlines, Marilee has not taken any action to change its purpose or commitment of providing water to the “carved out” property or the Property through its meters and waterlines.

¹⁶ Id. at *4.

¹⁷ See Order, Item 19 in Docket No. 46866 at 5-6 (May 19, 2017) (providing the Commission’s findings of facts and conclusions of law in denial of Deason’s 2017 Petition under TWC § 13.254(a-5)).

2. *Petitioner Has Not Shown Evidence That Marilee Is No Longer Committed To Serving The Property.*

In *Mountain Peak*, the landowner City of Midlothian provided the CCN holder with proposed plans for development of the subject property, and the appellate court confirmed that the lift station and 1" waterline on the 6.7 acres was installed to provide water to the lift station, rather than providing water for the proposed plans on the subject property. In addition to no agreement or meter serving the subject property under an agreement, *the CCN holder did not have the capacity to serve the subject property.*

Here, Commission Staff and Petitioner ignores the fact that Marilee has provided evidence of meters and service agreements that obligated service to the Property under such agreements, and Marilee has committed and continued to provide water service, as the Commission has already found in 2017.

Further, Petitioner has not provided any evidence that Marilee is *no longer committed to serving the Property or taken action to no longer provide water service to the Property*. Petitioner has merely shown that it has carved out land where three active meters exist, like former landowner Deason in the 2017 Petition, in another attempt to decertify the Property from Marilee's CCN. As shown in Exhibit A, Marilee has the waterlines, facilities, and capacity to currently serve and continue to serve the Property.

III. CONCLUSION

Marilee has shown that the Property is currently receiving water service, has performed acts and supplied things including but not limited to installing three active meters currently serving water under service agreements, has "committed" facilities and waterlines that currently serve and has the capacity and will continue to serve the Property

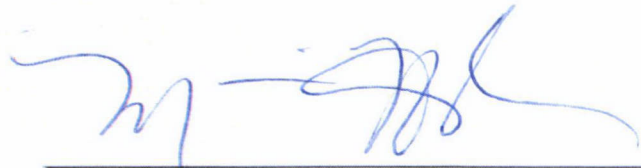
under *Crystal Clear*, and further, that the Commission has already found Marilee is committed to providing water to the Property when Deason also carved out land containing the meters in the 2017 Petition.

Except for the conveyance of the Property (including the Excluded Land) from Deason to Petitioner, the circumstances have not changed to support a decision other than denial or dismissal of the Petition, in conformity with the Commission's previous decision.

WHEREFORE, PREMISES CONSIDERED, for the reasons set forth herein and its filings in this docket, Marilee Special Utility District respectfully requests the Petition be denied in its entirety and all other such relief as to which it may be entitled.

Respectfully submitted,

JAMES W. WILSON & ASSOCIATES, PLLC



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ATTORNEYS FOR MARILEE SPECIAL
UTILITY DISTRICT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served on the following parties of record on July 2, 2020, by e-mail.¹⁸

via e-mail: creighton.mcmurray@puc.texas.gov

Creighton McMurray
/Attorney-Legal Division
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P.O. Box 13326
/Austin, Texas 78711-3326

/Attorney for the Commission

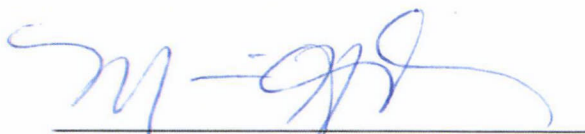
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Attorneys for Petitioner



Maria Huynh

¹⁸ See *Issues Related to the State of Disaster for Coronavirus Disease 2019*, Docket No. 50664, Order Suspending Rules (Mar. 16, 2020).

EXHIBIT A

**SUPPORTING AFFIDAVIT OF EDDY DANIEL, P.E.,
CONSULTING ENGINEER FOR MARILEE SPECIAL UTILITY DISTRICT**

STATE OF TEXAS §
 §
COUNTY OF COLLIN §

BEFORE ME, the undersigned authority, on this date personally appeared Eddy Daniel, P.E., who being by me first duly sworn states as follows:

“My name is Eddy Daniel. I am more than 18 years of age and I am of sound mind and qualified to make this affidavit. I have personal knowledge of all facts stated herein.

I am a licensed professional engineer in the State of Texas.

I am employed by Daniel & Brown Inc. (d/b/a DBI Engineers), a professional engineering and consulting firm, which provides professional engineering and consulting services to Marilee Special Utility District (“Marilee”).

I am familiar with the water delivery system that is owned and operated by Marilee. I have been personally involved, along with the staff of DBI Engineers, in maintaining a computer model of the hydraulic capability of the Marilee water delivery system for over 20 years.

I have reviewed the filings of Marilee in this Docket.

Marilee has committed facilities and currently provides retail water service to the Property, specifically through an 8” waterline on the Property connected to a 2” waterline at the corner of County Roads 130 and 132 through Meter #309, a 4” waterline on the Property through Meter #721, and a 6” waterline at the corner of County Roads 132 and 131 through Meter #1528. Attached to this Supporting Affidavit is a true and correct copy of a portion of Marilee’s water system map reflecting these waterlines and facilities described herein.

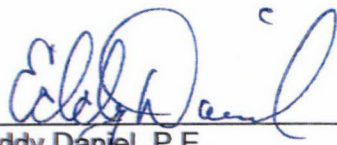
In addition to the waterlines and meters above, Marilee has constructed excess capacity and committed to providing retail water service to the Property and other properties in the immediate area, as Marilee is obligated to and mandated under state law and its Certificate of Convenience and Necessity.

Specifically, Marilee owns and operates an existing water well and elevated tank (Well #5 and Elevated Tank) located on the east side of CR 128 and south of CR 130. The well and elevated tank is located less than 4,000 LF away from the Property. The Property also receives water service from Well #3, Well #6, and Pump Station #2 located to the northwest on CR 134 less than 7,000 LF away.

Additionally, Marilee is currently constructing a new water well (Well #7) on CR 128 located to the east of the Property. The proposed water well will be completed in approximately 30-60 days from the date of this affidavit. The Well #5 and Elevated Tank facilities currently provide water service to the existing 8" waterline located along the southern boundary of the property. The proposed Well #7 will provide additional water supply to the Property through the existing 8" waterline and will provide service to other real property located within the same pressure plane.

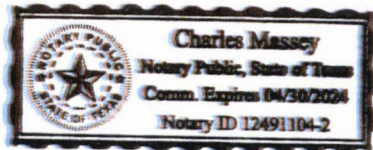
Marilee's Meters #309, #721 and #1528, 8" waterline, 2" waterline, 4" waterline, 6" waterline, existing and new water wells, elevated tank, pump station, and any appurtenances thereto, as provided in this affidavit, are waterlines and facilities committed to providing retail water service to the Property."

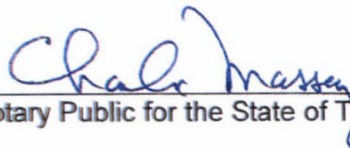
Signed this the 2nd day of July, 2020.



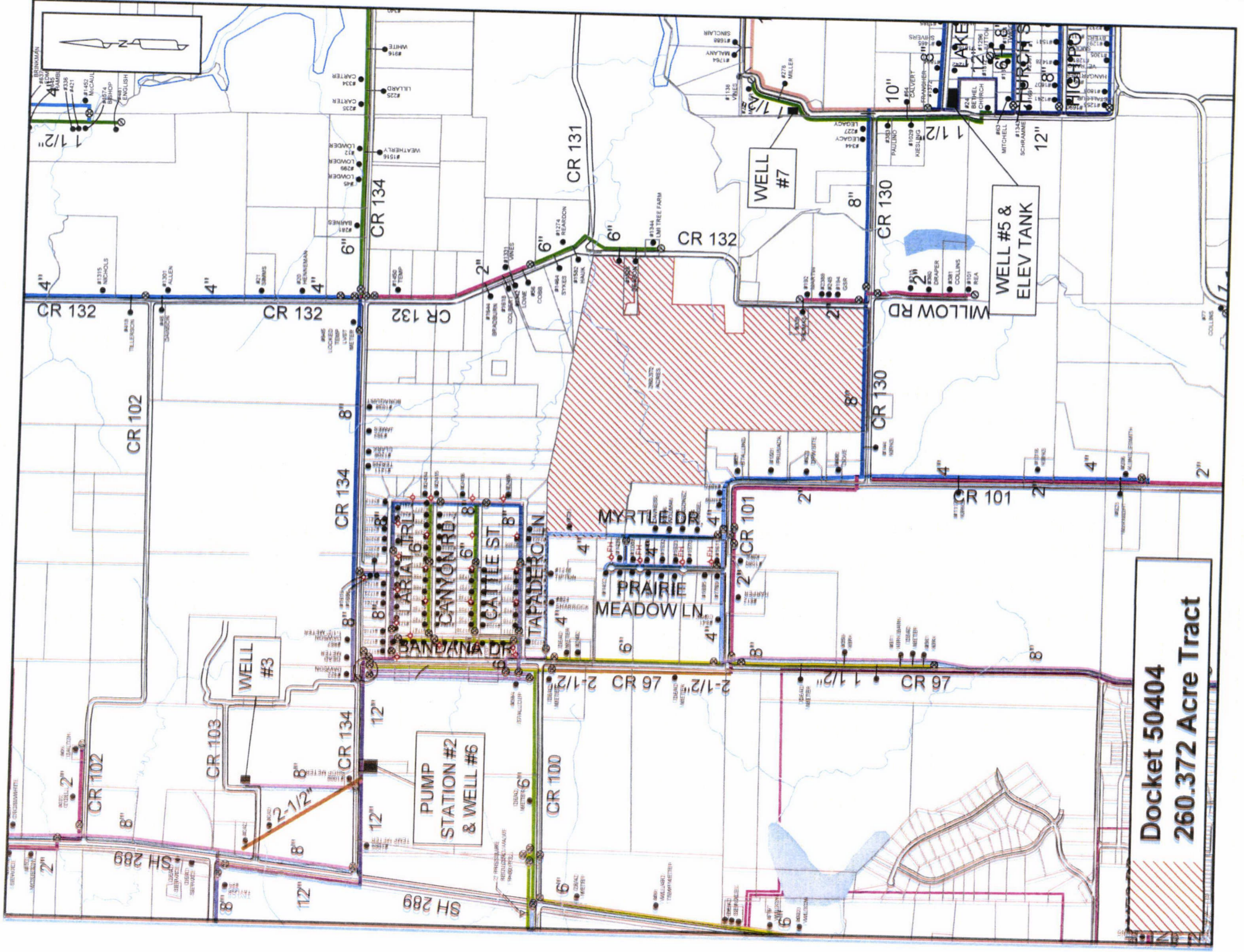
Eddy Daniel, P.E.

SUBSCRIBED AND SWORN TO before me on the 2nd day of July, 2020, by Eddy Daniel, P.E.





Notary Public for the State of Texas



Docket 50404
260.372 Acre Tract

PUMP STATION #2 & WELL #6

WELL #7

WELL #5 & ELEV TANK

