



Control Number: 50404



Item Number: 29

Addendum StartPage: 0

DOCKET NO. 50404

2020 NOV 19 AM 10:14

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 §

PUBLIC UTILITY COMMISSION
OF TEXAS

**ORDER NO. 6
DENYING MOTION TO DISMISS**

In this matter, 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, seek streamlined expedited release for a tract of land the trust owns from Marilee Special Utility District's water certificate of convenience and necessity (CCN) number 10150 in Collin County. In Order No. 2 filed on January 30, 2020, the prior administrative law judge (ALJ) granted Marilee SUD's motion to intervene. On April 16, 2020, Marilee SUD filed what effectively constitutes a motion to dismiss. On November 13, 2020, this matter was reassigned to the undersigned ALJ.

I. Background

The petitioner owns an approximately 266-acre tract of land in Collin County located within Marilee SUD's water CCN number 10150 (petitioner's entire acreage). Marilee SUD has the following infrastructure on or in close proximity to the petitioner's entire acreage: an 8" waterline running just south of the property; a 2" waterline running off the 8" line that serves a portion of the property; a 4" waterline running just west of the property and that serves a portion of the property; a 6" waterline running just east of the property; and three water meters located on, and providing water service to, portions of the property.

In Docket No. 46866,¹ the prior owner of the petitioner's entire acreage sought streamlined expedited release of an approximately 258-acre portion of the petitioner's entire acreage. In that docket, the Commission concluded that the 258-acre portion for which the prior owner sought streamlined expedited release included at least two of the three lots that were actively receiving metered water service from Marilee SUD. Accordingly, the Commission concluded that the tract for which release was sought in Docket No. 46866 was receiving service from Marilee SUD and denied the petition.

In the present docket, the petitioner requests expedited release of an approximately 260-acre portion of the 266-acre tract owned by the petitioner. The 260 acres for which the petitioner in this docket seeks release deviates slightly in size and boundaries from the 258 acres for which the prior owner sought release in Docket No. 46866. The petitioner concedes that there are three lots within the petitioner's entire acreage that have water meters and are receiving, or were until recently receiving, water service from Marilee SUD. However, those lots are not within the 260 acres for which the petitioner seeks release. Moreover, it is not the petitioner who is receiving water service on those lots, but tenants of the petitioner.

In its motion to dismiss, Marilee SUD argues that, in light of the Commission's denial of the petition in Docket No. 46866, the petition in the present docket should be dismissed under the doctrines of res judicata or collateral estoppel.

II. Discussion

Under 16 Texas Administrative Code (TAC) § 22.181(d)(3) and (4), the Commission may dismiss a claim or proceeding if it is barred by res judicata or collateral estoppel.

Res judicata, which is also known as claim preclusion, "bars the re-litigation of claims that have been finally adjudicated or that arise out of the same subject matter and should have been litigated in the prior suit."² It consists of the following elements: "(1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or the presence of parties in

¹ *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, Order (May 19, 2017).

² *O'Carolan v. Hopper*, 414 S.W.3d 288, 307 (Tex. App.—Austin 2013, no pet.).

privity with the prior parties; and (3) a second action based on the same claims that were raised or could have been raised in the first action.”³

Like *res judicata*, collateral estoppel, which is also known as issue preclusion, bars re-litigation of issues between parties that have already been decided.⁴ It consists of the following elements: “(1) the facts sought to be litigated in the second action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; (3) the parties were cast as adversaries in the first action.”⁵

Marilee SUD argues that the petition in this docket is barred, under *res judicata* and collateral estoppel, because the final order in Docket No. 46866 has already decided the issue of whether the property in question is receiving service from Marilee SUD.

The petitioner and Commission Staff disagree. The ALJ disagrees as well. The current petition is not barred by *res judicata* or collateral estoppel because the current petition is not a second action based on the same claims that were raised in the first action, nor does it involve the same facts that were at issue in the first action. The property for which release is sought in the present docket is different from the property for which release was sought in Docket No. 46866 in ways that are meaningful to the analysis of whether the property is receiving water service. Even Marilee SUD concedes that Docket No. 46866 and the present docket do not involve exactly the same property, but only “essentially the same” or “substantially the same” property, and that, in the present docket, the acreage for which petitioners seek release does not include the three lots on which the water meters are located and which are receiving service.⁶

For these reasons, the motion to dismiss on the grounds of *res judicata* or collateral estoppel is denied.

³ *Id.*

⁴ *Fenenbock v. W. Silver Recycling, Inc.*, 601 S.W.3d 32, 40 (Tex. App.—El Paso 2020, no pet.).

⁵ *Id.*, at 41-42.

⁶ Marilee SUD’s Surreply to Petitioners’ Reply, at 4 (April 16, 2020); Marilee SUD’s Response to Administratively Complete Petition, at 4 (June 19, 2020).

Signed at Austin, Texas the 19th day of November 2020.

PUBLIC UTILITY COMMISSION OF TEXAS



HUNTER BURKHALTER
CHIEF ADMINISTRATIVE LAW JUDGE