

Decision 83 01 054 JAN 19 1983

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application
of CALIFORNIA WATER SERVICE COMPANY,
a corporation, for authorization to
extend its Selma District service
area into contiguous territory in
the County of Fresno within the
service area of, but not presently
served by, James Kitchen, d/b/a/
Wesmilton Water System.

ORIGINAL
Application 61022
(Filed November 2, 1981)

McCutchen, Doyle, Brown & Enersen by
A. Crawford Greene, Attorney at
Law, for California Water Service
Company, applicant.
Palmer & Willoughby, by Michael F.
Willoughby, Attorney at Law, for
Wesmilton Water Service, protestant.

O P I N I O N

Statement of Facts

An approximate 1.5 square mile area sited primarily in the unincorporated region a mile north of the City of Selma in Fresno County, and bounded substantially by De Wolf, Springfield, Huntsman and Thompson Avenues (See Appendix A map), constitutes the public water utility service territory served by James E. Kitchen and Bernice K. Kitchen, husband and wife, as joint tenants dba Wesmilton Water System (Wesmilton).

Initially the dba venture of C. Wesley Bird and Jennie C. Bird, the Wesmilton operation was first authorized by this Commission in Decision (D.) 49449 dated December 21, 1953 in Application (A.) 34772 to serve an area known as the Khan Tract. Subsequently, as additional consumers in contiguous territories in the unincorporated

region were added to the system over the years, the service territory of the utility was expanded, either by Commission decision or as provided under Public Utilities (PU) Code § 1001, until the utility's filed service territory attained its present parameters in 1973.

Over the years the Bird ownership was characterized by considerable litigation before the courts and this Commission. As relevant here, following the unconsummated Ferraro sale in 1967 and the resulting litigation through 1975 (see D.73661 dated November 21, 1976 in A.49665 et seq.), the utility again was sold, this time in 1976 to the Kitchens. Again protracted litigation followed (See D.86320 dated August 10, 1976 in A.56436 et seq.), and although Commission authorization for the transfer to the Kitchens became final in October, 1979 (See D.90917), it was not until June 1980, when civil litigation finally ended, that the Kitchens were able to assume control.

The eastern boundary of the Wesmilton service territory after 1966 has remained constant, marked by the eastern edge of a 500-foot wide strip of land, parallel to and east of Thompson Avenue, extending from Huntsman Avenue on the south to Springfield Avenue on the north. Supplied in recent years from a 6-inch main in East Dinuba Avenue extending east to Thompson Avenue, Wesmilton customers on Thompson Avenue for a distance of approximately 1,300 feet north from East Dinuba Avenue are served by a 2-1/2-inch main, and customers for a distance of approximately 1,300 feet south of East Dinuba Avenue are served by a 6-inch main.

Meanwhile, to the south the City of Selma for years has been competently served by Cal Water, a large water service utility serving 20 separate systems statewide. As subdivision activity in the unincorporated areas to the north increased, Selma has annexed certain of these subdivisions, including Rita Mann Estates and Emma

Estates on Wright Avenue about 1,000 feet east of Thompson Avenue. Well-satisfied with Cal Water Service in the city, and desirous of having but one water purveyor serving within the city limits, as early as April 1973 Selma's mayor, John B. Howard, wrote Cal Water to suggest that it buy out Wesmilton, or failing that, obtain Commission authorization to extend Cal Water's 8-inch main north on Thompson Avenue in order to hook into and serve the two new subdivisions being annexed. However, at that time apparently the Wesmilton system, comprised of various sized mains ranging in age to 30 years, supplied from three wells with a total production capability of 1,700 gallons per minute, possessing no elevated or ground level storage tanks but dependent on the pumping capacity and two small pressure tanks, did not interest Cal Water as an acquisition. Instead, Cal Water began a series of attempts to detach and transfer chunks of access way or development territory from Wesmilton's service area to itself.

In that these efforts interrelate, and bear on the instant proceeding, each will be reviewed here:

The Thompson Avenue Extension - Advice Letter 411

By this advice letter, and with the full knowledge and assent of Bird, Cal Water on May 8, 1973 sought authorization from the Commission to transfer to itself a rectangular strip on the southeastern corner of Wesmilton's service territory (the strip lay east of Thompson Avenue and extended north from Huntsman Avenue to a point 660 feet south of East Dinuba Avenue - see Appendix A map). Cal Water wanted this strip to lay a main to connect to the Rita Mann Estates and Emma Estates subdivisions then being developed. Despite opposition from Ferraro (the putative purchaser of the Wesmilton system who at that time was tied up in litigation with Bird over the purchase), by Commission Resolution W-1449 dated May 23, 1973, the strip was transferred to Cal Water (see also Wesmilton Advice Letter 15). Cal Water thereupon installed an 8-inch main extension north on Thompson Avenue from Huntsman Avenue to serve the two new subdivisions on Wright Avenue.

In 1973 the City of Selma adopted a General Plan. Among other things, in accord with Fresno County policy that urban

development occur within urban areas, this plan set apart the area bounded by Huntsman, Thompson, East Dinuba, and Highland Avenues, as a "residential reserve" earmarked for future residential expansion.

Subsequently, in October 1977 Selma adopted its Subdivision Ordinance and City Code Section 9-6-10.30(A) which provided that all lots within an improved subdivision must be served by Cal Water. This enactment either overlooked or ignored the fact that all the land in the above described General Plan residential reserve was land lying within the Wesmilton service territory.

The Bonadelle Development - Case (C.) 10872

In May 1979 John Bonadelle, a Fresno developer, asked Selma to amend the General Plan to add another 106 acres, all land within the city's sphere of influence but land north of East Dinuba Avenue (thus bypassing the as yet undeveloped and unannexed residential reserve lands mentioned above) to the city by annexation as the Dinuba-Thompson Annexation. Bonadelle proposed a phased development for these lands to build approximately 500 residential units. The bulk of these lands were also lands lying within the Wesmilton service territory.

One of the matters required to be addressed by the Environmental Impact Report, which had to accompany the annexation proposal to the Local Agency Formation Commission (LAFCO), was that of water service in the area to be annexed. The parties then squarely faced the fact that while the city might prefer one water purveyor and has the right to grant a franchise to a utility operating within municipal limits, that right may not be used, directly or indirectly, to abrogate the ultimate authority of the Commission to determine the service areas of public utilities operating within the State. The city lacked authority to divest Wesmilton of a substantial portion of its service territory. In an attempt to resolve the problem the city held a meeting with Kitchen and Cal Water's local manager. Cal Water attempted to negotiate transfer of the Dinuba-Thompson annexation land from Wesmilton to Cal

Water. When these negotiations were unsuccessful, Cal Water prepared the draft of a complaint for the city to file with the Commission (assertedly at the city's request because of the city's inexperience in such matters).

On December 5, 1980 Selma filed C.10872 with the Commission naming Kitchen and Cal Water as defendants, alleging Wesmilton's inability to serve the annexation area, and seeking transfer of the Dinuba-Thompson annexation area, from Wesmilton to Cal Water. By D.93379 dated August 4, 1981, (City of Selma v Kitchen and Cal Water Service Co.) the Commission denied Selma's request, observing that the annexation area was within Wesmilton's service area; that Wesmilton was already serving a half dozen customers in the area, and that Wesmilton stood ready, willing, and able under the terms of its tariff's main extension rule to serve the proposed subdivision. The Commission further noted that the city had failed to demonstrate any act or thing done or omitted to be done by Wesmilton that would constitute a violation of any provision of law or any order or rule of this Commission. Subsequently the city's petition for rehearing was also denied (D.93684 dated November 3, 1981).

The Nelson Property-Vinewood Estates - Advice Letter 748

Concurrently with Cal Water's efforts relating to the Dinuba-Thompson transfer request, the consulting firm of Blair, Church and Flynn, acting on behalf of another developer, Nelson Properties, whose owner preferred initially to remain anonymous, by letter dated July 22, 1980 to Cal Water asked that utility to seek transfer of an approximately 20-acre tract later known as Vinewood Estates, located to the south in the residential reserve area, from Wesmilton's to Cal Water's service area. The developer proposed to erect residential housing units on the tract and Cal Water was furnished with a preliminary map of the proposed development. This request was followed up on August 7, 1980 by letter from the city

administrator of Selma wherein the city asked Cal Water to seek transfer of the area. Conforming, on August 18, 1980 Cal Water filed Advice Letter 748 seeking transfer to it of the Vinewood Estates area. When Kitchen learned of this request, he immediately protested to the Commission.

The Nelson-Carr Properties-Vinewood Estates
A.61022

When Cal Water learned of Kitchen's objections to its advice letter filing and use of the advice letter procedure, it proceeded formally on November 2, 1981 by filing A.61022, the instant matter. By it Cal Water asks for an order authorizing extension of its Selma District into contiguous Wesmilton service territory to encompass the Nelson and Carr properties located in the southeastern corners of the Wesmilton service territory, and for authority to furnish service to those properties under its Selma district tariff. Assertedly the 20 acres of the Nelson property are to be developed in two phases to provide approximately 400 dwelling units, and there are no immediate plans for development of the Carr property. In its application Cal Water set forth its understanding that the City of Selma and both Nelson and Carr desire that service to the properties be provided by Cal Water; that Nelson for more than half a year was unable to reach mutually agreeable terms for water service from Wesmilton; that the estimated cost to Nelson of Wesmilton service would exceed \$300,000, five times the estimated \$60,000 cost of service from Cal Water; and that Cal Water is more qualified to provide service. Cal Water also sought consolidation of this application with that of C.10872, then before the Commission on a petition for rehearing.¹

¹ The petition for rehearing filed jointly by Selma and Cal Water was denied in D.93684 dated November 3, 1981, which date was one day after this application was filed.

In his reply filed February 17, 1982,² Kitchen asked the Commission to deny Cal Water's application, noting that many of the same issues were presented in C.10872 and that C.10872 had been decided adversely to Cal Water. Kitchen asserted that this is the fourth concerted effort by Cal Water to annex a portion of the Wesmilton service area. Kitchen observed that the lands in issue are exclusively within Wesmilton's filed service territory; that Wesmilton presently serves property adjacent to the proposed Nelson development; that no development at all is even proposed for the Carr property; and that Wesmilton stands ready, willing, and able to supply service to the Nelson property in accordance with the requirements of General Order (GO) 103 and its filed main extension rules.

A duly noticed public hearing was held April 6, 1982 in San Francisco before Administrative Law Judge (ALJ) John B. Weiss. At conclusion of the hearing the matter was submitted.

At the hearing both parties entered prepared testimony from their witnesses as ordered by the ALJ, and presented rebuttal evidence. Cal Water's witnesses were Donald L. Houck, applicant's vice president, Nicholas A. Pavlovich, city administrator of the City of Selma, and Dwight G. Nelson, owner and sole proprietor of Nelson Properties. James H. Kitchen, co-owner with his wife, testified for Wesmilton. Because of common and interwoven facts present in this and the Bonadelle case (C.10872) discussed above, the ALJ took official notice of the record in that matter.

Discussion

This application essentially poses two questions for our consideration. First, what should be our position with regard to the integrity of a public water utility's service territory vis-a-vis

² Kitchen sought and was granted an extension of time in which to file an answer and to engage a new attorney.

another utility which seeks to serve the same area, and second, has Wesmilton been unreasonable or unresponsive to Nelson's asserted overtures relating to potential service.

The Integrity of a Water Utility's Service Territory

As business enterprises, public utilities are in a class by themselves, with privileges and obligations that differ essentially from those of other kinds of businesses. The owner of a nonutility, and therefore unregulated business venture, is privileged under our statutory as well as economic laws to reap whatever profits he lawfully can in the competitive milieu. On the other hand, the regulated utility is limited to earning a reasonable return. However, the regulated water utility does have one special privilege, that of a limited monopoly and protection from competition within the territory it is dedicated to serve. It is protected from new ventures or encroachments from others. As a general rule the Commission does not authorize a water utility to render service in any part of an area located within the service territory of another water utility, unless the latter is unwilling and unable to provide such service (West San Martin Water Works, Inc. (1980) 3 CPUC 2d, 435, 451). The evidence of such unwillingness or inability must be substantial.

We believe there are good reasons for maintaining the integrity of a utility's filed service territory. Although the service areas of two utilities may be located adjacent to each other and both appear to be providing water service in similar terrain, neighboring utilities may be subject to different factors which require them to impose radically differing developmental or operational requirements and charges upon developers and customers. Such factors can include original capitalization; the timing and location of previous or present construction and extension programs; the density or dispersal of residential, commercial, or industrial

development in each service territory; the customer mix; and the presence or absence of water supply problems. However, the ratepayers and/or developers served or to be served are not inclined to be philosophical about the origins of these differences. If discontented customers or would-be developers are permitted to switch or choose a utility purely for the sake of lower rates or lower installation advances, a chain reaction could be set off. It is difficult to know where or how it would end. Apart from considerations of fundamental fairness, the utility presently serving is unlikely to incur any reductions of its costs from the diversion, nor will the remainder of its system likely to be benefited. The company certainly will not be strengthened by loss of customers or potential customers. It would have to spread its costs among the same or smaller numbers of customers. Rather than being able to draw benefits from being part of the strengthened system of a growing utility, the residue of customers may be forced to see their service deteriorate as their utility's service area is nibbled away by a stronger neighbor. The only result can be higher rates, deterioration of service, and an aging plant.

Cal Water argues that allowing it to serve the Nelson and Carr properties would be consistent with Resolution M-4708, adopted on August 28, 1979. In that resolution, we established a policy to deny certificates for Class D water company operations if they are

likely to be unviable or marginally viable, if they are likely to provide inadequate service, or if another entity is able to serve the proposed area. Cal Water misreads Resolution M-4708. Our objective was to forestall creation of new Class D utilities with new problems, not to weaken existing water companies or to encourage intrusions by other utilities into their service territories.

If customers or would-be developers were allowed to pick and choose between neighboring utilities for their own economic advantage, the situation would be highly unstable and utility planning not only impossible but meaningless. Certainly the public interest always must enter into the consideration, but we must be concerned with the overall welfare of all the public involved in that utility's service territory, and not merely with that of a subdivider and his prospective customers located in the immediate area of the proposed subdivision.

In the instant matter we are not particularly impressed with Cal Water's efforts to undermine the integrity of the Wesmilton service territory boundaries as set forth in Wesmilton's filed maps. We recall that in Portola Building Co. v Cal Water (Decision 82-01-68 dated January 19, 1982, in C.11019), Cal Water took an opposite stance to that which it adopts here. There the situation was reversed, and a developer (abetted by the municipality) who would have benefited by lower construction costs were his service to be provided by the available adjacent mains of a municipal water utility rather than by a Cal Water main extension, sought transfer of a chunk of Cal Water's service territory to the municipal utility. Cal Water vigorously resisted. There we dismissed the complaint after determining that the complainant had failed to allege any violation of any provision of law, order, or rule of this Commission, noting that if the municipal utility involved wished to serve an area already served, there were established ways it could proceed, all involving the potential of just compensation for the private utility.

As Cal Water must be well aware, extensions of territory which a utility has dedicated itself to serve are obtained either from Commission decisions establishing specific boundaries of the additional territory, usually noncontiguous to existing areas, or more commonly, under the provisions of PU Code § 1001 which permits a water utility to extend service into territory contiguous to its existing territory where that new area is not already served by another utility. And, as a glance at the filed service area maps of just about all water utilities under our jurisdiction will confirm (including those of Cal Water), these § 1001 contiguous extensions quite commonly take in far more territory than that which will be immediately "served," i.e., will immediately see installation of mains, service connections, etc. However, as we stated in Radisavljevic (D-90262 dated May 8, 1979 in A-58345 and A-58464), "such extended areas, preferably to the extent possible, should be defined by logical natural boundaries (emphasis added), avoiding small unserved enclaves or peninsulas, and they may not be gerrymandered to exclude customers or potential customers." Whatever other of its deficiencies or transgressions in the past may have been, Wesmilton has practiced this general rule to the letter.

As far back as 1963, at a time when it was the only public utility willing to provide water service in this sparsely settled area north of Selma, and the economics of any system extensions at all were at best marginal, Wesmilton grew by extending its mains to accommodate individual customers and small subdivisions. As it did so it complied with our rules by filing service territory maps, and these filed maps show that both the Nelson and Carr properties were included within the utility's extended service area boundaries at that time. Whether by design or happenstance, Wesmilton's territorial extensions as shown on these filed maps were to "logical natural boundaries." In this instance, these boundaries were the only natural features, the existing north-south, east-west grid roads over the flat terrain. They included Thompson Avenue on the east and Huntsman Avenue on the south.

Cal Water argues that Alisal Water Company ((1966) 65 CPUC 197) is persuasive of the issue here. We do not agree. In Alisal, Cal Water and Alisal operated water systems with adjoining service areas. Their respective filed service territory maps each typically embraced substantial undeveloped or uninhabited areas somewhat beyond the existing facilities of each. A subdivider proposed to develop and sell lots on a tract of land which lay astride the common boundary lines shown on the respective maps. Although Cal Water was the larger, both utilities were well-managed and provided generally excellent service to substantial numbers of customers. But had the respective service area boundaries been maintained and had each utility provided in-tract facilities completely adequate to serve only the lots that lay within its own service area, water mains of the two would have paralleled each other past 50 of the lots, and in the approaches to the subdivision, additional paralleling of some 1,732 feet of mains would have occurred. Under these circumstances the Commission found that such duplication of facilities would have been wasteful, and that the public interest would be better served were only one utility to serve the entire subdivision. The developer preferred Alisal because it involved a lesser advance payment. The Commission, noting that Alisal's costs and its rates would be less, and that problems with quantity and water pressure in Alisal's existing system in that vicinity would be eliminated were it to be permitted to integrate the proposed subdivision segment and well into the rest of the Alisal system, thereby strengthening and benefiting the weaker system, concluded that public convenience and necessity would be best served were Alisal authorized to serve the entire subdivision. Accordingly, Alisal was designated.

The situation in the case at bar is fundamentally different. The Nelson and Carr properties lie entirely within the the Wesmilton service area. There is no overlapping involving

different service areas. The proposed development in the Nelson property does not straddle the boundary line between Wesmilton and Cal Water. While it is correct that filed tariff maps of themselves are not determinative of the precise boundaries of a utility's service area, they do more than merely portray for the benefit of an enquiring public those areas from which an application for water service will be entertained. By filing the map the utility has undertaken an obligation to serve in that area. And where a utility holds itself out to the public to furnish water in areas beyond its certificated area, it will be found to have dedicated its service to that territory and is bound to serve that area in the manner prescribed by its filed tariff (DiLiberto v Park Water Co. (1956) 54 CPUC 639). Customers and would-be customers within the area have a right to demand service without prejudice or discrimination, and the utility must, upon demand, provide service (PU Code § 453).

The 3,350 ratepayers of Cal Water's Selma District would be only slightly affected if the Nelson-Carr properties were transferred. Fixed costs could be spread over a slightly larger customer base, thus allowing some economies of scale to be realized. Present excess capacity available from Cal Water's 8-inch mains in Huntsman and Thompson Avenues (excess capacity available as the result of prior main extensions paid for by advances from earlier subdividers) would be put to immediate use rather than being held in anticipation of future development in Cal Water's extended territory to the east of Thompson Avenue.

On the other hand, the Wesmilton system is at a critical crossroad. With 265 customers it is today too small to constitute a viable base unless it grows. Its problems can be resolved over the long range only by development in its service territory. It must grow or deteriorate. It occupies and serves a compact and realistically conceived service territory with excellent potential for development and future expansion.³

³ It would be beneficial to all were Cal Water to acquire the entire Wesmilton system. However, Kitchen purchased Wesmilton as a long-term investment believing the potential for development was excellent. He paid approximately twice the depreciated rate base, and has been put to considerable legal expense. He would expect to recover on his investment in any sale. On the other hand, Cal Water, able to earn only on the depreciated rate base were it to buy Wesmilton, declines today to pay Kitchen more than rate base to acquire Wesmilton despite Cal Water's interest in the growth potential in the Wesmilton service area.

With reasonably competent management it has potential to become a viable water utility serving the water requirements of the area northwest of Selma. Development of the Nelson subdivision, including addition of the well proposed for that subdivision, and looping the subdivision with the rest of the Wesmilton system would bring benefits to the existing ratepayers and provide a strengthened system, particularly when considered in conjunction with the system improvements contemplated from the impending Safe Drinking Water Bond Act loan.⁴ This Commission has a duty to see that a public utility is so constituted as to be financially able to provide service of satisfactory quality at reasonable rates to all the utility's customers, and that the utility's area of operations is protected against encroachments which might lessen the utility's ability to viably sustain its operations. We can well appreciate that it would be the mutual preference of Selma and Cal Water that there should be only one water purveyor serving territories within Selma's city limits. However, we stated our position in that regard in D.93379 (City of Selma v Kitchen and Cal Water Service Co. - the Bonadelle development) where we said: "We believe that a determination based upon a city's preference alone can lead to unjust and inequitable results." That same conclusion applies here.

⁴ The Wesmilton system, supplied from three existing wells with a total producing capacity of 1,700 gallons per minute (gpm) has encountered problems with the pesticide Di-bromo-chloro-propane (DBCP), a not uncommon problem throughout the San Joaquin Valley where the pesticide is used for agricultural purposes. One of the three wells is delivering water which is unacceptable because it contains excessive amounts of DBCP. To solve this problem and otherwise bring the system up to standard, Kitchen applied for a loan under the California Safe Drinking Water Bond Act of 1976. At the time of hearing he had been notified of approval of a \$310,000 loan for the construction of two new deep wells (one at an old well site at Leonard Avenue, and the second on a new site Kitchen is purchasing on Thompson Avenue just north of East Dinuba Avenue), a 6,000-foot, 10-inch distribution main connecting the two new wells and, to the extent funds may remain, an extension of the 6-inch line down Highland Avenue toward Huntsman Avenue, replacing the present 2-inch main.

In summary, we determine that a utility should be protected with regard to the integrity of its filed service territory, and absent a strong and clear showing that a demand has been made upon a utility to provide service within that filed service territory under the terms of its filed tariff, and that the utility has been unable or is unwilling to comply (as in West San Martin Waterworks, supra), no change in the service areas of the utilities involved should be made.

Wesmilton's Response to Nelson's Service Requests

It has been strenuously argued throughout this proceeding by Nelson, Selma, and Cal Water that Wesmilton has been unresponsive to Nelson's repeated overtures for service. It was asserted that Nelson has been unable to reach "mutually agreeable terms" for service to his proposed development; that despite repeated efforts by Nelson, Kitchen has either dragged his feet or has been totally incompetent; and that, therefore, a transfer of the Nelson-Carr part of the service area is called for. We find, however, that this interpretation of the record badly strains credibility.

Detailed review of the substantial correspondence and testimony chronicling the events recorded in this proceeding makes it clear that from inception of this project Nelson was against any tie between his development and Wesmilton's system. He wanted to get Cal Water service. The very apparent reason is that it would be far less costly to him if he could get Cal Water. Cal Water had a main adjacent to his property, whereas Wesmilton service would require a more expensive extension. Therefore, from the beginning Nelson used every effort to enlist the assistance of both Selma officials and Cal Water. Nelson's few overtures to Kitchen provided Kitchen with fragmentary, conflicting, and incomplete information, and made it virtually impossible for Kitchen to have responded timely to Nelson's demands. Despite having been informed of a developer's obligations under the provisions of Main Extension Rule 15, Nelson

has repeatedly sought to avoid those requirements, and instead to "reach mutually agreeable terms for service," stating that he is financially unable to install the system requested.

The city cooperated with Nelson and officially authorized an action to be commenced before this Commission to cut Wesmilton out. It also had passed an ordinance designed to ensure that only Cal Water could serve the new areas being incorporated in itself. In these efforts both Nelson and Selma had the cooperation of Cal Water.

At the hearing it was unrebutted that Kitchen first learned of this prospective development on land within his service area late in 1980, but that try as he did, he was unable to find out from anyone who the developer was.⁵ It was not until a city Planning Commission meeting February 16, 1981 that Kitchen discovered that Nelson was the developer. Kitchen testified that following that meeting he had introduced himself to Nelson and told Nelson he would be happy to work with him to provide water service whenever Nelson was ready. At that time he further briefly explained the mechanics of Main Extension Rule 15 which applied.

Nine days after that Planning Commission meeting, Nelson, on February 25, 1981, wrote to this Commission to ask that his property be transferred out of the Wesmilton service area to that of Cal Water. He was informed March 1, 1981 by staff that he would have to deal with Wesmilton. Only then did Nelson contact Wesmilton. By a letter dated March 5, 1981 Nelson wrote Kitchen, enclosing five maps or diagrams of the proposed subdivision and asking that Kitchen within seven days furnish his plans to serve, stating that he, Nelson, needed those plans to decide whether he would proceed to seek

⁵ Kitchen testified that he had contacted Blair, Church and Flynn (the indicated engineers for the project), the then property owner in Watsonville, the Selma realtor handling the transaction, and the director of the Selma Planning Commission. None could or would tell him who the developer was. But Nelson later, in June 1981, revealed in a letter to the Commission that development plans had begun in April 1980.

a change to Cal Water. Nelson went on to state that he understood that as a developer he would not be responsible for development of the system, well, pressure tanks, etc.

Kitchen had his attorney respond on March 13, 1981. The attorney wrote, pointing out that Nelson's March 5 letter and maps contained no information regarding the numbers, classification, sequence, or quantity of service connections required, and asked that projected dates of the construction phases, anticipated water needs during construction, and the dates service would be required, be provided. The attorney pointed out that while Kitchen would be happy to meet and work out matters, preliminarily the stated information would be required.

In reply, on March 24, 1981 Nelson wrote, stating that as the earlier maps had provided the zoning, Wesmilton should have been able to derive the requested information. He then went on to state the maximum density to which the property could be developed, concluding that this showed a potential requirement of 500 to 550 water connections.⁶ Nelson gave the date of anticipated start for construction as being August 1, 1981.⁷

⁶ In Cal Water's application in this matter, it is stated that the utility proposes to extend service to 25 lots in Phase 1 by means of 22 services, and to one large lot in Phase 2 by one connection to serve 400 persons (which Nelson testified meant a maximum of 280 individual units). Pavlovich, the city administrator, testified of a maximum of 350 dwelling units. The exact number is still uncertain.

⁷ Which, as we shall see, was unrealistic. Nelson did not even apply for approval of his tentative tract map from the Selma Planning Commission until September 25, 1981.

About this time Kitchen's attorney had learned from Selma's attorney, Paulette Janian, that Nelson had indicated that he would not work with Wesmilton and had asked the Commission to transfer his property. When on March 31, 1981 Kitchen's attorney asked Nelson about this, Nelson responded April 2, 1981, denying talking to Janian about any transfer, and stating that "it appears from the onset, that Wesmilton is probably not in a position at this time to adequately serve this property since this property has been in the planning stages for over one year now, and information concerning this project has been public record for that amount of time." He repeated his request (of a week earlier) that the service plans be provided promptly "to prevent any further delays in the start of construction by April 24, 1981."

After Kitchen's attorney had advised Kitchen not to discuss matters with Selma's city administrator in light of Selma's application in the pending Bonadelle matter, Selma's attorney on April 14, 1981 wrote Kitchen's attorney, pointing out that the city council had authorized the filing of another complaint with the Commission to determine who would serve the Nelson property. The attorney then stated that if Wesmilton provided specific and detailed answers to nine questions by May 1, 1981, on how Wesmilton proposed to serve Nelson, and who would pay the costs, the city attorney would assess the information and "consider recommending to the city council that they reverse their previous decision." In that letter the attorney estimated that a maximum of 350 dwelling units could be built on Nelson's property.

On April 27, 1981 Nelson wrote Wesmilton's attorney that Wesmilton was delinquent in furnishing information; that the delay led Nelson to believe there was little desire to work with Nelson and that unless Nelson got the information by May 1, 1981 he would go to the Commission to seek service elsewhere. In reply the Wesmilton attorney, on April 29, 1981, told Nelson that Wesmilton's engineering firm, Hanna and Hanna, was authorized to work directly with Nelson.

On June 8, 1981 Nelson drafted a letter (but held it until June 16, 1981) to the Commission, stating he could wait no longer and asked that this property be transferred to Cal Water's territory; that Wesmilton did not have the means to serve it, and was unprepared to make the capital improvements necessary to serve his property. That same day he wrote Wesmilton with accusations of stalling.

More correspondence followed, but finally late in June Nelson met with Kitchen in Hanna and Hanna's office to work on details. At that meeting Nelson asked and was told that Kitchen would sell Wesmilton for \$300,000. Following that meeting Nelson was provided with a preliminary cost estimate dated June 24, 1981 predicated upon the Wesmilton Master Plan and incorporating improvements for the entire Highland, East Dinuba, Thompson, and Huntsman Avenue quarter of the Wesmilton system as contemplated in the Environmental Impact Report (EIR) prepared by Nelson's engineers in connection with the Vinewood Estates project. The total costs set forth in that overall estimate were \$310,640, of which \$250,020 were preliminarily attributable to Nelson's project.

On August 6, 1981 Nelson asked Wesmilton to join with Selma and draft and enter a cooperative groundwater recharge program agreement with the Consolidated Irrigation District, a step which would facilitate annexation of Nelson's property into Selma's city limits. Kitchen immediately complied and on August 10, 1981 signed an agreement which became effective October 7, 1981.

On August 20, 1981 Nelson wrote Kitchen with reference to the June 24, 1981 Wesmilton system estimate, stating that it was not feasible for the developer of a 25-acre parcel to assume the initial cost of a system developed for 160 acres. He stated he intended to work with Wesmilton provided the utility would provide the necessary wells and mains and Nelson could provide the lateral extensions. On September 25, 1981 Kitchen's attorney wrote Nelson stating that Wesmilton was ready, willing, and able to extend service to Nelson's project under the terms of the Wesmilton main extension rule whenever Nelson would be able to commit.

A further exchange followed with Nelson, on October 1, 1981 and October 19, 1981, writing to charge that Wesmilton wanted to require Nelson to install facilities which would benefit the entire 160 acres of the Wesmilton system and that his project could not financially handle this. Kitchen responded to the first letter on October 14, stating that Nelson was confused by looking at the Wesmilton Master Plan; that Nelson would only be required to install facilities sufficient to meet the needs of his development plus a connection to Wesmilton's Thompson Avenue main. Nelson's reply erroneously stated that the system Wesmilton proposed would cost approximately \$300,000 to \$350,000. As we have seen, on November 2, 1981 Cal Water filed this application.

Nelson's insistence that it was Kitchen who delayed his project does not stand up to close scrutiny. We believe that Kitchen has made reasonable efforts to provide the information needed by Nelson, within the limitations imposed by Nelson himself. Nelson never filed an application with Wesmilton. Nelson did not even have a final "Tentative Map for Tract No. 3352 - Vinewood Estates" for submission to the Selma Planning Commission until September 21, 1981. 8

⁸ Obviously, despite Nelson's assertions to Kitchen in letters that construction was to begin August 1, 1981, or April 24, 1981, etc., construction could not have begun before the city and LAPCO formally approved the annexation, and the city issued building permits. As of the date of the hearing, no application for a building permit had even been filed.

According to Nelson's testimony he had provided Kitchen with the same maps as those which accompanied his February 25, 1981 letter to the Commission. From these Kitchen gave his estimates dated June 24, 1981. But those maps set forth a street and lot layout entirely different from the layout later adopted on June 25, 1981 in the so-called "Tentative Map" which was provided to Kitchen sometime in July and which was used by Cal Water in its application. And this Tentative Map between revisions dropped 1/5 of the lots and one entire street (Mitchell Street) from the final September 21, 1981 version which was filed with the city - a change not reflected in the Cal Water application map (dated September 15, 1981). Had Nelson continued to work with Kitchen further he would have seen the August 11, 1981 preliminary cost estimate prepared by Hanna applicable to Tract No. 3352, his project. Instead he wrote his August 20, 1981 letter, stating the earlier cost estimates were financially impossible, and ceased any further meaningful contact.

At this point comment on the August 11, 1981 estimate for service to Nelson's tract is appropriate. The estimate, derived from Wesmilton's Master Plan drawing dated August 7, 1981, was prepared by Hanna and Hanna, Kitchen's engineers. It projected a basic cost, before overhead, administrative, and inspection charges of 10%, of \$187,640. A loop to Highland Avenue was separately projected at \$20,720 (plus 10% overhead administrative and inspection). Thus the total cost with the loop and 10% overhead charges was projected at \$229,196.

At the hearing Kitchen volunteered that a transposition error had been made by the engineers,⁹ and he attempted to correct the error and the projections affected by it from the witness chair. Kitchen was not very precise with his spontaneous corrections and made errors. However, we can, by using the actual footages shown on the exhibit maps and the given costs per lineal foot on the estimates, obtain corrected figures applicable to the estimate. Simple addition and multiplication are all that is required. The results are set forth in Appendix B. They show that the basic extension to connect on Thompson Avenue to the Wesmilton system, including the cost of the well, pump and electrical, plus overhead, would be \$207,636. If Nelson requires a looped service to Highland Avenue Wesmilton mains (as at the hearing Nelson testified he would to obtain Housing and Urban Development approval for federal insurance) that cost, including overhead, would be another \$32,340. Thus, the total corrected cost would be \$239,976.

⁹ The existing 6-inch main on Thompson south from Dinuba had been transposed with the existing 6-inch main on Highland south from Dinuba. In fact, as can readily be ascertained by reference to the detailed service maps of the Wesmilton system contained in Exhibit 7, the 6-inch main on Thompson extends south not 500 feet as Hanna indicated, but 1,300 feet (to within 700 feet of Nelson's property), serving customers along the way. The Highland 6-inch main extends south only 500 feet, not the 1,500 feet indicated by Hanna. However, beyond the 6-inch main, there is another 1,500 feet of 2-inch main south on Highland, serving Wesmilton customers almost to what would be named Nelson Boulevard, the northern street boundary of Nelson's proposed Vinewood Estates.

Hanna and Hanna did not separately list the in-tract costs of mains, services, and hydrants. They had no final in-tract plans to work from. However, the Nelson Boulevard main (the largest footage component) is already in the estimate, and Mitchell Avenue was dropped from Phase I and may or may not be in Phase II, leaving only the 750 feet of Mills (sometimes called Snyder) Street and the cul-de-sac. At \$12 a lineal foot these 8- and 6-inch street mains would cost \$9,000. If we use Cal Water's estimates of \$8,643 for services (although 1/5 of these were dropped in Nelson's last Tentative Map) and \$4,731 for hydrants, we can estimate that another \$22,374 would cover these remaining in-tract facilities.

Therefore, assuming that Nelson requires looping to Highland Avenue, the advance he would be required to make, based on the information available as of the hearing would be approximately:

Basic extension and well, pump, etc. costs	\$207,636
Loop to Highland Avenue	32,340
In-tract mains, services, and hydrants	<u>22,374</u>
Vinewood Estates Extension Advance	<u>\$262,350</u>

Nelson in August wrote that water service costs of this magnitude for a development of the size he plans made it financially impossible for him to assume them. Considering that water service connection fees to public water districts today not uncommonly range from \$300 to \$1,000 per dwelling unit¹⁰ and that Vinewood Estates contemplates over 300 dwelling units, Nelson's average water connection cost of about \$875 ($\$262,350 \div 300 = \875) cannot be considered abnormal or excessive by contemporary standards.

¹⁰ For example, Gilroy and Morgan Hill respectively. And the San Lorenzo Valley County Water District charges \$3,000 per dwelling unit. Cal Water's noncontiguous public utility facility installed near Salinas to serve Vista del Rio's 80 units was contracted with Northern California Savings and Loan Company at a per-unit cost of \$4,360.

In summary, the reason for delay rests not with Kitchen and Wesmilton, but rather in the alliance between Nelson, the City of Selma, and Cal Water to try to get this tract removed from the Wesmilton service territory. Nelson's desire to avoid service from Wesmilton is abundantly clear from the tone and content of his numerous letters and his actions. He has refused to accept the fundamental requirements in both the standard Rule 15 of Wesmilton's tariff and GO 103 that an applicant for a main extension to serve a new subdivision is obligated to advance the reasonable costs of initial construction, extension, or modifications of a utility's existing water system when these are required to provide service to the new subdivision and/or to provide fire protection. As of the date of the hearing the city still had not rescinded the exclusive agent ordinance naming Cal Water as the sole water purveyor. Cal Water's participation is also evident, by its preparation of drawings for service to a tract where it knew it had no authorization to serve and by this application itself.

The Carr Property

Beyond his September 15, 1981 letter to Cal Water expressing his support of Cal Water's application, and requesting that his approximate 5-acre property adjacent to the Nelson property also be transferred into the Cal Water service territory from the Wesmilton service territory, Paul Carr took no part in this proceeding, and no other testimony or evidence was presented pertaining to his property. Consequently, there is no reason to distinguish consideration of his property from that of Nelson's in our resolution of the Cal Water application.

Conclusion

Having determined that the integrity of a water utility's filed service territory will be protected against intrusions by another water utility unless a strong and clear showing is made that the first utility has been unable or unwilling to comply with a request to provide service, and also having determined that Wesmilton has not been either unreasonably dilatory or unresponsive to Nelson's overtures pertaining to potential service to his embryonic subdivision, we cannot find, as requested by this application of Cal Water, that the public convenience and necessity require the transfer of the Nelson and Carr areas from the Wesmilton service territory to Cal Water's Selma district service territory. Accordingly, we will deny the application.

Findings of Fact

1. Wesmilton is a public water utility with authorization to serve in what has been primarily the unincorporated area northwest of the City of Selma.
2. Since 1966 Wesmilton's filed tariff service territory has embraced a 1.5 square mile area bounded substantially by De Wolfe, Springfield, Huntsman, and Thompson Avenues.
3. Kitchen in 1976 purchased Wesmilton from Bird, but as a consequence of protracted litigation with Bird over the purchase, was unable to assume control of the utility until mid-1980.

4. One of Wesmilton's three wells is encountering problems as a result of infiltration of an agricultural pesticide. To resolve that problem and to rehabilitate part of the system Kitchen has sought and obtained approval to receive a Safe Drinking Water Bond Act loan.

5. Increasingly subdivision development is taking place in the unincorporated area northwest of Selma; and Selma, as a result of restrictions imposed by the county against development in unincorporated areas, has sought to incorporate these subdivisions into the city.

6. Cal Water is a public water utility with authorization to serve in the City of Selma through its Selma District.

7. By a subdivision ordinance passed in 1977 Selma adopted a policy of having the city boundaries and Cal Water's boundaries co-extensive.

8. A real estate developer, Nelson, seeks to develop and construct approximately 300 residential dwelling units in two phases on an approximate 20-acre tract outside the city limits and within the Wesmilton service territory.

9. With the cooperation of Selma, Nelson sought to have his tract annexed to Selma.

10. Cal Water has a main in a street adjacent to Nelson's tract, whereas the nearest Wesmilton main is 700 feet from the tract. Service from Wesmilton would also require another well. Accordingly, Nelson could obtain water service for his tract from Cal Water at approximately one-quarter to one-fifth the cost that service from Wesmilton would require.

11. Nelson prefers to obtain service from Cal Water and to this end has sought, with the full cooperation and assistance of the City of Selma and Cal Water, to have his property and the small Carr property adjacent transferred from the Wesmilton service territory to the Cal Water service territory.

12. A similar attempt by Selma and Cal Water to divest Wesmilton of the Bonadelle tract to the north of Nelson's tract was denied by D.93379 dated August 4, 1981 in C.10872 (Rehearing denied by D.93684 dated November 3, 1981).

13. To permit utility customers or would-be utility customers within a utility's service territory to pick and choose which utility will serve them would hinder utility planning and would be destructive of the utility's economic viability with deleterious results to the utility's existing ratepayers.

14. The Commission has a duty to see that a public utility once certified to serve continues to be so constituted as to be financially able to provide service of satisfactory quality and reasonable rates to all its customers. To this end the utility's area of operations must be protected against encroachments which might lessen the utility's ability to viably sustain its operations.

15. The objective behind Resolution M-4708 dated August 28, 1979 was not to promote the weakening of Class D water companies, or to encourage intrusions into their service territories, but rather to forestall creation of new small utilities of doubtful viability.

16. Absent a strong and clear showing that a utility is unable or unwilling to meet demands to provide service within the provisions of its filed tariff no changes in its service area should be made.

17. Kitchen has not been shown to be other than standing ready, willing, and able to extend service to the Nelson tract under the provisions of Wesmilton's filed main extension rules.

18. To achieve economic stability and viability, the Wesmilton system must be permitted to develop its territory. Loss of the Nelson tract would serve to adversely affect the present rate payers.

Conclusion of Law

The application should be denied.

O R D E R

IT IS ORDERED that the application of California Water Service Company for authorization to extend its Selma District service area into the service area of James Kitchen, dba Wesmilton Water Service, is denied.

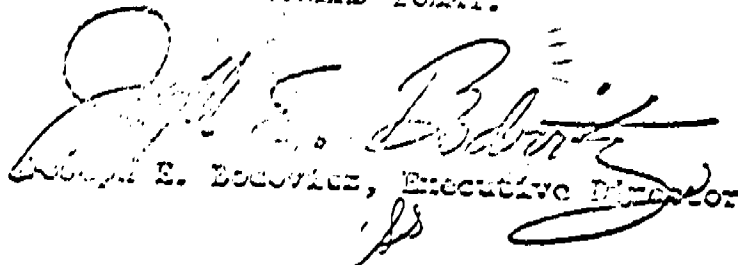
This order becomes effective 30 days from today.

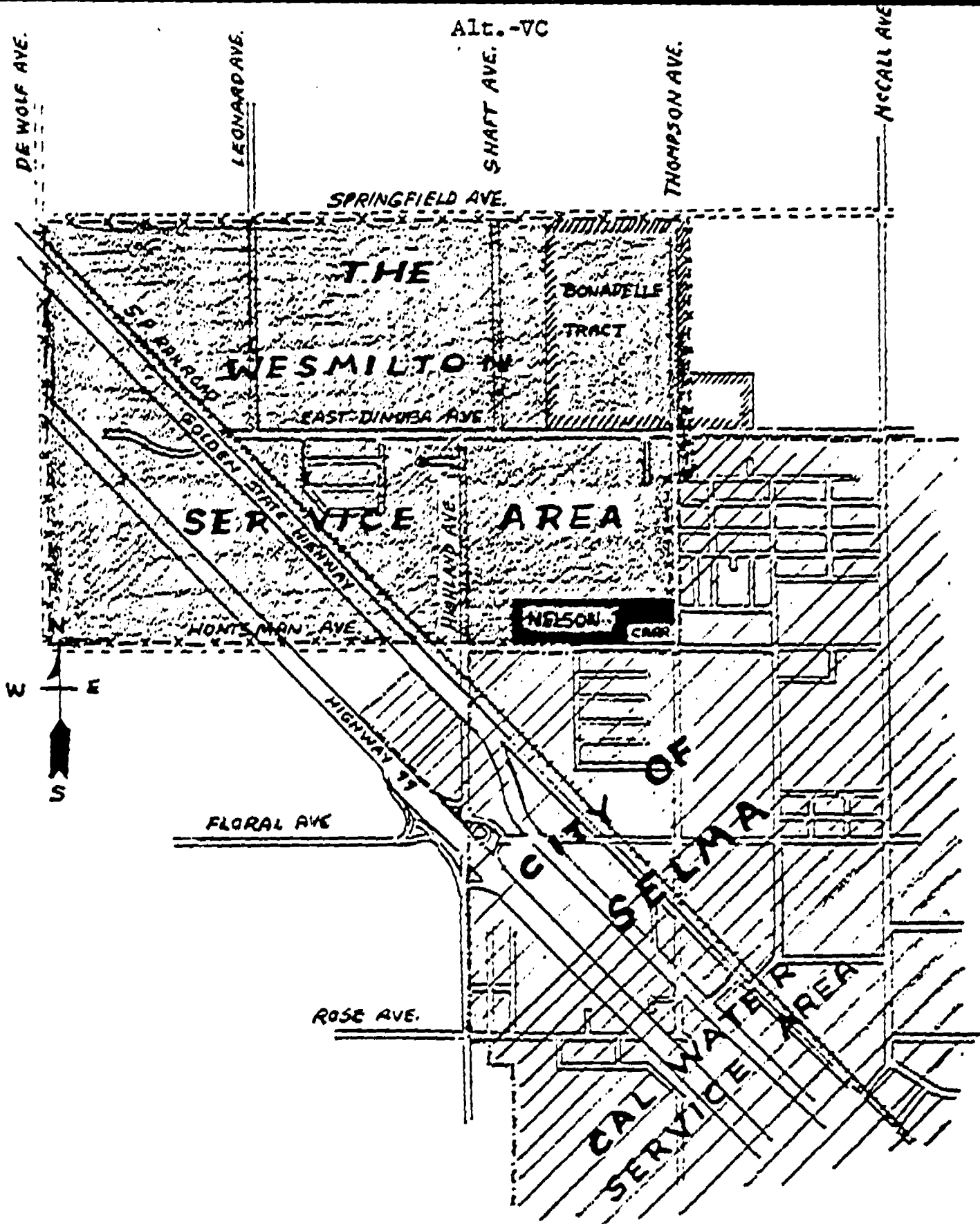
Dated JAN 19 1985, at San Francisco, California.

LEONARD M. GRIMES, JR.
President
PRISCILLA C. GREW
DONALD VIAL
Commissioners

Commissioner Victor Calvo,
being necessarily absent, did
not participate

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Joseph E. Bobovick, Executive Director



----- CAL WATER SERVICE BORDER
 -x-x-x-x- WESMILTON SERVICE BORDER

A. 61022
 APPENDIX "A"

APPENDIX B

Wesmilton Water System
 Revised Preliminary Cost Estimate
 Tract No. 3352

<u>Item</u>	<u>Description</u>	<u>8/11/81 Est.</u>	<u>Should Be</u>
A.	Basic Extension Cost Estimate		
1.	60 lineal ft. 12 in. main @ \$16/ft	\$ 960	\$ 960
2.	2,620 lineal ft. 10 in. main @ \$14/ft.	36,680	
	2,700 lineal ft. 10 in. main @ \$14/ft. (700 feet down Thompson and 2,000 feet from pump east to Thompson on Nelson)		37,800
3.	Water well, pump and electrical	<u>150,000</u>	<u>150,000</u>
		187,640	188,760
	10% overhead admin. & inspection	<u>18,764</u>	<u>18,876</u>
		206,404	207,636
B.	Main Intertie (Loop) to Highland Avenue Cost Estimate		
4.	1,480 lineal ft. 10 in. main @ \$14/ft.	20,720	
	2,100 lineal ft. 10 in. main @ \$14/ft. (1,500 ft. 2 in. replaced by 10 in. and 600 ft. 10 in. from Highland to pump)		<u>29,400</u>
		20,720	29,400
	10% overhead admin. & inspection	<u>2,072</u>	<u>2,940</u>
		22,792	32,340
5.	Total development cost with loop (A+B)	\$229,196	\$239,976

(END OF APPENDIX B)