

**ORIGINAL**Decision No. 90554 JUL 17 1979

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application )  
of C. WESLEY BIRD and JENNIE C. )  
BIRD, husband and wife, for )  
authority to sell to JAMES H. )  
KITCHEN and BERNICE K. KITCHEN, )  
husband and wife, as joint )  
tenants all of their right, )  
title and interest in the water )  
systems now owned by C. Wesley )  
Bird and Mrs. Jennie C. Bird, )  
and known as the WESMILTON )  
WATER SYSTEM, and the ANOOSH-VAN )  
WATER SYSTEM, in the County of )  
Fresno, State of California, and )  
to transfer Certificates of )  
public convenience and necessity. )

Application No. 56436  
(Petition filed July 3, 1979)

O P I N I O N

Decision No. 86238, issued August 10, 1976, approved the transfer of the Anoosh-Van Water System and the Wesmilton Water System, owned by C. Wesley Bird and Jennie C. Bird (sellers), to James H. Kitchen and Bernice K. Kitchen (buyers). Subsequent to the decision, buyers and sellers had a falling out which resulted in court action and certain petitions to the Commission. As a result of the petitions, buyers were enjoined by Decision No. 86985, dated February 15, 1977, from interfering with the operation of the two systems. A lapse in the authorized transfer period has been averted by three orders by the Commission authorizing an extension in the transfer period. The latest of these extensions was by Decision No. 89675, dated November 28, 1978 and extending the time for completion of the transfer to December 1, 1979.

The completion of the transfer of the Anoosh-Van Water System from sellers to buyers was accomplished by Decision No. 89054, dated July 11, 1978. That decision recited the somewhat unusual manner of accomplishing the transfer and determined that it was in full compliance with the requirements of this Commission and the Public Utilities Code.

At the time of the completion of the transfer of the Anoosh-Van Water System, all that remained to complete all aspects of this application was the completion of the transfer of the Wesmilton Water System. This completion was being delayed by continued litigation concerning the title to the water system properties, Case No. 208786-4 in the Superior Court of Fresno County.

The Commission has received a certified copy of two interlocutory judgments entered in that proceeding which place title to the Wesmilton Water System in the buyers and make an accounting of all monies related to the system. By the terms of the judgments, the buyers are directed to be placed in possession of the property forthwith. A copy of each of the interlocutory judgments is appended to this order.

The buyers have additionally informed the Commission by means of an advice letter filing that they have adopted the existing tariffs of the Wesmilton Water System. Buyers now request that the Commission find them to be a public utility in connection with that system.

While compliance with a transfer authorization does not normally require any subsequent orders by this Commission as long as the requirements of the transfer have been complied with, the Commission believes that an order is appropriate in this situation due to the protracted and complex nature of the events in this transfer. Although not mandated, this decision will serve to clarify the status of the Wesmilton Water System.

The Commission recognizes that the judgments on which the transfer was ordered by the Superior Court are interlocutory in nature, and therefore may be subject to appeal and review at some time in the future. The ongoing nature of the court proceeding between the buyers and sellers, which includes issues beyond the title to the water system property, may not be concluded for a significant time. It is our belief that to allow uncertainty in the operation of the Wesmilton Water System to continue until such time as the last appeal in the court proceeding might be completed - perhaps years from now - would not be in anyone's best interest.

Findings of Fact

1. The court proceeding which was undertaken to establish proper title to the Wesmilton Water System has been concluded on an interlocutory basis in favor of the buyers.
2. The establishment of the proper title in the Wesmilton Water System was the only remaining issue affecting the completion of the transfer of the Wesmilton Water System from sellers to buyers.
3. All other conditions precedent for transfer of the Wesmilton Water System have been complied with.

Conclusion of Law

The transfer of the Wesmilton Water System from the sellers to the buyers should be approved and declared final. The effective date of this order should be the date on which it is signed because of the immediate need by patrons of the water system to know the public utility entity to whom they should look to for service and the payment of their bills.

O R D E R

IT IS ORDERED that:

1. The transfer of the Wesmilton Water System from C. Wesley Bird and Jennie C. Bird to James H. Kitchen and Bernice K. Kitchen is authorized and approved.

2. James H. Kitchen and Bernice K. Kitchen, doing business as Wesmilton Water System, are a public utility water corporation.

3. C. Wesley Bird and Jennie C. Bird are relieved of their public utility responsibility in relation to the Wesmilton Water System.

The effective date of this order is the date hereof.

Dated JUL 17 1979, at San Francisco, California.

John E. Byron  
President

Wesley L. Johnson

Charles D. Hoyle

Clara J. Smith

Samuel W. Smith  
Commissioners

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CHARLES W. BREWER, 070263  
Attorney at Law  
Cowin, Johnson, Brewer, Tibbs & Kinney  
929 "L" Street, Suite B  
Fresno, California 93721  
(209) 445-1234

**FILED**

GALEN LARSON, Clerk

By \_\_\_\_\_

Attorney for Plaintiffs &  
Cross-Defendants

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

JAMES H. KITCHEN and BERNICE )  
K. KITCHEN, husband and wife, )  
 )  
 ) plaintiffs. )  
 )  
 ) vs. )  
 )  
 ) C. WESLEY BIRD AND JENNIE C. )  
 ) BIRD, etc., et al., )  
 )  
 ) Defendants. )

CASE NO. 203786-4

INTERLOCUTORY JUDGMENT  
FOLLOWING ACCOUNTING

AND RELATED CROSS-ACTIONS.

The above-entitled case came on regularly for trial on October 27, 1978, in Department 6 of the above entitled court, the Honorable Simon Marootian, Judge, presiding, without a jury, the court thereafter having entered an Interlocutory order dated April 6, 1979, and on April 13, 16 and 19 and June 5, 1979 having heard evidence, both oral and documentary, on behalf of all parties with regard to the Accounting previously ordered the Court, having considered the evidence, and having heard the arguments of Counsel, and being fully advised in good cause appearing:

WHEREFORE, IT IS HEREBY ORDERED ADJUDGED AND DECREED as follows, to wit:

APPENDIX A

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1. The Defendants-Sellers are accountable to Plaintiffs-Buyers for net profits from August 25, 1976 through May 31, 1979 in the sum of \$18,713.77.

2. The Defendants-Sellers are entitled to an offset against said net profits for interest in the sum of \$25,174.16 for the same period of time, but not to exceed the amount of net profits for which they are accountable.

3. Plaintiffs shall be placed in possession of the subject property and business forthwith.

4. Plaintiffs shall, within one month of taking possession, commence making payments of \$800.00 per month including interest at 8 percent for a period of three years, pursuant to the terms of the contract and escrow agreement which the Court has previously ordered specifically performed.

5. Plaintiffs shall not be required to make any lump sum payment prior to being placed in possession of the property and business.

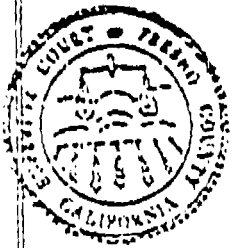
DATED: June 12, 1979

SIMON MAROOTIAN

Judge of the Superior Court

THE FOREGOING IS APPROVED AS TO FORM:

The foregoing instrument is DOTY, QUINLAN, KERSHAW & FANUCCHI correct copy of the original on file in this office.



ATTEST:

JUN 13 1979

BY

GALEN LARSON, County Clerk  
State of California  
County of Fresno

Edward L. Fanucchi,  
Attorney for Defendants and  
Cross-Complainants

By [Signature]  
DEPUTY

APPENDIX B

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CHARLES W. BREWER, 070263  
Cowin, Johnson, Brewer, Tibbs & Kinney  
Attorneys at Law  
929 "L" Street, Suite B  
Fresno, California 93721  
(209) 445-1234

APR 6 9 38 AM '79  
GALVIN HUGH  
FRESNO COUNTY CLERK  
BY \_\_\_\_\_ DEPUTY

Attorneys for Plaintiffs and  
Cross-Defendants

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

JAMES H. KITCHEN and BERNICE K.)  
KITCHEN, husband and wife, )

Plaintiffs, )

NO. 208786 - 4

vs. )

C. WESLEY BIRD and JENNIE C. )  
BIRD, husband and wife, )  
individually and doing busi- )  
ness as WESMILTON WATER SYSTEM )  
and ANOOSH-VAN WATER SYSTEM, )  
and DOES I through X, )

Defendants. )

INTERLOCUTORY ORDER

C. WESLEY BIRD and JENNIE C. )  
BIRD, husband and wife, and )  
doing business as WESMILTON )  
WATER SYSTEM and ANOOSH-VAN )  
WATER SYSTEM, )

Cross-Complainants, )

vs. )

JAMES H. KITCHEN and BERNICE )  
K. KITCHEN, husband and wife, )  
and DOES I through V, inclu- )  
sive, )

Cross-Defendants. )

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## APPENDIX B

1           The above-entitled cause came on regularly for  
2 trial on October 27, 1978, in Department 6 of the above-entitled  
3 court, the Honorable Simon Marootian, Judge, presiding, without a  
4 jury, the trial having been bifurcated and the court hearing only  
5 the issues of: quiet title, injunctive relief, specific perform-  
6 ance, rescission, and cancellation of instrument, the remaining  
7 issues being reserved for jury; and was actually tried on that  
8 date and on October 30, 1978. Plaintiffs and Cross-Defendants  
9 JAMES H. KITCHEN and BERNICE K. KITCHEN appeared by Charles W.  
10 Brewer, their attorney and Defendants and Cross-Complainants C.  
11 WESLEY BIRD and JENNIE C. BIRD by her guardian ad litem, ROBERT  
12 BIRD, appeared by Edward L. Fanucchi, their attorney.

13           Evidence, both oral and documentary, was introduced on  
14 behalf of all parties and the cause was argued and submitted for  
15 decision. The court, having considered the evidence, and having  
16 heard the arguments of counsel, and being fully advised and good  
17 cause appearing:

18           WHEREFORE, IT IS HEREBY ORDERED as follows, to-wit:

19           1. Title to the property commonly known as the Wesmilton  
20 Water System including all pumps, storage tanks, valves, pipes,  
21 equipment and the real property particularly described as:

22           PARCEL 1:

23           Lot 103 in TRACT NO. 1188, KHAN TRACT, according  
24 to the map thereof recorded in Book 15 Page 33  
25 of Plate, in the office of the County Recorder  
26 of said County;

26           EXCEPTING THEREFROM the North 120 feet of the  
27 East 75 feet thereof;

27           ALSO EXCEPTING THEREFROM the North 312 feet of  
28 the South 467 feet of the East 115 feet thereof,  
said South 467 feet being measured along the



APPENDIX B

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East line of said lot;

ALSO EXCEPTING THEREFROM that portion thereof described as follows:

Beginning at the most Southerly corner of said Lot; thence North along the East line thereof 150 feet; thence West 115 feet; thence South 20 feet to the Southwesterly line of said Lot; thence Southeasterly along said, Southwesterly line 175 feet to the point of beginning.

PARCEL 2:

The East half of the North 208.708 feet of the West 208.708 feet of the East half of the West half of the Southwest quarter of Section 30; Township 15 South, Range 22 East, Mount Diablo Base and Meridian, according to the United State Government Township Plats.

is quieted in the plaintiffs JAMES H. KITCHEN and BERNICE K. KITCHEN as of August 25, 1976, and said plaintiffs are the owners of full beneficial title effective that date, subject to payment by plaintiffs of the consideration and delivery of the note and trust deed in accordance with the escrow agreement between the parties.

2. Plaintiffs JAMES H. KITCHEN and BERNICE K. KITCHEN have performed and are entitled to specific performance of the real estate contract and receipt of deposit and the escrow agreement, dated January 27, 1976, and January 29, 1976, respectively, subject to payment by plaintiffs of the consideration and delivery of the note and trust deed in accordance with said escrow agreement between the parties.

3. The court reserves jurisdiction to decide when the notice of pendency of the present action which was recorded by defendants on December 16, 1977, in Book 6935, Page 783, Official Records, Document No. 135141, Fresno County, shall be expunged.

## APPENDIX B

1           4. Defendants C. WESLEY BIRD and JENNIE C. BIRD by her  
2 guardian ad litem ROBERT BIRD, are enjoined from further inter-  
3 ference with the rights and interests of plaintiffs JAMES H.  
4 KITCHEN and BERNICE K. KITCHEN as owners of the Wesmilton Water  
5 System, and are ordered to cooperate in transferring the possession,  
6 operation and maintenance of said property to plaintiffs, includ-  
7 ing but not limited to the delivery of all records, memoranda,  
8 books and papers pertaining to the constructions, maintenance  
9 and operation of the Wesmilton Water System, except that pending  
10 the completion of the following, defendants shall continue in  
11 possession of the property:

12           (1) Execution and delivery of the note and trust  
13 deed as provided by the escrow agreement and payment of the money  
14 to be credited to the note and trust deed so as to make it current  
15 from August 25, 1976, to the date of this order;

16           (2) an accounting by and between defendants and  
17 plaintiffs regarding all operation of the subject property, to be  
18 prepared, filed and served in the manner and at the times set  
19 forth hereinbelow;

20           (3) approval of said accounting by this court and  
21 the payments of money and/or the adjustment of credits and debits  
22 thereunder;

23           (4) cooperation by and between the parties in  
24 connection herewith in order to facilitate completion of the  
25 transition so that possession can be delivered to plaintiffs.

26           5. Defendants are ordered to account for all income  
27 derived from the Wesmilton Water System from August 25, 1976, to  
28 the date of this judgment and until such time as the transfer to

APPENDIX B

1 the plaintiffs in complete. Defendants are ordered to have  
 2 filed and served said accounting no later than March 23, 1979.  
 3 Similarly, plaintiffs are ordered to prepare an accounting with  
 4 regard to the Wesmilton Water System, to have been filed and  
 5 served no later than March 23, 1979. Both parties shall have  
 6 until April 11, 1979, within which to file and serve their  
 7 objections, if any, to the accounting of the other.

8 6. The court shall hear and consider the matter  
 9 of the accountings, and any objections thereto, at 8:30 a.m.,  
 10 April 13, 1979, in Department 6 of the above-entitled court.  
 11 The parties shall have 30 minutes each to present evidence and  
 12 oral statements to supplement or explain their respective  
 13 accountings and/or their respective objections to the accounting  
 14 of the other.

15 7. This interlocutory order is made for the purpose  
 16 of providing for an orderly and fair operation and accounting  
 17 of the subject property and business pending the transfer of  
 18 possession to plaintiffs, the completion of the accounting and  
 19 the trial of final issues which have been bifurcated.

20 THE FOREGOING IS APPROVED  
 21 AS TO FORM:

The foregoing instrument is a  
 correct copy of the original on  
 file in this office.

22 DOTY, QUINLAN, KERSHAW & FANUCCHI  
 23 By \_\_\_\_\_  
 24 EDWARD L. FANUCCHI, ATTORNEY  
 25 for Defendants and Cross-Defendants



26 ATTEST: JUN 29 1979

GALEN LARSON, County Clerk  
 State of California  
 County of Fresno  
 By \_\_\_\_\_ DEPUTY

26 DATED: APR 6 1979

SIMON MAROOTIAN  
 Judge of the Superior Court