

Decision No. 28055

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the Matter of the Application
of
JESSE NICHOLSON, for revision
of a contract, and to determine
that A. E. Montgomery is subject
to rate schedule.

Application No. 26511.

For Applicant, LUCAS & WYCKOFF, Attorneys,
by STEPHEN WYCKOFF.

For Protestant, J. FRANK MURPHY, Attorney.

ROWELL, COMMISSIONER:

O P I N I O N

Applicant Jesse Nicholson owns and operates a small domestic water system known as the Valencia Water Works, near Aptos, Santa Cruz County. In 1920 he purchased certain water distribution facilities and water rights in Valencia Creek from Harriet Hihn and Theresa A. Hihn, his deed of conveyance imposing upon him the obligation to supply water for family use without charge to two houses and a small barn, then owned by the grantors. One A. E. Montgomery has recently purchased such premises. Nicholson seeks the Commission to relieve him from that obligation to continue free service to Montgomery.

Nicholson's water service was first declared to be a public utility when in 1939 he applied to the Commission in Application No. 22522, for authority to render utility service and to establish a schedule of rates. The Commission's decision in that proceeding reviewed the history of the water service which had been rendered in that community even before Nicholson acquired the water system. There had been a lumber mill located on Valencia Creek, owned by the Hihn family, and a system of pipes had been installed to deliver water to the homes of those there

employed. The Commission's opinion stated that the evidence indicated a complete dedication of the water supply and distribution system to public use by the Hihns interests as early as the year 1886.

Were the Commission now to accept such finding made in the 1939 proceeding as meaning that all of the water rights in Valencia Creek owned by the Hihns at the time of their conveyance to Nicholson were devoted to public use, we would be compelled to hold that his continuance of free water service to the Montgomery premises would constitute an undue preference to one consumer. The law of this State, as reflected in judicial opinions, the latest of which is *Lamb vs California Water and Telephone Co.*, 21 Cal. (2) 33, is that the owner of a water right, after a dedication of such water to public use, may not carve out any part thereof for the private use of himself or his assigns; but he may at the time of dedication reserve a part for his own use. When waters have once been impressed with a public use, it is within the power of the Commission to enforce the application of non-discriminatory rates without impairing any private contract obligation. And should the contracting party then assert a failure of consideration, his claim for restitution must be presented to a court of law rather than to this Commission.

The facts as recited in the deed of the Hihns to Nicholson indicate that they claimed to own a one-half interest in all the waters of Valencia Creek. Water was then being diverted through a small flume; and from this flume water was being raised into a storage tank by means of a Rife Hydraulic Ram and then distributed by gravity through a pipe system. Along with the distribution system deeded to Nicholson; he was granted the right to divert and use so much of the flow of Valencia Creek as then was required to economically operate the hydraulic ram. In addition to the cash consideration paid by Nicholson, he obligated himself to run and connect a one and one-quarter inch pipe to the two places belonging to his grantors and to supply water to them and their assigns for family use without charge.

It appears from the testimony given by Mr. Nicholson in this proceeding that he did make such pipe connections, though of lesser size, and thereafter supplied free water whenever called upon by occupants of those houses. There were

about ten connected services at the time he acquired the distribution system. Thereafter he extended his lines, and today he has twenty-one connected consumers. In the winter of 1939 the hydraulic ram was washed out and has not since been operated. He has installed a small electrically-driven pump and now lifts the water directly from the stream instead of from the flume.

There was no evidence presented at the hearing on this application which would cast any doubt upon the correctness of the Commission's judgment of 1939 when it declared that Nicholson's water supply and his facilities for distribution had been dedicated to public use prior to the time he acquired them in 1920. On the other hand, there is nothing in the record which would permit us to further find with certainty that all of the water rights of the Hihns were dedicated to public use at that time, or that by their instrument of conveyance in 1920 they attempted to carve out of dedicated water a purely private right for themselves and their assigns. Neither are the recitals in that instrument in any way inconsistent with Nicholson's contention that the service which he agreed to render to the two houses was to be from his own public utility waters and water delivery system.

The circumstances seemingly prompting Nicholson to file this application need not be here enlarged upon. It is sufficient to say merely that a dispute arose between Nicholson and Montgomery over the excessive amount of water alleged to be consumed at the latter's residence. Nicholson declares that he is still willing to provide him with a reasonable amount of water for domestic use. Because of limited capacity of his water system and the difficulties encountered in distributing water throughout a hilly residential area, it is evident that the service rendered to the rest of his customers may be seriously impaired unless the use of water by Montgomery be subject to the same rules and regulations as are applicable to other customers.

Therefore, in view of Nicholson's offer to continue free service for domestic use only, and the inadequacy of the record now before us to permit the making of findings as to the legal rights of the parties, it is our opinion that the issuance of an order permitting Nicholson to continue free water service for

domestic use only would be the most equitable solution of this dispute. Both parties should understand that the quantity of this free water is strictly limited to the amount reasonably necessary for domestic purposes only, a use which shall not imperil the rights of the other consumers to adequate water service. I recommend the following order.

ORDER

A hearing having been had upon the above described application of Jesse Nicholson, the matter considered, and good cause appearing

IT IS HEREBY ORDERED that Jesse Nicholson be and hereby is authorized to deliver a reasonable amount of water to A. E. Montgomery for domestic use only in accordance with the findings in the foregoing Opinion and to waive the collection of all charges for water so delivered, and also to waive the collection of charges for water heretofore delivered.

The effective date of this Order shall be the 20th day from and after the date hereof.

The foregoing Opinion and Order is hereby approved and adopted as the findings, opinion and order of the Commission.

Dated at Los Angeles California, this 10th day of July, 1945.

Richard D. Rudolph
Richard Jackson

Frank W. Case
Walter H. Russell

COMMISSIONERS.