

Decision No. 57751

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of DICK R. FRIESEN for a certificate of public convenience and necessity and for the establishment of rates for water service to Angwin and vicinity in Napa County.

Application No. 36736
(Further Hearing)

Investigation on the Commission's own motion into the status, operations, practices, contracts, rules, charges and service of DICK R. FRIESEN and of J. H. CHAMPION in the furnishing of water in or near the community of Angwin, Napa County, California.

Case No. 5683
(Further Hearing)

ANGWIN CHAMBER OF COMMERCE,
Complainant,
vs.
DICK R. FRIESEN,
Defendant.

Case No. 5910

In the Matter of the Application of PACIFIC UNION COLLEGE ASSOCIATION for an order authorizing it to carry out the terms and conditions of a contract dated February 20, 1957, with Dick R. Friesen for accommodation storage of water for a limited period of time.

Application No. 38853
(Further Hearing)

Scott Elder, for Dick R. Friesen, applicant in Applications Nos. 36736 and 38853, respondent in Case No. 5683, and defendant in Case No. 5910.
Leigh Athern, for Angwin Chamber of Commerce, complainant in Case No. 5910 and interested party in Application No. 36736 and Case No. 5683.
Avakian & Johnston, by Spurgeon Avakian and H. Helmut Loring, for Pacific Union College Association, applicant in Application No. 38853.
Edward G. Fraser, Jr. and John D. Reader, for the Commission staff.

O P I N I O N

Nature of the Proceedings

The above-entitled proceedings concern water service being rendered by Dick R. Friesen, doing business as Angwin Water Works, in the community of Angwin and vicinity, located about eight miles

northeast of the City of Saint Helena, in Napa County. Collectively, they have raised and still present many involved questions. Some of these have been settled by prior decisions^{1/} rendered in one or more of these and related matters. There remain, however, several issues to be determined in the three proceedings which have been reopened for further hearing and in the complaint, all inter-related. Such issues will be summarized hereinafter.

Details of the original filings and of the previous decisions and orders entered in these several matters will be included herein only to the extent deemed necessary to clarify and facilitate the present considerations. To attempt to review in more detail what has taken place heretofore, would tend to confuse an already complex situation and would unduly prolong what must necessarily be a somewhat lengthy discussion.

Angwin Chamber of Commerce,^{2/} on February 27, 1957, filed a complaint against Dick R. Friesen, Case No. 5910, in which it referred to Decision No. 53765 and requested that the Commission order and require defendant Friesen not to furnish water to any new or additional consumers. The complaint alleged that during the summer period there would be insufficient water available to Friesen to give adequate service within his certificated area, that the defendant had reached the limit of his capacity to supply water to said area, and that no further consumers of water could be supplied

^{1/} Decision No. 53765 dated September 18, 1956, in Application No. 36736 and Case No. 5683 and Decision No. 54196 dated December 4, 1956, in the same matters; Decision No. 54858 issued ex parte April 16, 1957, in Application No. 38853; also Decision No. 56840 dated June 17, 1958, in rate increase Application No. 39533.

^{2/} Sometimes herein called Chamber.

from defendant's system without injuriously withdrawing the supply from those who have heretofore been supplied therefrom. In his answer to the complaint, filed March 27, 1957, defendant Friesen alleged that in accordance with the limitations of the order in Decision No. 53765, he had made commitments to furnish certain additional services, not exceeding six in number, within his service area. Friesen asked that the Commission issue its order as requested in the complaint, except that provision be made for the defendant to fulfill the said commitments.

On August 6, 1957, Friesen filed a petition to reopen Application No. 36736 and Case No. 5683 and for modification of Decision No. 53765. The petition contained the following allegations:

1. That, while the said decision prescribes that no new or additional subdivisions or multiple unit connections may be served without a showing that there is available an adequate supply of water, it imposes no limitation as to serving additional individual applicants; that, however, Friesen's water supply is inadequate to permit him to furnish water to any additional consumers (excepting a certain few to whom commitments for service have already been made) without injuriously affecting his existing consumers; and that Friesen's certificate should be amended to give recognition to this situation.
2. That the said decision required Friesen to set up on his books the plant accounts and depreciation reserve substantially as shown in Table 6-A of the staff's Exhibit No. 12; that, however, the valuations assigned in said Table 6-A to many items of property were seriously inaccurate and prejudicial to Friesen; and that said Table 6-A includes as public utility assets a number of items, especially certain sources of supply, which have not been devoted to the public service.
3. That the foregoing determinations and directions were inadvisedly made and given by the Commission without a full and sufficient knowledge and understanding of the matters, because the facts concerning them were not presented completely or adequately at the hearings; that said determinations and directions have an important and significant influence upon the adequacy of Friesen's service and the sufficiency of the rates and charges necessary to maintain that service; and that the two

proceedings were being requested to be reopened for further evidence and reconsideration of said determinations and directions, in connection with a rate increase application then in process of preparation by Friesen.

On April 7, 1958, attorneys for Pacific Union College Association^{3/} and Friesen jointly filed a petition to reopen Application No. 38853, in which petition reference was made to Application No. 36736 and Case No. 5683 and to the Commission's decisions in all three matters. The petition alleged as follows:

1. That, in rendering its Decision No. 53765, in addition to the errors specified in Friesen's petition to reopen Application No. 36736 and Case No. 5683, the Commission erred also in ruling that the agreements between College and Friesen were subject to Commission jurisdiction, in that they were private agreements and concerned water never dedicated to public use; that the relevant evidence presented in the prior hearings was inaccurate and incomplete; and that such evidence should be corrected and supplemented in order to apprise the Commission adequately as to the facts regarding these agreements and the water in question.
2. That the contract of February 20, 1957, pertaining to storage and sale of 20 acre-feet of water by Friesen to College, submitted in connection with Application No. 38853, was entered into by the parties thereto without advice of counsel and with an erroneous understanding of the legal effect of said instrument, resulting in erroneous acquiescence by the parties to the Commission's jurisdiction over said contract as determined by the Commission's Decisions No. 53765 and No. 54858.
3. That, since the said contract of February 20, 1957 did not correctly set forth the intention of the parties thereto and since by it the parties erroneously acquiesced in the Commission's jurisdiction over said contract, the parties, on April 4, 1958, entered into a new agreement, rescinding the former one, a copy of which was attached to the petition.

The petition requested that the Commission (1) reconsider the status of said 20 acre-feet of water and the Commission's jurisdiction over the agreements between College and Friesen;

^{3/} Either this corporation or Pacific Union College, itself, sometimes called herein College.

(2) vacate and set aside its order in Decision No. 54858; and
(3) find that the agreements between Friesen and College concerning the supply of water by the former to the latter for irrigation purposes out of Oroville Lake and Deer Lake are not subject to the Commission's jurisdiction.

Summary of the Issues

In these four inter-related proceedings, the basic issues now before the Commission for determination may be briefly stated as follows:

1. The sufficiency of the water supply for the public utility system now being operated by Friesen.
2. The modification and clarification of the present limitation of water service imposed upon Friesen, in his certificated area, as to how many and which new connections, if any, he should be authorized to supply in addition to the customers now being served.
3. The extent of dedication to public utility purposes of certain water supply facilities included in the items of utility properties as shown in Table 6-A of Exhibit No. 12 which Friesen was ordered to set up on his books of utility plant accounts.
4. The Commission's jurisdiction over agreements between Friesen and College concerning the storage by Friesen of the 20 acre-feet of water and its delivery and sale to College for irrigation purposes.

Public Hearings

After due notice to all interested parties of record in the several proceedings, further hearings in Application No. 36736, Case No. 5683 and Application No. 38853, combined with the original hearing in Case No. 5910, were held on a consolidated record before Commissioner Ray E. Untereiner and Examiner E. Ronald Foster on April 17 and 18, 1958, at Angwin. A number of people, including customers of the utility, attended the hearings and some of them testified in regard to their desires to obtain water service to their premises.

Following the introduction of further evidence, both oral and documentary, by Friesen on his own behalf, by two witnesses for Chamber and by one witness for College, the matters were submitted for decision subject to the later filing of two exhibits which were received by the Commission on April 28, 1958.

Including the 30 exhibits presented at the hearings in 1955, there were 47 exhibits introduced in evidence in relation to these several proceedings and the reporter's transcript of the record therein contains 709 pages.

On July 3, 1958, counsel for Friesen filed a stipulation signed by himself and counsel for all other appearances of record wherein the parties agreed that if Friesen were called for further testimony in these proceedings he would testify on direct- and cross-examination substantially as set forth in the stipulation and the parties agreed that the said stipulation might be considered in evidence herein. On July 9, 1958, Friesen's attorney filed a petition for an order reopening the proceedings to receive the said stipulation in evidence. By the Commission's Decision No. 57144, dated August 12, 1958, submission in the above-entitled proceedings was set aside and the matters were reopened only for the purpose of receiving in evidence the stipulation filed July 3, 1958; the said stipulation was received in evidence; and the four proceedings again were submitted for decision.

Nature of the Evidence

To supplement and bring up to date the evidence introduced at the 1955 hearings, the several witnesses at the recent hearings offered oral testimony supported, in some instances, by additional exhibits, all of which will be discussed under appropriate headings hereinafter.

1. Source of Water Supply Facilities

Except for an annual amount of about 13 acre-feet of water obtained from three low-yield springs and three small-capacity wells, Friesen obtains his water supply chiefly from impounded seasonal rainfall run-off, amounting normally to about 375 acre-feet, from a watershed of some 500 or 600 acres, of which Friesen claims ownership to only about 200 acres. The several impounding dams are all located on Friesen's ranch, as is the treatment plant where all water from the springs and reservoirs (with the exception of that supplied to the College for irrigation purposes) is filtered and chlorinated prior to delivery to the distribution system.

Friesen introduced in evidence a contour map (Exhibit No. 32) of the area in which are situated the six reservoirs or lakes formed by earth-fill dams which he has constructed and another map (Exhibit No. 33) showing the name, point number, capacity and relative location of the same six lakes. On both maps four of the lakes, Red, Newton, Granite and Whitehead, are colored blue to indicate that Friesen considers them as "domestic" reservoirs intended to be used for supplying water to the public utility system. Pipelines are shown leading from these four lakes and from three springs to the filter plant and storage tanks from which a 6-inch pipeline delivers the water to the public utility distribution system.

The other two lakes, Oroville and Deer, are colored green on the maps to indicate that Friesen considers them as "agricultural and recreational" reservoirs and not intended to be included as part of the public utility system or dedicated to public utility purposes. There is no permanently installed connecting pipeline between either of the two so-called agricultural lakes and the system of domestic lakes. An 8-inch pipeline, owned and maintained by College and

constructed by it on a right-of-way granted by Friesen, delivers water from Oroville Lake through a meter to College for irrigation purposes only. Friesen endeavors to maintain the water in Oroville at a relatively high level for recreational purposes, including boating, fishing and swimming, in connection with his summer resort activities, and some water also is used from it for irrigation and stock watering purposes on his ranch.

A pipeline has been installed to conduct water from Deer Lake over a saddle into another watershed where Friesen uses it for irrigation of additional agricultural or grazing land and from where any water not so used will flow down a separate watercourse toward Oroville Lake. It is important to note the fact that water from the Deer Lake watershed, unless so impounded there and diverted by means of the said pipeline, would flow along its natural watercourse into Newton Lake and any water overflowing or released therefrom (other than through the pipeline to the filter plant) would then flow into Oroville Lake.

Also, it is evident that water from Whitehead Reservoir can be released to flow through a natural watercourse into Oroville Lake.

2. Applications to Appropriate Water

Friesen put in evidence photostat copies of several applications to appropriate water which had been filed at various times with the Division of Water Resources^{4/} of the State Department of Public Works, together with other documents attached or specifically related thereto.

^{4/} Abolished in 1956 and State Department of Water Resources and State Water Rights Board created as independent agencies.

Of particular importance is the earliest one, Application No. 8512 (Exhibit No. 34) dated December 2, 1935, and amended March 24, 1936, which was filed by the College requesting permission to appropriate, for irrigation of 360 acres at locations described therein, a total of 101.45 acre-feet of water per annum, to be collected and stored between October 1 and May 1 of each season in various detailed amounts at points 1, 2, 3, 4 and 5, which points Friesen testified correspond to Oroville, Red, Newton, Granite and Deer Lakes, respectively. Permit No. 4760 was issued July 3, 1936, approving such appropriation. Documents attached to the application reveal that on March 15, 1937, College assigned to Friesen all its right, title and interest in said Application No. 8512 and Permit No. 4760; that on April 4, 1939, Friesen re-assigned his interest in the said filing to College for a term of 20 years; that on February 4, 1957, College again assigned to Friesen the residual interest in the said filing but reserved for College the 20 acre-feet theretofore stored by Friesen in either Whitehead or Newton Reservoirs under the 18-year contract dated February 10, 1941 and expiring February 10, 1959 (Exhibit No. 30); that it was the purpose and intent of College to terminate that contract upon the granting of a permit from the Water Rights Board for a change in place of storage and diversion upon its own lands; and that College made application to have the said 20 acre-feet of water stored in a reservoir located on an unnamed draw, being a tributary to Angwin Creek at a location apparently on lands of College. On February 28, 1958, the Water Rights Board issued an order (Exhibit No. 37) granting permission to change the place of use under said Application 8512, Permit 4760, to 280 acres at certain locations for irrigation purposes and to certain other locations for domestic, stockwatering and recreational purposes.

Soon thereafter, on April 10, 1958, the Water Rights Board issued License 5064 (Exhibit No. 38) certifying to Friesen and Colledge the right to the use of the original amount of 101.45 acre-feet of water per annum for irrigation, domestic, stockwatering and recreational uses under said Permit 4760; to be collected, however, at six points, which now include Whitehead Lake, and in detailed amounts at each point differing considerably from those named in the original filing.

On September 26, 1936, Friesen filed Application No. 8801 with the Division of Water Resources (Exhibit No. 35), requesting permission to appropriate for domestic, recreation and stock purposes a total of 136 acre-feet of water per annum in various detailed amounts at points 1, 2, 3, 4 and 5 which also correspond to Oroville, Red, Newton, Granite and Deer Lakes, respectively. Permit No. 4861 was issued December 14, 1936, approving such appropriation. On February 28, 1958, the Water Rights Board issued another order (Exhibit No. 42), granting permission to change the place of use under said Application 8801, Permit 4861, to 65 acres at certain locations for irrigation purposes and to certain other locations for domestic, stockwatering and recreational purposes. Also, on April 10, 1958, the Water Rights Board issued License 5063 (Exhibit No. 43) certifying to Friesen the right to the use of the said amount of 136 acre-feet of water per annum, for similar purposes as before, under Permit 4861; to be collected, however, at points 2, 3, 5 and 6, which points correspond to Red, Newton, Deer and Whitehead Lakes and in detailed amounts differing considerably from those named in the original filing, except in the case of Newton Lake.

Application No. 11275 (Exhibit No. 36) dated February 5, 1946, and amended April 30, 1946, was filed with the Division of Water Resources by Friesen, requesting permission to appropriate for irrigation

of 30 acres at locations described therein, for domestic use at certain locations, and for watering 500 head of livestock at other locations, a total of 40 acre-feet of water per annum, to be collected in certain detailed amounts at points 1, 5 and 6, which points correspond to Oroville, Deer and Whitehead Lakes. Permit No. 6653 was issued December 30, 1946, approving such appropriation, subject to any prior rights, including rights initiated by the filing by the City of Napa of Application No. 10990.

There follows a tabulation of the appropriations covered by the three above-described applications, permits and licenses, showing the detailed amounts at each point of diversion as last authorized by the state agencies and the totals related to the capacities of the several storage reservoirs, identified by the names of the lakes and showing when they were constructed:

Item	Diversion or Storage Points						Total
	1	2	3	4	5	6	
Point Number ϕ							
Name of Lake	Oroville	Red	Newton	Granite	Deer	Whitehead	
Constructed #	1929-33	1939	1936	1936-7	1936	1946-7	
Capacity, Acre-Feet*							
"Domestic" Res.	-	36	65	14	-	85	200
"Agr. & Rec." Res.	34.45	-	-	-	43	-	77.45
Total	34.45	36	65	14	43	85	277.45
<u>Diversion, Acre Feet</u>							
Appl. 8512, Lic. 5064	21	24	25	14	2.45	15	101.45
Appl. 8801, Lic. 5063	-	12	40	-	14	70	136
Appl. 11275	10	-	-	-	10	20	40
Totals	31	36	65	14	26.45	105	277.45

ϕ Numbers relate to diversion points designated in applications to appropriate water.

Additional construction to create present storage capacities may have been done in later years.

* As shown in Exhibits Nos. 33 and 40.

The record does not explain the apparent discrepancies in the foregoing tabulation between the reservoir capacities and the total diversions at three of the points.

On October 17, 1950, Friesen filed Application No. 14406 with the Division of Water Resources (Exhibit No. 1), requesting permission to appropriate for irrigation of 390 acres at locations described therein and for domestic, recreational and stockwatering uses at certain locations, a total of 130 acre-feet of water per annum, to be collected in detailed amounts at points 7, 8 and 9, which refer to storage reservoirs not yet constructed. Permit No. 9205 was issued November 28, 1952, approving such appropriation, subject to any prior rights, including those initiated by the filing by the City of Napa of Application No. 10990.

3. Water Deliveries

Water served to domestic customers and also that sold to College for irrigation purposes is delivered through meters registering in cubic feet. For purposes of comparison with water diversions and storage, the total deliveries for the past four years have been converted to acre-feet and are shown in the following tabulation, based on Exhibit No. 41 and additional testimony by Friesen.

Calendar Year*	<u>Domestic Water Consumption</u>			From Reservoirs Acre- Feet	Irrigation Water Sold to College Acre-feet	Total# Deliveries from Reservoirs Acre-Feet
	<u>Total Deliveries</u> Cubic Feet	<u>Acre-Feet</u>	<u>Springs and Wells</u> Acre-Feet			
1954	5,136,773	117.92	13	104.92	20.15	125.07
1955	4,877,534	111.97	13	98.97	1.21	100.18
1956	5,027,457	115.41	13	102.41	22.00	124.41
1957	4,827,605	110.83	13	97.83	(negligible)	97.83

* Reservoirs full each year, except that in 1957 the level in Newton Lake was one foot below capacity.

Total does not include transmission and distribution system losses, nor water released for agricultural and other purposes on Friesen's properties.

Friesen testified that in all years prior to 1954 he had sold irrigation water to College in quantities much greater than the contractual 20 acre-feet, even over 40 acre-feet having been delivered in each of 9 years between 1940 and 1953, inclusive, the amounts varying with the College's requirements and what Friesen said he could spare. In 1955 and 1957 he was able to supply only the small deliveries shown because of the demand on his domestic system. In order to meet that demand, he stated that he had used portable pumps to obtain small quantities of water available immediately after rainstorms in the creek below the reservoirs and to pump water out of Oroville Lake into Red Lake for treatment and thence by way of Whitehead Lake to his filter plant, as emergency measures.

From Exhibits Nos. 6, 7 and 47, it may be observed that the seasonal rainfall in the Angwin-St. Helena area was greatly in excess of normal in the 1955-1956 season while it was considerably below normal in the seasons of 1953-1954, 1954-1955 and 1956-1957. It may also be noted that during the past three decades there have been two seven-year periods when the seasonal rainfall in this area was below normal.

Friesen testified, however, that the amount of rainfall is not a reliable criterion of the available diversions since the effective storage in the reservoirs depends greatly upon the timing and duration of the rains and the amount of runoff resulting from them. The catchment area above Deer Lake is relatively small so that it is not always possible to fill that reservoir. Run-off during years of ample rainfall cannot be utilized beyond the capacity of the existing reservoirs.

The evidence shows that a large percentage of the amount stored at the end of the rainy season is lost by evaporation and seepage before it is withdrawn for use. Friesen also testified that it is often not possible to utilize all of the water in the lakes due to the stagnant condition which occurs toward the end of the dry season. The amounts remaining in the four domestic reservoirs during recent years was vaguely estimated by Friesen as somewhat less than 25 percent, or 50 acre-feet. The amount of evaporation and seepage losses cannot be determined accurately but has been estimated by engineers of the Commission's staff at 85 acre-feet (Exhibit No. 12).

Therefore, the question arises as to how it is possible to supply from the four domestic lakes, with a combined capacity of only 200 acre-feet, an amount of about 100 acre-feet delivered to the domestic consumers, after accounting for estimated evaporation and seepage losses, unaccounted-for transmission and distribution system losses, whatever amounts may be used from these lakes by Friesen for his own agricultural and other purposes on his ranch or to replenish withdrawals from Oroville Lake for delivery to the College, and the amounts of water left in the four lakes as unsuitable for domestic use. A partial answer to this question is found in Friesen's further testimony contained in the stipulation filed with the Commission on July 3, 1958, and which has been admitted as evidence since the conclusion of the hearings.

In effect, the said stipulation states that after the reservoirs are filled by natural rainfall and pumping in December or January, the water consumption and losses by evaporation are restored

during the next three or four months until the reservoirs are last filled ordinarily at the end of April and sometimes as late as during May. From recorded domestic water consumption during the months of January to April, inclusive, for the years 1955, 1956 and 1957, there have been computed the average domestic consumptions during the three-month period of February, March and April and for the four-month period including January. Based on U. S. Weather Bureau data, the percentage of annual evaporation which occurs during the same three-month and four-month periods has been estimated at 12.5 percent and 16.5 percent, respectively, and these percentages have been applied to the 85 acre-feet of estimated total evaporation from the four reservoirs. The results of these approximations are as follows:

	<u>Three-Month Period</u>	<u>Four-Month Period</u>
Average Domestic Withdrawals	16.43 Ac.Ft.	20.61 Ac.Ft.
Evaporation (and Seepage)	10.60 " "	14.20 " "
Totals	27.03 " "	34.81 " "
Total Average Volume Restored -	30+ Acre-Feet	

The stipulation states that the effect of these circumstances is to add approximately 30 acre-feet each year to the effective capacity of the domestic reservoirs and to increase by about that amount the yield of the reservoirs in each of the years shown in Exhibit No. 41 (excepting only 1957). It further states that this restoration of consumed and evaporated water does not result in any excess appropriation of water beyond the 200 acre-feet authorized, as there is a holding-over of up to 25 percent, or 50 acre-feet each year.

Nevertheless, the fact remains that with the conditions under which Friesen conducted his water utility operations, in 1955 and 1957 he was unable to fulfill his contract with College to furnish 20 acre-feet of water for its irrigation purposes after meeting his domestic public utility requirements by taking such emergency measures as have been described.

The record shows that the College uses its water for irrigation during the dry season from April or May to October, or from about the time that the rains fill the reservoirs for the last time in the spring until the rains start again in the fall. During that time there are heavy evaporation and seepage losses. Therefore it is evident that in order for Friesen to deliver to College a net amount of 20 acre-feet, there must have been stored a correspondingly larger amount, probably between 30 and 35 acre-feet, or a considerable percentage of the authorized diversions and of the available storage capacity in the reservoirs.

4. Public Utility Status, Agreements and Commitments

After Friesen had purchased the White Cottage Ranch in 1929 or 1930, he continued to provide the water service to neighbors which had been started by predecessor owners of the ranch. Although claiming to render this service on an accommodation basis from surplus water, the record shows that in 1931 he drilled a well and developed new springs to meet increased demands of new customers and in 1945 he drilled two additional wells. Beginning in about 1929, he has since constructed and enlarged six earth-fill dams to impound run-off water, entitlements to which he has acquired as the result of applications filed with the Division of Water Resources as early as 1935.

Relying on the provisions of Section 1 of the Act for Regulation of Water Companies (now included as Sections 2701, 2704 and 2707 of the Public Utilities Code), beginning on July 14, 1941, Friesen required all applicants for water service to sign an "Agreement and Waiver" (Exhibit No. 39), with the idea that he would not become a public utility. However, about 1947 he began to realize that he was becoming such a utility and he began to take on other customers, requiring no waiver after 1947.

The record indicates that in 1947, after L. F. Noonan's project for a subdivision failed to materialize, with the possibility that Friesen might lose the right to that amount of water for failure to apply it to beneficial use, Friesen made that water available to the area near the Sanitarium through a system operated for some years by J. H. Champion and which system Friesen acquired in March, 1957. Also, in 1948 or 1949, pursuant to an agreement with College dated February 27, 1948 (Exhibit No. 2), Friesen acquired certain facilities owned by College and used by it to supply domestic water service to some 70 or 80 homes near its campus. From time to time Friesen constructed additional distribution and water treatment facilities and added more customers. In 1952 he found he was running short of water and began to refuse further applications for service.

Exhibit No. 44 consists of a stack of cards on which are listed the names, street addresses (or mailing addresses) and meter designations of all of Friesen's domestic customers as of April 5, 1958, at which time there were 322 active service connections which supply probably about 450 residences and small business establishments, including service rendered through a number of multiple connections. The exhibit also includes cards showing the locations of 30 temporarily inactive or disconnected services.

In addition to supplying water to all locations indicated in Exhibit No. 44, both active and inactive, Friesen considers himself obligated to serve 15 other locations because of promises he has made. These 15 are those that remain unserved out of the list of 40 locations promised water service as of October 25, 1955, filed as Exhibit No. 11, the other 25 having been provided service in the meantime. The remaining 15, according to Friesen's testimony at the recent hearing, are L. F. Noonan (6), Akin property (2), M. Gaede (2), College, Baker Field (1), Morton, Circle Drive (1), Funkhouser (1), B. Camet (1) and Circle Drive, present owner unknown, (1).

Friesen feels no obligation to provide connections to more than the 6 promised services for L. F. Noonan, to additional locations on property owned by Mrs. Arlene Holst, nor to a lot owned by Don Brehm, all three of whom have requested such service and about which more will be related hereinafter.

5. Angwin Chamber of Commerce

Two witnesses, the Chamber's President and one of the members of its Board of Directors, testified in support of the position taken by that organization in its complaint, Case No. 5910, namely, that Friesen's water system had reached the limit of its capacity to serve and that the addition of more customers would be injurious to those now being served. Although the complaint had been filed during a season of deficient rainfall, one of the witnesses expressed his reliance on the evidence presented by Friesen and reiterated his belief that the current season, with its copious rainfall, did not change the general situation.

The Chamber, with a membership of 50 or more, purports to represent all of the business people, many of the home owners and some other residents of Angwin having approximately 300 families and a population of about 700, largely of the religious faith which supports the College, the main hub of the community. Under cross-examination, the Chamber's main witness maintained the position that the requested restriction of water service was not aimed at keeping out persons of other faiths by preventing subdivisions and other proposed developments but was to ensure normal and healthy growth of the community. In brief, the Chamber feels that it would be unwise to add new customers to the existing water system while there is no prospect of meeting their water needs in addition to the requirements of those already dependent upon the available water supply. The witness pointed out that if Friesen were allowed to add an unlimited number of individual applicants for service, as permitted by the Commission's order, the resulting growth would create a shortage of water supply to the ultimate detriment of the community.

In response to a question asked by counsel for Friesen, the witness stated that the Chamber would have no objection to the fulfillment of the commitments previously made and numbering 15 as hereinabove identified.

6. L. F. Noonan's Petition for Service

In Decision No. 53765 the opinion was expressed that Friesen had enough water to enable him to supply at least six individual connections to L. F. Noonan's development on Lot 7 of La Jota Rancho, without injuriously affecting existing consumers.

At the reopening of these proceedings, Noonan presented a petition (Exhibit No. 31) in which he asked for a modification of the previous decision and a clarification of the order pertaining to water service to his 180-acre holdings.

Noonan claimed that the heavier rainfall during the two years since the hearings held in 1955 had changed the conditions which led to the former limitations of service. He also referred to current plans being developed by the City of St. Helena to store water in nearby Bell Canyon, claiming that arrangements could be made to obtain surplus water therefrom to supply the Angwin area, which would remove the necessity for any limitation of service.

In particular, Noonan testified that if and when the said six service connections were provided, he would want to extend the lines and supply twelve premises from them by means of multiple branches. This is contrary to the original intent, in view of the insufficiency of the available supply. He also asked that the location of the six services not be restricted to the parcel on the west side of White Cottage Road, as indicated on Exhibit No. 16, but that such service might be rendered to parts of the 56-acre subdivision planned on the east side of that road. He pointed out that such a limited number of services would not satisfy his desire to obtain total service to his planned subdivisions.

In reply to Noonan's request, Friesen maintained that he was committed to provide only the six service connections to Noonan's property as listed on Exhibit No. 11 previously discussed.

7. Service to Silvershoe Ranch

Water service is now being rendered to one residence on the Silvershoe Ranch owned by Mrs. Arlene Holst who stressed her desire to obtain more services to be connected to the existing pipeline passing through her ranch properties. She testified that at present she has no intention of subdividing her land but that she wants to construct additional residences for the caretaker of the ranch, for herself, her son and other members of the family. This witness asked that Friesen be authorized to connect three new services this year and three more next year, without prejudice to additional connections after that.

Mrs. Holst based her claim to service on the agreement made with the predecessor owner of the property, involving the right of way for the pipeline from which several service connections have been made to customers located on the borders of her ranch, and through which pipeline the former Champion service area, now included in Friesen's certificated area, is being supplied with water. Friesen maintains that he cannot supply any more connections on the Silvershoe Ranch from his available supply, in view of other commitments, without injuriously affecting his existing consumers.

8. Request of E. Don Brehm for Water Service

At the more recent hearing, E. Don Brehm renewed his request made at the hearing on June 29, 1955, to obtain water service to an unimproved lot located at about 276 White Cottage Road, in lieu of that formerly furnished to his residence located at 600 Liparita Avenue. His request was partially based on the claim that he had installed a well at his former residence which, in effect, relieved the Friesen system from supplying such premises with water and that, therefore, he should be granted equivalent service at the new location.

Brehm testified that he had made several requests for his desired service, including some by letter (Exhibits Nos. 45 and 46), which had been ignored in spite of Brehm's contention that, under the conditions stated in the Commission's Decision No. 53765, as an individual, he was entitled to such service. Friesen would not admit that he had ever made a commitment or promise to render service to Brehm at any other location than at his residence at 600 Liparita Avenue.

This is but one of many refusals by Friesen to add new services pending the outcome of the present proceedings, in which he has asked that additional service connections be limited to those which he has promised.

Inspection of Exhibit No. 44 reveals the fact that 600 Liparita Avenue is listed under another name as an active service on April 5, 1958. This would appear to indicate that service at that location has not been relieved, at least not entirely, by the well installed by Brehm at that location and seems to invalidate his claim to service on an exchange basis.

9. Agreement with Pacific Union College Association

Attached to the petition to reopen Application No. 38853, filed by attorneys for College and Friesen, is a copy of an agreement dated April 4, 1958, purportedly entered into between Dick R. Friesen and Pearl Friesen, husband and wife, and Pacific Union College Association. The agreement essentially provides for the cancellation of the contract dated February 20, 1957, between Friesen and College (authorized by the Commission's Decision No. 54858 on April 16, 1957) and the substitution of the new contract wherein Friesen agrees to sell and deliver to College

20 acre-feet of water per year for irrigation of its land at a price of \$10 per acre-foot, the water to be delivered from Oroville Lake and Deer Lake subject to maintaining Oroville Lake substantially full for recreational purposes. Friesen also agrees to curtail his own use of said water for irrigation purposes whenever such further taking would endanger College's right to water deliveries. The contract is to run for a period of 5 years, subject to renewal from year to year. It is also provided that the agreement may be terminated in the event that College provides facilities upon its own property capable of storing at least 20 acre-feet of water.

The new agreement differs from the authorized contract of February 20, 1957 in several important particulars: (1) no reference is made to the original 18-year contract of February 10, 1941 nor to any rights granted to College by the State Water Rights Board to store and use 20 acre-feet of water per year; (2) no recognition is made of Friesen's public utility status nor of the Commission's jurisdiction in the matter; (3) the water is to be delivered from two of Friesen's reservoirs specifically named; (4) the delivery of water to College is limited only by the sufficiency of water in Oroville Lake for recreational purposes, after draining all of the water impounded in Deer Lake into Oroville Lake; and (5) the contract period extends many years beyond the terminal date of February 10, 1959, named in both of the earlier contracts.

The Commission has not been asked to approve the new contract but it has been requested to rescind Decision No. 54858 and to find that agreements between Friesen and College with regard to the supply of water for irrigation purposes out of the reservoirs known as Oroville Lake and Deer Lake are not subject to the Commission's jurisdiction and approval.

During the two days of hearing, although Friesen described the manner in which deliveries of irrigation water have been and are expected to be made to College, he made no specific reference to the said petition filed jointly in his behalf nor did he testify directly in support of it.

H. L. Shull, business manager of the College for more than ten years last past, testified that he had executed the contract of April 4, 1958 on behalf of the College. He admitted that he had also signed, as treasurer and business manager of the College, Application No. 38853 and the agreement of February 20, 1957, submitted therewith. He stated that the new agreement describes more exactly the arrangement under which the College and Friesen have been operating for a number of years past. He testified that it was not his understanding that the water which the College has been receiving from Friesen was in any respect dedicated to domestic use but that the College's 20 acre-feet was reserved for irrigation purposes, subject only to the priority for recreational use in Oroville Lake. The College has its own domestic supply and does not obtain water from Friesen's system other than for irrigation and agricultural purposes. There is no connection between the two systems.

It is the contention of College that the 20 acre-feet of water stored by Friesen and delivered by him to College for irrigation purposes is not a part of his public utility operations and that therefore the Commission has no jurisdiction therein.

10. Miscellaneous Items

Considerable discussion at the hearing revolved around the possibility of acquiring water from the Bell Canyon project of the City of St. Helena, whereby Friesen could be relieved of service to some of his consumers, particularly those in the former Champion service area near the sanitarium, thereby releasing some water to others who have requested service. However, the present record does not contain any substantial evidence of the feasibility of obtaining water from that source, either from an engineering, political or economic standpoint. On the basis of the information now presented, Friesen could not be expected or required to utilize the Bell Canyon water supply to augment his other sources.

In the petition filed by Friesen to reopen these proceedings, it is alleged that, in connection with the Commission's prior decision, Friesen was required to accept valuations of his utility property which were inaccurate and prejudicial to his interests and that certain sources of supply included therein have not been devoted to the public service. It should be observed that, in spite of declared intentions to do so, Friesen has not submitted an appraisal of his public utility properties differing from or in comparison with the Commission staff's appraisal as of April 30, 1955, as shown in Table 6-A of Exhibit No. 12 and which has heretofore been found to be reasonable. Therefore, the previous finding will be confirmed herein.

Summary, Findings and Conclusions

The evidence herein clearly demonstrates and we hereby find that Friesen has been operating as a public utility "water corporation" within the meaning of the Public Utilities Code, since about 1931 or 1932, and that, therefore, his operations are subject to the jurisdiction of this Commission and to regulation by it, and that during the course of such operations he has acquired rights to appropriate and store water in reservoirs located on his property and to use such water for various purposes.

Careful examination of the documents pertaining to such appropriations, added to and amended from time to time, does not reveal any allocation to the several purposes of specific amounts, by either quantities or percentages, of the permissible appropriations. It does reveal that storage thereof was to be made in each such application in a group of reservoirs now designated by Friesen in some cases as "domestic" and other cases as "agricultural and recreational". Furthermore, the arrangement of the six reservoirs herein discussed is such that water from reservoirs of one designation may be introduced into those of the other designation, and vice versa. We find that the waters appropriated under the several applications, permits or licenses and stored in the various reservoirs are so intermingled and commingled that any designation of the use to which the water is intended to be put, by size or location of the storage facilities, is purely arbitrary and artificial.

A review of the evidence shows and we find that water from Deer Lake, Newton, and Whitehead reservoirs has been used or specified to be used to supply or replenish that delivered from Oroville Lake to

College for irrigation purposes in accordance with the successive agreements and contracts entered into between College and Friesen. We find that water has been taken from Oroville Lake and can be released from Deer Lake, when available and necessary, to supply the so-called domestic reservoirs and that, at least in two years of record, Friesen has withheld irrigation water from College in order to be able more nearly to satisfy the demand for domestic public utility use. It is recognized that under California law domestic use of water has priority in demand over that for irrigation or agricultural purposes.

Therefore, the Commission finds and concludes that during the time Friesen has held himself out to render public utility service, all of his water facilities have been dedicated to that service. Under the circumstances existing here, all six reservoirs forming his principal source of water supply have been needed and will be needed in the future to render an adequate supply of water as a public utility, and no distinction can be made among them, all of them having been impressed with the stamp of public utility status and public use and we so find.

Also, the storage and sale of water for irrigation purposes, although subordinate to that for domestic purposes, we find to be a part of the public utility service which Friesen is obligated to provide. It follows that whether that service is provided at filed tariff rates or under contract, it is subject to control and regulation by this Commission and comes within its jurisdiction as provided by law. Therefore, the Commission finds that the contract of February 20, 1957, entered into between Friesen and College as authorized by Decision No. 54858, or any extension or renewal of such contract, is properly subject to the Commission's jurisdiction. It

may be pointed out that in paragraph 5 of the said contract there is expressed the understanding that College will endeavor to provide its own reservoir for the storage of the said 20 acre-feet, the right to which has been previously acquired from the State Water Rights Board. Until then and as long as such water is stored in Friesen's reservoirs, any contract, such as that dated April 4, 1958, attached to the petition herein, relating to the storage, delivery and sale of the said 20 acre-feet of water from any of such reservoirs, unless duly authorized by this Commission, is hereby declared to be null and void. The rule is firmly established that no private water right may be carved out of a public use. (Lamb v. California Water and Telephone Co. 21 Cal. (2d) 33, 42.)

From the evidence herein the Commission finds that Friesen's present water supply has about reached the limit of its capacity to adequately serve the existing customers and that the unlimited addition of more customers may injuriously withdraw the supply wholly or in part from those who have heretofore been supplied. The order herein will clarify the limitation already placed upon Friesen as to the servicing of additional customers. In view of the promises and commitments by which Friesen considers himself actually and morally bound to render service, at locations listed in Exhibit No. 11, and in consideration of the fact that Friesen is now rendering service to many of those locations, it is our opinion and we find that in all equity those locations on that list remaining unserved are entitled to similar service and that connections thereto from Friesen's water system should be authorized. The said list includes six individual connections to optional locations on Noonan's property; no additional connections requested by him will be authorized at this time. Likewise, requests for additional connections to Holst's Silvershoe Ranch

and to Brehm's property will not be authorized. All additional connections not authorized herein must await determination of the availability of a more adequate supply of water.

In order to facilitate a more accurate determination in the future of the availability of the water supply from Friesen's present existing sources, the order herein will require the installation and reading of gauges whereby a record of the storage in the several reservoirs will be maintained. By comparing such records with the metered consumption of water, both for irrigation and domestic utility purposes, and with the governmental rainfall records already being kept, it is believed that a more effective control of the operations pertaining to the storage and release of water can be accomplished. The objective of such control is the establishment of the proper priorities of water for domestic consumers, irrigation by the College, and Friesen's own use of the water for agricultural, recreational and other purposes.

Friesen has incurred a public utility obligation which must be fulfilled within all reasonable limits of the physical capacity of his sources of supply and his financial ability. This obligation requires reasonable action and effort on Friesen's part to develop or acquire additional sources of water supply to reasonably meet the needs of his present customers and the growth of the community, if it is economically possible for him to do so.

It may also be pointed out that if the interests of the property holders in the community demand a more complete service than Friesen can furnish as a privately owned public utility, it may be necessary and desirable to form a district or other organization with more adequate financing to import water from other and more remote

sources in greater quantities than can be obtained from Friesen's limited watershed.

O R D E R

Decision No. 53765 dated September 16, 1956, having been issued in Application No. 36736 and Case No. 5683; Decision No. 54858 dated April 16, 1957, having been issued ex parte in Application No. 38853; petitions having been filed and orders issued to reopen the said three proceedings for further hearing; complaint Case No. 5910 having been filed; public hearing having been held on all four matters on a consolidated record and the said matters having been submitted for decision; and the Commission now being fully advised and basing its decision upon the findings and conclusions contained in the foregoing opinion,

IT IS HEREBY ORDERED as follows:

1. That until a showing has been made, satisfactory to the Commission, that there is available an adequate supply of water for any requested new connections in addition to all consumers then being served, and the Commission, upon such showing, shall first have modified this order, Dick R. Friesen shall limit the service of water in the future, in the area for which a certificate of public convenience and necessity has heretofore been granted to him, to the following categories:

- a. The active service connections and also the temporarily disconnected or inactive service connections, as of April 5, 1958, at the locations represented on the cards introduced herein as Exhibit No. 44.
- b. Connections to the premises of such of the following persons promised water service listed on Exhibit No. 11, in the number and at the locations indicated, who remained unserved as of April 18, 1958, and who may apply for service

to single-family residences, each service connection to be 3/4-inch pipe size and specifically limited to supply one such residence and its appurtenant premises:

<u>Name</u>	<u>No. of Services</u>
L. F. Noonan, Lot 7 of La Jota Rancho, from existing pipeline on White Cottage Road, as shown on Exhibit No. 16, on either the east or west side of said road	6
Akin property	2
M. Gaede	2
College, Baker Field	1
Morton, Circle Drive	1
Funkhouser	1
B. Camet	1
Present owner unknown, Circle Drive	1
Total	<u>15</u>

2. That beginning on February 1, 1959, and every three months thereafter until and including February 1, 1961, Dick R. Friesen shall report to the Commission in writing how many and which of the additional services, authorized by the foregoing subparagraph 1-b of this order, have been connected to his distribution system, which report shall show the name and location of the customer and the date when service was first commenced thereto.

3. That on or before March 1, 1959, Dick R. Friesen shall install and maintain in the storage reservoirs known as Oroville, Red, Newton, Granite, Deer and Whitehead Lakes suitable visual gauges, reading in feet and tenths of feet, by which the depth of water above the outlet pipe in each reservoir may be determined; that on or before March 1, 1959, he shall have prepared a chart or curve corresponding to each of the six gauges which show the water storage capacity in acre-feet of the respective reservoir for any gauge reading; and that on or before March 10, 1959, he shall report to the Commission, in writing, the date on which each of the six gauges was installed and shall furnish the Commission with six copies of the corresponding chart or curve for each of the six reservoirs. Dick R. Friesen shall install similar gauges and prepare charts or curves corresponding thereto for any and all additional such storage

reservoirs that in the future may be installed and placed in operation in connection with his public utility system.

4. That commencing on the date when each gauge is installed as required by the preceding paragraph 3 of this order and on the tenth, twentieth and last day of each month thereafter, and as much oftener as he may desire for his purposes, Dick R. Friesen shall cause the said gauges to be read and a written record maintained of the depth of water in each storage reservoir, and that on or before the fifth day of each of the months of January, April, July and October through the year 1961 he shall file with the Commission a tabulation of the gauge readings, the corresponding quantity of water in storage in each reservoir and the total quantity of stored water for each date of the gauge readings during the preceding three-month period.

5. That to the extent that he has failed to comply with ordering paragraph 6 of the Commission's Decision No. 53765, Dick R. Friesen shall file with this Commission, within ninety days after the effective date of this order, a copy of the journal entries used to record on his books of account the plant accounts and depreciation reserve as of April 30, 1955, substantially as shown in Table 6-A of Exhibit No. 12 (which specifically includes the items of Source of Supply Plant listed therein as Oroville Lake, Newton Reservoir, Red Lake, Whitehead Reservoir, Granite Reservoir and Deer Lake), together with other similar entries used to record subsequent acquisitions such as the Champion water system.

6. That the Commission's investigation herein, Case No. 5683, having been reopened upon the petition of Dick R. Friesen, again is discontinued.

7. That, except as modified herein, the order in the Commission's Decision No. 53765, in Application No. 36736 and Case No. 5683,

is hereby confirmed and shall remain in full force and effect.

8. That, except to the extent of the relief granted in the preceding paragraphs of this order, the complaint herein of Angwin Chamber of Commerce, Case No. 5910, be and it is dismissed.

9. That the petition filed jointly on behalf of Pacific Union College Association and Dick R. Friesen to vacate and set aside the Commission's order in Decision No. 54858 in the reopened Application No. 38853 be and it is hereby denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 16th day of December, 1958.

[Signature]
President
[Signature]
[Signature]
[Signature]
Commissioners

Commissioner Peter E. Mitchell, being necessarily absent, did not participate in the disposition of this proceeding.