

WATER RIGHTS IN THE BALANCE: THE MVWA vs. NYS CANAL CORP. DISPUTE

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The abundance of New York's water resources makes disputes over their use relatively rare compared to other parts of the country. However, we now have a regional dispute between the Mohawk Valley Water Authority (MVWA) and the State in the form of the New York State Canal Corporation (Canal Corp.). My intent is not to give an in-depth legal analysis but, rather, to place the dispute in an historical context that gives insight into why it developed, to report on recent legal proceedings, and to suggest potential outcomes for the future.

Most people in the Mohawk Valley are familiar with the Canal Corp., a subsidiary of the NYS Thruway Authority, which is responsible for operation of the state's canal system. Canal Corp. is the current successor to other state agencies, which were responsible for the canal system in the past.

MVWA is the successor to The Consolidated Water Company of Utica (CWCU) and the City of Utica. An entity created by the state legislature under the Public Authorities Law, MVWA owns and operates the public water supply system that serves approximately 130,000 people in the City of Utica and all or parts of 15 Towns and Villages located nearby in Oneida and Herkimer Counties. MVWA obtains all of its water from the Canal Corp.'s Hinckley Reservoir on the boundary of Herkimer and Oneida Counties, and this reservoir obtains its water from the West Canada Creek. It is the MVWA's use of the Canal Corp.'s reservoir that sets the stage for today's dispute. To understand how this evolved, we must look back more than 100 years.

In the late 1800s and early 1900s, the City of Utica was growing and needed a large, reliable supply of water to supplement its several smaller supplies. West Canada Creek, about 18 miles northeast in Herkimer County, could fill this need, so the CWCU went about acquiring water rights from riparian owners along the Creek. Many individual agreements were involved. Most were relatively short, and either just involved the exchange of money or had simple requirements that assured the landowner of sufficient water for livestock or crops located on

the riparian tract of land. Others, however, were complex, particularly those involving mill or power company owners where flowing water is energy. Those agreements contained provisions intended to ensure that when the Creek's flow was naturally low, the effect of CWCU's use of the Creek would be mitigated. CWCU was required to either stop taking water or to release water into the Creek from a CWCU storage reservoir to make up for what it removed. This release is called a "compensating flow," and the storage reservoir may be called a "compensating reservoir." To meet these requirements, CWCU in 1906 constructed a 1.17 million gallon compensating reservoir at Gray, located on Black Creek, a tributary of the West Canada Creek.

At about the same time, to meet an increased commercial need, the State of New York decided to enlarge its canal system. This expansion required large, reliable supplies of water and the West Canada Creek was one of those chosen. The state appropriated lands and water rights, including some of those owned by CWCU, but reserved from the appropriation a flow of 100 cubic feet per second (cfs) for CWCU's purposes. The 25 billion gallon Hinckley Reservoir (state reservoir) was constructed to store water from the West Canada Creek for use in the canal. This cut CWCU off from its storage reservoir at Gray Dam. A number of lawsuits resulted from CWCU and the State both seeking the same resource.

The lawsuits were ultimately resolved by an agreement between CWCU and the State signed 12/27/1917 (the "Agreement"), which recited all their conflicts. The 1917 Agreement declared that "The flow of said water in West Canada creek is sufficient, if properly conserved and regulated to permit of its use for two public uses and purposes, to wit, canal uses and purposes, and as a source of water supply" for CWCU. Among its many provisions, the parties agreed that the State's appropriation of West Canada Creek water would be construed to reserve from the appropriation 75 cfs to CWCU rather than 100 cfs; that CWCU would be allowed to use the state dam and reservoir "as a settling basin and as a transporting agent for stored water from [CWCU's] storage reservoir or reservoirs" and

would be able to take its flow from two 42” pipes in the state dam for municipal water supply purposes. The parties agreed that CWCU and its successors would “at all times” maintain a storage reservoir(s) above the state dam on West Canada Creek that would permit CWCU to fully comply with the provisions of certain attached earlier agreements with third party riparian owners, the intent being to maintain CWCU's relationship with those owners as if the state dam had not been built. The parties also agreed that, if CWCU or successors failed to provide and operate the storage reservoir(s), it would have NO right or authority to take water from the state reservoir or West Canada Creek above Trenton Falls, except in specified emergency situations.

The Agreement went on to express State's concern that the third party agreements might be changed, done away with, or construed to postpone or relieve CWCU's obligations to store water and make compensating flows. The state desired to fix and define a minimum low flow in the West Canada Creek “below which no water shall, under any circumstances or conditions (except as herein expressly provided for) be diverted by [CWCU], its successors, grantees, or assigns unless compensation or contribution be made.” The parties mutually agreed that 335 cfs would be the “low flow” below which CWCU would be prohibited from taking water without it making a contribution. The parties also agreed that when CWCU's diversion averaged 25 cfs (10 cfs more than when the agreement was made), the dimensions of the compensating reservoir(s) would be enlarged to store not less than 2 billion gallons, and that for every additional 10 cfs taken, the reservoir(s) would be enlarged an additional 800 million gallons until the storage would be not less than 6 billion gallons [note: about ¼ the size of Hinckley] when the full 75 cfs is drawn. The Agreement reiterated that, if CWCU failed to provide and operate the storage reservoir(s), it had no right to take any water from the state reservoir or from the creek above Trenton Falls.

Utica continued to grow and acquired CWCU during the 1930s, after receiving a permit from the state's Water Power and Control Commission (now the Dept. of Environmental Conservation) to do so. At mid-century, Utica's population both peaked and its withdrawals had reached the 25 cfs threshold at which expansion of the storage reservoir was required. The city, 16 square miles in size, was essentially at full build-out. Perhaps

Utica leaders tried to avoid an expense, realizing that an expansion of the storage reservoir would only benefit suburban municipalities. Perhaps no one enforced the compensating flow obligation (there is no clear evidence compensating flows were *ever* made). Perhaps there was confusion in the state as to who was responsible for enforcing the Agreement (e.g., the entity running the canals, the attorney general, or the entity supervising water supply systems). Perhaps the effects of non-compliance were not noticed among the fluctuations caused by the state's normal operation of its reservoir. Regardless of the reason, no expansion of Utica's storage reservoir was made or demanded.

The region's population continued to grow, as did withdrawals from Hinckley. In 1968 a comprehensive water supply study had been commissioned by Oneida and Herkimer Counties and the NYS Department of Health to ensure that the region's water resources would be properly managed to accommodate a regional population expected to grow to 800,000 by 2020. That Study acknowledged that Utica would need 6 billion gallons of storage capacity, if it were to take the full amount of water allowed under the Agreement with the state; and that even with the storage, the Utica area could face a water shortage if the region grew as predicted. The Study, however, may have been motivated by more than regional growth. A year earlier, in 1967, a comprehensive water supply study for the City of New York and Westchester County included plans to develop the Hinckley reservoir watershed for downstate use. By 1969, Utica's withdrawals had reached the 35 cfs threshold that required a second expansion of the storage reservoir. Perhaps people were waiting to see what New York City was going to do with Hinckley; perhaps no one noticed adverse effects from Utica's non-compliance with the storage and contribution requirements; or perhaps it was unclear who in the state should enforce the 1917 Agreement. Regardless, no expansion of the storage reservoir was made or demanded.

Something changed around 1970. Perhaps it was the reapportionment of the State Senate in the late 1960s, which reduced Upstate New York's voice in state government; perhaps it was the changes to state policy that followed; or perhaps it was due to other reasons; but the anticipated growth in the Utica area never materialized. Instead, the region began losing population, the Utica Water Board began losing customers,

withdrawals from Hinckley started to drop, and financial pressures on municipal operations started to mount.

Utica allowed its dam at Gray to fall into disrepair. Due to safety concerns, about 1989 the gates to Gray Dam were fully opened, and it could no longer hold reserve flows. In the early 1990s, Utica built a costly new filtration plant near Hinckley to meet federal drinking water requirements. The city eventually abandoned all water sources other than Hinckley because it became impracticable to treat them.

In 1996, the City of Utica ceded ownership of its water supply system to the MVWA, due to financial considerations, after MVWA received a water supply permit from NYS Department of Environmental Conservation (NYSDEC) to assume ownership. The water supply permit was premised on MVWA's right to take water under the 1917 Agreement. Under pressure from NYSDEC safety concerns, MVWA in early September 2001 advertised that it was seeking a permit to demolish Gray Dam. Perhaps it was because the notice failed to mention that a water supply permit could be affected; or perhaps it was because people receiving the notice in September, 2001, had other things on their minds; but no one objected to the proposal to demolish Gray Dam. The dam was subsequently removed in 2002.

Shortly afterward, MVWA aggressively sought to expand its reach to obtain new customers. In 2002 it instituted a new cheaper rate tier for very high volume customers. In 2003 it entered an agreement to sell water to the Town of Verona, beyond its statutory service area. Although the agreement contemplated delivery of, at most, less than 2 million gallons per day (MGD), news accounts indicated that the proposed pipeline would be capable of delivering 7 MGD (almost 11 cfs), which would be a 1/3 increase over existing use. A 2003 MVWA bond prospectus indicated MVWA was courting the nearby City of Sherrill and Town of Vernon, both also beyond its statutory service area, as potential customers. It should be noted that under the 1968 Comprehensive Water Supply Study, none of these municipalities were to receive Hinckley Reservoir water. It should also be noted that Sherrill and Vernon were customers of other water suppliers, and that MVWA's NYSDEC permit prohibited it from competing with other

water suppliers. In 2003, MVWA applied to DEC to expand service in four other towns.

Perhaps MVWA's aggressiveness woke people up to the idea that Hinckley Reservoir and their rights might be affected by MVWA's actions. People discovered the 1917 Agreement. People objected to MVWA's proposed expansions and registered them with NYSDEC. A power company served MVWA with a notice of claim, indicating MVWA's failure to make compensating flows was causing it harm. The Canal Corp. objected to expansions and demanded payments for the water taken from its Hinckley Reservoir.

MVWA responded in 2005 with a lawsuit against the State, the Canal Corp., and Erie Boulevard Hydropower (the power company) asserting seventeen causes of action. Canal Corp. and Erie filed counter claims. Discovery took place followed by various motions to dismiss or for summary judgment, as well as a motion to intervene by West Canada Riverkeepers and several individual property owners. Judge Hester made rulings in May 2009 on the various motions. The State and MVWA subsequently appealed to the Appellate Division, which handed down rulings during November, 2010, and, later, during February, 2011, denied a motion to reargue or for permission to appeal to the Court of Appeals. The matter is now back before Judge Hester.

It is easier to understand what happened and where we are now in the litigation by looking at the different legal theories the parties proceeded upon and what the courts did with them, rather than examine each pleading chronologically.

Regarding the potential intervention by Riverkeepers and others, Judge Hester denied the motion to intervene. Judge Hester found that based on his other rulings intervention was moot. He also found that the motion was untimely, noting that intervention was sought 2½ years after the litigation had commenced and after discovery had taken place without a reason given for the delay. This determination was not appealed, and the potential intervenors are now out of this specific litigation. They can, however, institute a separate proceeding to adjudicate their rights.

Regarding issues involving Erie Hydropower, MVWA sought a declaration against Erie

alleging that MVWA acquired a prescriptive right against Erie to divert water without compensation to Erie (Causes 9, 17). This theory is similar to “adverse possession,” where someone who builds a structure partially on your property after so many years acquires a right to leave it there. MVWA also sought a declaration under Environmental Conservation Law §15-0701 that its diversion was “harmless” as defined by that provision relative to Erie and, thus, was legal (Cause 16). Erie counterclaimed against MVWA for damages due to the reduction in flows through its turbines, due to MVWA's failure to make compensating flows. MVWA contended that in 1958 Erie's predecessor released MVWA's predecessor from any obligation to make compensating flows, thus barring Erie from seeking compensation now. MVWA also contended that Erie's common law right to flows in the West Canada Creek were abrogated by its own 1921 agreement with the State, where it essentially gave up those rights to the State. Erie moved for partial summary judgment against MVWA, and MVWA cross-moved for summary judgment against Erie. Judge Hester agreed with MVWA and concluded that Erie failed to establish the existence of any rights against MVWA with regard to the flow of the West Canada Creek at the Hinckley dam. Judge Hester also concluded that Erie had no right as a third-party beneficiary to enforce the reservoir or compensating flow requirements of the 1917 Agreement. Judge Hester, thus, did not have to reach the issues of potential prescriptive rights or harmless actions by MVWA. Judge Hester granted summary judgment to MVWA dismissing Erie's counterclaim. The Appellate Decision upheld Judge Hester, concluding that MVWA established that Erie has no rights against MVWA with regard to the flow of West Canada Creek at Hinckley Reservoir and that Erie raised no triable issue of fact. These rulings effectively take Erie out of the picture in future proceedings. They also suggest that others who may try in the future to claim third-party beneficiary status under the 1917 Agreement will be unsuccessful.

With potential interveners and the power company out of the way, we are left with plaintiff MVWA and the State defendants. Overall, MVWA wants a declaration that it has unconditional rights to take 75 cfs of water from West Canada Creek at Hinckley Reservoir.

MVWA's claim of an unconditional right to draw water is based on (per Cause 1, MVWA's Second Amended Complaint) its original acquisition of property and riparian rights from landowners along the West Canada Creek prior to 1912, when the state filed its appropriation papers for the canal system; and (Cause 2) the appropriation map and CWCU's deed of its rights to the state, which did not give the state any ownership in the unappropriated 75 cfs of flow. Judge Hester rejected this theory and granted the State's motion to dismiss these causes, concluding that all of MVWA's riparian rights were surrendered and replaced with the rights and obligations that arise from the 1917 Agreement. This determination was not appealed. This ruling simplifies further litigation by making the 1917 Agreement the starting point for determining MVWA's rights.

MVWA alleged several causes of action based on statute of limitations, lack of material breach, and equitable concepts such as waiver, estoppel, assent and discharge, and laches. MVWA noted that it had never made compensating flows nor been asked to do so. It noted a lack of evidence that the 335 cfs “low flow” had ever occurred. It argued that DEC made it destroy Gray Dam while knowing that even if the entire contents of the Gray Reservoir were dumped into Hinckley, it would not be noticeable. It noted how the 25 and 35 cfs withdrawal thresholds had been crossed without anyone ever asking for an expansion of storage capacity. In essence, MVWA argued that any breach of the 1917 Agreement was insignificant, and, regardless, the state should not be allowed to enforce the Agreement now because no one from the state did anything to enforce it for some 90 years.

Judge Hester found MVWA's arguments persuasive – to a point. The judge noted that, while the Agreement required devices to measure MVWA's withdrawals from Hinckley and the flows released from the storage reservoir, no devices were required to measure the inflow into Hinckley. How would anyone know if the “low flow” level of 335 cfs had ever been reached – and the requirement for compensating flows triggered? Because of the lack of evidence of the need to ever make a compensating flow, the judge concluded that no violation of the compensating flow requirement had been proven, and the need for the storage reservoirs had not been established as well. Yet, the judge acknowledged that MVWA's rights were defined

by the 1917 Agreement. The judge gave MVWA partial summary judgment for two causes of action (Causes 4 and 11) based on MVWA's arguments waiver and estoppel. In plain language, the judge would allow MVWA to do in the future what the State had allowed MVWA or its predecessors to do in the past without the need for any compensating flows or reservoirs. Judge Hester defined this as allowing MVWA to withdraw up to an average of 35 cfs without restrictions. Usage above that amount would require compliance with the 1917 Agreement. The judge dismissed the rest of MVWA's causes of action as "moot," and granted MVWA summary judgment dismissing all of the State's counterclaims.

The Appellate Division found that the court erred when it dismissed the State's first counterclaim, which alleged that MVWA was barred from taking water from Hinckley because it had breached the 1917 Agreement. The counterclaim was reinstated. The Appellate Division also found in error the partial summary judgment on Causes 4 and 11 which declared MVWA has the right to divert Hinckley reservoir water at a rate not to exceed 35 cfs without compensation. The State and MVWA both contended that the record did not support the 35 cfs number. The Appellate Division agreed and vacated the judge's declaration. The Appellate Division felt there was "conflicting evidence" whether MVWA's obligations under the Agreement were ever triggered by "low flow" conditions, which raised "triable issues of fact" whether the State defendants intended to relinquish their rights under the Agreement, whether they should be

prevented from enforcing the Agreement, and whether the State's delay prejudiced MVWA such that laches should preclude the state from enforcing the rights. The Appellate Division also noted that the court dismissed four causes of action (numbers 6, 7, 13 and 14) among others as "moot," concluded that those causes must be reinstated, and that MVWA abandoned all others dismissed as "moot." Causes 6 and 13 allege that DEC's determination that Gray Dam constituted a safety hazard, and the knowledge that release of the entire contents of Gray Reservoir would not impact flows into or out of Hinckley Reservoir, were events that frustrated the purpose or made it impossible for MVWA to meet the compensation and reservoir provisions of the 1917 Agreement, thus relieving MVWA of those requirements. Causes 7 and 14 allege, among other things, that if there was a breach by MVWA, it was not material.

Other than narrow down the participants and identify the 1917 Agreement as the source of MVWA's rights, litigation thus far leaves a lot of significant issues for Judge Hester to resolve in the MVWA v. State dispute. Will the storage requirement be considered immaterial when withdrawals require expansion of storage to be almost ¼ the size of Hinckley? Will past immateriality of non-compliance excuse future non-compliance when impacts might be significantly greater? Does the State have a duty to remind MVWA of its obligations and to enforce the Agreement's provisions at all times, or only when breaches threaten serious consequences? We anxiously await Judge Hester's ruling.