

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONEIDA

MOHAWK VALLEY WATER AUTHORITY,

Plaintiff,

-v-

THE STATE OF NEW YORK, ERIE BOULEVARD
HYDROPOWER, L.P., and THE NEW YORK STATE
CANAL CORPORATION,

Defendants.

Plaintiff designates Oneida County as the
place of trial.

SUMMONS

Index No:

The basis of the venue is the
plaintiff's place of business and location
of property giving rise to the action

Plaintiffs business address:

One Kennedy Plaza
P.O. Box 345
Utica, New York

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED to answer the Complaint in this action and to serve a copy of your answer, or, if the Complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within twenty (20) days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

DATED: April 25, 2005
Syracuse, New York

HANCOCK & ESTABROOK, LLP
Attorneys for Plaintiff

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TO: OFFICE OF THE ATTORNEY GENERAL
{H0479411.1}

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ERIE BOULEVARD HYDROPOWER, LP
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Liverpool, NY 13088

STATE CANAL CORP.
200 Southern Boulevard
Albany, NY 12201

STATE OF NEW YORK
SUPREME COURT
MOHAWK VALLEY WATER AUTHORITY,

COUNTY OF ONEIDA

Plaintiff,

-v-

THE STATE OF NEW YORK, ERIE BOULEVARD HYDROPOWER, L.P., and THE
NEW YORK STATE CANAL CORPORATION,

Defendants.

COMPLAINT

Index No.: _____

Plaintiff MOHAWK VALLEY WATER AUTHORITY, by and through its attorneys,
Hancock & Estabrook, LLP, as and for its complaint against defendants THE STATE OF
NEW YORK, ERIE BOULEVARD HYDROPOWER, L.P. and THE NEW YORK STATE
CANAL CORPORATION hereby states and alleges as follows:

SUMMARY OF THE ACTION

1. This action arises from a dispute over the continued right of the Mohawk Valley Water Authority (the “Plaintiff” or “Water Authority”) to draw water from the West Canada Creek at Hinckley reservoir, located in Oneida and Herkimer counties.

2. In the late 1890s, it became necessary for Plaintiff’s predecessors-in-interest to obtain a new water supply for the provision of water to Utica area residents.

3. In the early 1900s, Plaintiff’s predecessor designated the West Canada Creek as its new water source and acquired the riparian rights necessary to draw water from the West Canada Creek for water supply purposes.

4. Upon information and belief, in the early 1900s, the State of New York (the “State”) decided to improve the Erie Canal system by constructing Hinckley dam and reservoir, which would increase flows for diversion downstream at Morgan dam, into Nine Mile Creek, and ultimately, into the Erie Canal. In 1912 the State appropriated all the water rights acquired by Plaintiff’s predecessor for the Erie Canal improvement, with the exception of 100 cubic feet per second (“c.f.s.”) of water which was unconditionally reserved from the appropriation to Plaintiff’s predecessor.

5. Shortly thereafter, Plaintiff’s predecessors filed a claim dated August 10, 1914, in the Board of Claims arising out of the State’s appropriation. This claim was settled by an agreement dated December 27, 1917 (the “1917 Agreement”), which set the compensation for the appropriation and damage caused by the construction of the Hinckley dam and reservoir, and in which, the parties agreed to reduce to 75 c.f.s. the water rights reserved to Plaintiff’s predecessor from the appropriation.

6. Plaintiff's predecessors also conveyed by deed all of its water rights above Morgan dam to the State with the exception of 75 c.f.s of water unconditionally reserved to Plaintiff's predecessor for water supply purposes.

7. Neither the State nor defendant New York State Canal Corporation ("Canal") have ever appropriated or otherwise obtained the rights to the 75 c.f.s reserved to Plaintiff's predecessor from the 1912 appropriation.

8. Although the agreement settling the claim which arose from the State's appropriation contained provisions calling for the maintenance of a compensation reservoir for the replacement of water taken by Plaintiff's predecessor when the flow of the West Canada Creek fell below a certain point, those provisions were not contained in either the State's appropriation nor the deed conveying Plaintiff's predecessor's riparian rights to the State

9. For almost a century now, Plaintiff and its predecessors have drawn water from the West Canada Creek at Hinckley reservoir, without replacement, pursuant to the rights acquired from property owners along the West Canada Creek and excepted from the State's 1912 appropriation.

10. Now, for the first time, defendant Canal seeks to charge Plaintiff \$400,000 per year for water drawn from the West Canada Creek at Hinckley, claiming ownership over those waters based on Plaintiff's alleged failure to compensate flows taken.

11. Additionally, defendant Erie Boulevard Hydropower, L.P. ("Erie Hydro"), has served a notice of claim on Plaintiff asserting that its use of water without replacement is unreasonably interfering with its common law riparian rights.

12. Plaintiff therefore seeks, as against all defendants, a declaration as to its continued right to draw water from the West Canada Creek at Hinckley reservoir, absent any compensation requirements, in order to meet the drinking water needs of residents within its existing and future service areas and that such use is not unreasonably interfering with any riparian rights that defendant Erie Hyrdo may have.

THE PARTIES

13. Plaintiff, formerly known as the Upper Mohawk Valley Regional Water Board, is a corporate municipal instrumentality organized under the laws of the State of New York with its principal place of business located at 1 Kennedy Plaza, Utica, New York, 13502.

14. Plaintiff was created pursuant to Public Authorities Law § 1226-bb, for the purpose of providing drinking water to the residents of the Mohawk Valley region, including portions of Oneida and Herkimer counties.

15. Plaintiff is the successor-in-interest to the rights and responsibilities of the former West Canada Water Works Company, the Consolidated Water Company of Utica, N.Y. (the “Water Company”) and the City of Utica.

16. Upon information and belief, defendant the State of New York (“the State”) owns the rights to the waters of the West Canal Canada Creek at Hinckley reservoir with the exception of the flow of 75 cubic feet per second reserved to the Plaintiff.

17. Upon information and belief, defendant Canal is a public benefit corporation created pursuant to Public Authorities Law § 382 to operate and maintain the New York State canal system, including Hinckley dam and reservoir.

18. Upon information and belief, Canal's principal place of business is located at 200 Southern Boulevard, Albany, New York, 12201.

19. Upon information and belief, defendant Erie Hyrdo is a limited partnership created and existing under the laws of the State of Delaware and is registered to do and does business in the State of New York.

20. Upon information and belief, Erie Hyrdo owns two hydroelectric facilities located along banks of the West Canada Creek below Hinckley reservoir and is successor-in-interest to the former Utica, Gas & Electric Company.

JURISDICTION AND VENUE

21. The State and Canal are subject to the jurisdiction of this Court pursuant to the terms of the 1917 Agreement which authorizes Plaintiff to challenge "in any court of competent jurisdiction in an appropriate action or proceeding, including an action for an injunction" a determination that Plaintiff "is not contributing to the quantity of water required by th[e] agreement or that it is in any respect failing to comply with the provisions of th[e] agreement."

22. The State and Canal are also subject to the jurisdiction of this Court pursuant to Section 1541 of the New York Real Property Actions and Proceeding Law ("RPAPL").

23. Defendant Erie Hyrdo is registered to do business in New York as a foreign corporation and as such is subject to the jurisdiction of this court.

24. Venue in Oneida County is proper pursuant to Article 5 of the CPLR as the location of Plaintiff's principal place of business and the location of a portion of the property giving rise to the riparian rights at issue in this action.

BACKGROUND AND RELEVANT FACTS

25. In the 1800s, the water supply for the City of Utica came from a water shed south of Utica. In the late 1800s, this water supply became inadequate in quantity and quality. The City of Utica ordered the examination of viable sources of water for Utica area residents. As a result of this examination, the City determined that the West Canada Creek, which originated in the lakes and mountains of the Adirondacks and was known for its pure and good quality water, was the most suitable source for its water supply.

26. At or about the time the West Canada Creek was selected as the most suitable water source, it had a yearly average flow of approximately 1000 cubic feet per second.

27. In the late 1890s and early 1900s the West Canada Water Works Company, began acquiring the land and riparian rights necessary to construct its water supply system which would originate from the West Canada Creek. Attached hereto as Exhibit "A" is a schedule of deeds conveying property to the West Canada Water Works Company from individual property owners situated above where Hinckley dam is now located to above where Morgan dam diverts water into Nine Mile Creek for delivery to the Erie Canal.

28. By deed dated November 13, 1899 and recorded in the Oneida County Clerk's Office, Book 55 of Deeds at page 262, the West Canada Water Works Company conveyed to Plaintiff's predecessor, the Water Company, those properties listed in Exhibit "A".

29. The Water Company acquired additional property between the location of the Hinckley Dam and the Morgan Dam for its water supply system, more particularly identified in the schedule of deeds attached hereto as Exhibit "B".

30. In addition to the appropriations set forth in Exhibits "A" and "B", Plaintiff's predecessor, the Water Company, also entered into contracts with three companies located along the West Canada Creek that used the water for power supply purposes. These contracts were dated March 10, 1905, August 17, 1906, and March 19, 1909, and were entered into with Utica Gas & Electric Company ("UG&E"), International Paper, and Newport Electric Light and Power Co. ("Newport Power"), respectively.

31. UG&E, which operated a hydroelectric power plant a short distance below Hinckley at Trenton Falls, was the largest user of water for power supply purposes during the early 1900s.

32. The three contracts allowed the Water Company to divert water from the West Canada Creek subject to certain conditions that called for the replacement of the diverted water from a compensating reservoir when the flow of the creek was below certain identified levels.

33. The replacement conditions were included in the agreements for the purpose of ensuring sufficient water flow to meet the power generation needs of the three companies.

34. To comply with the agreement entered into with UG&E, Plaintiff's predecessor constructed a dam and reservoir located on Black Creek, a tributary to the West Canada Creek approximately eight miles above Hinckley (hereinafter referred to

as “Gray dam and reservoir”). Construction of the dam and reservoir was completed on or about February 1907.

35. As constructed, Gray reservoir held approximately 1.2 billion gallons of water but upon information and belief, had the capacity hold between two and three billion gallons of water in the event the height of the Gray dam was raised.

36. The water supply system, as initially constructed, ran seventeen miles from an intake point below where Hinckley dam is now located to a holding reservoir in Deerfield, New York.

37. To avoid pollution caused by sulfite pulp mills, an existing slaughter house and the large number of dwellings in the area, the intake point was moved to a location above where Hinckley dam is now located.

38. The Water supply system was completed on or about September 12, 1906.

The State's Appropriation and the Plaintiff's Reserved Right

39. In 1903, the Barge Canal Act was enacted for the purpose of improving the Erie, Oswego and Champlain Canals. The Act authorized the State to appropriate lands necessary for improvements to those Canals.

40. In connection with the Barge Canal Act, the State undertook to construct Hinckley dam and reservoir to increase the flow of the West Canada Creek at Hinckley dam for diversion downstream at Morgan dam into Nine Mile Creek and ultimately, into the Erie Canal.

41. In connection with the construction of Hinckley dam and reservoir, the State appropriated the land necessary for the construction, as well as "all the waters flowing in the West Canada Creek at Hinckley, N.Y., except the flow of water to the extent and amount of 100 cubic feet per second, which flow and rights are expressly omitted from this taking and excepted and reserved to the Consolidated Water Company of Utica, N.Y., pursuant to its corporate powers and for its corporate purposes."

42. The State further, "except[ed], reserved[ed] and left[] to said Water Company the easement and right to take, draw and convey the said flow of one hundred (100) cubic feet per second of water from said creek, across the said land, and through the State's dam to be constructed thereon, by means of the two iron pipes, each of the diameter of forty-two inches, already laid in the location show on the State's plan of said dam." A copy of the above-referenced appropriation map that was filed in the office of the Superintendent of Public Works is attached hereto as Exhibit "C".

43. The State's construction of the Hinckley dam in or about 1912 cut the Water Company's pipe lines in two, forcing it to relocate the lines and connect them to intake valves installed in the dam itself.

44. Additionally, construction of Hinckley dam worked to nullify the impact, if any, of the release of waters from Gray reservoir on riparian owners below Hinckley dam.

45. The Water Company and the State thereafter entered into an agreement executed by the Water Company on December 24, 1912 and the State on January 21, 1913, which recognized that the water supplied by the West Canada Creek could adequately meet both Canal and the Water Company needs, set the compensation for the appropriation and damage to the lines and reiterated that 100 cubic feet per second of water had been reserved from the taking to the Water Company (the "1913 Agreement").

46. The Water Company began drawing water from Hinckley reservoir as early as 1914.

47. After the construction of Hinckley dam, the Attorney General for the State refused to approve the 1913 Agreement, which resulted in the Water Company instituting a \$10 Million claim in the Board of Claims, dated August 10, 1914.

48. The State and the Water Company settled this claim by the 1917 Agreement which again recognized that the water supplied by the West Canada Creek could adequately meet the needs of both the Canal and the Water Company. The agreement set compensation for the damage caused by the appropriation and

construction and indicated the parties' agreement that the flow excepted from the State's 1912 appropriation would be reduced to 75 c.f.s.

49. By deed dated December 27, 1917 and recorded in the office of the Oneida County Clerk in Liber 748 of conveyances at page 63, Plaintiff's predecessor conveyed to the State all of its right and title to the flow of the West Canada Creek at Hinckley "except the flow of water to the extent and amount of a twenty-four hour average of seventy five cubic feet per second the amount however at no time to exceed a maximum of eighty-five cubic feet per second which flow and right are expressly omitted from this conveyance and excepted and reserved to the Consolidated Water Company of Utica, N.Y., pursuant to its corporate powers and for its corporate purposes." A true and correct copy of the deed is attached hereto as Exhibit "D".

50. The 1917 Agreement included additional provisions stating that when the flow of the West Canada Creek fell below 335 c.f.s., the Water Company was to replace water taken to maintain the flow of 335 c.f.s.

51. The 1917 Agreement further state that the Water Company was to build increasingly larger storage reservoirs as the amount of water diverted increased, for the purpose of replacing flows, if such replacement became necessary.

52. These flow compensation and reservoir provisions were not included in either the map of the State's 1912 appropriation (Exhibit C) or the deed conveying Plaintiff's predecessor's riparian rights to the State (Exhibit D).

53. The reservoir and replacement provisions were included in the 1917 Agreement for the purpose of ensuring that the Water Company met the pre-existing

replacement obligations contained in the 1905, 1906 and 1909 Agreements entered into with the UG&E, International Paper, and Newport Power.

54. Upon information and belief, UG&E thereafter brought its own claim against the State arising out of its appropriation of the waters of the West Canada Creek on or about.

55. Upon information and belief, UG&E and the State settled the claim by agreement dated June 14, 1921, (the "1921 Agreement") pursuant to which the State paid UG&E \$100,000 and agreed to discharge water from Hinckley reservoir pursuant to a particular operating diagram.

56. In 1925, the Water Company entered into an agreement with UG&E for the development of a second hydroelectric power plant on the West Canada Creek at Prospect (the "1925 Agreement"). The agreement required UG&E to construct a pumping station and pay the cost of pumping water into the Water Company's water mains.

57. Upon information and belief, at some point prior to 1958, Niagara Mohawk acquired both UG&E and Newport Power.

58. In or about 1937, the City of Utica acquired the rights and liabilities of the Water Company.

59. In 1958 Niagara Mohawk entered into an agreement that released it and its successors from its obligation to pay the costs of pumping water into the City's mains incurred under the 1925 Agreement, and in turn, released the City and its successors from the replacement and reservoir obligations contained in the prior agreements between the Water Company and UG&E and Newport Power.

60. In or about 1996, Plaintiff acquired from the City of Utica all rights and responsibilities related to the water supply system, including the right to use up to 75 c.f.s of water from the West Canada Creek, as heretofore described.

Plaintiff's Use of the West Canada Creek Waters

61. Plaintiff and its predecessors have continuously drawn water from Hinckley reservoir for water supply purposes since 1914.

62. Upon information and belief, a venturi meter or other measuring device was installed in Hinckley dam which would allow measurement of water diverted by Plaintiff and its predecessors.

63. Upon information and belief, neither the State nor Canal nor anyone acting on their behalf have ever installed any device that would allow measurement of flows into Hinckley reservoir.

64. Although the 1917 Agreement contained provisions which required that the Water Company replace water taken when the flow of the West Canada Creek was below 335 c.f.s. and called for the construction of additional storage reservoirs based upon the amount of water diverted, compliance with these provisions has never been required.

65. The only storage reservoir ever built by the Water Company or its successors was Gray reservoir located on the Black Creek.

66. The Gray reservoir was never operated in any manner to compensate flows taken by the Water Company and its successors.

67. Upon information and belief, compensating flows as called for under the 1917 Agreement were never needed.

68. Upon information and belief, if compensating flows had been needed, they would not have impacted flows into or out of Hinckley reservoir because even the release of the entire contents of Gray reservoir would have had no appreciable impact on the flow of water into or out of Hinckley reservoir.

69. As early as 1984, due to safety concerns raised by the New York Department of Environmental Conservation (“NYDEC”), the gates of the Gray reservoir were opened half-way to maintain the reservoir at half-capacity.

70. In or about 1989, due to on-going safety concerns and upon notice to defendants and/or their predecessors, the gates of the Gray dam were fully opened, at which point the reservoir could no longer hold reserve flows.

71. In 2001, the Plaintiff applied to the NYDEC for a permit authorizing the removal of Gray dam due to the safety issues raised. After publication and notice to interested parties, including defendants and or their predecessors, the permit was granted and the Gray dam was subsequently removed.

72. Since the installation of the intake valves in Hinckley dam, none of the defendants, nor anyone acting on their behalf, has ever requested that the Plaintiff or its predecessors replace flows taken from the West Canada Creek at Hinckley reservoir.

73. Since the installation of the intake valves in Hinckley dam, none of the defendants, nor any one acting on their behalf, has ever requested that Plaintiff or its predecessors construct additional storage reservoirs referenced in the 1917 Agreement.

The Controversy

74. In 2002, Plaintiff sought to expand its service area to four additional towns, and as such, was required to obtain a permit from the NYDEC.

75. Defendant Canal has opposed the water supply permit application submitted to the NYDEC in connection with this expansion, claiming it is successor-in-interest to the State under the 1917 Agreement and that Plaintiff has no right to continue to draw water from Hinckley reservoir absent payment for the water diverted.

76. Defendant Erie Hydro, who upon information and belief, owns the hydroelectric plants previously owned by UG&E at Trenton Falls and Prospect, has also opposed the application and in addition, served a notice of claim on Plaintiff asserting it is being injured by Plaintiff's use of the water without replacement.

FIRST CAUSE OF ACTION

Declaration Pursuant Article 15 of the RPAPL - The State Has No Right to 75 c.f.s. -

77. Plaintiff repeats and realleges the allegations as set forth in paragraphs 1 through 76 of the Complaint as if fully set forth herein.

78. This cause of action is brought pursuant to Article 15 of RPAPL to compel a determination as to the Plaintiff's continued right to draw water from the West Canada Creek at Hinckley reservoir.

79. Prior to 1912, Plaintiff's predecessor, the Water Company, acquired land and accompanying riparian rights from property owners along the banks of the West Canada Creek necessary for it to supply water to Utica area residents.

80. That notwithstanding the State's 1912 appropriation or any agreements the Water Company entered into with the State thereafter, the Water Company's right to divert at least 75 c.f.s. from the West Canada Creek at Hinckley reservoir continued unabated and unencumbered from its original acquisition and continues to be unencumbered today.

81. By virtue of Plaintiff's riparian rights, the defendants' adverse claims that they are entitled to compensation for use of water by Plaintiff within the aforementioned 75 c.f.s. is unfounded and has no basis in law.

82. Plaintiff seeks a declaration as against all defendants that its right to divert up to 75 c.f.s. from the West Canada Creek at Hinckley reservoir, which it has owned since before 1912, remains absolute and unconditional.

SECOND CAUSE OF ACTION

Declaration Pursuant Article 15 of the RPAPL

- Plaintiff's Right to 75 c.f.s. is Unrestricted -

83. Plaintiff repeats and realleges the allegations as set forth in paragraphs 1 through 82 of the Complaint as if fully set forth herein.

84. By virtue of the Barge Canal Act, the State provided Plaintiff's predecessor with notice that the State would be appropriating all of the Plaintiff's riparian rights to the waters of the West Canada Creek at Hinckley reservoir, with the exception of 100 c.f.s. to which Plaintiff's predecessor would retain the ownership rights.

85. In 1912, the State appropriated the land necessary for the construction of Hinckley dam and reservoir as well as the waters of the West Canada Creek at Hinckley, with the exception of 100 c.f.s. reserved to Plaintiff's predecessors, all as particularly set forth in the appropriation map attached hereto as Exhibit C.

86. Following a dispute over the compensation for the appropriation, the Plaintiff's predecessor and the State settled the dispute by the 1917 Agreement, which provided, *inter alia*, that the existing riparian rights of Plaintiff's predecessor would be further reduced from 100 c.f.s to 75 c.f.s.

87. Following the settlement, the parties caused a deed dated December 27, 1917 to be recorded in the office of the Oneida County Clerk in Liber 748 of conveyances at page 63, pursuant to which Plaintiff's predecessor conveyed to the State all of its right and title to the flows of the West Canada creek at Hinckley "except the flow of water to the extent and amount of a twenty-four hour average of seventy five cubic feet per second the amount however at no time to exceed a maximum of eighty-five cubic feet per second which flow and right are expressly omitted from this conveyance and excepted and reserved to the Consolidated Water Company of Utica, N.Y., pursuant to its corporate powers and for its corporate purposes."

88. Defendants have opposed the water supply permit application submitted by Plaintiff to the NYDEC, purporting to have the authority or right to restrict, condition and/or terminate the Plaintiff's ability to draw 75 c.f.s. from Hinckley reservoir.

89. Neither the appropriation map filed in connection with the 1912 appropriation (Exhibit C) nor the 1917 deed conveying the water rights of Plaintiff's predecessor to the State (Exhibit D) condition or limit the Plaintiff's ownership rights, or otherwise give the State any ownership rights to the aforementioned 75 c.f.s.

90. Plaintiff seeks a declaration as against all defendants that, pursuant to the State's 1912 appropriation (Exhibit C) and the 1917 conveyance of water rights to the State by Plaintiff's predecessor (Exhibit D), Plaintiff has the absolute and unconditional right to draw 75 c.f.s from the flows of the West Canada Creek at Hinckley reservoir.

THIRD CAUSE OF ACTION

Declaration Pursuant to Article 15 of the RPAPL - Statute of Limitations -

91. Plaintiff repeats and realleges the allegations as set forth in paragraphs 1 through 90 of the Complaint as if fully set forth herein.

92. Plaintiff and its predecessors have continuously drawn water from the West Canada Creek at Hinckley reservoir since as early as 1914.

93. That neither Plaintiff nor its predecessors have ever replaced flows taken from the West Canada Creek at Hinckley reservoir.

94. Upon information and belief, Plaintiff's predecessor began drawing approximately 25 c.f.s. of water in or about 1948, without objection or demand for a larger compensation reservoir by any of the defendants.

95. Upon information and belief, Plaintiff's predecessor began drawing approximately 35 c.f.s. of water in or about 1969, without objection or demand for a larger compensation reservoir by any of the defendants.

96. In our about 1989, upon notice to the defendants' predecessors, the gates of the Gray dam were fully opened, at which point the Gray reservoir could no longer store reserve flows for compensation.

97. In 2001, after notice to defendants or their predecessors, the NYDEC authorized the removal of Gray dam, which was completed in 2002.

98. Upon information and belief, prior to the submission of the Plaintiff's 2002 water supply permit application to the NYDEC, none of the defendants nor any of their predecessors had ever requested that the Plaintiff or its predecessors increase the capacity of its compensation reservoir or rebuild Gray dam.

99. In the over ninety years that the Plaintiff and its predecessors have been drawing water from Hinckley reservoir, none of the defendants nor any of their predecessors have ever required that Plaintiff or its predecessors replace flows taken.

100. All of the defendants are barred by the statute of limitations from claiming that Plaintiff or its Predecessor breached any obligation to replace flows or maintain storage reservoirs set forth in the 1917.

101. To the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, Plaintiff seeks a declaration that the statute of limitations bars enforcement of the flow compensation and reservoir provisions leaving Plaintiff the unrestricted and absolute right to draw up to 75 c.f.s from the flows of the West Canada Creek at Hinckley reservoir.

FOURTH CAUSE OF ACTION

**Declaration Pursuant to Article 15 of the RPAPL
- Estoppel/Waiver/Laches -**

102. Plaintiff repeats and realleges the allegations as set forth in paragraphs 1 through 101 of the Complaint as if fully set forth herein.

103. Upon information and belief, a venturi meter or other measuring device was installed in Hinckley dam which would allow measurement of water diverted by Plaintiff and its predecessors.

104. Upon information and belief, neither the State nor Canal nor anyone acting on their behalf have ever installed any device that would allow measurement of flows into Hinckley reservoir.

105. Upon information and belief, the defendants were aware that neither Plaintiff nor its predecessors have provided compensating flows or increased reservoir capacity at any time.

106. In the almost century that the Plaintiff and its predecessors have been drawing water from Hinckley reservoir, none of the defendants nor any of their predecessors have ever required that Plaintiff or its predecessors replace flows taken.

107. Upon information and belief, none of the Defendants nor their predecessors objected to the proposed and eventual removal of the Gray dam as noticed by the DEC, nor have they ever requested the construction of a compensating reservoir by Plaintiff or its predecessors.

108. Plaintiff and its predecessors were reasonably lead to believe by the defendants and/or their predecessors that compliance with the flow compensation and reservoir requirements would not be required.

109. As such, the defendants are barred by the equitable doctrines of estoppel, waiver and laches from claiming that Plaintiff or its predecessors breached any

obligation to replace flows or maintain storage reservoirs set forth in the 1917 Agreement.

110. To the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, Plaintiff seeks a declaration that the equitable doctrine of estoppel, wavier and/or laches bars enforcement of the flow compensation and reservoir provisions leaving Plaintiff the unrestricted and absolute right to draw up to 75 c.f.s from the flows of the West Canada Creek at Hinckley reservoir.

FIFTH CAUSE OF ACTION

Declaration Pursuant to Article 15 of the RPAPL - Assent and Discharge -

111. Plaintiff repeats and realleges the allegations as set forth in paragraphs 1 through 110 of the Complaint as if fully set forth herein.

112. In the almost century that Plaintiff and its predecessor have been drawing water from the West Canada Creek at Hinckley reservoir, they have never replaced flows taken.

113. In the near century that Plaintiff and its predecessor have been drawing water from the West Canada Creek at Hinckley reservoir they have never been required to maintain increasingly large storage reservoirs.

114. None of the defendants or their predecessors have ever required that Plaintiff or its predecessors comply with the flow compensation and reservoir provisions of the 1917 Agreement thereby assenting to forgo compliance with the those provisions.

115. To the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, Plaintiff seeks a declaration that any duty to comply with the flow compensation and reservoir requirements has been discharged by the defendants assent to forgo plaintiff's compliance with those provisions.

SIXTH CAUSE OF ACTION

Declaration Pursuant to Article 15 of the RPAPL - Frustration of Purpose/Impossibility -

116. Plaintiff repeats and realleges the allegations as set forth in paragraphs 1 through 115 of the Complaint as if fully set forth herein.

117. The DEC's determination that the Gray dam constituted a safety hazard, along with the knowledge that any release of compensating flows, including the release of the entire contents of Gray reservoir, would not impact flows into or out of Hinckley reservoir, constituted events frustrating the purpose of or otherwise rendering it impossible for Plaintiff to meet the compensation and reservoir provisions contained in the 1917 Agreement.

118. As such, to the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, Plaintiff seeks a declaration as against all defendants that the purpose for or performance under the flow compensation and reservoir provisions was frustrated or otherwise rendered impossible thereby excusing Plaintiff from compliance with those provisions, barring any claim for damages or forfeiture of Plaintiff's right to draw 75 c.f.s from the flows of the West Canada Creek at Hinckley reservoir.

SEVENTH CAUSE OF ACTION

Declaration Pursuant to Article 15 of the RPAPL - Absence of a Material Breach -

119. Plaintiff repeats and realleges the allegations as set forth in paragraphs 1 through 118 of the Complaint as if fully set forth herein.

120. The purpose of the flow compensation and reservoir requirements was to ensure that Plaintiff's predecessors met their pre-existing contractual obligations to

UG&E, Newport Power, and International Paper, requiring the replacement of flows under certain conditions.

121. Plaintiff is no longer required to meet the obligations contained in the prior agreements with UG&E and Newport Power by virtue of Niagara Mohawk's release of Plaintiff's predecessor from those obligations in 1958.

122. Upon information and belief, neither International Paper nor any successor to its interest under the 1906 agreement with Plaintiff's predecessor remain in business.

123. The only other purpose for the flow replacement and reservoir requirements in the 1917 Agreement, in addition to compliance with the UG&E, Newport Power and International Paper agreements, was to ensure a minimum flow was maintained in the West Canada Creek to meet both Canal needs and those of the Plaintiff and its predecessor.

124. Upon information and belief, the flows of the West Canada Creek have been more than sufficient to meet both Canal and Plaintiff's needs and replacement flows called for under the 1917 Agreement have never been needed.

125. Upon information and belief, the defendants cannot specify any point at which the flows of the West Canada Creek fell below 335 c.f.s., thereby triggering the compensation provision.

126. Upon information and belief, even if triggered, replacement as called for under the 1917 Agreement would provide no appreciable increase in the level of water contained in Hinckley reservoir nor would it provide any appreciable increase in the flows released from Hinckley reservoir, and as such, the provisions provide no appreciable benefit to any of the defendants.

127. Upon information and belief, even the release of the entire contents of Gray reservoir would not have had any appreciable impact on the flow of water into or out of Hinckley reservoir.

128. As a such, to the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, Plaintiff seeks a declaration as against all defendants that any failure by Plaintiff or its predecessors comply with the flow compensation or reservoir provisions does not constitute a material breach of the 1917 Agreement forfeiting plaintiff's right to draw up to 75 c.f.s. of water from Hinckley reservoir free of charge.

EIGHTH CAUSE OF ACTION

Declaration Pursuant to Article 15 of the RPAPL - Absence of a Damage to Defendants -

129. Plaintiff repeats and realleges the allegations as set forth in paragraphs 1 through 128 of the Complaint as if fully set forth herein.

130. Upon information and belief, the flow compensation and reservoir requirements contained in the 1917 Agreement cannot appreciably impact the flow of the West Canada Creek into or out of Hinckley reservoir.

131. As such, any failure by Plaintiff to comply with these compensation and reservoir requirements has not and will not cause harm to the defendants.

132. To the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, Plaintiff seeks a declaration as against all defendants that any failure by Plaintiff or its predecessors to comply with the flow compensation or reservoir provisions of the 1917 Agreement has been merely harmless and thus does not entitle

the Defendants to the recovery of damages or the forfeiture of Plaintiff's right to draw up to 75 c.f.s. of water from Hinckley reservoir free of charge.

NINTH CAUSE OF ACTION

Declaration Pursuant to the 1917 Agreement - Statute of Limitations -

133. Plaintiff repeats and realleges the allegations as set forth in paragraphs 1 through 132 of the Complaint as if fully set forth herein.

134. That pursuant to the terms of the 1917 Agreement Plaintiff was entitled to draw up to 75 c.f.s of water from Hinckley reservoir.

135. That the 1917 Agreement allows Plaintiff to challenge, in any court of competent jurisdiction, including State Supreme Court, a determination by the State or its successors that Plaintiff is in any respect failing to comply with the provisions of the 1917 Agreement.

136. That Canal, as successor to the State under the 1917 Agreement, has asserted that Plaintiff has violated the 1917 Agreement by failing to replace flows when required under the Agreement.

137. Plaintiff and its predecessors have continuously drawn water from the West Canada Creek at Hinckley reservoir since as early as 1914.

138. That neither Plaintiff nor its predecessors have ever replaced flows taken from the West Canada Creek at Hinckley reservoir.

139. Upon information and belief, Plaintiff's predecessor began drawing approximately 25 c.f.s. of water in or about 1948, without objection or demand for a larger compensation reservoir by any of the defendants.

140. Upon information and belief, Plaintiff's predecessor began drawing approximately 35 c.f.s. of water in or about 1969, without objection or demand for a larger compensation reservoir by any of the defendants.

141. In or about 1989, upon notice to defendants or their predecessors, the gates of the Gray dam were fully opened, at which point the Gray reservoir could no longer store reserve flows for compensation.

142. In 2001, after notice to defendants or their predecessors, the NYDEC authorized the removal of Gray dam, which was completed in 2002.

143. Upon information and belief, prior to the submission of the Plaintiff's 2002 water supply permit to the NYDEC, none of the defendants nor any of their predecessors have ever requested that the Plaintiff or its predecessors increase the capacity of its compensation reservoir or rebuild Gray dam.

144. In the over ninety years that the Plaintiff and its predecessors have been drawing water from Hinckley reservoir, none of the defendants nor any of their predecessors have ever required that Plaintiff or its predecessors replace flows taken.

145. All of the defendants are barred by the statute of limitations from claiming that Plaintiff or its Predecessor breached any obligation to replace flows or maintain storage reservoirs set forth in the 1917.

146. To the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, Plaintiff seeks a declaration that the statute of limitations bars enforcement of the flow compensation and reservoir provisions leaving Plaintiff the unrestricted and absolute right to draw up to 75 c.f.s from the flows of the West Canada Creek at Hinckley reservoir.

TENTH OF ACTION

**Declaration Pursuant to the 1917 Agreement
- Estoppel/Waiver/Laches -**

147. Plaintiff repeats and realleges the allegations as set forth in paragraphs 1 through 146 of the Complaint as if fully set forth herein.

148. Upon information and belief, a venturi meter or other measuring device was installed in Hinckley dam which would allow measurement of water diverted by Plaintiff and its predecessors.

149. Upon information and belief, neither the State nor Canal nor anyone acting on their behalf have ever installed any device that would allow measurement of flows into Hinckley reservoir.

150. Upon information and belief, defendants were aware that neither Plaintiff nor its predecessor have provided compensating flows or increased reservoir capacity at any time.

151. In the almost century that the Plaintiff and its predecessors have been drawing water from Hinckley reservoir, none of the defendants nor any of their predecessors have ever required that Plaintiff or its predecessors replace flows taken.

152. Upon information and belief, none of the Defendants nor their predecessors objected to the proposed and eventual removal of the Gray dam as noticed by the DEC, nor have they ever requested the construction of a compensating reservoir by Plaintiff or its predecessors.

153. Plaintiff and its predecessors were reasonably lead to believe by the defendants and/or their predecessors that compliance with the flow compensation and reservoir provisions would not be required.

154. As such, the defendants are barred by the equitable doctrines of estoppel, waiver and laches from claiming that Plaintiff or its predecessors breached any

obligation to replace flows or maintain storage reservoirs set forth in the 1917 Agreement.

155. To the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, Plaintiff seeks a declaration that the equitable doctrine of estoppel, waiver and/or laches bars enforcement of the flow compensation and reservoir provisions leaving Plaintiff the unrestricted and absolute right to draw up to 75 c.f.s from the flows of the West Canada Creek at Hinckley reservoir.

ELEVENTH CAUSE OF ACTION

Declaration Pursuant to the 1917 Agreement - Assent and Discharge -

156. Plaintiff repeats and realleges the allegations as set forth in paragraphs 1 through 155 of the Complaint as if fully set forth herein.

157. In the almost century that Plaintiff and its predecessor have been drawing water from the West Canada Creek at Hinckley reservoir, they have never have replaced flows taken.

158. Since as early as 1948, Plaintiff has draw flows of at least 25 c.f.s without objection or demand for a larger compensation reservoir by any of the defendants.

159. None of the defendants or their predecessors have ever required that Plaintiff or its predecessors comply with the flow compensation and reservoir provisions of the 1917 Agreement thereby assenting to forgo compliance with the those provisions.

160. To the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, Plaintiff seeks a declaration that any duty to comply with the flow compensation and reservoir requirements has been discharged by the defendants assent to forgo plaintiff's compliance with those provisions

TWELFTH CAUSE OF ACTION

Declaration Pursuant to the 1917 Agreement - Frustration of Purpose/Impossibility -

161. Plaintiff repeats and realleges the allegations as set forth in paragraphs 1 through 160 of the Complaint as if fully set forth herein.

162. The DEC's determination that the Gray dam constituted a safety hazard, along with the knowledge that any release of compensating flows, including the release of the entire contents of Gray reservoir, would not impact flows into or out of Hinckley reservoir, constituted events frustrating the purpose of or otherwise rendering it impossible for Plaintiff to meet the flow compensation and reservoir requirements contained in the 1917 Agreement.

163. As such, to the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, Plaintiff seeks a declaration as against all defendants that the purpose for or performance under the flow compensation and reservoir provisions was frustrated or otherwise rendered impossible thereby excusing Plaintiff from compliance with those provisions, barring any claim for damages or forfeiture of Plaintiff's right to draw 75 c.f.s from the flows of the West Canada Creek at Hinckley reservoir.

THIRTEENTH CAUSE OF ACTION

Declaration Pursuant to the 1917 Agreement - Absence of a Material Breach -

164. Plaintiff repeats and realleges the allegations as set forth in paragraphs 1 through 163 of the Complaint as if fully set forth herein.

165. The purpose of the flow compensation and reservoir requirements was to ensure that Plaintiff's predecessors met their pre-existing contractual obligations to

UG&E, Newport Power, and International Paper, requiring the replacement of flows under certain conditions.

166. Plaintiff is no longer required to meet the obligations contained in the prior agreements with UG&E and Newport Power by virtue of Niagara Mohawk's release of Plaintiff's predecessor from those obligations in 1958.

167. Upon information and belief, neither International Paper nor any successor to its interest under the 1906 agreement with Plaintiff's predecessor remain in business.

168. Upon information and belief, any claimed right enforce to the compensation provisions contained in the 1906 agreement with Plaintiff's predecessor is barred by prior judicial determination.

169. Upon information and belief, the flows of the West Canada Creek have been more than sufficient to meet both Canal and Plaintiff's needs and replacement flows called for under the 1917 Agreement have never been needed.

170. Upon information and belief, the defendants cannot specify any point at which the flows of the West Canada Creek fell below 335 c.f.s., thereby triggering the compensation provision.

171. Upon information and belief, even if triggered, replacement as called for under the 1917 Agreement would provide no appreciable increase in the level of water contained in Hinckley reservoir nor would it provide any appreciable increase in the flows released from Hinckley reservoir, and as such, the provisions provide no appreciable benefit to any of the defendants.

172. Upon information and belief, even the release of the entire contents of Gray reservoir would not have had any appreciable impact on the flow of water into or out of Hinckley reservoir.

173. As a such, to the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, Plaintiff seeks a declaration as against all defendants that any failure by Plaintiff or its predecessors comply with the flow compensation or reservoir provisions does not constitute a material breach of the 1917 Agreement forfeiting plaintiff's right to draw up to 75 c.f.s. of water from Hinckley reservoir free of charge.

FOURTEENTH CAUSE OF ACTION

Declaration Pursuant to the 1917 Agreement - Absence of Damage to Defendants -

174. Plaintiff repeats and realleges the allegations as set forth in paragraphs 1 through 173 of the Complaint as if fully set forth herein.

175. Upon information and belief, the flow compensation and reservoir requirements contained in the 1917 Agreement cannot appreciably impact the flow of the West Canada Creek into or out of Hinckley reservoir.

176. As such, any failure by Plaintiff to comply with these compensation and reservoir requirements has not and will not cause harm to the defendants.

177. To the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, Plaintiff seeks a declaration as against all defendants that any failure by Plaintiff or its predecessors to comply with the flow compensation or reservoir provisions of the 1917 Agreement has been merely harmless and thus does not entitle the Defendants to the recovery of damages or the forfeiture of Plaintiff's right to draw up to 75 c.f.s. of water from Hinckley reservoir free of charge.

FIFTEENTH CAUSE OF ACTION

**Declaration Pursuant to ECL § 15-0701
- Harmless Diversion -**

178. Plaintiff repeats and realleges the allegations as set forth in paragraphs 1 through 177 of the Complaint as if fully set forth herein.

179. Defendant Erie Hydro has served a notice of claim asserting that Plaintiff's diversion of water without replacement is unreasonably interfering with its common law riparian rights.

180. Defendant Erie Hydro is barred from asserting Plaintiff is required to compensate flows so as to avoid damage to Erie Hydro by virtue of Niagara Mohawk's 1958 agreement releasing Plaintiff from any such obligation to compensate flows.

181. To the extent defendant Erie Hydro is not barred by virtue of the 1958 release, upon information and belief, its common law rights to the flows of the West Canada Creek were abrogated by the 1921 Agreement it entered into with the State, under which it agreed to the release of water pursuant to a particular operating diagram.

182. Upon information and belief, Plaintiff's diversion of water from the West Canada Creek at Hinckley reservoir has no impact on the release of flows from Hinckley reservoir.

183. As such, Plaintiff's use of the waters of the West Canada Creek without replacement constitutes a mere harmless diversion pursuant to ECL §15-0701.

184. Plaintiff seeks a declaration that defendant Erie Hydro is barred by release from asserting damage from Plaintiff's use of waters from the West Canada Creek at Hinckley reservoir without compensation or alternatively, that Plaintiff use is merely harmless and thus does not require compensation.

SIXTEENTH CAUSE OF ACTION

**Declaration Pursuant to ECL § 15-0701
- Prescriptive Right -**

185. Plaintiff repeats and realleges the allegations as set forth in paragraphs 1 through 184 of the Complaint as if fully set forth herein.

186. To the extent Plaintiff's diversion is deemed to be harmful to defendant Erie Hyrdo, such diversion has been open and notorious and adverse to the interest of Erie Hydro and its predecessors for the prescriptive period establishing a prescriptive right on behalf of Plaintiff to use water from the West Canada Creek at Hinckley without compensation.

187. To the extent Plaintiff's diversion is deemed to be harmful to defendant Erie Hyrdo, Plaintiff seeks a declaration that it has acquired a prescriptive right to divert water from the West Canada Creek at Hinckley without compensation.

WHEREFORE, for the foregoing reasons, Plaintiff seeks the following relief:

A. Under the first through fourteenth causes of action, a declaratory judgment under Article 15 of RPAPL or the 1917 Agreement as against all defendants that;

1. Plaintiff has an absolute and unconditional right to use up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir as reserved from the States 1912 appropriation (Exhibit C) and as deeded to the State by Plaintiff's predecessor in 1917 (Exhibit D);

2. Alternatively, to the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, that the statute of limitations bars enforcement of the flow compensation and reservoir provisions leaving Plaintiff the unrestricted and

absolute right to draw up to 75 c.f.s from the flows of the West Canada Creek at Hinckley reservoir;

3. Alternatively, to the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, that the equitable doctrines of estoppel, waiver and/or laches bars enforcement of the flow compensation and reservoir provisions leaving Plaintiff the unrestricted and absolute right to draw up to 75 c.f.s from the flows of the West Canada Creek at Hinckley reservoir;

4. Alternatively, to the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, that any duty to comply with the flow compensation and reservoir requirements has been discharged by the defendants assent to forgo plaintiff's compliance with those provisions leaving Plaintiff the unrestricted and absolute right to draw up to 75 c.f.s from the flows of the West Canada Creek at Hinckley reservoir;

5. Alternatively, to the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, that the purpose for or performance under the flow compensation and reservoir provisions was frustrated or otherwise rendered impossible thereby excusing Plaintiff from compliance with those provisions, barring any claim for damages or forfeiture of Plaintiff's right to draw 75 c.f.s from the flows of the West Canada Creek at Hinckley reservoir;

6. Alternatively, to the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, that any failure by Plaintiff or its predecessors

comply with the flow compensation or reservoir provisions does not constitute a material breach of the 1917 Agreement forfeiting plaintiff's right to draw up to 75 c.f.s. of water from Hinckley reservoir free of charge;

7. Alternatively, to the extent the 1917 Agreement is deemed to in any way encumber or restrict Plaintiff's right to draw up to 75 c.f.s of water from the West Canada Creek at Hinckley reservoir, that any failure by Plaintiff or its predecessors to comply with the flow compensation or reservoir provisions of the 1917 Agreement has been merely harmless and thus does not entitle the Defendants to the recovery of damages or the forfeiture of Plaintiff's right to draw up to 75 c.f.s. of water from Hinckley reservoir free of charge; and

B. Under the fifteenth and sixteenth causes of action, Plaintiff seeks a declaration as against Defendant Erie Hydro that:

1. Erie Hydro is barred by release from asserting damage from Plaintiff's use of waters from the West Canada Creek at Hinckley reservoir without compensation or alternatively, that Plaintiff's use is merely harmless and thus does not require compensation; or

2. To the extent Plaintiff's diversion is deemed to be harmful to defendant Erie Hydro, Plaintiff seeks a declaration that it has acquired a prescriptive right to divert water from the West Canada Creek at Hinckley without compensation; and

C. interest, costs, disbursements and attorneys' fees to the fullest extent permitted by law; and

D. such other and further relief that this Court deems just and proper.

DATED: April 25, 2005
Syracuse, New York

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