At a Term of the Supreme Court of the State of New York, held in and for the County of Oneida at the Oneida County Courthouse, Rome, New York on May 15, 2009.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONEIDA

MOHAWK VALLEY WATER AUTHORITY,

Plaintiff,

vs.

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

Defendants.

DECISION, ORDER AND JUDGMENT

Index No.: CA2005-000928

RJI No.: 32-05-0778

APPEARANCES:

HANCOCK & ESTABROOK
By: John L. Murad, Jr., Esq
Attorneys for Plaintiff

HISCOCK & BARCLAY
By: Douglas J. Nash, Esq
Attorneys for Defendant Erie Boulevard Hydropower, L.P.

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By: Roger B. Williams, Esq., AAG
Attorney for Defendants The State of New York and
The New York State Canal Corporation

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By: Thomas Whyatt, Esq.
Attorneys for Intervenors West Canada Riverkeepers, Inc., Stanley E. Gilbert, Papp Enterprises, Inc. d/b/a West Canada Creek Campsites, West Canada Creek Association, Inc., Trenton Falls Association, Inc., George K. Doolittle, Katrina Hanna, Peter DeF. Millard, Virginia B. Kelly, Bruce D. Kellogg and Kathleen A. Kellogg

SAMUEL D. HESTER, J.

DECISION, ORDER AND JUDGMENT

This case involves the rights of the plaintiff to withdraw waters from the Hinckley Reservoir for the purpose of supplying the City of Utica and surrounding communities with water. The subject of the motions before the Court is plaintiff's second amended complaint which alleges 17 causes of action against the defendants as well as the defendants' affirmative defenses and counterclaims alleged against the plaintiff.

The Motions

1. Defendant Erie Boulevard Hydropower, L.P.'s motion for partial summary judgment against the Mohawk Valley Water Authority.

By notice of motion dated September 26, 2008 (filed on September 22, 2008), defendant Erie Boulevard Hydropower, L.P. (Erie) moves for partial summary judgment against plaintiff, Mohawk Valley Water Authority, pursuant to CPLR § 3212, ECL § 15-0701 and RPAPL §§ 1511 and 1515 (1) (c) and (d), dismissing the first through fifteenth and the seventeenth causes of action as alleged in plaintiff's second amended complaint. The motion is supported by the affirmation of Douglas J. Nash, Esq. dated September 26, 2008 with exhibits A through N annexed thereto and the second supplemental affirmation of Douglas J. Nash, Esq. dated November 6, 2008 with exhibits X through BB annexed thereto in support of Erie's motion as well as in opposition to the motion of plaintiff directed at Erie. Plaintiff has opposed Erie's motion by affirmation of John L. Murad, Jr., Esq. dated October 17, 2008 with exhibits A through Q annexed thereto.

2. Plaintiff Mohawk Valley Water Authority's motion for summary judgment against defendant Erie Boulevard Hydropower, L.P.

By notice of motion dated September 26, 2008 (filed on September 26, 2008) plaintiff moves to dismiss the counterclaims of Erie pursuant to CPLR §§ 3211 (a) (5) and for summary judgment declaring that it is not obligated to compensate Erie in any manner for water it withdraws from Hinckley Reservoir. The motion is supported by the affirmation of John L. Murad, Jr., Esq. dated September 26, 2008 with exhibits A through JJ annexed thereto, the Affidavit of Patrick J. Becher sworn to on September 26, 2008 with exhibit A annexed thereto, and the reply affirmation of John L. Murad, Jr., Esq. dated November 7, 2008 with exhibits A through J annexed thereto. Murad's reply affirmation objects to the court considering the reply affirmation of Roger B. Williams, Esq. dated October 15, 2008 with exhibits T and U annexed thereto in opposition to plaintiff's motion for summary judgment against Erie on the ground that defendants, the State of New York and the New York State Canal Corporation (State defendants), are not the subject of the claims against which plaintiff is moving. In opposition to the motion of plaintiff, Erie has submitted the first supplemental affirmation of Douglas J. Nash, Esq. dated October 16, 2008 with exhibits O through W annexed thereto and the affidavit of John Parrish, Ph.D., P.E. sworn to on October 15, 2008. As referenced above, the State defendants have submitted the affirmation of Roger B. Williams, Esq. dated October 15, 2008 with exhibits T and U annexed thereto filed as a reply to the opposition of plaintiff to the State defendants' motion for summary judgment against plaintiff to be considered as opposition to plaintiff's motion for summary judgment filed against Erie.

3. Defendants The State of New York and The New York State Canal Corporation move for summary judgment against plaintiff.

The State defendants, by notice of motion dated September 26, 2008, seek summary judgment against plaintiff dismissing plaintiff's second amended complaint and for summary judgment finding that plaintiff is in breach of an agreement dated December 27, 1917 (1917 Agreement) between the State of New York and Consolidated Water Company of Utica, N.Y., a predecessor in interest to plaintiff; for a declaration that plaintiff has no present legal right to withdraw water from the Hinckley Reservoir until such time as plaintiff complies with the terms of the 1917 Agreement; for a declaration that the State defendants are entitled to an accounting of the amount of waters drawn by plaintiff from Hinckley Reservoir during any period plaintiff was in breach of the 1917 Agreement; for a declaration that the State defendants are entitled to an accounting of the gross revenues plaintiff has received from the sale or distribution of the Hinckley waters; for a declaration that the State defendants are entitled to a money judgment against plaintiff in such amount as will fairly and justly compensate the State defendants for plaintiff's usage of the Hinckley waters during any time of plaintiff's breach of the 1917 Agreement; and that the State defendants are entitled to indemnification by plaintiff for any and all damage for which the State defendants may be found liable to other parties as a result of plaintiff's breach of the 1917 Agreement. The motion of the State defendants is supported by the affirmation of Roger B. Williams, Esq. dated September 26, 2008 with exhibits A through S annexed thereto. This affirmation is to be considered in opposition to the cross motion of plaintiff seeking summary judgment against the State defendants. Also in support of their motion, the State defendants have submitted the reply affirmation of Roger B. Williams, Esq. dated October 15, 2008 with exhibits T

through U annexed thereto. In addition, the State defendants have submitted such affirmation in opposition to plaintiff's motion for summary judgment against Erie. Also, the State defendants have submitted the affirmation of Roger B. Williams, Esq. dated November 7, 2008 with exhibits V through AJ annexed thereto which also is to be considered in opposition to plaintiff's cross motion for summary judgment against the State defendants. In opposition, plaintiff has submitted the affirmation of John L. Murad, Jr., Esq. dated October 17, 2008 with exhibits A through OO annexed thereto also submitted in support of plaintiff's cross motion against the State defendants (discussed hereinafter).

4. Mohawk Valley Water Authority cross moves for summary judgment against The State of New York and the New York State Canal Corporation.

Plaintiff moves by notice of cross motion dated October 17, 2008 (filed on October 17, 2008) seeking summary judgment against the State defendants on the third, fourth, tenth and eleventh causes of action contained within the second amended complaint, for a declaration that enforcement of the flow compensation and reservoir provisions of the 1917 Agreement are barred by the six-year statute of limitations, or alternatively, by the equitable doctrines of waiver, laches, estoppel, frustration of purpose and impossibility of performance and for summary judgment dismissing all of the counterclaims asserted by the State defendants. Plaintiff's cross motion is supported by the affirmation of John L. Murad, Jr., Esq. dated October 17, 2008 with exhibits A through OO annexed thereto and the affidavit of Patrick J. Becher, sworn to on October 17, 2008 with exhibit A annexed thereto. The motion is opposed by the affirmation of Roger B. Williams, Esq. dated November 7, 2008 with exhibits V through AJ, which are also considered in further support of the motion for summary judgment filed by the State defendants seeking dismissal of plaintiff's second amended

complaint as well as for judgment on the counterclaims asserted by the State defendants against plaintiff.

5. Motion to Intervene.

By notice of motion dated December 23, 2008, a number of parties seek to intervene in this action pursuant to CPLR § 1012 (a), CPLR § 1013 and RPAPL § 1511. The parties seeking to intervene include individual owners of property downstream from the Hinckley Reservoir, commercial organizations operating downstream from the Hinckley Reservoir and organizations established for the purpose of protecting and preserving the West Canada Creek and its wildlife and environment. The proposed intervenors have submitted numerous affidavits, agreements and other documents contained in the original notice of motion and in the form of separate affidavits. In addition, the State defendants submitted an affirmation of Roger B. Williams, Esq. dated January 28, 2009 in support of the motion to intervene. Erie filed a "Notice of Joinder in Motion to Intervene" dated January 29, 2009. In opposition to the motion to intervene, plaintiff submitted the affidavit of John L. Murad, Jr., Esq. sworn to on January 29, 2009 and the affidavit of Patrick J. Becher sworn to on January 29, 2009.

Background

In the late 1800s, the West Canada Creek was selected by the City of Utica as a new source of water for its citizens. At that time, the creek had a yearly average flow of approximately 1,000 cubic feet per second (cfs). In the late 1890s and early 1900s, the West Canada Water Works Company (WCWWC) began acquiring land and riparian rights in the vicinity of where Hinckley dam is now located, necessary to construct its water system which would originate from West Canada Creek. On November 13, 1899 WCWWC conveyed those properties to plaintiff's predecessor

Consolidated Water Company of Utica, N.Y. (the Water Company). Subsequently, more property was acquired by the Water Company downstream from the present location of Hinckley dam. Also, in 1905, 1906 and 1909, the Water Company entered into contracts with three companies located along West Canada Creek that used the water for power supply purposes (Utica Gas & Electric Co. [UG&E], International Paper and Newport Electric Light and Power Co. [Newport Power]). These three contracts allowed the Water Company to divert water from West Canada Creek subject to certain conditions that called for the replacement of diverted water from a compensating reservoir when the flow of the creek was below certain identified levels. To comply with the contracts with the three above listed companies, the Water Company constructed a dam and reservoir located on Black Creek, a tributary to West Canada Creek, approximately eight miles above the present location of the Hinckley dam. This became known as Gray dam and reservoir which held approximately 1.2 billion gallons of water.

In 1903, the Barge Canal Act was promulgated pursuant to which Hinckley dam and reservoir was to be constructed to increase the flow of West Canada Creek at Hinckley for diversion at Morgan dam into Nine Mile Creek and into the Barge Canal (Canal). The State of New York appropriated the land and "all the waters flowing in the West Canada Creek at Hinckley, New York, 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." On January 21, 1913 the State of New York entered into an agreement with the Water Company in which it was recognized that the water supplied by West Canada Creek could meet both Canal and Water Company needs, set the compensation for the State of New York appropriation and for

damage to the delivery lines of the Water Company and reiterated that 100 cfs of water had been reserved from the taking to the Water Company. After execution of the agreement, the Attorney General refused to approve it and the Water Company filed a claim. That claim was settled by the 1917 Agreement which again recognized that the water supplied by West Canada Creek could adequately meet the needs of both the Canal and the Water Company, set compensation for the appropriation and the damage and indicated the parties' agreement that the flow excepted from the 1912 appropriation by the State of New York would be reduced to 75 cfs. The 1917 Agreement included additional provisions stating that when the flow of West Canada Creek fell below 335 cfs, the Water Company was to replace water taken to maintain the flow of 335 cfs and 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. By deed dated December 27, 1917, plaintiff's predecessor, the Water Company, conveyed to the State of New York all of its right and title to the flow of 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."

The deed did not include flow compensation or reservoir provisions.

After the State of New York and the Water Company executed its agreement, UG&E brought its own claim against the State of New York arising out of the State of New York's appropriation of the West Canada Creek waters. The claim was settled by an agreement in 1921 and the State of New York paid UG&E $100,000.00 and agreed to discharge water from Hinckley Reservoir pursuant

to a particular operating diagram. In 1925, the Water Company entered into a second agreement with UG&E for the development of a second hydroelectric power plant on West Canada Creek at Prospect and required UG&E to construct a pumping station and pay the cost of pumping water into the Water Company's water mains. In 1937 the City of Utica acquired the rights and liabilities of the Water Company. At some time prior to 1958, Niagara Mohawk (NIMO) acquired both UG&E and Newport Power. In 1958, NIMO entered into an agreement with the City of Utica that released NIMO and its successors from the obligation to pay the costs of pumping water into the City of Utica water mains and in turn, NIMO released the City of Utica and its successors from the replacement and reservoir obligations contained in the prior agreements between the Water Company and UG&E and Newport Power. In 1996 plaintiff acquired from the City of Utica all rights and responsibilities related to the water supply.

Plaintiff has continually drawn water from Hinckley Reservoir for water supply purposes since 1914. A venturi meter or other measuring device has been installed in Hinckley dam which allows measurement of water diverted by plaintiff and its predecessors. There is no indication that a device that would measure flows of West Canada Creek into Hinckley Reservoir was installed at any time. There is also no indication that, prior to the commencement of the current litigation, the State of New York has ever required plaintiff or its predecessors to comply with the provisions of the 1917 Agreement that required the Water Company or its successors to replace water taken when the flow of West Canada Creek was below 335 cfs or called for the construction of additional storage reservoirs based upon the amount of water diverted. The only storage reservoir ever built was Gray reservoir and dam. In 1984, as a result of safety concerns raised by New York State Department of Environmental Conservation (NYSDEC), the gates of Gray dam were opened half-way to maintain

the reservoir at half-capacity. In 1989 the gates were placed in a fully open state. In 2001 plaintiff applied to NYSDEC to remove the Gray dam, the permit was granted and Gray dam was removed.

In 2002 plaintiff sought to expand its service area to four additional towns and applied for a permit from NYSDEC. The New York State Canal Corporation opposed the water supply permit application claiming it is successor-in-interest to the State of New York under the 1917 Agreement and that plaintiff has no right to continue to draw water from Hinckley Reservoir absent payment for the water diverted. Erie, a successor in interest to NIMO, owns the two hydroelectric plants previously owned by UG&E at Trenton Falls and Prospect, and also opposed the application and served a notice of claim upon plaintiff asserting injury by plaintiff's use of the water without replacement. The State defendants seek to charge plaintiff $400,000.00 per year for water drawn from West Canada Creek at Hinckley, claiming ownership over those waters and claiming plaintiff failed to provide compensating flows required by the 1917 Agreement.

The Pleadings

On April 25, 2005 plaintiff filed a summons and complaint against Erie and the State defendants. That complaint has been amended twice, most recently by plaintiff's second amended complaint dated March 13, 2008. The second amended complaint contains 17 causes of action.

Plaintiff's first cause of action seeks a declaration against all defendants pursuant to RPAPL Article 15 that the State defendants have no right to the 75 cfs of water as plaintiff alleges that notwithstanding any agreements made with the State of New York, plaintiff's right to divert at least 75 cfs of water from West Canada Creek at Hinckley Reservoir continued unabated and unencumbered from its original acquisition and continues to be unencumbered today and 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 75 cfs of water is unfounded. Plaintiff seeks a declaration against all defendants that it has the right to divert at least 75 cfs of water from West Canada Creek at Hinckley Reservoir.

Plaintiff's second cause of action seeks a declaration against all defendants pursuant to RPAPL Article 15 that plaintiff's right to 75 cfs of water is unrestricted pursuant to the deed executed on December 27, 1917 whereby plaintiff's predecessor conveyed to the State of New York all of its right and title to the flows of 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."

Plaintiff's third cause of action seeks a declaration against all defendants pursuant to RPAPL Article 15 concerning the statute of limitations and alleges that the plaintiff and its predecessors have continuously drawn water from West Canada Creek at Hinckley Reservoir since as early as 1914 and never replaced flows taken, nor have any of the defendants required that the flows be replaced, therefore all of the defendants are barred by the statute of limitations from claiming that plaintiff or its predecessors breached any obligation to replace flows or maintain storage reservoirs. To the extent that the 1917 Agreement encumbers or restricts plaintiff's right to draw 75 cfs of water then 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 cfs from the flows of West Canada Creek at Hinckley Reservoir.

Plaintiff's fourth cause of action seeks a declaration against all defendants pursuant to

RPAPL Article 15 that estoppel/waiver and laches bar the enforcement of the flow compensation and reservoir provisions of the 1917 Agreement because defendants have never required such compliance, thus, plaintiff and its predecessors were reasonably led to believe that compliance with the flow compensation and reservoir requirements would not be required. To the extent that the 1917 Agreement encumbers or restricts plaintiff's right to draw 75 cfs of water then estoppel/waiver and laches bar enforcement of the flow compensation and reservoir provisions leaving plaintiff the unrestricted and absolute right to draw up to 75 cfs from the flows of West Canada Creek at Hinckley Reservoir.

Plaintiff's fifth cause of action seeks a declaration against all defendants pursuant to RPAPL Article 15 on the basis of assent and discharge in that plaintiff and its predecessors have been drawing water from West Canada Creek at Hinckley since 1914 and never replaced flows taken and have never been required to comply with the flow compensation and reservoir provisions of the 1917 Agreement. Thus, 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.

Plaintiff's sixth cause of action seeks a declaration against all defendants pursuant to RPAPL Article 15 on the basis of frustration of purpose and impossibility and alleges that NYSDEC's determination that 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. To the extent that the 1917 Agreement encumbers or restricts

plaintiff's right to draw 75 cfs of water then plaintiff seeks a declaration against all defendants that the purpose for or performance under the flow compensation and reservoir provisions was frustrated or otherwise rendered impossible thus relieving plaintiff from compliance with those provisions and barring any claim for damages or forfeiture of plaintiff's right to draw 75 cfs from the flows of West Canada Creek at Hinckley Reservoir.

Plaintiff's seventh cause of action seeks a declaration against all defendants pursuant to RPAPL Article 15 alleging an absence of material breach in that the 1917 Agreement provisions for flow compensation and reservoir requirements were to ensure that plaintiff's predecessors met their pre-existing contractual obligations with the private power companies. NIMO released plaintiff's predecessors from those obligations in 1958 and International Paper is no longer in business and there is no successor in interest. Plaintiff alleges that the only other reason for the flow replacement and reservoir requirements in the 1917 Agreement was to ensure a minimum flow was maintained in West Canada Creek to meet both Canal needs and those of plaintiff and its predecessors. Plaintiff alleges that upon information and belief the flows of West Canada Creek have been more than sufficient to meet both Canal and plaintiff's needs and the flows called for in the 1917 Agreement have never been needed. Further, plaintiff alleges that defendants cannot specify any point at which the flows of West Canada Creek fell below 335 cfs thereby triggering the compensation provision and further that the replacement provisions, even if triggered, 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 of the 1917 Agreement provide no appreciable benefit to any of the defendants. Thus, if the 1917 Agreement does encumber or restrict plaintiff's right to draw 75 cfs of water then any failure to comply with the flow

compensation or reservoir provisions does not constitute a material breach of the 1917 Agreement.

Plaintiff's eighth cause of action seeks a declaration against all defendants pursuant to RPAPL Article 15 alleging an absence of damage to the defendants since the flow compensation and reservoir requirements contained in the 1917 Agreement cannot appreciably impact the flow of West Canada Creek into and out of Hinckley Reservoir, thus failure of plaintiff to comply with these provisions has not and will not cause harm to defendants and to the extent that the 1917 Agreement does encumber or restrict plaintiff's right to draw 75 cfs of water, then plaintiff's failure to comply with the flow compensation or reservoir provisions has been harmless and does not entitle defendants to recovery of damages or forfeiture of plaintiff's right to draw up to 75 cfs of water from Hinckley Reservoir free of charge.

Plaintiff's ninth cause of action seeks a declaration against Erie that to the extent plaintiff establishes a valid right to divert water from Hinckley Reservoir by virtue of its first through eighth, or tenth through fifteenth causes of action, yet such diversion is nevertheless deemed to be harmful to Erie, plaintiff seeks a declaration that it has acquired a prescriptive right as against Erie to divert water from the West Canada Creek at Hinckley Reservoir without compensation to Erie.

Plaintiff's tenth cause of action seeks a declaration against all defendants that enforcement of the 1917 Agreement is barred by the statute of limitations and alleges that plaintiff has taken water from West Canada Creek at Hinckley without ever replacing flows when required pursuant to the agreement. The Gray dam was removed upon notice to defendants and with approval of NYSDEC. None of the defendants ever requested that the compensating reservoir or Gray dam be rebuilt. None of the defendants ever required plaintiff or its predecessors to replace the flows taken, therefore, to the extent that the 1917 Agreement is deemed to in any way encumber or restrict plaintiff's right to

draw up to 75 cfs from West Canada Creek, plaintiff seeks a declaration against all defendants that the statute of limitations bars enforcement of the flow compensation and reservoir provisions of the 1917 Agreement leaving plaintiff with the unrestricted and absolute right to draw up to 75 cfs from West Canada Creek at Hinckley.

Plaintiff's eleventh cause of action seeks a declaration against all defendants that estoppel/waiver and laches bar the enforcement of the flow compensation and reservoir provisions of the 1917 Agreement because defendants have never required such compliance. Thus, plaintiff and its predecessors were reasonably led to believe that compliance with the flow compensation and reservoir requirements would not be required. To the extent that the 1917 Agreement encumbers or restricts plaintiff's right to draw 75 cfs of water, then estoppel/waiver and laches bar enforcement of the flow compensation and reservoir provisions leaving plaintiff the unrestricted and absolute right to draw up to 75 cfs from the flows of West Canada Creek at Hinckley Reservoir.

Plaintiff's twelfth cause of action seeks a declaration against all defendants in that plaintiff and its predecessors have been drawing water from West Canada Creek at Hinckley since 1914 and never replaced flows taken and have never been required to comply with the flow compensation and reservoir provisions of the 1917 Agreement, thus plaintiff seeks a declaration that to the extent that the 1917 Agreement does encumber or restrict plaintiff's right to draw 75 cfs of water, 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.

Plaintiff's thirteenth cause of action seeks a declaration against all defendants in that NYSDEC's determination that 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. To the extent that the 1917 Agreement encumbers or restricts plaintiff's right to draw 75 cfs of water, then plaintiff seeks a declaration against all defendants that the purpose for or performance under the flow compensation and reservoir provisions was frustrated or otherwise rendered impossible thus relieving plaintiff from compliance with those provisions and barring any claim for damages or forfeiture of plaintiff's right to draw 75 cfs from the flows of West Canada Creek at Hinckley Reservoir.

Plaintiff's fourteenth cause of action seeks a declaration against all defendants that there is an absence of a material breach in that the 1917 Agreement provisions for flow compensation and reservoir requirements were to ensure that plaintiff's predecessors met their pre-existing contractual obligations to the private power companies. NIMO released plaintiff's predecessors from those obligations in 1958 and International Paper is no longer in business and there is no successor in interest. Upon information and belief any claimed right to enforce the compensation provisions contained in the 1906 agreement with plaintiff's predecessors is barred by prior judicial determination. Upon information and belief the flows of West Canada Creek have been more than sufficient to meet both Canal and plaintiff's needs and the flows called for under the 1917 Agreement have never been needed. Further, defendants cannot specify any point at which the flows of West Canada Creek fell below 335 cfs thereby triggering the compensation provision. Plaintiff alleges that the replacement provisions, even if triggered, 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 of the 1917 Agreement

provide no appreciable benefit to any of the defendants. Thus, if the 1917 Agreement does encumber or restrict plaintiff's right to draw 75 cfs of water, then any failure to 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 cfs from Hinckley Reservoir free of charge.

Plaintiff's fifteenth cause of action seeks a declaration against all defendants that there is an absence of damage to defendants since the flow compensation and reservoir requirements contained in the 1917 Agreement cannot appreciably impact the flow of West Canada Creek into and out of Hinckley Reservoir, thus failure of plaintiff to comply with these provisions has not and will not cause harm to the defendants and to the extent that the 1917 Agreement does encumber or restrict plaintiff's right to draw 75 cfs of water, then plaintiff's failure to comply with the flow compensation or reservoir provisions has been harmless and does not entitle defendants to recover damages or cause forfeiture of plaintiff's right to draw up to 75 cfs of water from Hinckley Reservoir free of charge.

Plaintiff's sixteenth cause of action seeks a declaration against all defendants pursuant to ECL § 15-701 that plaintiff has caused a harmless diversion of waters. Erie has served a notice of claim asserting that plaintiff's diversion of water without replacement is unreasonably interfering with its common law riparian rights. Erie is barred from asserting plaintiff is required to compensate flows so as to avoid damage to Erie by virtue of NIMO's 1958 agreement releasing plaintiff from such obligation to compensate flows. To the extent that Erie is not barred by virtue of the 1958 release, its common law right to the flows of West Canada Creek were abrogated by the 1921 Agreement it entered into with the State of New York, under which it agreed to the release of water pursuant to a particular operating diagram. Upon information and belief, plaintiff's diversion of

water from West Canada Creek has no impact on the release of flows from Hinckley, thus plaintiff's use of the waters of West Canada Creek without replacement constitutes a mere harmless diversion pursuant to ECL § 15-701.

Plaintiff's seventeenth cause of action seeks a declaration against Erie pursuant to ECL § 15-701 alleging that plaintiff has acquired a prescriptive right to use water from West Canada Creek without compensation. Plaintiff alleges that to the extent diversion of water from Hinckley Reservoir by plaintiff or its predecessors, without flow compensation, is deemed to be harmful to Erie, such diversion has been open and notorious and adverse to the interest of Erie 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 and that to the extent plaintiff establishes a valid right to divert water from Hinckley Reservoir under its first through eighth, or tenth through fifteenth causes of action, yet such diversion is nevertheless found to be harmful to Erie, plaintiff seeks a declaration that it has acquired a prescriptive right to divert water from West Canada Creek at Hinckley without compensation to Erie.

The State defendants have answered the second amended complaint admitting that there were appropriations to plaintiff's predecessors and also that one of plaintiff's predecessors entered into contracts with UG&E on March 10, 1905, International Paper on August 17, 1906 and Newport Power on March 19, 1909 and that those contracts allowed plaintiff's predecessor to divert water from 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. The State defendants admit the appropriations through the Barge Canal Act and that certain reservations were made to one of plaintiff's predecessors concerning the right to take, draw and

convey the flow of 100 cubic feet per second from West Canada Creek (later reduced to75 cubic feet per second). The State defendants admit that in 2001 plaintiff made application to NYSDEC for a permit authorizing the removal of Gray dam due to safety issues. The State defendants have alleged the following affirmative defenses: failure to state a claim; and improper venue.

The first counterclaim asserted by the State defendants against plaintiff, alleges a breach of the 1917 Agreement and seeks a declaration that plaintiff is barred from drawing any water from the Hinckley Reservoir until such time as there is compliance with the 1917 Agreement. The second counterclaim demands an accounting of the amount of water that has been drawn from the reservoir during any period that plaintiff was in breach of the 1917 Agreement and an accounting of the gross revenues plaintiff has received from the sale or other distribution of the water. The third counterclaim alleges that plaintiff had no authority to draw water from Hinckley Reservoir at any period after it failed to perform its obligations under the 1917 Agreement and the State defendants have suffered damages, calculated pursuant to 21 NYCRR § 156.4, because of the failure of plaintiff to provide contribution from compensating reservoirs and have caused the State defendants to be unable to perform its public benefit of maintaining the Canal system and meeting its obligations to Erie. The fourth counterclaim alleges breach of the 1917 Agreement causing damage to the State defendants in that the State defendants will have to construct and maintain compensating reservoirs. The fifth counterclaim alleges that the events of the summer and fall of 2007, when the flows of West Canada Creek above Hinckley dam were less that 335 cubic feet per second, were the fault of plaintiff. It alleges that due to the deficiencies in plaintiff's physical plant the State defendants had to reduce the withdrawal of water for Canal purposes and had the plaintiff not breached the 1917 Agreement by failing to provide upstream compensating flows, the elevation of Hinckley Reservoir

would have been significantly higher in the fall of 2007 and the 2007 "state of emergency" would have been lessened or not declared. The sixth counterclaim alleges that pursuant to the 1917 Agreement the State defendants are entitled to indemnification from plaintiff for all damages to which the State defendants may become liable by reason of plaintiff's diversion of water from Hinckley Reservoir without compensating flows. Erie has served a Notice of Intent to File a Claim against the State defendants and the State defendants have sought a defense from plaintiff.

Plaintiff has replied to the counterclaims denominated first through fourth above and plaintiff has rejected the fifth and sixth counterclaims as having been made without the required leave of court.

Erie has answered the second amended complaint admitting the existence of the 1917 Agreement between the State of New York and plaintiff's predecessor and that the 1917 Agreement contained a provision requiring a compensation reservoir. Erie admits that it served a Notice of Claim on plaintiff asserting a claim for damages resulting from plaintiff's tortuous interference with the 1921 Agreement between the State of New York and Erie's predecessors. Erie denies that the sole purpose of the reservoir and replacement provisions in the 1917 Agreement was to permit the Water Company to comply with the contracts with the three businesses executed in 1905, 1906 and 1909. Erie admits that UG&E settled its claim against the State of New York by agreement dated 1921. Erie admits that Gray dam was removed by plaintiff and asserts that such removal was in breach of the 1917 Agreement and denies that it was given any prior notice as to the planned and ultimate removal of Gray dam by plaintiff. Erie has alleged that plaintiff has failed to join indispensable parties, such as other riparian owners along West Canada Creek at Hinckley in violation of RPAPL § 1515 (1) (d) and § 15-0701 (6). Erie alleges affirmative defenses as follows:

failure to state a cause of action; plaintiff's causes of action are barred in whole or in part by the doctrines of estoppel and/or unclean hands; plaintiff's causes of action are barred in whole or in part by the doctrine of laches and/or the applicable statute of limitations; plaintiff's causes of action are barred in whole or in part by plaintiff's words, actions and/or course of conduct in waiving such claims; plaintiff's causes of action are barred in whole or in part by the applicable statute of frauds; plaintiff's causes of action are barred in whole or in part by the doctrines of unjust enrichment, unclean hands, and/or unconscionability; plaintiff's causes of action are barred, in whole or in part as being prohibited and in contravention of the statutory and/or common law and public policy of the state; plaintiff's causes of action are barred in whole or in part because plaintiff has failed to join indispensable parties; and plaintiff's causes of action are barred in whole or in part by documentary evidence.

As background to its counterclaim, Erie alleges that it owns or operates a network of hydroelectric facilities in the State of New York and that two are located on West Canada Creek, one in Russia and one in Trenton, and as a result of the acquisition of these facilities from NIMO, Erie has riparian rights along the waterways. Erie alleges that interference with these rights can cause operational disruptions, loss in ability to generate electricity and could compromise Erie's Federal Energy Regulatory Commission (FERC) licensing status. Erie alleges that the Trenton and Prospect facilities are located downstream of Hinckley Reservoir. Erie claims that it has continuously used West Canada Creek for water power purposes. The Trenton facility has operated since the late 19th century and the Prospect facility has operated since 1959 and that the land and water rights currently owned by Erie were not included in the 1912 taking by the State of New York, thus as a riparian owner, Erie has the right to the full flow of water through and along its property. Erie alleges that

plaintiff diverts water upstream of Erie's riparian property to generate electricity and to supply drinking water and because plaintiff does not return the diverted water to West Canada Creek, Erie has been caused to generate less electricity at both of its plants and therefore, plaintiff's diversion of water is unreasonable.

Insofar as a contractual claim is concerned, Erie claims that it is a foreseeable and intended third-party beneficiary to the 1917 Agreement between plaintiff's predecessor and the State of New York. Erie claims that the 1917 Agreement only permitted plaintiff's predecessor to use Hinckley Reservoir as a settling basin and as a transporting agent for stored water from its storage reservoirs, and to take the water through Hinckley dam by means of two iron pipes. Also, Erie alleges that plaintiff's predecessor was permitted to divert water only for domestic and municipal water supply purposes, and not for power purposes. In return plaintiff's predecessor agreed to maintain storage reservoir(s) above Hinckley dam on West Canada Creek or its tributaries and to fill the reservoir(s) from time to time from the flood, freshet or excess of flow waters in West Canada Creek or its tributaries and to contribute that water supply to the natural flow of West Canada Creek above Hinckley dam. Erie states that the 1917 Agreement provided that should plaintiff's predecessors or successors fail to provide for upstream storage reservoir(s) that it would have no right or authority or be permitted to take or draw any water from Hinckley Reservoir or from West Canada Creek above Trenton Falls while such failure continued. Also, the State of New York and plaintiff's predecessors agreed that the State of New York would not be held responsible to respond to lower riparian owners because of diversions by plaintiff's predecessors.

Erie alleges that the 1921 Agreement between the State of New York and Erie's predecessor, UG&E, states that the purpose of the agreement is to operate Hinckley Reservoir and, after serving

the Canal uses and purposes, that the reservoir be fully used for the storage of water and the regulation of the flow of West Canada Creek below the same for the benefit of the power production and riparian lands on West Canada Creek below Hinckley Reservoir. The 1921 Agreement includes the 1920 Operating Diagram known as the Rule Curve which governs the amount of water required to be released from Hinckley Reservoir downstream through Erie's riparian property. Erie alleges that plaintiff has reduced the amount of water that would otherwise have been released from Hinckley Reservoir for Erie's benefit pursuant to the 1921 Agreement and the Rule Curve. Also, as a result of the failure of plaintiff to replace compensating flows, it has impaired Erie's ability to comply with its FERC license requirements.

Erie alleges one counterclaim against plaintiff that contains five causes of action. The first cause of action, pursuant to RPAPL Article 15, alleges that plaintiff's claims to Erie's riparian rights are without merit and that all claims that plaintiff may have had against Erie have been extinguished and Erie seeks a declaration that plaintiff may not use water from West Canada Creek without flow compensation and/or use of one or more compensating reservoirs that would serve to protect and preserve Erie's riparian and other property rights. The second cause of action, pursuant to ECL § 15-701 alleges that plaintiff's removal of Gray dam and use of water and planned increase in use of water from West Canada Creek without flow compensation interferes with Erie's present use of water from West Canada Creek and with Erie's riparian rights, causing the market value of Erie's riparian land to decrease. Erie seeks a declaration that plaintiff may not use water from West Canada Creek without flow compensation and/or use of one or more compensating reservoirs that would serve to protect and preserve Erie's riparian and other property rights. Erie alleges that it filed a Notice of Claim on October 25, 2004. Erie's third cause of action seeks a declaration regarding

Erie's common law riparian rights. It alleges that plaintiff's reduction in flows without replacement reduces the water that would be flowing down West Canada Creek through Erie's riparian property and has thus reduced the market value of Erie's property and has significantly reduced the amount of electricity Erie otherwise would be able to generate. Erie alleges that this constitutes an unreasonable interference with Erie's riparian rights. Erie seeks damages and a preliminary and permanent injunction prohibiting plaintiff from interfering or impairing Erie's riparian rights. Erie alleges that it filed a Notice of Claim on October 25, 2004. Erie's fourth cause of action alleges interference with contract. Erie alleges that although plaintiff's predecessor is not a party to the 1921 Agreement, plaintiff is aware of the existence of the 1921 Agreement and because plaintiff has used water stored in Hinckley Reservoir for purposes other than Canal uses and/or downstream power production by Erie, Erie's benefit of the 1921 Agreement and the Rule Curve has been reduced because the amount of water available to Erie has been reduced. Erie alleges that plaintiff's conduct is intentional and without justification and done with malice and has caused Erie to suffer significant damages. Erie seeks damages for plaintiff's interference with the performance of the 1921 Agreement and seeks a preliminary or permanent injunction prohibiting plaintiff from interfering with the 1921 Agreement. Erie alleges that it filed a Notice of Claim on October 25, 2004. Erie's fifth cause of action alleges breach of contract in that plaintiff breached the 1917 Agreement by removing Gray dam and used water from West Canada Creek without any compensating reservoir or other flow compensation and continues to do so. Erie alleges that plaintiff has breached the covenant of good faith and fair dealing implied in every contract; that Erie is a foreseeable and intended third-party beneficiary of the 1917 Agreement and may enforce its terms against plaintiff and that Erie has been damaged and will be damaged by plaintiff's continued breach of the 1917

Agreement. Erie demands specific performance of the 1917 Agreement and injunctive relief.

Plaintiff has replied to Erie's counterclaim and has pleaded affirmative defenses as follows: failure to state a cause of action; the counterclaims are or may be barred by the statute of limitations or otherwise time-barred; failure to mitigate damages and therefore, such damages were increased by such failure; the counterclaims in whole or in part are barred by the equitable doctrines of waiver, estoppel, laches, and unclean hands; the counterclaims are barred in whole or in part by the equitable doctrines of frustration of purpose and impossibility; the counterclaims in whole or in part are barred by the doctrine of assent and discharge; the counterclaims are barred in whole or in part as plaintiff has at a minimum obtained a prescriptive right to withdraw water from Hinckley Reservoir and the counterclaims are barred in whole or in part by Erie's failure to perform conditions precedent required by statute.

Motion For Summary Judgment By The State of New York
And The New York State Canal Corporation

At the outset, the court notes that the claims between plaintiff and the State defendants involve disputes and problems between entities whose sole purpose is to serve the public. The plaintiff and the New York State Canal Corporation are creations by legislative action. The problems raised by these two entities and presented to the court in this matter are ones that are not well suited for a court to resolve. This is particularly true in the present case when the parties are relying upon an agreement whose basis arose approximately 100 years ago. It goes without saying that since that time, there have been significant changes in the circumstances surrounding the issues in this case. This court in resolving the issues of these parties is limited to the written agreement of the parties and established legal remedies. The issues and problems presented in the present case

are of concern to the citizens of the State of New York and the citizens of the municipalities served by the plaintiff. The resolution of these matters can best be accomplished by the actions of the legislative and executive branches of the government of the State of New York.

The State defendants move to dismiss the second amended complaint of plaintiff and for summary judgment finding plaintiff is in breach of the 1917 Agreement and for certain declaratory relief in favor of the State defendants. Although the record contains a voluminous amount of documents and papers, the main focus of this case is the agreement dated December 27, 1917 between the State of New York, as party of the first part, (predecessor in interest to the New York State Canal Corporation) and Consolidated Water Company of Utica, N.Y., as party of the second part (predecessor in interest to plaintiff, also referred to as the "Water Company"). The preamble to the 1917 Agreement reads, in part, as follows:

> "Whereas, The State Engineer did heretofore and on or about the 30th day of July, 1912, by appropriation map No. 4128, Barge Canal Contract, No. 50, duly appropriate a tract or parcel of land situate on the southerly side of and extending to the thread of the West Canada Creek, at or near the village of Hinckley, town of Russia, Herkimer county, N.Y., to which parcel of land the party of the second part claims title; and
>
> Whereas, The State Engineer and Surveyor (as appears in and by the said appropriation map, a copy of which is hereto attached marked '1') did appropriate not only said tract or parcel of land, but also in form;
>
> '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 right are expressly omitted from this taking, and excepted and reserved to the Consolidated Water Co., of Utica, N.Y., pursuant to its corporate powers and for its corporate purposes' and also
>
> 'excepting, reserving and leaving 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 two iron pipes, each of

> the diameter of forty-two inches already laid in the location shown on the State's plan of said dam'."

A dispute had arisen between the State of New York and the Water Company covering the appropriation and the agreement between the parties dated 1913, and the Water Company filed a claim against the State. In that regard, the preamble provides that "[i]t is deemed advisable and for the best interests of the State to settle and adjust any and all claims and demands which have arisen or accrued or may hereafter arise or accrue to the party of the second part. ...." The preamble to the agreement also contained the following: "[w]hereas, The water to be used by the party of the second part is the water left unappropriated by the State by the said appropriation of 1912, as modified by this agreement."

Following are the portions of the 1917 Agreement which are relevant to the disposition of the motions of the parties:

> "First- That the appropriation, effected by the aforesaid Map No. 4128, Barge Canal Contract No. 50, shall be interpreted and considered to except, reserve and leave to the party of the second part from the property thereby appropriated, a flow of water to the extent and amount of not to exceed seventy-five (75) cubic feet per second, as herein defined (instead of one hundred (100), cubic feet per second as provided in said appropriation map and in said annexed contract marked '2') and also to grant and convey unto the party of the second part, in mitigation of its damages caused by the appropriations hereinabove recited, the easement and right to use the State dam and reservoir as a settling basin and as a transporting agent for stored water from second party's storage reservoir or reservoirs and to take, draw and convey the said unappropriated flow through said State dam, by means of two iron pipes, each of the diameter of forty-two inches, now constructed in said dam and across said Parcel No. 4128, such amount of water so taken not to exceed seventy-five (75) cubic feet per second as herein defined, as may from time to time be required by the party of the second part for domestic and municipal water supply purposes as herein defined, but not for power except as herein provided.
>
> The term 'seventy-five (75) cubic feet per second' wherever it appears in this

contract shall be construed to mean a twenty-four hour average of seventy-five (75) cubic feet per second, the diversion however at no time to exceed a maximum of eighty-five (85) cubic feet per second.

Second- The party of the second part covenants and agrees that it and its successors, grantees and assigns will at all times maintain, or cause to be maintained a storage reservoir or reservoirs above the State dam at Hinckley, on West Canada Creek or its tributaries; fill the same from time to time from the flood, freshet or excess of the flow of water in said creek or its tributaries over and above the amount of water sufficient to comply with the contracts hereinafter mentioned, and from said reservoir or reservoirs, discharge into, contribute and supply to the natural flow of West Canada creek, above the aforesaid State dam from time to time, quantities of water sufficient to comply fully with such of the provisions of the several contracts of the party of the second part with the Utica Gas & Electric Company, International Paper Company and Newport Electric Light & Power Company, hereto annexed and marked '4', '5' and '5-A', or any amendments thereof, as are now in force or hereafter may become effective (including the provisions of any contracts which may hereafter be substituted for such contracts or any of them) provided however that the quantity of water so diverted shall not exceed seventy-five (75) cubic feet per second as herein defined. And it is further understood and agreed that in the event of the failure of the party of the second part, its successors grantees or assigns to provide and operate or cause to be provided and operated the storage reservoir or reservoirs as and in the manner in this paragraph provided, it shall have no right or authority or be permitted to take or draw water from the said State reservoir or from said creek above Trenton Falls while such failure continues, except that in the event of the failure of any supply main, reservoir or reservoirs of the party of the second part, through flood, act of God, unprecedent drought, or any act beyond the control of the party of the second part, it shall not be prevented from taking water from said State reservoir during such reasonable period of time as is necessary to rebuild said supply main, reservoir or reservoirs, or during the period of such unprecedented drought.

Third- Neither said appropriations nor this contract shall in any way change or modify, or relieve the party of the second part from the provisions of the contracts between the Consolidated Water Co. of Utica, N.Y. and the Utica Gas and Electric Company, dated March 10, 1905, ... the purpose and intent of this agreement being to leave the relations of the said companies, and their respective rights and obligations under said contracts the same as if this contract had not been entered into, nor the State's dam built; ...

The party of the first part, having in mind that the aforesaid contracts, marked

'4' '5' and '5-A' respectively, might, by mutual consent or otherwise be either abrogated or so altered, amended or construed as to excuse or absolve the party of the second part from compensating or contributing to the natural flow of the stream as in the 'second' paragraph hereof provided for, or so as to indefinitely postpone the time when or point or state of flow where the duty of the party of the second part to contribute to the flow of the stream arises, is desirous of definitely fixing and defining a minimum or low stage or period of natural flow of the West Canada creek below which no water shall, under any circumstances or conditions (except as herein expressly provided for) be diverted by the party of the second part, its successors, grantees or assigns unless compensation or contribution be made.

Accordingly the flow of three hundred and thirty-five (335) cubic feet per second is hereby mutually fixed and agreed upon as the 'low flow' of said creek, in its natural state, below which, under no circumstances or conditions whatsoever (except as herein expressly provided for), shall any water be directly or indirectly drawn from the State reservoir, by the party of the second part, its successors, grantees or assigns, unless compensation or contribution is made as herein provided; and it is mutually stipulated and agreed that when the quantity of the natural flow of said creek is below three hundred and thirty-five (335) cubic feet per second the party of the second part shall (anything hereinbefore said to the contrary notwithstanding) at all times and under all circumstances and conditions (except as expressly provided for),-whatever alterations in or amendments or changes of the aforesaid contracts may be made-contribute to the natural flow of the stream, from the stored water in its storage reservoir or reservoirs, an amount and quantity of water equal to the amount and quantity of water below three hundred and thirty-five (335) cubic feet per second which it diverts.

For example:

If the natural flow into the State's reservoir is three hundred and thirty (330) C.F.S. and thirty (30) C.F.S. is drawn by the party of the second part, it shall supply to the stream above the State's reservoir thirty (30) C.F.S. from the stored water in its storage reservoirs, in addition to the natural inflow into said storage reservoirs.

If the natural flow into the State's reservoir is three hundred and fifty (350) C.F.S. and thirty C.F.S. is drawn by the party of the second part, it shall supply to the stream above the State's reservoir fifteen (15) C.F.S. from the stored water in its storage reservoirs, in addition to the natural inflow into said storage reservoirs.

If the natural flow into the State's reservoir is three hundred and sixty-five (365) C.F.S. and thirty (30) C.F.S. is drawn by the party of the second part, it will not be required to supply any stored water from its storage

reservoirs.

And it is further understood and agreed that when and in the event the quantity of water diverted and used as provided in paragraph 'FIRST' hereof by the party of the second part reaches the twenty-four hour average of twenty-five (25) cubic feet per second (which is approximately ten (10) cubic feet per second more than is now being diverted by it) the location and dimensions of the compensating reservoir or reservoirs shall be such that it or they will receive, intercept and store from the flood, freshet or excess flow of the streams, water of the quantity of not less than two billion (2,000,000,000) gallons at one filling thereof; that for each additional ten (10) cubic feet per second of water diverted by the party of the second part the reservoir capacity on operation shall be increased by at least eight hundred million (8000,000,000) gallons, so that when the quantity of water diverted by the party of the second part reaches seventy-five (75) cubic feet per second the location and dimensions of the compensating reservoir or reservoirs shall be such that it or they will receive, intercept and store, from the flood, freshet or excess flow of the streams, water of the quantity of not less than six billion (6,000,000,000) gallons at one filling thereof.

It is not intended, however, to limit the party of the second part to precisely the foregoing program or progress in the development of the reservoirs but to fix the minimum development required from time to time; and nothing herein contained shall be construed to prevent the party of the second part from anticipating the aforesaid schedule. For example, the party of the second part may, when its demand for water reaches twenty-five (25) cubic feet per second, provide or cause to be provided, a reservoir or reservoirs of four billion (4,000,000,000) gallons capacity, in which event no further increase would be necessary until the quantity of water diverted reached approximately sixty (60) cubic feet per second.

And it is further understood and agreed that in the event of the failure of the party of the second part, it successors, grantees or assigns, to provide and operate or cause to be provided and operated the storage reservoir or reservoirs as and in the manner provided, it shall have no right or authority or be permitted to take or draw water from the said State reservoir or from said creek above Trenton Falls while such failure continues, except that in the event of the failure of any supply main, reservoir or reservoirs of the party of the second part through flood, act of God, unprecedented drought or any act beyond the control of the party of the second part, it shall not be prevented from taking water from said State reservoir during such reasonable period of time as is necessary to rebuild said supply main, reservoir or reservoirs or during the period of such unprecedented drought.

> It is not intended by this provision to limit or restrict the scope, requirements or operation of the provisions of the 'SECOND' paragraph of this contract, or to absolve the party of the second part from the duty to contribute and supply to the natural flow of the said creek quantities of water equal to the quantity which it diverts as therein provided, the intent and purpose of this provision being, as hereinbefore stated, to make definite provision for the point or stage of the natural flow of said stream where contribution or compensation must begin in the event that, whether by abrogation, alteration or amendment of said contracts '4' '5' and '5-A' or otherwise the point or state of the natural flow where contribution or compensation must otherwise begin falls below three hundred and thirty-five (335) cubic feet per second.
>
> This contract shall not be construed to prevent the modification or abrogation of said annexed contracts '4' '5' and '5-a' or to create any new or additional rights in favor of either the said Utica Gas and Electric Company, the International Paper Company, the Newport Electric Light & Power Company or the Hinckley Fibre Company, or to impose any new or additional burdens on the said Consolidated Water Company of Utica, N.Y., in favor of either of said companies."

The 1917 Agreement contains a requirement that the Water Company was to install a "venturi meter for gauging water," the purpose of which was to measure the amount of water diverted by the Water Company pursuant to the 1917 Agreement. It also contains a provision that the Water Company is required to provide and maintain a "suitable measuring or gauge weir or other suitable device for determining the amount of water let down" from its storage reservoirs.

In summary, the 1917 Agreement served to settle the disputes between the State of New York and the Water Company and defined their relationship for the operation of what is known as the Hinckley Reservoir, which permitted the Water Company to divert the Hinckley dam flow of water not to exceed an average of 75 cfs. The 1917 Agreement contains the obligation of the Water Company to maintain one or more storage reservoirs above Hinckley dam, with quantities of water sufficient to comply with contracts made by the Water Company with certain utility companies including the predecessor of Erie. The 1917 Agreement describes the obligation for maintenance and

operation of compensating reservoirs in terms of minimum flow of water into the West Canada Creek upstream from the Hinckley Reservoir. Specifically, the requirement for discharge from compensating reservoirs is based upon a minimum flow above the reservoir of 335 cfs which is described as the "low flow" of the West Canada Creek.

Prior to the appropriation by the State of New York for the Hinckley Reservoir, the Water Company had constructed a dam known as the Gray dam for a reservoir for storage of its water supply for its customers. In the 1980s the dam developed problems and the capacity of the reservoir was limited to one half of its capacity. In 1989, the control gates of the dam were fully opened and the gates remained open until 2002, when the dam was destroyed. Gray dam was located on the Black River and the water flowed from it into the West Canada Creek at some point above the Hinckley dam.

The main basis for the claim that plaintiff's complaint should be dismissed and the State defendants should be granted summary judgment on the counterclaims is the claim by the State defendants that plaintiff breached the 1917 Agreement when, in 2002, it destroyed the Gray dam. The State defendants contend that by such breach, according to the terms of the 1917 Agreement, plaintiff forfeited its right to divert water at the Hinckley dam because it failed to provide a required compensating reservoir.

Plaintiff contends that the Gray dam was never operated as a compensating reservoir and that its main purpose over the years was flood control for the spring run off. Plaintiff also contends that at no time from the signing of the agreement in 1917 to 2002 had there been a demand by the State defendants or any other notification of a requirement for a compensating reservoir or a compensating flow. While there is some conjecture, there is no evidence in the record showing that the water

flowing into the Hinckley Reservoir at the West Canada Creek above Hinckley dam had fallen below the required 335 cfs at any time in the past. It is noted that while the 1917 Agreement contains a requirement for a flow of 335 cfs, it does not specify a requirement by the plaintiff or its predecessors in interest to provide equipment to measure the water flowing into the Hinckley Reservoir or a specification of the location and other measurement of the flow of the creek.

The State defendants' claim of breach of the 1917 Agreement by plaintiff by tearing down the Gray dam is not supported by the record. While the 1917 Agreement refers to the Gray dam, it does not contain a requirement that plaintiff's predecessor and plaintiff are required to specifically maintain the Gray dam but instead refers generally to compensating reservoirs. The record fails to establish, by proof in evidentiary form, that the conditions which trigger the requirement for a compensating reservoir or compensating flow have existed at any point in time in that there is no evidence in the record to establish that the flow into Hinckley Reservoir had fallen below 335 cfs.

The State defendants move to dismiss plaintiff's complaint in its entirety with reference to those causes of action by the plaintiff which seek declaratory judgment that it has the unrestricted right to withdraw up to 75 cfs of flow of water from the Hinckley Reservoir. However, plaintiff's ninth, sixteenth and seventeenth causes of action appear to be ones only seeking relief against Erie and not the State defendants. Plaintiff's third, fourth, fifth, sixth, seventh, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth causes of action are based on claims that defendants' failure to require plaintiff to comply with the compensating flow provisions of the 1917 Agreement over the years constitutes some form of waiver which excuses plaintiff from the compensating flow requirements or that there is a lack of a material breach. The pleadings indicate the claims of waiver are based upon statute of limitations, estoppel and waiver, ascent and discharge, frustration of

purpose, and lack of enforcement of the compensating flow requirements. As indicated above, the Court has found that the record does not contain evidence of a breach of the 1917 Agreement by plaintiff because of the failure to provide compensating flow or the destruction of the Gray dam. The record does not support any finding that the level of flow of the West Canada Creek above Hinckley Reservoir, which creates the obligation of plaintiff to provide compensating flow, has occurred or that the flow has been measured.

A party moving for summary judgment has the initial burden of coming forward with admissible evidence to establish the absence of a material issue of fact and, in the case of a defendant seeking to dismiss a complaint, that the cause of action has no merit. (*See GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985].) Based upon the record as discussed above, the State defendants have failed to satisfy such burden to obtain a dismissal of plaintiff's third, fourth, fifth, sixth, seventh, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth causes of action. Likewise, the State defendants have failed to satisfy such burden with regard to their counterclaims.

Plaintiff's first cause of action seeks a declaration that plaintiff is entitled to divert at least 75 cfs of water from the West Canada Creek at the Hinckley Reservoir through plaintiff's riparian rights. The second cause of action seeks the same relief but the cause of action is based on the deed executed on December 27, 1917 whereby plaintiff's predecessor reserved such amount of water flow in the deed which conveyed to the State of New York all of plaintiff's predecessor's right and title to the flows of the West Canada Creek at Hinckley. The record is clear that the appropriation by the State of New York of all of the riparian rights of the flow of the West Canada Creek at Hinckley culminated in the 1917 Agreement by which plaintiff surrendered all of its riparian rights and replaced those rights with the rights and obligations that arise from the 1917 Agreement. In this proceeding, plaintiff

has failed to show that there is any basis for a determination that the 1917 Agreement does not remain in full force and effect and that its obligations and rights concerning water from the West Canada Creek are based upon anything other than such agreement. Therefore, the State defendants are entitled to summary judgment dismissing plaintiff's first and second causes of action.

Cross Motion Of Plaintiff Against The State Defendants

Plaintiff seeks summary judgment in its favor with regard to its third, fourth, tenth and eleventh causes of action by which it seeks a declaration that enforcement of the flow compensation and reservoir provisions of the 1917 Agreement are barred by the statute of limitations or the equitable doctrines of waiver, laches, estoppel, frustration of purpose and impossibility of performance. Each of these causes of action seek a declaration that the State defendants are barred from restricting plaintiff from diverting up to 75 cfs of water at the Hinckley dam. In essence, plaintiff claims that it has the unrestricted and absolute right to draw up to 75 cfs from the Hinckley Reservoir and that it has diverted water at the dam at various rates of flow without providing compensating flow or increased reservoir capacity and that until 2002, the State defendants stood silent and took no action to enforce their rights against the plaintiff. The cross motion also seeks summary judgment dismissing the counterclaims of the State defendants.

As discussed above, the 1917 Agreement requires plaintiff to provide compensating flow into the West Canada Creek above Hinckley Reservoir below what is defined as "low flow." "Low flow" is defined as 335 cfs of water flow in the West Canada Creek above the Hinckley Reservoir. Although the record contains discussion by all parties about the "low flow" condition, none of the parties have provided facts which establish that the requisite flow has been measured and that the requirement for compensating flow under the 1917 Agreement has been triggered. Since defendants

have not established a breach by the plaintiff of the compensating flow portion of the 1917 Agreement, it cannot be said that the statute of limitations has run with regard to a breach of that provision.

Plaintiff presents an issue concerning the provisions in the 1917 Agreement which requires an increase in capacity of compensating reservoirs, at a time when the diversion of water by the plaintiff at the Hinckley dam is at or exceeds 25 cfs. Plaintiff alleges that in 1948 the Water Company began withdrawing 25 cfs of water which would have required an increase in the capacity of a compensating reservoir of 800,000,000 gallons and in the 1960s plaintiff began withdrawing 35 cfs of water which would have required an increase of capacity of an additional 800,000,000 gallons. While on this record, the State defendants may have waived or are estopped from enforcing this particular provision of the 1917 Agreement, there has been no showing that prior to the present action, defendants have commenced an action or made an attempt to enforce the provisions requiring increase in capacity of compensating reservoirs. Even if the State defendants are prevented from enforcing the provisions requiring increase in size of reservoirs, such requirement does not alone excuse the plaintiff's obligation to provide a compensating flow when the "low flow" of West Canada Creek occurs.

The State defendants' second amended answer contains six counterclaims, two of which were added in response to plaintiff's second amended complaint. The first counterclaim is based upon a claim of a breach of the 1917 Agreement by plaintiff as a result of the removal of the Gray dam and the failure to increase the capacity of compensating reservoirs. The second counterclaim is a demand for an accounting by plaintiff of the amount of water it has drawn at times when it was in breach of the 1917 Agreement. The third counterclaim is based, in part, upon a breach of the 1917 Agreement

and the right to the State defendants for compensation pursuant to 21 NYCRR § 156.4 (d) (5). The fourth counterclaim alleges that as a result of plaintiff's breach of the 1917 Agreement the State defendants will have to construct and maintain compensating reservoirs. The fifth counterclaim is based upon events which occurred in 2007, which, other than reciting events and claims, does not contain a request for relief. The sixth counterclaim is based upon claims of indemnification by the State defendants arising from the 1917 Agreement in connection with a notice of claim filed by Erie.

As discussed above, the record does not support a finding that plaintiff breached the compensating flow requirements of the 1917 Agreement, because there has been no showing that the conditions requiring compensating flow have arisen or have existed or that the removal of the Gray dam, standing alone, constitutes a breach of the 1917 Agreement. For these reasons, plaintiff is entitled to summary judgment dismissing the first, second and fourth counterclaims of the State defendants.

The third counterclaim seeks similar relief and adds a claim pursuant to 21 NYCRR § 156. However, reliance upon this regulation clearly is without merit in light of the fact that the parties entered into an agreement permitting plaintiff to withdraw water from the reservoir that would otherwise have been used for Canal purposes. Therefore, plaintiff is entitled to summary judgment dismissing the third counterclaim of the State defendants.

The fifth counterclaim of the State defendants does not contain any request for relief and, therefore, is dismissed because it fails to state a cause of action.

Finally, the sixth counterclaim presents new issues and is not submitted in response to the amendments made by the plaintiff, particularly since the amendments of the complaint by plaintiff dealt with claims involving Erie and not the State defendants. For this reason and for the reasons set

forth in *Garden State Brickface Co. v Stecker* (130 AD2d 707 [2d Dept 1987]), plaintiff is entitled to summary judgment dismissing the sixth counterclaim of the State defendants.

Plaintiff alleges that even if the Gray dam was intact and in full operation its contribution to the flow of water into West Canada Creek would be at best questionable. This is due in large part to the relative size of the Gray Reservoir, 1,250,000,000 gallons, as compared to the size and capacity of the Hinckley Reservoir, 25,000,000,000 gallons. While this claim seems to have merit, it is not for this court to undertake an examination of that claim. The issue before the court is the rights and obligations of the parties as set forth in the 1917 Agreement. The necessity for a compensating reservoir and the question of its effectiveness are issues for engineers and for state and local officials to resolve.

The 1917 Agreement contains no provision with regard to an obligation of either party to the agreement to install measuring devices to measure the flow of the West Canada Creek above the Hinckley dam. The record supports the conclusion that the State defendants made no attempts to require plaintiff to provide compensating flow even though the plaintiff and the State defendants take the position that plaintiff, by the terms of the 1917 Agreement, may have been required to do so at various times over the past 90 years. Based on the record as a whole, the plaintiff has established that the State defendants are barred by the equitable doctrines of waiver and estoppel, as alleged in plaintiff's fourth and eleventh causes of action, and the undisputed facts that plaintiff has for a period of approximately 90 years diverted water at the Hinckley dam without providing any compensating flow. The court having found that, based on the equities of the matter, the State defendants cannot interfere with the right to divert a certain flow of water from the Hinckley dam, the remaining issue is the extent to which plaintiff benefits from these equitable principles. Plaintiff claims that it has the

unrestricted right to divert up to 75 cfs. However, the right to divert this amount of flow is based not upon the principle of estoppel and waiver, but upon the 1917 Agreement. Plaintiff cannot accept the benefits of that agreement without bearing the obligations imposed upon it under such agreement. Therefore, in this case, plaintiff is not entitled to divert a flow in the amount of 75 cfs of water without providing compensating flow according to the terms of the 1917 Agreement.

However, plaintiff has established the right to divert amounts of water that are consistent with its usage and practice over the years. The submissions by plaintiff indicate that the maximum amount of flow that plaintiff has utilized has not exceeded 35 cfs. Since historically, plaintiff's diversion has not exceeded flow above these levels, it is not entitled to exceed those amounts based on the equities of the matter. Accordingly, plaintiff is entitled to a declaration that the State defendants may not restrict the right of plaintiff to divert the flow at the Hinckley dam at a rate not to exceed 35 cfs.

As a court of equity, this court has the power to consider the equities presented by the record, and the determination by this court is based upon the balancing of equities between the parties. (*See Town of Guilderland v Swanson*, 29 AD2d 717 [3d Dept 1968], *affd* 24 NY2d 871 [1969].) Equitable estoppel applies in situations such as the present case where a party "may be barred from asserting a claim of right to which he might otherwise be entitled, either because of his affirmative conduct or his silence ..." (see *Champion Mtge. v Knight*, 16 Misc 3d 1118 [A] [Sup Ct, Suffolk County 2007]). The equitable doctrine of waiver also applies in the present case as a means of a tool to avoid an unjust forfeiture. (*See Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 30 AD3d 1 [1st Dept 2006].)

The foregoing determination is based upon the allegations of the fourth and eleventh causes of action in the plaintiff's second amended complaint. As stated hereinbefore, the court has granted

judgment dismissing plaintiff's first and second causes of action. The remaining causes of action against the State defendants seek identical relief as that set forth in the fourth and eleventh causes of action. Since this court has made a determination in favor of plaintiff with regard to the fourth and eleventh causes of action, plaintiff's remaining causes of action against the State defendants are dismissed as moot.

Defendant Erie's Motion For Partial Summary Judgment Against Plaintiff
And Plaintiff's Cross Motion For Summary Judgment Against Defendant Erie

The motion by Erie seeks summary judgment limited to dismissal of all of plaintiff's causes of action except plaintiff's sixteenth cause of action. Plaintiff has cross moved for summary judgment against Erie seeking dismissal of the counterclaims of Erie and a declaration that plaintiff is not obligated to compensate Erie for withdrawals of water from Hinckley Reservoir.

The present record indicates that the relationship between plaintiff and Erie goes back to an agreement in 1905 between predecessors in interest of such parties, Consolidated Water Company of Utica, N.Y. (Water Company) and Utica Gas and Electric (UG&E). Pursuant to the 1905 agreement, UG&E consented to the Water Company diverting water from the West Canada Creek for its water supply subject to a requirement that the flow of water must be sufficient for the operation of the power plant of UG&E. In 1919 the same parties entered into an agreement modifying the terms of the 1905 agreement and acknowledged the right of the Water Company to divert water from the creek above the plant of UG&E and required that the Water Company contribute to the flow of the creek from "storage or compensating reservoir or reservoirs" to the flow of water between the Hinckley dam and the UG&E plant whenever the flow was less than 335 cfs. In 1925, the same parties entered into an additional agreement which continued the compensating flow requirements

provided in the 1905 and 1919 agreements. The 1925 agreement contained considerable detail about the relationship between the parties and dealt with future development. In 1958, NIMO, the predecessor in interest to Erie, entered into an agreement with the Water Company, pursuant to which the parties thereto released each other from all obligations arising from the prior agreements, including the 1905 and 1919 agreements. The 1958 agreement, however, provided that "the mutual releases and discharges contained in this instrument do not and shall not modify, rescind, cancel or annul any conveyance or reservation of title to land or interest therein heretofore made by or between any of the parties to the other and any of the agreements ..." specifying the 1905 and 1919 agreements.

As indicated hereinbefore, in 1912, the State of New York commenced proceedings to appropriate the land around the Hinckley Reservoir and to appropriate the flow of the water of the West Canada Creek at the Hinckley dam site. UG&E asserted claims in connection with the appropriation and in 1921 those claims were resolved by an agreement. Pursuant to the 1921 Agreement, UG&E then conveyed to the State of New York all of its "interest, easement and estate in the lands, structures and waters ... acquired by the State ... for the purpose of constructing and maintaining the ... Hinckley State Reservoir." In return, the agreement provided that the State of New York would operate the Hinckley dam in a specified manner which would assure flow of the water to the facilities of UG&E. The agreement made reference to the 1905 contract between the Water Company and UG&E and any amendments thereof, specifically, the provisions of said contract which obligated the Water Company to make compensating flow. A clause specifically provided in the 1921 Agreement between UG&E and the State of New York, that such agreement should not be construed to change, alter or modify the provisions of the 1905 contract between UG&E and the Water Company and its amendments.

Erie argues that plaintiff's first through eighth and tenth through fifteenth causes of action seek a declaratory judgment that it has the unconditional and unrestricted right to draw up to 75 cfs of water from the West Canada Creek at Hinckley Reservoir. The allegations are that plaintiff is entitled to such right as against Erie based upon the appropriation by the State of New York and the 1917 Agreement and the rights of plaintiff that derive from that agreement. Erie contends that there is no basis for plaintiff's claim that it has any right to divert water by the 1917 Agreement or otherwise. Erie also contends that it is an intended third party beneficiary of the 1917 Agreement and that as such, it is entitled to the benefit of the compensating flow requirements that the agreement imposes upon the plaintiff. Plaintiff's ninth and seventeenth causes of action request a declaration that plaintiff has acquired prescriptive rights against Erie to divert water from the West Canada Creek, based upon the claim that plaintiff has been withdrawing water from the creek for a period of over 90 years.

With regard to the claim by Erie that it is a third party beneficiary of the 1917 Agreement described above, such agreement contains the following language:

> "Neither said appropriations nor this contract shall in any way change or modify, or relieve the [Water Company] from the provisions of the contracts between the [Water Company] and [UG&E] , dated March 10, 1905, ... the purpose and intent of this agreement being to leave the relations of the said companies, and their respective rights and obligations under said contracts the same as if this contract had not been entered into."

In order for a party to claim it is a third party beneficiary of a specified agreement, the party asserting that right must establish that the contract was intended for its benefit. (*Mendel v Henry Phipps Plaza West, Inc.*, 6 NY3d 783, 786 [2006], quoting *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 [1983].) Erie has failed to establish that the contract was intended for its benefit

because the express language of the contract is to the contrary. Therefore, the record does not support Erie's claim that it is a third party beneficiary of the compensating flow provisions of the 1917 Agreement.

Erie contends that plaintiff has no rights to divert water from Hinckley Reservoir to the detriment of Erie as an owner of riparian rights as a downstream owner. Erie also contends that plaintiff cannot demonstrate that it has any rights to divert water for use for a municipal water supply. To the contrary, the record establishes that by the 1905 agreement and its amendments, Erie's predecessors permitted plaintiff to divert water. Further, Erie, by its predecessor NIMO, in 1958, released plaintiff's predecessor from the obligations contained in the 1919 agreement which contained the requirement to provide compensating flow. The 1958 agreement also, by its language, does not affect plaintiff's right to divert water pursuant to the earlier agreements. In addition, the record shows that the State of New York appropriated from Erie and others the flow of the West Canada Creek pursuant to the 1912 appropriations. Erie reached an agreement with the State of New York in connection with the appropriation providing for the surrender of its rights with regard to the flow of water at Hinckley dam and replaced them with an obligation of the State of New York to operate the Hinckley Reservoir in a certain manner to minimize the effect of the diversion by the State of New York for Canal purposes and the operation of the facilities of Erie. Erie has failed to establish the existence of any rights against plaintiff with regard to flow of West Canada Creek at the Hinckley dam.

In light of the foregoing, the court does not reach the issues of prescriptive rights contained in plaintiff's ninth and seventeenth causes of action. The court, however, notes that there is a distinction between the riparian rights of Erie at a location downstream from Hinckley dam as

compared to those of the State of New York and the plaintiff to divert water at the Hinckley dam. With regard to the cross motion of plaintiff seeking a declaration that it is not obligated to compensate Erie for water withdrawn from the Hinckley Reservoir, pursuant to the above analysis, plaintiff has established its right for such declaration. The court concludes that, based on the record as a whole, Erie has not shown the existence of any basis as against plaintiff for compensation for plaintiff's diversion of water from the Hinckley Reservoir. It should be noted that such declaration is only as against the rights of Erie and does not affect any other person or entity. The record also establishes that in light of the absence of any rights of Erie against plaintiff, plaintiff is entitled to summary judgment dismissing each of the counterclaims of Erie.

Motion For Leave To Intervene

Based upon the foregoing, the motion to intervene is moot. The court notes that the motion to intervene was filed over 2½ years after the present action was commenced and at a time when discovery had been complete, dispositive motions filed, and a trial scheduled. Both CPLR § 1012 (a) and § 1013 provide that an application for intervention must be "timely." The proposed intervenors have not provided a reason for the delay and have not claimed that the proposed intervenors did not have knowledge of the current proceedings. Based upon these circumstances, the court finds that the filing of the motion to intervene is untimely. (*See Norstar Apts. v Town of Clay*, 112 AD2d 750 [4th Dept 1985].)

For the reasons set forth above, it is hereby

ORDERED AND ADJUDGED that the motion by defendants the State of New York and the New York State Canal Corporation to dismiss plaintiff's first and second causes of action is granted; and it is further

ORDERED that the motion by defendants the State of New York and the New York State Canal Corporation to dismiss plaintiff's third, fourth, fifth, sixth, seventh, eleventh, twelfth, thirteenth, fourteenth and fifteenth causes of action is denied; and it is further

ORDERED that plaintiff's motion to dismiss in their entirety the counterclaims of defendants the State of New York and the New York State Canal Corporation is granted; and it is further

ORDERED AND ADJUDGED that plaintiff's motion for summary judgment in its favor against the State of New York and the New York State Canal Corporation with respect to its fourth and eleventh causes of action is granted in part to the extent that plaintiff is entitled to a declaration that it has the right to divert at the Hinckley Reservoir water flow at a rate not to exceed 35 cubic feet per second, and otherwise plaintiff's motion for summary judgment is denied and its complaint dismissed as moot; and it is further

ORDERED AND ADJUDGED that plaintiff's motion for summary judgment in its favor against the State of New York and the New York State Canal Corporation with respect to its third, fifth, sixth, seventh, twelfth, thirteenth and fourteenth causes of action is denied; and it is further

ORDERED that the motion by defendant Erie Boulevard Hydropower, L.P. for summary judgment against plaintiff is denied; and it is further

ORDERED AND ADJUDGED that plaintiff's cross motion against defendant Erie Boulevard Hydropower, L.P. seeking summary judgment dismissing the counterclaims of defendant Erie Boulevard Hydropower, L.P. in their entirety is granted; and it is further

ORDERED that the motion by West Canada Riverkeepers, Inc., Stanley E. Gilbert, Papp Enterprises, Inc. d/b/a West Canada Creek Campsites, West Canada Creek Association, Inc., Trenton

Falls Association, Inc., George K. Doolittle, Katrina Hanna, Peter deF. Millard, Virginia B. Kelly, Bruce D. Kellogg and Kathleen A. Kellogg for leave to intervene is denied; and it is further

ORDERED that plaintiff's counsel shall file this decision, order and judgment, together with the underlying documentation, with the Oneida County clerk's office within ten days of the date of this decision, order and judgment, and shall serve a copy of the filed decision, order and judgment upon counsel for the defendants and proposed intervenors, with notice of entry thereon, within ten days of the date of filing.

E N T E R.

Dated: May 15, 2009
at Rome, New York.

S/

Hon. Samuel D. Hester
Justice of the Supreme Court