

The following pages contain excerpts from the floor discussion of the New York State Assembly at the time legislation was passed by Assemblywoman RoAnn Destito. The legislation aims to clarify the rights of the Mohawk Valley Water Authority (MVWA) to withdraw West Canada Creek water from Hinckley Reservoir. Bill A8360 was passed by the Assembly in 2005 and again in 2006.

The MVWA has inserted clarifications in response to comments made by Assembly members Marc Butler and David Townsend. The MVWA comments are presented in red type.

**The Assembly
State of New York
Albany**

**THE HONORABLE SHELDON SILVER, SPEAKER
PRESIDING**

RECORD OF PROCEEDINGS

WEDNESDAY, JUNE 21, 2006

THE CLERK: Bill No. 8360-C, Rules Report No. 461, Destito, Brodsky. An act to amend the Canal Law, in relation to the acquisition of property for the canal system.

ACTING SPEAKER GREENE: An explanation is requested, Mrs. Destito.

MRS. DESTITO: Yes. Madam Speaker, this bill provides for preserving the rights of the Upper Mohawk Valley Regional Water Board as successor to the Consolidated Water Company to certain water flows and rights and it resolves an apparent dispute between two public entities. The Canal Corporation and the Upper Mohawk Valley Water Authority. And, I want to point out the fact that we have, in fact, amended the bill to take out the 100 cubic feet – actually it is 75 cubic feet, the title inaccurately reflects it, it is 75 cubic feet. And, it also takes out any penalties or any damages that the Canal Corporation would owe the Water Authority.

So, we have tried to improve the bill and make it more amenable to the Canal Corporation.

ACTING SPEAKER GREENE: Mr. Butler.

MR. BUTLER: Will the sponsor yield, please, Madam Speaker?

ACTING SPEAKER GREENE: Will you yield, Mrs. Destito?

MRS. DESTITO: Sure.

MR. BUTLER: RoAnn, could you first explain whom the Mohawk Valley Regional Water Authority is composed of?

MRS. DESTITO: It is composed of members who are appointed by various municipalities in the Water Authority area, representatives of the those municipalities that are provided water through the Authority.

MR. BUTLER: It is not correct that as a regional authority it falls outside Oneida County's lines, that Herkimer –

MRS. DESTITO: Yes.

MR. BUTLER: -- Herkimer County is also a part of the regional authority?

MRS. DESTITO: Yes, if that is what you are asking me; yes.

MR. BUTLER: Okay, because when we spoke when the Water Authority was created a number of years ago, we spoke here on the floor, you and I, very briefly about it and you did not acknowledge at that time, I believe, that Herkimer County was a part of this regional authority. But that –

NOTE: Approximately 5% of the MVWA's current customer base resides within Herkimer County in the western most portions of the Towns of Schuyler and Frankfort. At the present time, appointees from within Herkimer County comprise 17% of the Authority's Board of Directors. At other times, up to 25% of the Board are appointees from Herkimer County locations.

MRS. DESTITO: I don't think we ever discussed this bill before.

MR. BUTLER: Well, when the Authority was actually created, and I voted against it. But, that is incidental. When you talk about the 75 cubic feet per second –

MRS. DESTITO: Right.

MR. BUTLER: -- what is the current amount of water that the Water Authority removes from the Hinckley Reservoir?

MRS. DESTITO: Less than that. It is 75.

MR. BUTLER: Well, you want it to be 75, but what is the amount currently?

MRS. DESTITO: We want it to be 75. I don't have that information right at my fingertips right now.

MR. BUTLER: Did I understand in an article in today's paper it was about 41?

MRS. DESTITO: Correct.

MR. BUTLER: Could that be? Okay. So, we are talking about a 75 percent increase, somewhere between 75 and –

NOTE: The historical limit of the MVWA's daily draw from Hinckley Reservoir has been 75 cubic feet per second (cfs), or 48.5 million gallons per day, since 1917. The MVWA's current daily draw of 19 million gallons per day averages about 21% less than in the late 1960's because of lost industry. The proposed expansion to western Oneida County would not even make up that difference.

MRS. DESTITO: Right. We want to increase it for economic development use and expansion of the Water Authority's use into other communities.

MR. BUTLER: Okay, Now, you have titled it the West Canada Riparian Rights Restoration Act. I am sure you are aware that the West Canada Creek which Hinkley Reservoir flows into actually flows for a length of approximately 20 miles through Herkimer County?

MRS. DESTITO: Yes.

MR. BUTLER: Okay. Have there been any studies or any documentation that indicate with this additional water flow that is taken by the Water Authority, number one, what impact that additional taking would have on the hydropower facilities that are located on the West Canada Creek and, secondly, on the recreational opportunities on Hinkley Reservoir, itself, which during the dry periods of the summer is dramatically lower, and, third, on the trout habitats and the recreational opportunities along the West Canada, which is considered one of the best trout fishing streams in New York State?

NOTE: The West Canada Creek is a New York State public waterway. The Consolidated Water Company, predecessor to the MVWA, was already drawing water from the West Canada at the same point on the creek where Hinckley Reservoir was later constructed. Extensive studies have been conducted to verify that MVWA's use of the West Canada Creek has an insignificant effect on the water level in Hinckley Reservoir, and the flows of the West Canada below Hinckley Dam, because of the vast water storage in the Reservoir, even in times of sever drought.

The reservoir was designed to fluctuate in depth by more than 30 feet during normal operations. The level drops because of water releases through the dam for hydroelectric power generation.

FACT: When the Jarvis power turbines in Hinckley Dam are operated at peak capacity, 63 times more water is passed through the dam in one day than is withdrawn by MVWA during the same time period.

FACT: The total water used by the MVWA customers **during an entire year** is less than one third of the total water stored in Hinckley Reservoir when full.

FACT: A minimum flow of 160 cubic feet per second is required on the lower West Canada Creek at all times under the New York Power Authority's license issued by the Federal Energy Regulatory Commission for the operation of the Jarvis hydroelectric facility. Expanded use by MVWA would not interfere in any way with the Power Authority's ability to meet this requirement.

MRS. DESTITO: Mr. Butler, the Water Authority indicates to me that there will be no such impact, there has not been such an impact, and that the studies show that the impact on recreational fishing and whatever else that you mentioned would not be impacted. And, in fact, communities that this water needs to be expanded to are now living with the need for potable water, the Town of Westmoreland, the Town of Kirkland, parts of other – the Town of Verona that wants this water. There are people who, in fact, need water for existence. And, it is my understanding that your concerns have been addressed and that it is a matter of statement of fact that there has not been that type of a drought in many, many years. And, I don't have all of the facts of how many years, but it has been quite a few years, over 50, that that will not happen and that Hinkley Dam is, in fact, Hinkley Dam is, in fact, it is well-documented, that it is a good dam, it is a well-constructed dam, and it has served the purpose for the needs that you have talked about, recreation, fishing and so forth.

MR. BUTLER: In all due respect, I am not sure my concerns have been addressed. I have received some verbal assurances from the Water Authority that these concerns were unfounded, but I have seen no documentation.

NOTE: Representatives from the MVWA have met with Mr. Butler on several occasions to present factual information. Computerized hydraulic models have been constructed by Barton & Loguidice Engineers and are public information. These models have been supplied to both the NY State DEC and the NY State Canal Corporation and have not been disputed.

Additionally, I will add that the Canal Corporation vigorously disputes some of the assertions that have been made by the Water Authority, and I think that is the crux of the matter. We are getting several variations on the story from various agencies and organizations.

NOTE: During the past three years that this issue has been held up, the State Canal Corporation has continually changed its objections. They have also suggested that monetary payments to the Canal Corporation would alleviate their concerns about a potential water shortage, but have never explained how such payments would make more water available.

FACT: Neither the Canal Corporation, nor the downstream power company known as Erie Blvd. Hydropower, have ever produced scientific analysis to support their claim that increased use by MVWA would cause harm to either party or the downstream habitat.

MRS. DESTITO: Mr. Butler, may I continue because this piece of legislation is also necessary to be sure that our communities, both yours and mine, Oneida and Herkimer County, certainly have the water and the perception that we have water that we can sustain not only the existing businesses in our community, but the business that we hope to attract to our community such as a chip fab manufacturing plant that has been very widely discussed in the news today and this week and the past few months.

MR. BUTLER: I guess my answer to that would be, I would not dispute that there is an adequate source of water, my concern is how that water source is controlled and distributed within the region.

I want to go more specifically to your legislation. Your original bill is based on the 1912 agreement. You were talking about the 100-cubic-feet-per-second issue. I note that you have now changed that to 75 cubic feet per second.

MRS. DESTITO: Yes.

MR. BUTLER: But, does this acknowledge actually that the 1912 agreement was never validated by the State Attorney General and that the flow now is regulated by a rule curve that was created following additional litigation that occurred in 1917 and under which the dam has operated since?

MRS. DESTITO: I will make this statement:
Although 100 cubic feet per second was carved out from the State's appropriation in 1912, that agreement, I will concur, never received approval from the Attorney General. In order to settle the ensuing claim by the Mohawk Valley Water Authority's predecessor, the Consolidated Water Company of Utica, in 1917 the State entered into an agreement with the Water Company whereby a sum of money was paid and the Water Company's right to the water was reduced to 75 cubic feet per second.

MR. BUTLER: Correct.

MRS. DESTITO: And, then, the State caused a deed to be filed which reserved that 75

cubic feet to the Water Company as set forth in our initial draft. So, we did amend it with your concerns in mind to 75 cubic feet per second.

MR. BUTLER: So, you would not agree that when the Water Authority unilaterally acted to destroy the Gray Dam and the Gray Reservoir, which was one of these Upstate compensating water supplies, that they went out of agreement with this covenant that was made?

NOTE: The DEC determined the Gray Dam to be unsafe as early as the mid-1970's. It was classified as "high hazard/ high risk" because there was a potential for loss of life if it failed. The Gray Dam was deteriorated because it had not been used or maintained in the previous decades.

NOTE: The upstream storage and water release requirements in the 1917 Agreement were **never** followed because Hinckley Reservoir proved to be more than adequate for all needs. The Gray Reservoir was **emptied** in the early 1980's because the Gray Dam was unsafe. Environmental notices and permits to dismantle the dam were properly obtained from the DEC, the Adirondack Park Agency, and the Corps. of Engineers. The Canal Corporation was notified on multiple occasions during the 18 months before Gray Dam was taken down and did not respond. They were also notified nearly twenty years earlier that the reservoir was empty and they never attempted to enforce the 1917 Agreement.

MRS. DESTITO: Mr. Butler, the Gray Dam was eliminated with the Department of Environmental Conservation's approval and at the time with no comment from the Canal Corporation. It was only until the Water Authority, the Utica Water Authority, chose to expand their water to other communities and to expand their need was the Canal Corporation, very questionably, we questioned why were they interested in the Gray Dam.

MR. BUTLER: Okay. Okay, thank you, RoAnn.

MRS. DESTITO: Thank you.

MR. BUTLER: Madam Speaker, on the bill.

ACTING SPEAKER GREENE: On the bill.

MR. BUTLER: Okay. Thank you.

Madam Speaker, I see a number of problems with this bill: First, this matter is now under litigation and I think just from our discussion here today you can see there are dramatically differing points of view on this project, differences that this legislation, frankly, overlooks or ignored and issues that I believe are best resolved in this litigation and in the courts.

Additionally, I think this legislation would raise some Constitutional issues because it would, essentially, compel a State agency, the Canal Corporation, to give away with no

compensation an asset that it has under its control an jurisdiction. I know the Water Authority claims they have rights to this water supply with not cost involved. The Canal Corporation disputes that. That is just one of a number of issues that are under dispute in this issue.

NOTE: The Canal Corporation owns Hinckley Dam and the land that embodies the reservoir. In 1912, the State appropriated all the flows of the West Canada Creek for canal purposes, except for a flow of 100 cubic feet per second (cfs), which was “**expressly omitted from the taking**” and deeded to the water company for drinking purposes. In 1917, the water company agreed to reduce its portion to 75 cfs (equivalent to 48.5 million gallons per day), and a second deed was created to convey this flow as a property right. This portion of the creek flow is clearly **not** owned by the Canal Corporation and is **not** a Canal asset for which they should be compensated.

I also think, Madam Speaker, that it is a remarkable development that this legislative Body would interject itself into an issue, a dispute between two public agencies, and presume that in the bill that the State agency is in error in their position on this matter.

NOTE: The vast preponderance of historical documentation, scientific data, and contract law supports the MVWA’s position. For three years, the Canal Corporation has simply expressed its self-interest without offering any documentation to support its position.

FACT: The MVWA was created by State legislation under the Public Authorities Law and is considered a Public Authority of the State of New York, similar in statute to the Canal Corporation.

Additionally, this bill would subject the State Canal Corporation to the possibility of considerable liability.

NOTE: This has never been substantiated. The “possible liability” refers to the Canal Corp.’s obligations to release water downstream for Erie Blvd. Hydropower. Erie’s predecessor agreed to accept the flows according to the “rule curve” under a separate 1921 Agreement. MVWA’s use does not interfere with the State’s obligations under the 1921 Agreement.

And finally, as I noted and hoped to bring out during our discussion, the Water Authority is actually a joint venture between Herkimer and Oneida County. Herkimer County is a much smaller county and has had little say through the Authority on many decisions. And, you heard RoAnn Destito mention that this would be a dramatic expansion of the current Water Authority territory to an area in western Oneida County which would be of little or no value to Herkimer County. So, I can’t see what the positive impact would be on Herkimer County and possibly even neighboring counties to the west of us.

NOTE: The MVWA was created as a regional entity to ensure the public health and economic well being of the region. The MVWA is attempting to assist local communities who have been ordered by the State DEC to find alternative water sources due to public health concerns. Some of these towns have residents who are served by individual wells that sometimes run dry or can become contaminated by ground water.

FACT: The MVWA's financial models show that the proposed expansion via the Verona pipeline project, nearly three years overdue, would have negated the need for rate increases for at least ten years for all of its customers, including those in Herkimer County. The loss of this additional revenue, now exceeding \$1 million, has required rate increases totaling 23% in the past two years.

That puts us in the position of using an important resource and, again, we talked about chip plants and their possible development in the Utica region. This resource, which should be used and controlled jointly between the two counties and which, frankly, lies predominately, probably about three-quarters of its area is within Herkimer County's boundaries, this water supply would be used to actually lower the water rates for users in Oneida County which comprises the vast majority of the Authority ratepayers, and they would be using this resource for development in western Oneida County at Herkimer County's cost.

NOTE: There is no cost to Herkimer County that would result from expansion of the MVWA service area, only the benefit of stable water rates to attract business development.

NOTE: Several townships within Herkimer County are experiencing hardships related to water supply needs. Schuyler and Frankfort, currently served in part by the MVWA, are trying to expand the public water service but have been prevented from doing so. Schuyler has lost \$300,000 in Federal grant funding in the process, and may lose all of it if the project cannot be started soon.

Other towns and villages within Herkimer County continue to face water delivery difficulties with their own municipal systems. The MVWA stands ready and able to assist with these problems should the local officials ever choose to exercise that option. The MVWA was created for this purpose.

And, for all of those reasons, Madam Speaker, I would urge a no vote on this particular piece of legislation.

ACTING SPEAKER GREENE: Mr. Townsend.

MR. TOWNSEND: Thank you, Madam Speaker. Would the sponsor yield for a couple quick questions?

MRS. DESTITO: Sure.

ACTING SPEAKER GREENE: Will you yield, Mrs. Destito?

MRS. DESTITO: Yes, I would be glad to.

MR. TOWNSEND: RoAnn, I see we are on a C-print on this bill. Have the amendments and changes made to this bill, you said in your opening statement, I guess, was to address some

concerns of the Canal Corporation?

MRS. DESTITO: To address some of the concerns that we believe were expressed. The one that I just talked about with the 100 cubic feet and the 75 cubic feet and also the damages that were put in the bill, we did concede, I conceded that the damages should be removed from the bill.

MR. TOWNSEND: Thank you. Has the Canal Corporation signed on in support of this piece of legislation?

MRS. DESTITO: No, but we have reviewed it with them, and they have taken a wait-and-see attitude.

MR. TOWNSEND: I see that this bill has not been substituted as we have seen many bills in the last couple of days come over from the Senate. Does this bill have a Senate sponsor?

MRS. DESTITO: We are working on it.

MR. TOWNSEND: So, there is none at this point?

MRS. DESTITO: Not at this point.

MR. TOWNSEND: Thank you.

On the bill, Madam Speaker.

ACTING SPEAKER GREENE: On the bill.

MR. TOWNSEND: I think Assemblyman Butler outlined the major problems with this bill quite adequately, and I won't go into the whole history of the dispute between the Water Authority and the Canal Corporation. And, they have kind of skimmed over the third party in this whole legal issue, which is the Erie Boulevard Power Corporation that draws water for the turbines who have an agreement with the State of New York. (NOTE: As previously indicated, the proposed geographic expansion of the MVWA customer base does not interfere with the State's contractual obligations under their 1921 Agreement with Erie Blvd. Hydropower.)

And, this is an issue that is now before the courts on a three-party suit involving the Canal Corporation, who is really the main benefactor of Hinckley Reservoir because the Reservoir was established to supply water to the New York State Canal Corporation to maintain the Canal through Central New York; the power company who has

the rights to water coming down out of Hinkley to turn the turbines to generate the electricity; and the Mohawk Valley Water Authority. The Water Authority today has enough water coming through the system out of Hinkley to address the concerns of their current customer base and any expansion within the current system. Where the problem seems to have arisen, and this dispute has come to a head, is that the Water Authority wants to expand its system outside the enabling legislation when it was established many years ago.

NOTE: The MVWA's service area is clearly defined in the enabling legislation, Section 1226 of the Public Authorities Law. The legislation enables the MVWA to provide drinking water in far western Oneida County as well as other towns or villages in Herkimer County east of Schuyler and Frankfort.

I agree with Assemblyman Butler that this is an end run around the original legislation, and it also intercedes and puts us, the Legislature, in the middle of a pending lawsuit now before a Supreme Court justice in Oneida County to establish who does have the rights to this water. It is a State asset. Whether it should be paid for when it is used, the taxpayers of the State of New York should be reimbursed for it, what rights that the electric company has to that water and if, in fact, the Water Authority has the authority to expand their service area beyond the original legislation. And, we laugh about it, but really the whole issue seems to revolve around the Gram Dam that was torn down by the Water Authority, some say with the blessing of the DEC, others on the other side of the issue say without the blessing of the DEC. **(NOTE: as previously indicated, the MVWA obtained a permit from the DEC to remove the Gray Dam before the project was undertaken. The permit is a public document that is available to any Member of the State Assembly.)** But, it has created quite a problem in our area for water, and for us to put ourselves in the middle of it, is not the right thing to do at this point on legislation before the courts. And, I would recommend a no vote also. Thank you.

ACTING SPEAKER GREENE: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER GREENE: The Clerk will record the vote.

(The Clerk recorded the vote.)

Are there any other votes? The Clerk will announce the results.

(The Clerk announced the results.)

The bill is passed.