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AND THE

DECISIONS, OPINIONS AND RULINGS

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[Vol. 37] Water Power and Control Commission

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In the Matter of the Petition of the CITY OF ROCHESTER, to the New York State Water Power and Control Commission for Permission to Provide Additional Facilities for Water Supply; Honeoye Lake—Mud Creek

Water Supply Application No. 439

(Water Power and Control Commission, December 14, 1927)

**Memorandum.**

BY THE COMMISSION.— This is an application from the city of Rochester, Monroe county, whereby approval is asked of a project involving the use and development of Honeoye creek and Mud creek as new and additional sources of water supply for said city, the acquisition of the necessary lands and other rights and of the plans for the proposed construction.

This application was signed by Martin B. O'Neil, mayor; Harold W. Baker, commissioner of public works, and C. Arthur Poole, city engineer, on April 30, 1927, and was filed on May 2, 1927.

It is proposed to develop Honeoye creek as an additional source of water supply for the city of Rochester by the construction on that stream, about five miles south of the village of Honeoye Falls, of an earthen dam, 800 feet long by 60 feet high. The flow line of the reservoir thus formed is to be at elevation 830 and the reservoir itself will have a water surface of twelve and one-half square miles, a tributary drainage area of 187 square miles and will store 45,200,000,000 gallons of water. This reservoir will completely submerge the present Honeoye lake, forming a pond three times as long as that body of water. From the reservoir water is to be conducted to the city by conduits, of which two will eventually be built. They will probably be of steel pipe, sixty inches in diameter, and will go directly to Cobbs Hill reservoir without passing

through Rush reservoir. It is estimated that the construction of this reservoir will make available for the city the additional amount of 55,000,000 gallons of water per day. It is proposed to acquire the land which will be inundated by this reservoir and also to purchase land liberally for protective purposes; the maps filed showing that a tract of land approximately fifteen miles in length by three miles in width is to be acquired. This land is to be depopulated and either reforested or parked. All the land holdings of the city are to be protected by the enactment of sanitary rules and regulations and by strict patrol. All water drawn from the reservoir is to be chlorinated.

In addition water is to be obtained from Mud or Ganargua creek, a tributary of the Oswego river, the watershed of which lies immediately east of the watershed of Honeoye lake. On this stream, between Vincent and South Bloomfield, it is proposed to erect a diverting dam, forming a reservoir at elevation 864, which will have a tributary drainage area of about thirty-two square miles. From this reservoir it is proposed to drive a six-foot tunnel westerly, for about five miles, into the proposed Honeoye reservoir. Storage in Honeoye reservoir is to be utilized to equalize the flow of Mud creek. It is estimated that this development will make available an additional amount of 15,000,000 gallons of water per day.

Objections to this project were made on many grounds. Those to which consideration is now particularly given were that the plans of the city were claimed not to make adequate provision for the determination and payment of all legal damages, both direct and indirect, which will result from the carrying out of the project.

We find that this project involves the taking by the city of a large area of land. Such land will be depopulated, diverted from the uses to which it has hereto-

fore been devoted and thereafter used for water supply purposes and protected by drastic regulations, will be prohibited from most other public and private uses. The town of Richmond in Ontario county will be cut in two and the productive area and population thereof greatly reduced. The village of Honeoye and the hamlet of Richmond Mills will be completely wiped out. The village of Hemlock will either be removed or the people resident therein will be subjected to severe restrictions. The proposed Honeoye reservoir will be three times as long as the present Honeoye lake and will act as a bar to the free circulation of the people in this part of the State.

Generally speaking, the carrying out of this project will affect the lives and activities of all persons now dwelling and doing business in the neighborhood of the proposed reservoir. Such interference with and changes in the properties and method of living of these people will result in damages to them of many kinds, which will not be limited to the ordinary direct damages for which the general laws of the State now provide a method of determination and require compensation.

The Legislature in the past has enacted provisions for the determination and payment of damages resulting from this kind of water supply project on a more liberal scale than is provided for by general laws. Such damages must now be paid by the cities of New York and Albany.

At the time that the first law requiring the city of New York to pay for such indirect damages was enacted, another law was placed upon the statute books creating the State Water Supply Commission and charging it with the duty of determining that due provision was made for the determination and payment of all damages, both direct and indirect, which would result from the execution of a water supply

project. The courts have held that these companion laws must be read together. We are the successors in office of the State Water Supply Commission. It is, therefore, our duty to make determination with regard to this matter.

We are of the opinion that in this case damages should be paid on the same liberal scale fixed by the Legislature for the New York and Albany projects.

Although it appears that our predecessors in office have always held that it was their plain duty under the statute to make provision for the payment of indirect damages when such payment was found to be just, there seems to have been doubt as to the precise action that should be taken with regard thereto. The State Water Supply Commission in some of its earlier decisions inserted a condition that in the determination of damages the commissioners of appraisal should not be limited in the reception of evidence to the rules regulating the proof of direct damages. That Commission, however, did not long continue so to do. In the case of New York city, having found that the rule for the determination of damages was not sufficiently liberal, it held up the proceedings until the enactment of additional legislation.

We believe that, although it is one of our most important duties to provide for the payment of indirect damages in suitable cases, under the present general laws we may direct, but we cannot authorize a municipal corporation to pay them and, therefore, unless the Legislature has made such an authorization, our only recourse is either to reject the application on those grounds or to suspend judgment thereon until the Legislature has had an opportunity of passing on the matter. The last course is the one usually followed and generally seems best to meet the needs of the situation.

For these reasons we believe that final decision on **this application should be held in abeyance and the**

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city of Rochester be given a reasonable time in which to apply to the Legislature for relief and thereafter to submit to us a modified scheme for the determination and payment of direct and indirect damages.

We believe it to be unnecessary to discuss the various other features of this application, or to make further determination thereon at present.

We believe that a decision should be made in conformity with the views above expressed.

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**In the Matter of the Petition of the CITY OF ROCHESTER to the New York State Water Power and Control Commission for Permission to Provide Additional Facilities for Water Supply; Honeoye Lake—Mud Creek**

**Water Supply Application No. 439**

(Water Power and Control Commission, December 14, 1927)

**Permitting modification of plan.**

**BY THE COMMISSION.**—The city of Rochester, in the county of Monroe and State of New York, having on May 2, 1927, filed, under the provisions of article IX of the Conservation Law, an application to the Water Power and Control Commission for approval of the plans of said municipality for the acquisition and taking of a water supply, the acquisition and taking of an additional water supply, the taking or condemnation of lands for a new or additional source of water supply and of the construction proposed in connection therewith; and

After due notice, published as required by law, the hearing on this application having been held in the Liberty theatre in the city of Canandaigua on May 25, 1927, at 10:00 o'clock in the forenoon, and thereafter immediately adjourned to the Ontario county court house in said city of Canandaigua and thereafter con-

tinued, pursuant to adjournments duly taken, in said city of Canandaigua on July 18, 19, 20, 21 and 22, 1927, and in the Monroe county court house in the city of Rochester on September 15, 1927, and in the office of the Water Power and Control Commission in the city of Albany on October 8, 1927; and the city of Rochester, the applicant herein, having been represented by Claude S. Smith, and by George B. Draper, deputy corporation counsels; and objections having been filed by the board of supervisors of Ontario county and the town boards of the towns of Bristol, Canadice and Richmond, all of Ontario county, represented at the hearing by Earle S. Warner; by W. Scott Short and some fifty others, represented by Earle S. Warner, and by Nathan D. Lapham, of counsel; by the Lakeview Cemetery Association, represented by Nathan D. Lapham; town of Mendon, Monroe county, by James R. Martin; by the town of Lima, Livingston county, Alexander Menz, the Honeoye Falls chapter of the Isaak Walton League of America, the village and some fifty-seven residents of the village of Honeoye Falls, Monroe county, represented by James M. Heath; by some seven residents of Ontario county, represented by Messrs. Warren, Shuster & Case, Earl F. Case, of counsel; by seven members of the executive committee of the Finger Lakes Association, represented by Leonard H. Searing; by the Rush board of trade and some thirty-five residents of the town of Rush, Monroe county, represented by the Rev. M. J. Cluney; by the New York Conservation Association, Erie County Conservation Society, Buffalo Chapter of the Isaak Walton League of America, Ellsworth N. Croll; Lewis M. Weber and Anna Weber, represented by Thomas E. Lawrence; by Harwood Martin, James P. Wells and Carl Ashley, each appearing in person; by the municipal commission of the village of Fairport, Monroe county, represented by Sidney Scarth, superintendent; by the village of Macedon, Wayne county,

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A. B. Nichter, Louise F. Morris, the municipal board of the village of Newark, Wayne county, Arthur J. Menz, some seventeen residents of the town of Bristol, Ontario county, some forty-one residents of the town of Canadice, Ontario county, some one hundred and ten residents of the town of Richmond, Ontario county, some twenty-seven residents and taxpayers of the town of Richmond, Ontario county, W. J. Kinnear, some fifteen business firms of Hemlock, Livingston county, none of which or whom were represented at the hearing, although many of these objectors were present in person; and in addition some two hundred and thirty-four individual objections on newspaper clippings having been filed, some of the signers of which were represented by T. E. Lawrence; and some 308 individual protests, not in the form required for objections, having also been filed; and the Niagara, Lockport and Ontario Power Company having appeared by Warren Tubbs; and the Geneseo Country Association having appeared by Austin W. Erwin, neither of these organizations having filed objections; and

The petition, maps and profiles submitted by the petitioner having been examined, the witnesses called by the parties having been heard, together with arguments of counsel, and due deliberation thereon having been had, it is

*Determined*, that said plans fail to make fair and equitable provisions for the determination and payment of any and all legal damages to persons and property, both direct and indirect, which will result from the execution of said plans or the acquiring of said lands; but

WHEREAS, the said city of Rochester, except by authority of the Legislature, has no power to change said plans in such manner as to enable the above determination affirmatively to be made; and

WHEREAS, it appears that the needs of the applicant,

with due regard to the actual or prospective needs or interests of all other municipal corporations and civil divisions of the State affected thereby and the inhabitants thereof, will best be met by permitting said city to seek such legislation; it is therefore

*Decided*, that the said city should be permitted, after sufficient time to enable it to apply to the Legislature for such relief and additional authority, to file an amended plan or scheme for the determination and payment of such damages;

*Wherefore*, the hearing on this application is hereby adjourned and continued to a date to be hereafter fixed and to be not later than the first day of May in the year 1928, at which hearing such amended plan, and such amended plan only, will be considered:

*Provided*, however, that, if the said city of Rochester shall elect not to seek such legislative relief and not to file such amended plan, it may so certify to this Commission by written instrument filed in this office, whereupon, and on the date of such filing, this application shall be deemed to have been rejected.

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In the Matter of the Application of WATER DISTRICT No. 1 OF THE TOWN OF MOUNT PLEASANT, Westchester County, for Approval of Its Acquisition of a Source of Water Supply and of Its Financial and Engineering Plans for the Construction of a Water Supply System

Water Supply Application No. 448

(Water Power and Control Commission, December 23, 1927)

Memorandum.

BY THE COMMISSION.—Water district No. 1 of the town of Mount Pleasant, Westchester county, N. Y., was formed by the town board of said town, acting on a petition filed as required by the provisions of the