

There has recently been a lot of chatter regarding the change of ownership of the dam and flowage rights to Johnson Pond and Flat River Reservoir (“the Pond”) and rumors about what might come next. While I have no knowledge what-so-ever regarding the actual plans of the new owner, there are some basic assumptions, information and law which combined offer insight into what is, (and more importantly isn’t) possible. The basic assumption that is generating so much angst is that no one in their right mind would spend \$1.7million and not expect to monetize that investment. The most popular rumors are that the new owner plans to renegotiate an insane lease with the Town and to charge surrounding landowners for access to “the Pond”. I am not going to discuss the various options the Town of Coventry has to deal with this situation. Instead, I hope this writing provides a framework for the surrounding landowners to better understand their position in this mess.

In order to understand the new owner’s options, it is important to understand precisely what rights the new owner has acquired in order to know what rights could be enforced against the surrounding landowners. The new owner purchased all right, title and interest previously owned by the Quidnick Reservoir Company. A brief history of the Quidnick Reservoir Co., and the unique laws in existence when the Quidnick Reservoir Co. was created is important. The Quidnick Reservoir Co. was organized by a group of mill owners for the express purpose of creating bodies of water that could be controlled to provide energy in the form of flowing water to downstream water powered mills. Reservoirs were the equivalent of today’s modern day power plants.

Production from water powered mills (and thus the reservoirs that powered them) was so important to society that starting in 1734 the State of Rhode Island passed laws otherwise known as the Mill Acts. These laws granted mill owners the power of eminent domain for the purpose of flooding other people’s land to construct reservoirs. These laws required that the mill owners purchase the land where the dam would be located but not the land that was simply going to be flooded. It is important to remember that in the 1850’s (when Quidnick, Tiouge and Flat River were built by Q.R.C.) most rural land was farm land. Further, the mills owners’ only interest was in the flowage rights, allowing them to lower the reservoirs at will to provide waterpower. However, at all times the farmers were always allowed access to the reservoirs for recreation and to water their animals. The fact that the original farm owners had the right to use the newly created reservoirs is an interesting but probably not particularly strong argument in support of any rights today’s surrounding landowners might enjoy. The reason for this brief history lesson is to explain that the Quidnick Reservoir Co. did not own the entirety of “the Pond” and it didn’t need to to get what it wanted. The notion that the Quidnick Reservoir Co. “owned Johnson Pond /Flat River Reservoir” is incorrect, it owned part of it.

Thus, the Quidnick Reservoir Co. owned a portion of the lakebed comprising “the Pond” and the flowage rights over the entirety of “the Pond”, including over land it did not own outright. This is what was transferred to the new owner and it from these two properties rights (partial lake bottom ownership and flowage) that the new owner derives his bargaining power. What can be done with these property rights will be discussed next.

## Use of Flowage Rights to Control/Dictate Access to “the Pond”

One obvious threat that the new owner could attempt to make is that if surrounding landowners don't pay a fee then the lake will be lowered. This threat is not realistic or plausible for several reasons. First and foremost, it would constitute felony extortion. Rhode Island's Extortion statute can be found at R.I.G.L. § 11-42-2 and will not be quoted here. Suffice to say that threatening to harm someone's property or financial condition for their financial gain is a crime punishable by 15 years in prison and \$25,000 fine (then multiply that by the number landowners surrounding “the Pond”).

Second, such a scheme would be logistically impossible. Let's say the new owner made the following threat to 100 people “Pay me \$2,000/yr. or I'll lower the lake.” What would happen if five people paid and 95 didn't? You cannot selectively lower 95% of the lake. There is no way to enforce such a scheme, even if it were legal.

There is also the open question of whether R.I.D.E.M. would allow the lake to be lowered. There is reason to believe D.E.M. would not take kindly to such an action. A review of the Coventry Land Evidence Records shows that in 1993 D.E.M. fined the Quidnick Reservoir Co. for allowing the reservoir to get too low, sighting the effect on surrounding wetlands. See Coventry Land Evidence Records Book 409, Page 169. Interestingly, this isn't the first time someone in Rhode Island lowered a lake in an attempt to score a financial gain. In 1997, the then owner of the Pascoag Reservoir Dam wanted the State of Rhode Island to purchase the reservoir. If they refused, the owner threatened to lower the reservoir, (much to the dismay of the 300+ surrounding homeowners). In fact, he did lower the reservoir and D.E.M. went to court and obtained an order allowing it to close the gate and refill the reservoir. D.E.M. later sued the reservoir owner and the results of that lawsuit will be discussed infra. The point of this is to show that there is precedent to suggest D.E.M. would not allow “the Pond” to be intentionally lowered and doing so could result in substantial fines. Trying to establish D.E.M.'s position on this matter should be a priority for the surrounding landowners.

## Use of Land Ownership to Control/Dictate Access to “the Pond”

If the new owner can't use his flowage rights as a weapon, that leaves the rights to enforce the rights inherent in land ownership, specifically the right to exclude people from the land, otherwise known as “Trespass”. Presumably such a scheme would work something like this: “Unless you pay me \$2,000/yr. for this year's approved sticker, which must be placed on your boat and dock, you will be charged with trespass.” Fortunately for those living on “the Pond” this scheme has more problems than the last.

First, remember the earlier history lesson. The Quidnick Reservoir Co. never owned all the land under “the Pond”. Further, as an attorney who has dealt with many parcels of land surrounding “the Pond” I can personally attest to the fact that there are many parcels of land that extend into the pond. Why is this important? Because under R.I. law if you own *any* of the land under a body of water you are entitled to use the entire surface of the water. See, Dyer v.

Cranston Print Works Co., 48 A. 791 (R.I. 1901), Hood v. Slefkin, 143 A.2d 683 (R.I. 1958), Tyler v. Wilkinson, 24 F.Cass 472 (1827). (The underlying rationale for why the entire surface of the lake can be used would require an explanation of the history of R.I.'s Riparian Rights law which is far beyond the scope of this outline. The short explanation is that the "dry land" law of trespass is not applicable to "wet land" which is governed by riparian rights.)

This creates a huge logistical problem for the new owner. If he sees a boat on the lake how can he know if it came from one of the parcels that owns a portion of the lake bottom versus a parcel that only abuts the pond but does not extend under it? Short answer, he can't. Unfortunately for the new dam owner, things are about to get much worse.

### The Pascoag Reservoir Case

I mentioned earlier that D.E.M. sued the owner of the Pascoag Reservoir dam. Beyond having an environmental interest in Pascoag Reservoir, D.E.M. also had a dock and boat ramp at the reservoir. D.E.M. advanced an ingenious argument to ensure they could not be denied access to the reservoir. D.E.M. argued that the piers that supported their dock rested on the bottom of the lake had been in place for over ten years and thus under the law of adverse possession they now owned a small portion of the lakebed and therefore had the right to use the entire surface of the reservoir. **AND THE RHODE ISLAND SUPREME COURT AGREED!** The case is Reitsma v. Pascoag Reservoir & Dam, LLC., 774, A.2d 826 (R.I. 2001). Therefore, any surrounding landowner who has a dock, pier, wall, boat lift, etc., that has been touching the bottom of "the Pond" for ten consecutive years now owns that small portion of the lakebed and has the right to use the entire surface of "the Pond". (You cannot consume or remove water from the reservoir, but you can reasonably use it in its natural state. That's the holding of another R.I. Supreme Court case.) Pascoag Reservoir also stands for the proposition that if you (together with your predecessors in title) can prove that you have used "the Pond" for recreation for ten continuous years you can obtain the right to continue to enjoy that use (otherwise called an easement by prescription). This can be harder to prove, but may be an option for those who don't own a structure that rests on the lakebed.

This creates another logistical nightmare for the new owner. The new owner could be facing hundreds of adverse possession/prescriptive easement lawsuits that would need to be defended against, not to mention having no way of knowing which properties have the legal right to use "the Pond" and which don't.

I would also note that this is not the first time a dam owner in Coventry tried to push around the abutting land owners. In the late 80's the owner of the dam at Quidnick Reservoir tried to make demands on and restrict access from the abutting properties. The end result of that squabble was that the dam owner backed down after confronted with the legal realities of its situation. That squabble was part of the reason I became an attorney.

This is not intended to be an exhaustive examination of the factual and legal issues involved but should serve as a good outline. Further, not everything is good news for the

surrounding landowners. For example, I question if D.E.M. could stop the new owner from permanently removing the dam and returning the pond to its original condition as a stream. I could make good arguments on both sides of that question. And, the Town has some fascinating options at its disposal to blunt any attack by the new owner (which do not necessarily include buying the reservoir). Maybe there will be a Part 2 to this outline.

Good Luck,

Chris Anderson, Esq.