

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

ANDREW MCLEOD, in his capacity as :
Director, Rhode Island Department of :
Environmental Management, et al. :

V. :

PC 98-1946

PASCOAG RESERVOIR DAM, LLC :

DECISION

DARIGAN, J., This case was tried before a justice of the Superior Court without intervention of a jury from July 26, 1999 through September 7, 1999, with interruption occasioned by the schedules of counsel and the Court.

The plaintiff in this action, the Director of the Department of Environmental Management and others, hereinafter referred to as the State, filed a complaint against the defendant, Pascoag Reservoir Dam, LLC, hereinafter called the Corporation, on April 22, 1998.

The complaint averred a violation of the Freshwater Wetlands Act pursuant to R.I.G.L. 2-1-18 et seq. by the Corporation regarding property owned by the Corporation known as the Pascoag Reservoir Upper Dam, R.I. Dam #016. In addition, the complaint alleged that the Corporation interfered with the public's right to a recreational easement over and on said Echo Lake, so called, hereinafter referred to as the lake, by virtue of riparian rights, navigability and the Public Trust Doctrine, easement by prescription, adverse possession and dedication by the Corporation of the lake for public purposes. The State, therefore, prays for certain permanent injunctive relief with regard to the

Corporation's maintenance and operation of the lake and dam and with respect to the public's rights in and to said lake.

The Corporation filed its answer to the State's complaint on May 27, 1998, as well as a counterclaim for inverse condemnation, trespass, and alleging a violation of the Corporation's substantive due process rights by the State. The defendant's claim for inverse condemnation was voluntarily dismissed without prejudice during trial.

The State's allegation of violation of the State's Freshwater Wetlands Act by the Corporation was severed from this trial by the Court on motion of the State over the objection of the Corporation.

Facts and Travel

The following facts are generally not in dispute. Pascoag Reservoir, also known as Echo Lake, is an artificially created body of water and is located in the towns of Burrillville and Glocester, Rhode Island. The lake covers between 355 and 387 acres of water surface and is over two miles in length and has over ten miles of shoreline.

The lake is ringed by approximately 300 private homes, two for-profit businesses and two camps for children operated by religious organizations.

In 1964, the State purchased a lot abutting the lake of approximately one and three quarter acres. In 1965 the State constructed a boat ramp facility to permit members of the public to launch boats from the ramp onto the lake.

The State has continuously owned and maintained this boat ramp facility to the present day.

The boat ramp itself is 30 feet wide with a 12 foot traction surface. It is 48 feet long, 38 feet of which is submerged at ordinary high water. There is also a "prop-wash zone," an additional area which

extends 6 feet outward from the submerged end of the traction surface and which lies on the lake bed under water.

The defendant Corporation has claimed ownership of the lake since 1983. The Corporation's predecessors in title who created the lake, did so in 1860 upon lands purchased or owned by the Corporation's predecessors in title and flooded by a dam to create the lake.

Said predecessors in title were an association of mill owners who created the lake to provide power to its mill interests in the area.

These predecessors in title maintained the dam, #016, and controlled the level of the lake uninterruptedly from the lake's creation to its sale to the Corporation in 1983, lowering the lake in winter and raising the lake in summer.

Since 1983 the Corporation has been assessed real property taxes on the lake by both the towns of Burrillville and Glocester.

Since 1983 the Corporation has continually paid the taxes levied by both towns and has conducted the maintenance and upkeep of the lake since its purported ownership in 1983.

Lakefront property owners have been using the lake for swimming, boating and fishing for a substantial period of time.

Members of the general public, as well as lakefront land owners, have accessed the lake via the State owned and maintained boat ramp since its construction in 1965.

The State owned boat ramp facility provides the only public access venue for the public to access the lake for boating, fishing, and swimming - and is utilized in summer - and to a lesser degree, in winter for winter related activities.

On or about July 28, 1997, the Corporation erected a “no trespassing” sign in the vicinity of the State’s boat ramp. In a letter dated July 30, 1997, the Corporation notified the State that it was “withdrawing any express or implied permission to use the reservoir. No further access by the general public should be permitted through the boat ramp.” (Defendant’s Ex. CC).

Other issues arose during this time frame which caused a justice of this Court to issue an order temporarily restraining the Corporation from altering the water levels of the lake without permission from the State’s Department of Environmental Management.

It is as a result of this latest round of activity that this lawsuit results.

Adverse Possession

A governmental entity may adversely possess the land of its private citizens.¹

The State argues that it “has possessed the portion of the bottom of the Pascoag Reservoir (the lake) which is physically occupied by the boat ramp itself and that this possession has been actual, open, notorious under claim of right, continuous, and exclusive for a period in excess of ten years.” (State’s Post Trial Memorandum at p.6.)

The statutory period for establishing title by adverse possession in Rhode Island is ten years. G.L. 1956 §34-16-1; 34-7-1 (1998 Reenactment). Claimants in adverse possession cases must establish each of the elements of possession by a preponderance of clear and convincing evidence. Gammons v. Caswell, 447 A.2d 361, 366 (R.I. 1982). It is well settled that in order to establish

¹ See e.g. 3 Am.Jur.2d§180. Title by adverse possession may be acquired by ... a State. Id.; 18 ALR3d 681; Atty. Gen. v. Ellis, 198 Mass 91, 84 NE 430 (1908) (affirmed judgment quieting title in the commonwealth to a pond, which had been granted to an individual but occupied by the commonwealth’s lessee for more than 20 years); Talbot v. Town of Little Compton, 52 RI 280, 160 A.466 (1932) (holding that a town acquired title to beach land by adverse possession under evidence showing that the town’s residents had long used the land for taking sand and for access to the water).

adverse possession under §34-7-1, a claimant's possession must "be actual, open, notorious, hostile, under claim of right, continuous, and exclusive." Sherman v. Goloskie, 95 R.I. 457, 465, 188 A.2d 79, 83 (1963). See also Aud-War Realty Co. v. Ellis, 557 A.2d 69, 70 (R.I. 1989). Evidence of adverse possession must be proved by strict proof, that is, proof by clear and convincing evidence of each of the elements of adverse possession. See, e.g., Samuel Nardone & Co. v. Bianchi, 524 A.2d 1114 (R.I. 1987); Spangler v. Schaus, 106 R.I. 795, 264 A.2d 161 (1970); Hilley v. Simmler, 463 A.2d 1302, 1304 (R.I. 1983).

In this case, the State relies mainly on the undisputed fact that the "footprint" of the boat ramp has rested on the bottom of the lake bed on the Corporation's property in excess of the minimum statutory requirement of ten years and that its presence was open and notorious, hostile and continuous under a claim of right in excess of the ten year period required by law to establish a property interest by adverse possession.

It is undisputed that the State's boat ramp has existed in the same place and configuration since 1965 and that the Corporation was fully aware of its presence. There is no doubt that the presence of the boat ramp was "open" and "actual" and in excess of the statutory period and apparent to the Corporation's predecessors in title.

The term "hostile" does not connote a communicated emotion, but rather, action inconsistent with the claims of others. The State purchased the land upon which the boat ramp was built on March 25, 1964, from James P. Hurst (State's Ex. 18) and constructed the ramp in 1965. The record is devoid of any evidence provided by the State to indicate that the construction of said ramp was hostile, notorious or adverse or constructed under a claim of right to the portion of the lake bed occupied by the submerged portion of the boat ramp.

The Court finds, as a fact, that the reasonable inferences to be drawn from the evidence adduced at trial as provided from testimony of the State's primary witnesses Malcolm Grant, John O'Brien and Fred Vincent, regarding the construction and maintenance of the boat ramp over some 32 years is that, until the controversy arose regarding the lake, generally in 1996-1997, the State asserted no right or property interest in the portion of the lake bed covered by the submerged portion of the boat ramp. There is no evidence that the State ever asserted or exercised any rights adverse to the owner of the lake bed.

"The law presumes that when the character of the occupation of land is not initially adverse, it continues to be of the same nature in the absence of some conduct indicating a change." Spangler, 106 R.I. at 804 (1970) and Tefft v. Reynolds, 43 R.I. 538, 113 A. 787 (1921).

After a careful review of the exhibits and testimony in support of the State's claim, this Court finds that the State has failed to prove its allegation of adverse possession by a preponderance of clear and convincing evidence, or strict proof.

Prescriptive Easement Over the Reservoir
by the General Public and/or
the State of Rhode Island

The State has alleged in its complaint that it has obtained, by and for itself and the general public, via its construction maintenance and use of the State owned boat ramp, an easement by prescription in the lake extending over, across, on, and into the full length and breadth of said lake.

In support of its claim that the general public has gained a prescriptive easement for the recreational use of the lake for boating, swimming, and fishing; the State produced at least twelve witnesses to testify at trial from its total of 21 witnesses called. These witnesses testified to years of unfettered access to the lake both prior to and subsequent to the construction of the boat ramp. The

witnesses came from the ranks of waterfront lot owners, persons who operated for-profit businesses on, or dependent upon the lake, persons who operated profit and nonprofit campgrounds along the shores of the lake and other members of the general public who came from afar who testified to their use of the boat ramp and the lake itself for fishing, swimming, and the like.

The witnesses collectively testified that they never sought nor received permission to use the lake or were in any way prohibited or limited in their use of the lake for the recreational purposes customarily engaged in on a lake of this type. The witnesses testified to long years of usage and familiarity as well as shorter more infrequent uses. Many lakefront dwellers testified that the boat ramp was their only means of access to the lake either because of the configuration of their lots or the size of their boats. The State also provided testimony that the value of the lakefront lots, including those sold by the Corporation over the years, was enhanced by the accessibility of the lake either via the boat ramp or the waterfront lots.

The witnesses, particularly those who had lived in the Pascoag area or along the lakefront for many years, acknowledged that the lake had been created in the previous century by a consortium of mill owners who operated the lake to serve the industrial needs of the mills. Those witnesses with this knowledge and/or historical perspective testified that they knew the lake was owned and created by the mill owners and that the dam (#016) was maintained and operated by the mill owners during this long history. There was no disagreement in the fact that the lake water level was seasonally lowered in the late fall for the winter season to prevent ice damage to property, and raised in the spring to its normal depth to provide recreational activity and that this activity was conducted by the mill owners throughout that time.

Not one witness who testified for the State testified that the witness's use of the lake was under any claim of right to use the lake. Each witness testified as to their assumption that they had a right to use the lake or that they had used the lake throughout their life without any thought to whether they had a right to do so or not.

Under cross examination, those witnesses who were lakefront owners did not know or believe that the deeds to their property, whether from the Corporation, its predecessors in title, or from other grantors, contained any indication that they had rights in the lake running from their deeds.

The State witnesses who were employees of the Department of Environmental Management who testified regarding the general public's use of the boat ramp from 1965 to the present could not testify as to how many of the general public use the boat ramp on any given day, month, or year, whether in season or out. One witness, Paul C. Dolan, a DEM officer, testified that he has been chair of the Northwest Council since 1986. This Council issues permits for use of boat ramps in northern Rhode Island for groups of 10 or more boaters. He testified that the number of permits issued for the lake boat ramp ranged from a low of one in 1982 (first year of permits) to a high of 19 in 1999 (Ex. 13). Other than that testimony, there was no credible, probative, or relevant testimony with regard to the rate of usage of the boat ramp by the general public from its construction in 1965 to the present.

Several of the State's witnesses from the Pascoag area acknowledged knowing Mr. Marcus Thompson. It is well established by the testimony that Mr. Thompson was the person who was in charge of the lake for the mill owners and the person to see if a problem arose concerning the lake. All witnesses who knew Mr. Thompson also testified that he never gave permission to use the lake, or sought to limit or prohibit use of the lake in any way.

The defense called eight witnesses in its case, four of whom were employees of the Department of Environmental Management. The defense's main witness regarding the issues of ownership and use of the lake was Vincent Mesolella. This witness testified that he purchased the Uxbridge Worsted Mill in Central Pascoag in 1983. With that purchase came certain rights in Pascoag Reservoir (the lake). In January 1998 he consolidated all reservoir rights by deed in the Pascoag Reservoir Corporation (Ex. HH) (the Corporation). With this purchase came all records, correspondence, and files of the Corporation's predecessor in title.

He testified that in 1983 he received numerous calls regarding needed repairs to the gatehouse of the dam. Upon inspection, he observed debris in the area, bottles and cans and signs of what he determined to be juvenile activity and vandalism. He told a passing boater that he intended to lower the water so that people could not jump into the water from the gatehouse and injure themselves. He testified that as a result of that conversation he received several calls of protest which resulted in a meeting held at the Fireman's Hall in Pascoag. He testified that the meeting was attended by 200 people. He told the group that the lake was his and that if they wanted a say in its management, the group should buy the lake. He further testified that at that meeting, no one disputed his claim of ownership of the lake. His testimony in this regard was not contradicted by evidence.

He testified to the facts and circumstances which led to the agreement with the Pascoag Upper Dam Association (the association) (Ex. KKK), which was entered into between the association and the Corporation allowing the association to maintain the dam and raise and lower the water. This arrangement continued from 1983 to the present with Raymond Cloutier opening and closing the dam.

Mr. Mesolella testified that he was aware that the public and lakefront owners were using the lake for seasonal recreational activity both in summer and winter. He testified that he had no objection to this use and allowed it to proceed without interruption until 1997. He testified that he allowed this use until that time because the association had undertaken the maintenance of the gatehouse and dam.

In support of the defense claim that the Corporation had allowed permissive use of the lake for recreational and other purposes and retained in itself all aspects and rights of ownership in the lake bed and in and upon the water of the lake, the defense, through Mr. Mesolella, introduced a number of documents purporting to support that position of the Corporation.

A series of letters from the Corporation's predecessor in title to various lakefront land owners, businesses, and organizations were introduced as exhibits to attempt to establish a record of continuous active and affirmative control of the lake from 1937 through 1983 when the Corporation came on the scene, and from 1983 to the present day in exhibits introduced on behalf of the Corporation.

These letters purport to grant or withhold permission for a number of activities in and around the lake.

A letter dated July 12, 1949 memorializes an agreement entered into between the Pascoag Fire District and the Corporation granting permission to "construct, operate and maintain - upon the corporation's land . . . one pole line." (Ex. KK). Also introduced was a letter granting permission to a lakeside camp to install running water to the camp when the Water Company received permission from the Corporation to install the pipes. (Ex. LL).

There is also a series of letters from 1953 which indicate that landowners on the perimeter of the lake asked permission to build wharfs in the cove area. The response from the Corporation to each request clearly outlines the rights retained by the Corporation. (Ex.'s NN, OO, PP). Additionally, a

1954 letter to a Mr. Ducharme further explains the rationale behind the Corporation's grant or refusal of certain earlier requests. (Ex. QQ). When a Mr. Edward Tatro was contemplating purchase of some land abutting Pascoag Reservoir in 1955, he received a letter from the Corporation stating, "the westerly boundary line of the land in question does not give you access to the water of Pascoag Reservoir." (Ex. RR). This same letter was sent to several other potential purchasers of "waterfront" lots. (See Exhibits TT, UU, VV, WW, YY, ZZ).

When Mr. Tatro, who was 80 years old, was called by the State as a rebuttal witness regarding Ex. RR supra; Mr. Tatro testified that Marcus Thompson was convinced by him (Mr. Tatro) that the premise of Mr. Thompson's letter to him was in error, and that Mr. Thompson withdrew his objection to Mr. Tatro's position. Mr. Tatro acknowledged that Mr. Thompson acted on behalf of the mill owners and that the mill owners owned the lake and controlled its depth via the dam, in effect corroborating the fact of the mill's owners active management of the lake.

In 1962, the Pascoag Reservoir Corporation wrote to the State Division of Harbors and Rivers advising them that "the Pascoag Reservoir Corporation, who control the water rights of Pascoag Reservoir, have given permission to the Pascoag Ski Club to hold an exhibition of water skiing events at the Reservoir on August 26, 1962." (Ex. EEE). This exhibit is a direct contradiction of the testimony of State's witness Wallace Lees, who testified that he was involved in these ski exhibitions for three years and never sought or received permission from the Corporation to hold these water ski events.

The standard a plaintiff must achieve to establish an easement by prescription is equivalent to that already stated as necessary to establish ownership by adverse possession.

Prescriptive rights, however, are not favored in the law, since they necessarily work corresponding losses or forfeitures on the rights of other persons. 25 Am. Jur. 2d Easements and Licenses ¶ 45.

Our Supreme Court has stated frequently with regard to easements by prescription “in order to create an easement by prescription claimants have the burden of establishing actual, open, notorious, hostile and continuous use under a claim of right for ten years... . Each of these elements must be established by a preponderance of clear and satisfactory evidence.” Alteri v. Dolan, 423 A.2d 482, 483.

This is a burden that must be met by all seeking to establish an easement by prescription to use the lake.

In this portion of the case, the State of Rhode Island seeks to establish an easement by prescription on behalf of the general public of the State of Rhode Island by its construction, maintenance, and use of the boat ramp on the lake and by its encouraging of its use by the general public-at-large. “It is well settled that the public cannot acquire by custom or common prescription profits a prendre in another’s land.” Sanchez v. Taylor, 377 F.2d 735, 738 (1967). This Tenth Circuit case about lands in Colorado is analogous to this case albeit a land versus a water fact pattern.

The evidence in that trial in Colorado revealed that from earliest time of settlement, the inhabitants of the grant periodically used the unfenced areas of the grant for pasturing, wood, and recreation. Some testified that they used the land for grazing and other purposes without restriction.

This is analogous to the testimony of the good people of Pascoag and beyond who testified to uses similar in kind but of those customarily engaged in on a body of water, i.e. swimming, boating, and fishing.

The evidence is clear in the case at bar that these claims and uses, testified to by the witnesses for the State, have been in no way exclusive, as the testimony has shown that many others from the Pascoag area and untold numbers of the general public had enjoyed the same activities on the lake during the same period.

It is fundamental that to prove an easement by prescription over the lake in this case, that the use was actual, adverse, hostile, and under a claim of right. It must be open, notorious, exclusive, and continuous for the statutory period. This proof must be shown by a preponderance of clear and convincing evidence, or strict proof.

The very essence of this claim is that its use must be hostile not only against the true owner but against the world as well. Sanchez at p. 739.

This Court finds that the cited case of Baker v. Normanoch Association, Inc., 25 N.J. 407 136 A.2d 645 (1957) is also analogous to the case at bar. It portrays the same kind of activity and use of a lake in New Jersey as has been testified to in this case. In the absence of any evidence or strict proof that the persons who used the lake in that case did so under a claim of right, the Court determined that the long time use of the claimants in that case was permissive and that the permissive use was withdrawn when the lake was sold to new owners and the owners served notice that its permission was withdrawn.

The defense in this case has offered testimony and exhibits which purport to establish a claim of ownership in this artificially created lake from its formation by the Corporation's predecessors in title, the consortium of mill owners, to the conveyance of all right title and interest to the Corporation in 1983 and 1990.

In addition to the comments made earlier concerning evidence of permissive use of the Corporation's predecessor in title, the defense also offered other exhibits purporting to establish recognition by the State that the title to the lake, lake bed, and dam was vested in the Corporation.

In December 1938, the Chief of the State Division of Fish and Game/Department of Agriculture and Conservation wrote to the then owners of Pascoag Reservoir concerning the low water level. "I have been given your name as one of several who have interests in this particular body of water and, having heard of your generosity and philanthropies, I take it for granted that you, like ourselves, would be most anxious that nothing takes place in ponds or streams over which you had jurisdiction that would tend to destroy the fish life that makes up such a great part of the recreation for a large number of people." (Ex. JJ).

The reply letter from the mill owners dated December 7, 1938 explains the necessity for lowering the level of the lake to make necessary repairs to the dam inasmuch as the last repairs of a similar nature to the dam had not been done since 1912. (Ex. JJ). The letter indicates the water level would be restored when the repairs were completed.

A review of the testimony and exhibits introduced at trial clearly indicates that the cause of the controversy between the State and the Corporation began when the State intended to enlarge and enhance the boat ramp built by the State in 1964.

An application was made in June of 1995 by the Department of Environmental Management (hereinafter referred to as DEM) to the Division of Freshwater Wetlands of DEM to enlarge, enhance, and repair the existing State boat ramp facility on the lake. Exhibits C, D, E, F, G, H, J pertain in one way or another to the permitting process. The Corporation was unaware of this application until it was notified of the proposed project as an abutting owner. The State was notified by the U.S. Army Corps

of Engineers, as part of the process, to obtain the permission of the lake bed owner before a permit would be granted to enlarge the boat ramp.

The Corporation, through Mr. Mesolella and Mr. Richard Ahlborg, objected to the proposed project and sent a legal memoranda to the State outlining its position on the matter.

The State replied on February 12, 1996 (Ex. J) acknowledging that it needed approval from the Corporation and suggested a lease agreement with the Corporation to allow a modified enhancement of the boat ramp facility.

In a memo to Fred Vincent, Bureau Chief at DEM, from John F. O'Brien, Department Administrator at DEM, both witnesses at trial (Ex. K 12-3-96) indicated that "It was discovered that the land under the water and adjacent to the ramp was in private ownership. Our inability to acquire an easement or fee title to this property prohibited the division from continuing with these expansion plans."

In addition, as to the question of lake ownership, the defense called David E. Chopy of DEM as its witness. Mr. Chopy is a dam inspector for the State. On October 14, 1998 (Ex. Y) Mr. Chopy sent a letter to Mr. John Dean, Esquire, attorney for the Corporation as "owner and/or operator of the above noted dam" along with a series of recommendations for maintenance of the dam and a pamphlet entitled "Dam Ownership, responsibility and Liability" which forewarned the "owner" that any problem with the dam would result in the "owners" strict liability for damages.

Prior to the Chopy letter, (Ex. Y) the State had sent letters to the Treasurer of the Corporation on July 15, 1982 (Ex. U) informing the Corporation of its communication in July of 1979 about recommendations made at that time to repair the dam. The letter was from Peter M. Janaros, PE, Chief of Division of Land Resources. Exhibit V contains further information and communications regarding

the maintenance of the dam by the Corporation, all of which refer to the Corporation as the “owner.” These communications were in May of 1979.

In addition to the foregoing, there was testimony from Malcolm Grant and Vincent Mesolella regarding a meeting held in the offices of then Governor Edward DiPrete on September 23, 1987 regarding the Corporation’s desire to sell the lake, lake bed, and dam to the State. At the time, Mr. Grant was Chair of the State’s Land Acquisition Committee. Mr. Grant testified that he explained the procedure to Mr. Mesolella and his attorney, James Taft, as to how the State approached a prospective land acquisition. The Corporation made a formal request to the State to purchase the lake. On December 14, 1987 (Ex. O) Mr. Grant responded to the Corporation via Mr. Mesolella, indicating that after a review of the site evaluation of the lake “the land in question appears to be unsuitable to public recreational use, at least at a State level and we presently maintain two public launch ramps on the reservoir which provide adequate boating access.”

John Dean, Esquire, prior counsel to the Corporation testified to negotiations he entered into with the State for the purchase and sale of the lake to the State on May 6, 1996. (Ex. AA).

In July of 1996, the State responded it did not have funds to purchase or lease the lake.

In July of 1997, the Corporation, after notice to the State, posted no trespassing signs in the area of the boat ramp (Ex. BB and CC), and sent notice to the Gloucester and Burrillville Police Department. (Ex. DD). As a result of this activity, the Town of Burrillville, through its town manager, Michael C. Wood, offered to meet to discuss the problem with the Corporation. (Ex. EE). A meeting was held but nothing of substance was accomplished. Mr. Dean testified that throughout his dealings with the various representatives of the State, there was no assertion of an easement by prescription to

the lake by the State until the State learned the lake was owned by the Corporation and after the Corporation had shown some evidence of title to the State.

Mr. Dean's testimony indicated further attempts by the Corporation, the State, and the towns involved to bring this matter to a conclusion. Those efforts were not successful and this lawsuit is the apparent result.

Findings of Fact and Conclusions of Law

The Court, in its consideration of the claims that the State has achieved for itself and for the general public, an easement by prescription in, on, over and across the full length and breadth of the lake, makes the following findings of fact and conclusions of law based on its careful consideration of the credible evidence, exhibits, and testimony heard at trial and the entire record. That the lake is owned in fee simple by the Corporation, holding good, valuable and exclusive title in and to the waters of said lake, the lake bed or land over covered by the waters of the lake and the dam designated as Rhode Island Dam #016. That the lake is an artificially created body of water made by and for the exclusive purposes of the Corporation's predecessors in title in 1860.

That the State has failed to prove by a preponderance of the credible evidence in a clear and convincing fashion that the public or any individual member of such public has gained or achieved any right, title or interest in the lake for any purpose whether by prescriptive easement or adverse possession.

The Court finds that no witness for the State, or the general public, has proven by clear and convincing evidence that their collective or individual use of the lake was pursued under a claim of right or was in any way hostile, open, notorious, or adverse to the interests of the Corporation. The Court also finds that in the absence of such proof and in the face of the overwhelming credible evidence

provided by the documentary evidence introduced at trial by the defense, that the Corporation is the owner of said lake as aforesaid, and that any use engaged in by any member of the public of the lake, whether swimming, boating, or fishing was done at the sufferance of, and with the permission of, the Corporation and its predecessors in title from the time of its (lake's) formation to the withdrawing of said permission by the defendant in 1997.

The Court further finds that the State has failed to prove by a preponderance of the clear and convincing evidence that the State has achieved for itself an easement by prescription over, on, or in the lake.

The State's witnesses have established only those contacts which are incidental to the normal and legitimate authority of the sovereign such as patrolling the lake to enforce the laws of the State, issuing permits for the use of the State boat ramp, periodic maintenance and repair of the boat ramp, and the stocking of some species of fish on an occasional basis and inspection of the dam #016.

The Court finds that the State's assertion or claim of right to either adverse possession or a prescriptive easement to the lake is of recent vintage, well within the ten years required by law to establish a claim of that nature and that fact notwithstanding, the State in no aspect of this case established by clear and convincing evidence that its claim of interest in either the lake, lake bed, or dam, were in any way made under a claim of right, hostile, or adverse to the owner Corporation or its predecessors in title from the construction of the boat ramp to the present.

Riparian Rights, Navigability, Public Trust Doctrine

The State has also claimed an interest in the lake by virtue of riparian rights, navigability and the Public Trust Doctrine.

The evidence offered by the State to support these claims is sparse at best.

The Court has found as a fact and as a conclusion of law that the lake is an artificial body of water made by the mill owners in 1860. It is not a natural body of water.

Riparian rights are susceptible of being gained or obtained by way of deed, through the passage of time, and through certain uses recognized at common law.

“When an owner of land on the banks of a stream has by exercise of right of flowage created an artificial pond the right to use the water is in the creator and land owners, along the borders of the created lake do not acquire rights in the water brought to his land by the pond.” Goloskie v. LaLancette, 91 R.I. 317 (1960).

In the case at bar, there is no question based on the credible evidence that the lake resulted from the flowage of water resulting from the damming of the Pascoag River over the lands purchased by the mill owners. If riparian rights existed in the stream, they undoubtedly belonged to the mill owners who purchased the land along the stream that was overflowed when the dam was crated.

There was an assertion by the State at trial that the stream which was dammed by the Corporation was a navigable stream and as such, carried with it certain rights.

The only evidence introduced at trial to support that position were copies of ancient maps of the area from 1831 (Ex. 23) and 1846 (Ex. 24) and 1855 (Ex. 25). These exhibits, standing alone, do not prove navigability by a fair preponderance of the evidence.

This Court finds, as a fact and as a conclusion of law, that the State has failed to establish any riparian rights either in the artificially created lake or in the original stream by virtue of navigability or acquired riparian rights.

There was contained in the brief of the defendant certain arguments regarding the rights that a dam owner of an artificially created body of water has in its ability or duty to control, maintain, alter, or

preserve for the benefit of others, a dam controlling said body of water. This Court has decided the question of ownership of the dam, lake, and lake bed and the question of rights and/or responsibilities of dam owners is not properly before this Court, so those issues will not be addressed in this decision.

The Public Trust Doctrine is a legal mechanism for recognizing a preexisting right. See The Public Trust Doctrine and Legislative Regulation in Rhode Island; a Legal Framework Providing Greater Access to Coastal Resources in the Ocean State, 24 Suffolk Univ. L. Rev 353 by Ruberto and Ryan.

The State, while pleading this doctrine, offered no evidence to support its application in this case at trial, so the action fails for lack of credible evidence.

Dedication

The last claim of the State is that the Corporation dedicated the lake to public use either implied in fact or implied in law.

Dedication is an exceptional and unusual method of passing title to interest in land. This being so, the same quality of evidence that is needed to demonstrate the existence of a dedication must be presented to show the extent thereof. Volpe v. Marina Parks, Inc., 220 A.2d 525 (R.I. 1966). Dedication will not be inferred from mere permissive use of unenclosed land. Callahan v. Town of Middletown, 292 S.W. 501.

In order to establish the existence of an easement by dedication, there must be evidence that grantor intended to offer the land interest to the public. “Whether a landowner has made an offer to dedicate his property to the public is purely a question of determining from the facts of the particular case the owner’s intent.” Robidoux v. Pelletier, 120 R.I. 425, 391 A.2d 1150 (R.I. 1978). Secondly, the offer must be accepted by either means of public use or official action. Gammons v. Caswell, 447 A.2d 361 (R.I. 1982). The State bears the burden of proving this acceptance by clear and convincing

evidence, Valone, 197 A.2d 314 and any acceptance must take the form of some sort of overt act. Senn v. MacDougall, 639 A.2d 494 (R.I. 1994).

It has also been held that in order to establish a dedication from the use of the land by the public, the user must be adverse to and exclusive of the use and enjoyment of the property by the owner. District of Columbia v. Robinson, 180 U.S. 92; Association of Independent Taxi Operators, Inc., v. Yellow Cab Co., 82 A.2d 106 (Md.). It must be under a claim of right and it may not be a mere use by the public. under and in connection with, its use by the owner in any manner desired by him. Irwin v. Dixon, 50 U.S. 92 (1850).

The State relies on Talbot v. Town of Little Compton, 52 R.I. 280, 160 A.466 (1932) for support in its position on presumption of dedication. State's Post Trial Memorandum at 20. As the State cites in Talbot, the long continued public use of a beach including hunting, fishing, and bathing as well as the regular removal of sand and gravel for municipal purposes, their activities, along with others, amount to a finding by the Court of adverse possession by the town. Surveyors of the town cleared the beach of rubbish. One surveyor, at the direction of the town council, removed the snow from the road which crossed the land. All these activities were done under claim of right.

The facts of Talbot differ from those before this Court. In Talbot, there seemed to be a real question about the original ownership of this property.

“If the original proprietors did not allot the land in question, we think it was their intention and the intention of the colony that the town should succeed to all their rights therein.” Talbot, 160 A. at 469.

The Court says “there is no evidence tending to support the finding of the trial justice that the complainant held a title acquired by adverse possession.” Id. at 468. The paper title was not strong

enough to establish ownership, so the Court looked to possession. There were several factors which convinced the Court that the town rather than the Talbots had acquired the right to this land.

The town had regularly dispossessed this property of large quantities of stone and sand, under claim of right. It had maintained the property. Additionally, the public, in great numbers, used this area for hunting, fishing and bathing. “Such long and continued use raises a presumption of dedication.” Id.

In the instant case, there is clear paper title resting in the defendant Pascoag Reservoir Corporation. Testimony offered at trial indicates that over the years, the public has gained access to the water via the State’s boat ramp. However, the Corporation still remains fully liable for any occurrence on its property, it pays taxes and maintains the area. Furthermore, the evidence produced gives this Court no indication of how many people actually use or used the ramp to gain access and with what frequency. It isn’t clear whether two or two hundred citizens utilized this ramp. There is no record of daily, weekly or monthly use.

Additionally, like the others, this claim rests on the adverse and hostile nature of the State’s action and as previously discussed, there is not sufficient evidence to meet the State’s burden. Further, the State has failed to provide clear and convincing evidence of intent to dedicate the lake to public use. To the contrary, the defendant provided this Court with a plethora of written material notifying various individuals and agencies of its claim of sole ownership and right to exercise its interests at any time. These letters and memoranda instruct the recipients that any grant of permission to use or alter the defendant’s property was subject to revocation at any time.

The travel of this case has brought into focus and raised the question of the rights of private ownership interests in a man made body of water and the public’s right or interest in utilizing such a resource for recreational, leisure activities, and in this case, for profit and nonprofit business interests.

It is important to note that the individuals who testified regarding their individual use of said lake, and their individual interests in the outcome of this case, are not being adjudicated in this decision. The property owners along the lake shore, and those who testified as to their personal use of the lake, are not parties to this lawsuit except to the extent that they have gained no rights in this lake either by adverse possession or by easement by prescription as averred by the State.

It is well recognized by this Court that Echo Lake, so called, has played an important role in the lives of many citizens of Rhode Island. This Court has determined that its use by the public has been permissive through the assent of both the defendant Corporation and its predecessors in title. Private property rights are among the most important and hallowed rights enjoyed by citizens of this State. It is beyond this Court's authority to deprive a private landowner of the rights inherent in ownership because a landowner has chosen to allow others to benefit from his property. To do so would be to penalize the generosity of private landowners.

Title 32 Chapter 6 of the Rhode Island General Laws of 1978, Chapter 375, while mentioned in this trial and in the memoranda of the parties, play no role in this decision, but does offer some insight into the General Assembly's concern for the public use of private land.

Inasmuch as the State has not satisfied its burden to prove that which it has asserted or claimed by a fair preponderance of the credible evidence by clear and convincing evidence, the State's request for its injunctive relief is denied.

Accordingly, the Court finds that the defendant Corporation is the owner of the lake, lake bed, and dam, and may exercise all rights inherent in and consistent with private ownership and consistent with existing State statutes.

Judgment shall enter for the defendant Corporation. An order may enter forthwith consistent with this decision.

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