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# CURB UPDATE

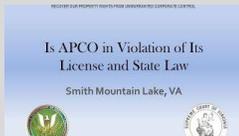


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**AUGUST 15, 2015**

**OUR MISSION IS TO EDUCATE AND INFORM ...**

**VOLUME 1, NUMBER 9**



**CURB YOUTUBE  
CHANNEL**



**LITIGATION STATUS**

## **IMPORTANT LINKS**

[Stakeholder Stories](#)

[APCO Authority](#)

[Property Owner Survey](#)

[Realtor Survey](#)

[CURB Handouts](#)

[Relevant Case Law](#)

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[Timeline](#)

## **Overview of Where Events Stand**

**APCO v Nissen** -- The Court issued an interim opinion on 24 April 2015. The opinion is not a final ruling. The trial date is set for January 2016. In the interim opinion the Court said that Nissens "have failed to state a plausible basis on which I could declare that APCO lacks sufficient property rights to compel them to remove the dock." The court cited conflicting legal precedence in arriving at its opinion.

Court: "[G]enerally, when an easement is created by grant or reservation and the instrument creating the easement does not limit its use the easement may be used for any purpose to which the dominant estate [APCO] may then, or in the future, reasonably be devoted. However, this general rule is subject to the qualification that no use may be made of the easement, different from that established when the easement was created, which imposes an additional burden on the servient estate [Nissen]." (legal cites omitted)

CURB Comment: APCO's easement was created by grant and was limited to flooding a portion of Nissens' land for purpose of the operation of the dam and power station, period. APCO's 1960 license included no requirement to regulate or limit landowner uses of the easement. APCO now wants to deny property owners all rights to use the easement so APCO can comply with its current federal license. This amounts to an unlawful expansion of the easement's purpose, ignores 40 years absent any APCO regulation and results in an uncompensated taking of property.

Even more troubling for APCO is the Court's interim opinion that APCO's flowage easement grants no rights to require property owners to re-vegetate (or presumably cut vegetation), or for APCO to deny a property owner to construct a pathway to access the waters. This would mean APCO lacks the property rights to impose SMP regulations. Bottom line -- APCO only has an easement to flood and the easement does not restrict landowners' use of the easement -- APCO lacks the property rights to regulate landowner uses.

**Pressl v APCO** -- APCO removed the case to federal court by misrepresenting the Federal Power Act applies to non-licensee landowners and its federal license and SMP can nullify private property rights. Their argument is absurd. Even the FERC cannot sustain these misrepresentations. Federal law requires the district court to sever the state property law claims in Pressl's complaint and remand them back to state court for trial. Once remand happens ... nothing will remain in federal court and APCO will face state property law.

**CURB v FERC** -- The FERC dismissed CURB's complaint and found that APCO is in compliance with its license. FERC also said they would not consider the issues CURB raised against FERC. CURB filed a request for rehearing on 7 August, which asks FERC to reconsider its position. Use this link to view [CURB's REHEARING](#). FERC has 30 days to deny the rehearing and then it's on to the DC Court of Appeals to hold FERC accountable for its regulatory violations.

**DON'T FORGET** -- **CURB's Upcoming Meeting at the Westlake Library on 20 August** -- During this meeting CURB will continue to update all on the status of on-going litigation, CURB's complaint to FERC, and answer questions and concerns. The meeting starts at 6:00PM.

Please consider making a donation to support the ongoing legal effort and education programs. CURB is a registered 501c(4) not-for-profit Virginia Corporation. Your donations to support CURB efforts are not discoverable and remain anonymous. Use the donate button on this Update. Thanks for your continued support ... For Our Property Rights

*Bill Brush*