

Presented to: Table Rock Lake Oversight Committee
Dr. Tamera S. Jahnke, Chairperson
FACA # 84572
Presented by: Fred Greene, permit holder
RE: Vegetation encroachment from USACE property

Issue: Vegetation encroachment where no set-back lines existed.

Abbreviations: Table Rock Lake (TRL), Shoreline Master Plan (SMP), U S Army Corps of Engineers (USACE), Limited Development Area (LDA), Table Rock Lake Oversight Committee (TRLOC), Missouri Department of Conservation (MDC), US Court of Federal Claims (CFC), Freedom of Information Act (FOIA)

Reference material: FOIA documents Exhibit A 1 – 4, TRL website Shoreline Management, Title 36, Chapter III, Part 327, Exhibit B revised June 27, 2018, Item 9, US Court of Federal Claims case 1:17-cv-09001-CFL filed December 17, 2019, Taney County Fire Marshal letter, Exhibit B, Denial letter from USACE Exhibit C, Follow-up email after inspection in January 2019 Exhibit D.

Purpose: To determine a course of action for structures built prior to State, Counties or Cities having defined building set-back lines. Since all Counties in both states surrounding TRL now have building set-back lines, this course of action would only apply to a small sub-set of structures built previously that are closer to the USACE property boundary than currently allowed.

COMMITTEE ACTION: *Recommend the USACE Table Rock* allow property owners, whose properties were built prior to building set-back lines, to clear a 20 foot buffer from the nearest point of permanent structure (will be less than 20 feet) onto USACE property to reduce the risk to both parties from inadvertent damage due to conditions beyond either's control. This buffer zone would be subject to a vegetation modification permit and paid for by the adjacent property owners.

Discussion and reasoning:

Summary

The USACE TRL has been advised by the County Fire Marshall of Taney County that vegetation on USACE property is creating an imminent peril to private property, particularly private residences and multi-family properties built before current set-back requirements were enacted. The threat to the USACE, and US Taxpayer who the USACE manages the property in question for, increased after the December 2019 ruling in a case brought by Houston area residents who owned property up-stream from two reservoirs managed by the USACE. The CFC found these private property owners were flooded directly as a result of USACE management of the two reservoirs. The CFC found the USACE liable due to the USACE knowingly increasing reservoir capacity without acquiring the additional property that would be flooded should the reservoirs reach full capacity. The CFC found these actions constituted an "unauthorized taking of private property without compensation".

Vegetation and how it affects personal property

In many locations where the USACE manages resources for the US taxpayer, State, County or City ordinances control how close a private residence or multi-family properties can be built to USACE

property. These are typically called building set-backs. Unfortunately, in many rural areas, the States, Counties or Cities involved did not always have set-back requirements. This allowed private residences and multi-family properties to be built extremely close to the USACE property line.

As vegetation grows on USACE property, any clear space that might have existed between a private residence or a multi-family property becomes reduced. This lack of clear space could pose a threat both to structures built near a property line and to the property entrusted to the USACE by the US taxpayer.

Set-backs, enacted over the years, allow the private property owner a buffer on their own property between their personal structures and land managed by the USACE. With set-backs in place, vegetation on USACE property affecting the safety of private property should never be a larger issue.

The dilemma is how to deal with structures built prior to set-back lines and now potentially endangered by or endangering vegetation on USACE property.

Tab 2: In the past, according to FOIA documents, the USACE issued vegetation permits to the owners of multi-family facilities. Unfortunately, multi-family facilities are often owned by investors or corporations who might or might not be aware of the permits or the rules for requesting a permit transfer to a new owner.

Tab 3: As stated on the USACE TRL SMP website, the USACE allows for the removal of dead vegetation outside a permitted area (even on USACE property) IF that vegetation posed a direct threat to the private property of the permit holder. In this passage, the USACE is acknowledging vegetation can be a risk to personal property.

Tab 4: Exhibit B to Title 36 Chapter III, Part 327 in item 9 states “The permittee shall be responsible for any damage that may be caused to the property of the United States by the activities of the permittee under this Shoreline Use Permit/License and shall exercise due diligence in the protection of all property located on the premises against fire or damage from ***ANY AND ALL OTHER CAUSES***” (bold and italics added by author for emphasis).

Item 9 clearly puts the burden on the permittee, which in the case of vegetation on USACE property would imply the permittee has the ability to protect US property by removing some vegetation as a preventative measure in an attempt to protect additional US property from a structural fire that might spread out of control onto US property inadvertently.

For private structures and multi-family properties built prior to required setback lines, changes in current practices allowed by the USACE as recommendations from the TRLOC committee, could eliminate a potential risk to both the USACE and US taxpayer and Permittee.

Tab 5: In a December 2019 ruling by the CFC* in Washington, DC, in a case brought by Houston area residents of flooded property ***up-stream*** from two USACE managed reservoirs, (Case 1:17-cv-09001-CFL), the USACE was found liable when specific actions of the USACE constituted an unauthorized taking of private property without compensation. In this instance, the USACE knowingly increased the capacity of two reservoirs without acquiring the additional land necessary to account for that increased capacity.

Tab 6: As previously stated, the USACE TRL has been advised by the County Fire Marshall in Taney County that vegetation on USACE property is creating an imminent peril to private property. And as such, the private property is creating the same peril to the USACE managed property.

Tab 7: In the USACE’s denial of an appeal by a condominium association with this exact issue, the USACE admitted the property in question had been issued previous vegetation modification permits. However, the letter states they were issued in error. Interestingly, the next sentence states, “Had the permit been active and maintained in compliance it would have been honored”.

Tab 8: In a subsequent review by a USACE Ranger in early 2019, the association is granted permission to remove dead trees which pose a peril to overhead dock power as well as vines in the area which a private land biologist determined to be invasive. According to the USACE Ranger’s follow-up email to the association, this “private land biologist” determined “...the fire hazard is minimal to non-existent as it sits right now”. This meeting was in January. Does the statement “...as it sits right now” mean in January only? What about July? Is there a difference in the vegetation around TRL in the summer compared to the winter?

The USACE TRL has made a decision. As an Advisory Committee, organized under Federal Law with the official designation 84572, your job, as defined in the law, is to give advice and give the Government Agency relying on your advice as much pertinent information as possible. It is up to the Government Agency, in this case the USACE TRL, to determine if that advice is worth considering.

As a US taxpayer, with a vested interest in the property managed around TRL by the USACE, each committee member must ask themselves if it is worth ignoring this issue or should it be passed along to the USACE. Ultimately the District Commander of the USACE in Little Rock would answer to the CFC in Washington. The CFC will ultimately decide this issue.

Specific USACE Table Rock actions:

- 1) **Accept the recommendation of the TRLOC and implement their recommendations**
- 2) In instances where private residences or multi-family dwellings were constructed prior to required building set-backs, allow the resident or residents, to prepare and present a vegetation modification plan that includes removal of vegetation on USACE property to create a 20-foot buffer from the closest point of personal property. This plan would include;
 - 1) the approval of the State, County and City involved, 2) the approval of the fire department or emergency services district involved and 3) be designed and signed by a landscape architect practicing under a Missouri license.

Submitted to the USACE Table Rock Lake

Dr. Tamera S. Jahnke, Chairperson
FACA # 84572

Date Submitted

- The CFC is a special court that only hears monetary cases against the federal government, including cases that involve a “taking” under the Fifth Amendment of the U.S. Constitution. A successful takings claim requires a valid property interest and a government infringement upon that valid property interest.

US COURT OF FEDERAL CLAIMS
FINDS USACE LIABLE!!!!!!!



