

## J. SCOTT CHRISTIANSON

# Common enemy rule bad for flood-plain management



Between now and next Friday, the House of Representatives will likely vote on a bill that could thwart flood-plain management efforts and adversely affect the rights of Missouri's citizens.

Senate Bill 633 revises levee law to streamline the formation of levee districts. While one could argue the wisdom of encouraging more levees, the real danger of the bill is that it declares surface water a common enemy of Missourians and allows landowners to alter natural drainage patterns without liability for damage to adjacent property.

The notion of surface water as a common enemy was first adopted by Missouri and other states in the 19th century to encourage the development of unsettled land. In 1993, however, the Missouri Supreme Court ruled it inappropriate, saying instead that those who alter natural drainage must consider the effect on neighboring land.

The decision came in *Hiens Implement Co. vs. the Missouri Highway Commission*. In 1980, the highway department raised the roadbed of Highway 65 in Carroll County and installed small culverts under the road, damming and controlling the flow of surface water that before the work had occasionally flowed over the highway. The higher roadbed created a temporary lake on the implement company's land.

Highway officials declared the first flooding in 1981 a 100-year event. That wore thin, however, when the site flooded again in 1982, twice in 1983 and again in 1985 and 1991.

Hiens argued it was unreasonable for the state to alter the natural drainage so that Hiens' property would be flooded. The highway commission argued that because surface waters were a common enemy, it wasn't liable for any damage.

The court sided with Hiens, declaring that a rule of reasonable use be used to consider the effect on neighbors of altering drainage. The rule al-

lows alterations, so long as they don't intentionally or recklessly cause harm to adjacent property. In other words, consider your neighbors.

The common enemy provision was included in Senate Bill 633 because the highway department, struggling under the horrible burden of having to consider the effect of its construction on ordinary citizens, lobbied for its inclusion. If the bill passes as is, Missouri would abandon the reasonable use rule and revert to the days of viewing surface water as a common enemy.

David Shorr, director of the state Department of Natural Resources, and Jerry Presley, director of the state Department of Conservation, blasted the common enemy provision in a letter to Gov. Mel Carnahan. They said it "would deal a damaging blow to flood-plain management efforts," "eliminate the good neighbor approach to water management" and "facilitate a new round of levee wars where everyone loses."

The common enemy rule is itself the common enemy of all Missourians, save for those entities, whether governmental or business, that crave the power to change drainage patterns to their liking.

The scuttlebutt among lobbyists is that the House will refuse to vote on Senate Bill 633, and, in the event it does pass, Carnahan will veto it. Nevertheless, call your representative and voice your opposition to the common enemy doctrine. Tell them to oppose the bill unless it is amended to remove the common enemy rule. Call Rep. Chris Kelly at 1-751-2473 and Rep. Ken Jacob at 1-751-2419.

If you have a suggestion for a column, a gripe, a success story or whatever, write it down and send it to me, care of the Columbia Daily Tribune, PO Box 798, Columbia, Mo., 65205.