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## Bitterroot River Protective Ass'n v. Siebel, 108 P.3d 518 (Mont. 2005)

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applicable. Conversely, Titan maintained that the conditions of the 1996 NPDES permit were not applicable because Fidelity never installed the groundwater wells. Titan also asserted that MDEQ's method for calculating the concentration of regulated substances was incorrect.

The court reviewed the Commission's decision to fine Titan. Specifically, the court addressed whether the Commission's order (1) was supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4) violated one of Titan's statutory or constitutional rights.

The court determined that substantial evidence supported the Commission's order and that the Commission did not act arbitrarily and capriciously in issuing the order. During the two-day hearing, the Commission heard evidence from both parties, including discharge monitoring reports submitted by Titan indicating that Titan exceeded discharge limits specified in its NPDES permit. Thus, the Commission had substantial evidence for concluding that Titan violated the conditions of its NPDES permit. Similarly, given the length of the hearing and the information submitted, the Commission did not act arbitrarily or capriciously. The Commission could have imposed a \$400,000 fine on Titan for the NPDES permit violations, but instead only fined Titan \$5000.

Mississippi statutes authorized the Commission to impose a penalty of up to \$25,000 for each violation of a statute or regulation. Thus, the court found the Commission to be well within the Commission's power upon imposing a mere \$5000 fine. Additionally, the court deferred to the Commission's interpretation of the Commission's own regulation and methods for calculating the concentration limits imposed by the NPDES permit.

Lastly, the court found the Commission did not violate Titan's statutory or constitutional rights. The court rejected Titan's allegation that the MDEQ engaged in selective enforcement. To maintain a claim of selective enforcement, the court reasoned that Titan, in addition to showing other similarly situated facilities violated the law at issue, also needed to show that the Commission based its decision to selectively prosecute Titan on impermissible grounds, such as race or religion. The court determined Titan failed to demonstrate the Commission singled Titan out or that MDEQ based its prosecutorial decisions on impermissible grounds. Therefore, Titan could not demonstrate that MDEQ engaged in selective enforcement. Accordingly, the court affirmed MDEQ's order fining Titan \$5000.

*Cheryl R. Miller*

## MONTANA

**Bitterroot River Protective Ass'n v. Siebel, 108 P.3d 518 (Mont. 2005)**  
(holding significant amendments to a pending water appropriation

application yielded a completely new application for purposes of the application process).

In March 1999 Kenneth and Judith Siebel applied to the Montana Department of Natural Resources and Conservation ("DNRC") to appropriate Bitterroot River Basin ("Basin") water to their ranch ten days before the Montana legislature closed the Basin to new water appropriations. The Siebels' applications stipulated the intended use of the water as for the beneficial use of wildlife. Subsequent to filing their applications, the Siebels amended all four applications to reflect increases in the requested water amounts and changes in the means and points of diversion and the points of use. DNRC wrote to the Siebels, requesting further justification for the requested amendments. Upon receiving the Siebels' response, DNRC published a Notice of Application and entertained objections from the public regarding the Siebels' applications. The Bitterroot River Protective Association, the Montana Department of Fish, Wildlife, and Parks, the United States Fish and Wildlife Service, and a Basin resident (collectively "BRPA") objected to the applications. Specifically, BRPA argued the Siebels failed to articulate a beneficial use of the requested water.

A DNRC Hearing Examiner found the Siebels failed to establish a beneficial use for the water requested and, accordingly, denied the Siebels' applications. The Siebels appealed to DNRC. DNRC reversed the Hearing Examiner and granted all four of the Siebels' applications, concluding the Siebels proved the amounts of water requested were "reasonably necessary" to achieve a beneficial use. BRPA appealed the DNRC decision to the District Court of the First Judicial District for the County of Lewis and Clark.

The district court held DNRC erred by failing to recognize the Siebels' amended applications as new applications. In particular, the district court found the application amendments to be so substantial that the amended applications constituted new applications effectively barred by the Montana legislature's closure of the Basin to new water appropriations. The Siebels appealed to the Montana Supreme Court.

The supreme court agreed with the district court that the Siebels' amended applications constituted new applications and were not mere "refinements" of their original applications because the application changes were so significant that the amended applications did not resemble the original applications. Explicitly, the amended applications requested water amounts more than quadrupled the original requested amounts, and each of the amended applications changed one or more of: the means of diversion, the points of diversion, and the points of use. The court noted it had previously stated that changes to the place of diversion and changes to the place of use in water appropriation applications constituted significant changes indicative of a

new appropriation. As such, the court refused to consider the application amendments as refinements to the Siebels' original applications.

The court also rejected the Siebels' argument that water appropriation applications needed only to indicate the applicant's interest in acquiring water and did not need to specify water amounts, water uses, or means and places of diversion. The court recognized such an application was acceptable prior to passage of the 1973 Montana Water Use Act ("Act"). However, the Act fundamentally changed the appropriation process, thereby requiring specificity and completeness in appropriation applications.

The court thus affirmed the district court's decision to deny the Siebels' application for water appropriation.

*Kyle K. Chang*

## NEBRASKA

**Baumbach v. Hauxwell, No. A-03-549, 2004 Neb. App. LEXIS 247 (Neb. Ct. App. Sept. 21, 2004)** (holding the trial court erred in granting adverse possession claim where disputed boundary was the thread of an old river bed, the river was moved by an act of avulsion, and there was no showing of continuous possession or claim of ownership).

In a quiet title action, Bill Baumbach ("Baumbach"), Patrick and Cecily Bolte ("the Boltes") claimed adverse possession against Bryan, Doug, and Ami Hauxwell ("the Hauxwells"), and John Doe in the District Court for Red Willow County, Nebraska. The district court quieted title in favor of the Boltes, and the Hauxwells appealed. After reviewing the facts de novo, the Nebraska Court of Appeals reversed.

The Boltes purchased riparian land on the south side of the Republican River from Baumbach in January 2000. Prior to 1935, the Republican River served as a boundary line for several lots to the south of the land the Boltes purchased. The boundary of riparian lands extended to the thread, or center, of the river channel. In 1935 a flood caused the Republican River to shift its course to the north. This was a sudden act of avulsion and, as a result, the boundary line did not shift with the river as it would during a slow process of accretion. For land to be riparian, it must have water flowing over it or along its border. Because the sudden avulsion in 1935 moved the flow of the river without moving boundary lines, the lands south of the old Republican River no longer bordered water and, therefore, lost their riparian rights. When the Boltes purchased their land in 2000, the deed granted them riparian land starting from the thread of the current Republican River, then going south to where the thread of the Republican River existed prior to 1935. However, a fence existed to the south of the old river thread on land the Hauxwells owned in 2000. The Boltes claimed they owned the Hauxwell property south of the old river thread, to the fence, through adverse possession.