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THE DOCTRINE OF RELATION BACK IN MONTANA WATER LAW

General Sherman, commenting on the gold that was discovered at Sutter's Mill, California, in 1848, wrote, "That gold was the first discovered in the Sierra Nevadas which soon revolutionized the whole country and actually moved the whole civilized world."[1] Perhaps General Sherman was over zealous in his appraisal of that gold rush, but it is apparent that the sudden influx of early settlers to California did affect the development of our western states in many respects, not the least of which is the effect it had on the development of our modern mining and water law.

In a recent case[2] the Supreme Court of Montana had before it a factual situation wherein defendant William Armington, through his predecessors, secured a right to the use of thirty cubic feet per second of time of the waters of Tallow Creek in Phillips County, Montana. The appropriations therefor had been made in 1903 and 1913. The diversion was made by means of one ditch, described in the original notice as being "four feet wide on bottom, five feet wide on top, and one foot deep." In 1919 plaintiff B. H. Clausen's predecessors secured a homestead patent embracing the public land upon which defendant's appropriation had been made. In 1939 plaintiff filed notice of appropriation of all the waters of Tallow creek in excess of those already appropriated by defendant. However, at this time no appreciable amount of water was obtainable, for defendant's ditch had eroded to such an extent that it was diverting all the waters of Tallow Creek. Other than filing notice, plaintiff made no affirmative act to secure water under his "appropriation" until 1941, at which time he obtained the permission of defendant's predecessor to erect a dam and install a pipe capable of diverting thirty cubic feet per second of time, placed in such manner that no water would go over the dam onto plaintiff's land until thirty cubic feet had been diverted through the pipe. This was accomplished in 1942, and for the first time plaintiff received an appreciable amount of water which he beneficially used, and continued to do so until 1945, when defendant, over plaintiff's objection, removed the pipe and dam, leaving a ditch which measured twenty-six feet, six inches across the top, nine feet, six inches across the bottom, and four feet, seven inches deep.

[1]WIEL, WATER RIGHTS IN THE WESTERN STATES (3d ed. 1911) § 70 p. 71. For a history of the doctrine of appropriation see chapter V.
[2]Clausen v. Armington (1949) .....Mont....., 212 P. (2d) 440.

Action was brought by B. H. Clausen to compel William Armington to construct a headgate, and to enjoin him from so using his ditch as to interfere with plaintiff's beneficial use of the surplus water to which plaintiff claims he is entitled for irrigating his land.

In deciding the issues, the Court limited the defendant's right of appropriation to the amount of water that he could beneficially use. Said the court:

> ". . . it is manifest that defendants appropriation of thirty cubic feet per second or 1,200 miners inches was more than the amount necessary to irrigate '300 or 400 acres' and that defendant therefore has no occasion for a larger ditch than is specified and stated in the above notices of appropriation. . . ."

Defendant contended that because plaintiff did not within forty days of posting notice "proceed to prosecute the excavation or construction of the work by which the water to be appropriated is to be diverted," he did not make an appropriation. In this regard the court said:

> "However, a person may make a valid appropriation of water by actual diversion and use thereof without filing a notice of appropriation. . . ."

Further:

> "Not having constructed a ditch from Tallow Creek within a reasonable time after November 15, 1939, the date of his notice of appropriation, plaintiff's appropriation would not . . . relate back to that date, but . . . would date from the spring of 1942 when he directed the water onto his land and continued to do so in 1943, 1944, and 1945, before defendant in the fall of 1945, removed the pipe and and dam from his ditch, so as to prevent any further use of the water by plaintiff."

In reaching the decision above, the court considered three fundamental propositions: (1) To secure an appropriation there must be a completed ditch, (2) there must be a beneficial use for the water diverted, and (3) the water must be actually diverted from the stream. These fundamentals are not new with the courts. They extend back into the earliest decisions, and beyond. At the time of their inception there were no courts, and few lawyers. The laws, made by the miners themselves at their periodical meetings, were born of necessity, and framed to secure the desired practical results in a world which was guided by the basic doctrine of first come, first served. In order

to acquire a possession it was necessary that it be claimed before anyone else claimed it. The miner who first staked out a mining claim became the owner—so too, the appropriator[3] who first diverted and applied water to a beneficial use secured a right which was superior to that of a subsequent appropriator.[4] As the business of life grew more complicated and appropriations of water were made in greater numbers this basic doctrine proved inadequate to serve the ends of justice in all respects. Oftentimes it worked a hardship on appropriators, particularly those whose construction embraced a large amount of work. In *Conger* v. *Weaver*,[5] the California Supreme Court, in recognizing this hardship, said:

> "But from the nature of these works it is evident that it requires time to complete them, and from their extent in some instances, it would require much time; and the question now arises, at what point of time does the right commence, so as to protect the undertaker from the subsequent settlements or enterprises of other persons. If it does not commence until the canal is completed, then the license is valueless, for after nearly the whole work has been done any one actuated by malice or self-interest may prevent its accomplishment; any small squatter settlement might effectually destroy it."

At the time that this case was decided, a doctrine of relation back was being applied by the courts in cases pertaining to possessory interests in land and estates.[6] The California court commended this doctrine and held that in cases where ownership of the water was not based upon ownership of the land through which the water flows,[7] possession or actual appropriation of the water was the test of priority in any claim to the use of the water.[8] Consequently, said the court, a similar doctrine would be properly applied to those cases involving ownership of water. In applying the doctrine of relation back to the law of appropriations for the first time, the court said:[9]

> "Possession and acts of ownership are the usual indications of a right of property, and they must be judged ac-

[3]The word "appropriator" will be used throughout this article to indicate a person who commences an appropriation, whether or not he actually completes it.
[4]Eddy v. Simpson (1853) 3 Cal. 249.
[5](1856) 6 Cal. 548.
[6]Stark v. Barnes (1854) 4 Cal. 548.
[7]Irwin v. Phillips (1885) 5 Cal. 140, 142, in which the court held that there was no law or reason for holding the use of the water exclusively to the person who owned the land over which it flowed.
[8]Kelly v. Natoma Water Co. (1856) 6 Cal. 105; Maeris v. Bicknell (1857) 7 Cal. 262, 68 Am. Dec. 257.
[9]Conger v. Weaver (1856) 6 Cal. 548.

> cording to the nature of the subject matter . . . so in the case of constructing canals, under the license from the state, the survey of the ground, planting stakes along the line, and actually commencing and diligently pursuing the work, is as much possession as the nature of the subject will admit, and forms a series of acts of ownership which must be conclusive of the right."

Today, this doctrine of relation back is found, in some form or other, in the statutes or decisions of every western state.[10] In 1871, Mr. Justice Murphy, speaking for the Montana Supreme Court, adopted the doctrine and added that during the period between commencement and completion of the work, the appropriator was not bound to take notice of intervenors, nor was he bound to give them notice that waste water was to be reclaimed.[11] In *Murray* v. *Tingley*,[12] the court in applying the doctrine, said:

> "'Under the doctrine of 'relation back' as between two persons digging ditches at the same time, and prosecuting work thereon with reasonable diligence to completion, the one who first began work had the prior right, even though the other had completed his first. This was the doctrine of relation back.'"[13]

As noted above, the essential elements of an appropriation were a completed ditch, an actual diversion of the water, and an application of the water to a beneficial use. Before the doctrine of relation back applied, it was necessary that these requirements be met. Until they were, the appropriator did not receive a vested right, but upon completion of his work he received a right which related back to the time of commencement of his work. Thus, such preliminary work as surveying the ground, clearing brush, planting stakes, etc., served as notice to a subsequent, rival claimant, that even though he should succeed in completing his ditch first, his claim would be subordinate to the claim of the appropriator who commenced his ditch first and pursued his work with reasonable diligence to completion.[14]

The problem of establishing proof of priority was often ac-

[10] WIEL, WATER RIGHTS IN THE WESTERN STATES (3d ed. 1911).
[11] Woolman v. Garringer (1871) 1 Mont. 535.
[12] (1897) 20 Mont. 260, 50 P. 723.
[13] Under the doctrine of relation back the one who commenced work first got the prior right, even though the other completed his ditch first. Wright v. Cruse (1908) 37 Mont. 177, 95 P. 370.
[14] Murray v. Tingley (1897) 20 Mont. 260, 50 P. 723; Anaconda National Bank v. Johnson et al. (1926) 75 Mont. 401, 244 P. 141; Gates v. Settlers' Co. (1907) 19 Okla. 83, 91 P. 856.

companied by much confusion and conflicting testimony.[15] The courts had to depend almost entirely on the oral testimony of witnesses, whose memory, often-times, had become clouded by lapse of time. To obviate this as much as possible, many State Legislatures passed statutes requiring notices of appropriation to be filed. These notices provided concrete evidence of the date of commencing work, as well as regulating the manner of making an appropriation.

In 1885, the Montana Legislature passed an act[16] which provided that any person desiring to secure an appropriation of water, must post a notice at the point of diversion. This notice must contain a statement of: the quantity of water claimed, the purpose for which it was to be used, the means of diversion, the date, and the name of the appropriator. Within twenty days of posting the notice, it was required to be filed with the county clerk of the county in which the appropriation was to be made.[17] In addition, within forty days of posting notice the appropriator must proceed with his work, and complete it with reasonable diligence.[18]

If these provisions were to be construed alone, it would be apparent that the Legislature intended to allow only appropriations which were secured in compliance therewith, but the Legislature did not stop there. A further enactment[19] entitled EFFECT OF FAILURE provides:

> "A failure to comply with the provisions of this chapter deprives the appropriator of the right to the use of the water as against a subsequent claimant who complies therewith, but by complying with the provisions of this chapter the right to the use of water shall relate back to the date of posting the notice."

The Supreme Court of California, construing a statute similar[20] to the Montana provision, said:[21]

> "In this provision we begin to see the purpose and object of the legislature, which in our opinion was merely to

[15]See Murray v. Tingley (1897) 20 Mont. 260, 268, 50 P. 723, 724.
[16]Chapters 6, 7, and 8, Laws of Montana 1885, entitled "An act relating to Water Rights." This act has been carried through the codes and is set out today in essentially the same form. R.C.M. 1947 §§ 89-810, 89-811, and 89-812.
[17]R.C.M. 1947, § 89-810 (7100).
[18]R.C.M. 1947, § 89-811 (7101).
[19]R.C.M. 1947, § 89-812 (7102).
[20]The word "appropriator" is not susceptible of any greater or narrower force than the word "claimant," therefore no distinction can be drawn between the California Act and that of Montana. Murray v. Tingley *supra*, note 14.
[21]De Necochea v. Curtis (1889) 80 Cal. 397, 20 P. 563.

> define with precision the conditions upon which the appropriator of water could have the advantage of the familiar doctrine of relation."

In *Welles* v. *Mantes*,[22] the court held that the only effect of the code provision was to "establish a procedure" for the determination of a precise time in acquisition of title.

In Montana, Mr. Justice Buck, after referring to the California code provisions, and the interpretation given them by the court, said:[23]

> "We think the construction of the statute by the Supreme Court of California is logical and correct, and are of the opinion that the Montana act should be construed in the same manner. The Montana legislature, in the enactment of said water-right act, intended to regulate the doctrine of 'relation back'."

As a result of this construction, an appropriator today may proceed under either of two separate and distinct methods. He may: (1) proceed without regard to the statutes, in which case he must fulfill the requirements of the original method of appropriation, namely, a completed ditch, diversion of the water, and an actual application of the water to a beneficial use. By proceeding in this manner he will not secure the benefit of the doctrine of relation back. His right will date as of the time of actual application of the water to a beneficial use. Or he may: (2) proceed according to the terms of the statute, in which case he must post a notice, begin work within forty days, and complete his ditch with reasonable diligence.

If the appropriator proceeds under the statute, and completes his work with reasonable diligence, it is not necessary that he actually divert and use the water.[24] Upon *completion of his ditch*, or other means of diversion, he acquires a right which relates back to the *date of posting notice*.

Thus, the act of 1885, which is carried forward into our present statutes, limited the doctrine of relation back to those who comply therewith, and changed the original doctrine in two respects. (1) It changed the time at which the right vests by relation back; prior to the act, the right related back to the date of *commencing work*, but since the codes, the right relates back to the time of *posting notice*. (2) It changed the amount of work that need be done before the doctrine applies; prior to

[22](1893) 99 Cal. 583, 34 P. 324.
[23]Murray v. Tingley (1897) *supra*, note 14.
[24]Bailey v. Tintinger (1912) 45 Mont. 154, 122 P. 575.

the act it was necessary that there be an actual diversion, and an application of the water to a beneficial use. Today, however, by compliance with the statute, the final act necessary to secure the benefits of relation back is *completion of the ditch.* There need be no immediate application of the water to a beneficial use, but there must be an intention to use it within a reasonable time.

On this point the states are in conflict. Many states, including Colorado, hold that an actual application of the water to a beneficial use is an essential element of a valid appropriation.[25] It is ruled in Colorado that application of the water to a beneficial use is a condition precedent to the creation of the right, and not a condition subsequent. Under the Colorado theory, a consumer who takes from a public service ditch company is the actual appropriator. Montana courts do not follow the Colorado doctrine.[26] Said the court in *Baily* v. *Tintinger*:[27]

> "To deny the right of a public service corporation to make an appropriation independently of its present or future customers, and to have a definite time fixed at which its right attaches, would be to discourage the formation of such corporations and greatly retard the reclamation of arid lands in localties where the magnitude of the undertaking is too great for individual enterprise, if, indeed, it would not defeat the object and purpose of the United States in its great reclamation projects, for the United States must proceed in making appropriation of water (from the nonnavigable streams of this state at least) as a corporation or individual."[28]

[25]Wheeler v. Northern Irrigation Co. (1888) 10 Colo. 582, 17 P. 487, 3 Am. St. Rep. 603; Park v. Park (1909) 45 Colo. 356, 101 P. 406. "The final step, and the most essential element, to constitute a completed valid appropriation of water, is the application of it to a beneficial purpose. Whatever else is required to be or is done, until the actual application of the water is made for a beneficial purpose, no valid appropriation has been effected." Sowards v. Meagher (1910) 37 Utah 212, 108 P. 1113. The same result was reached in Hagerman Co. v. McMurray (1911) 16 N. M. 172, 113 P. 823.

[26]California and Oregon are in accord with Montana. In Nevada Ditch Co. v. Bennett, (1896) 30 Ore. 59, 45 P. 472, 60 Am. St. Rep. 777 it was held that the intent to hold the water for sale to third persons was a beneficial use, and that application to the specific ultimate use was not a condition precedent to an appropriation. Likewise, in California it is held that "By completion is meant conducting the waters to the place of intended use" without necessarily applying the water to actual use. California Civil Code § 1417.

[27]*Supra*, note 24.

[28]See also United States v. Burley (1909) 172 F. 615 Burley v. United States (1910) 179 F. 1, 102 C.C.A. 429.

The court said further:

> "It is clearly the public policy of this state to encourage these public services corporations in their irrigation enterprises, and the courts should be reluctant to reach a conclusion which would militate against that policy."

It was ruled by the court that the statutes provided a complete method of appropriating water, and that, when a public service corporation, or the United States Government complied with the statute and had its ditch or distributing system completed, and stood ready to deliver water to users upon demand, its appropriation was complete. To hold otherwise would be to hold the actual appropriation in abeyance, possibly for several years, during which time it would be impossible to determine the final rights of rival claimants.

Before completion of his ditch, even though he may proceed with reasonable diligence, an appropriator does not secure a vested right to the water. By posting notice at the point of diversion, he merely serves notice on intervenors that he intends to appropriate a certain amount of water, and that upon completion of his ditch with reasonable diligence, his right will relate back to the date of posting notice.[29] He has no cause of action against intervenors who use the water prior to completion of his work, unless they unlawfully interfere with his work. During the period of construction, however, he may use as much of the water as is necessary to his work, or as much as he needs to keep his ditches in repair.[30]

As between two rival claimants, both of whom have posted notice and completed their ditch with reasonable diligence, priority is in the one who posted first. By completing their ditches with reasonable diligence, both claimants secure the benefits of relation, which relates their rights back to the posting of notice. Under the doctrine of first in time, first in right, the one who posted his notice first prevails.

Substantially the same result would have been reached before the codes. Upon completion of the ditch with reasonable diligence, and a beneficial use, the rights would have related back to the commencement of the work. Since the statutory regulations, however, the doctrine of relation back will not apply to an appropriator who does not comply therewith.

[29]Woolman v. Garringer (1871) 1 Mont. 535; Miles v. Butte Electric Power Co. (1905) 32 Mont. 56, 79 P. 549; Nevada County and Sacramento Canal Company v. Kidd (1869) 37 Cal. 282.
[30]Weaver v. Conger (1858) 10 Cal. 233, 6 Morr. Min. Rep. 203.

An appropriator who proceeds without notice can secure no right against a rival claimant who does post notice before beginning his work. A failure to post notice amounts to a waiver of the right of relation back.[31] By beginning without notice an appropriator, in order to secure a completed appropriation, must fulfill the essentials of the original method. He must have: (A) a completed ditch, (B) an actual diversion of the water, and (C) a beneficial use. Upon fulfillment of these requirements, he will get a right as of the date of diversion and beneficial use. It is apparent that by commencing subsequent to a rival who posts notice he will acquire no prior rights, for the rival claimant who posts notice and completes his ditch with reasonable diligence will by relation back, get a right as of the date of posting notice.

It follows that a failure to post notice is not in all cases fatal. If the appropriator who posts notice should: (A) fail to file his notice, (B) file a defective notice, or (C) fail to prosecute his work with diligence as prescribed by statute, he loses the benefit of the doctrine of relation and it becomes a race of diligence between the parties to get the water diverted and applied to a beneficial use. The one first diverting and beneficially using will, in this case, prevail.

As between two claimants, neither of whom post notice, the one who actually diverts, and beneficially uses water will prevail. Prior to the act of 1885, the one who commenced first would win. No matter who completed his ditch first, the priority would be in the one who first gave notice by commencing work. This, of course, was dependent on his completion with reasonable diligence, and was the result of the doctrine of relation back giving him a right as of the time of commencement. Today, however, the doctrine of relation back is regulated by the codes, and it can not be applied unless notice is posted, and the statutes are complied with.

Respectable authority can be found holding contra to this result. In *Nevada Ditch Co.* v. *Bennet*,[32] the Oregon court said:

> "Either by statute, or custom so well recognized as to have the effect of a statute, it is usual for persons intending to appropriate the waters . . . to give warning by

[31]Murray v. Tingley, *supra* note 15; Bailey v. Tintinger, *supra* note 24; *Waters*, 67 C.J. p. 1011.

[32]*Supra*, note 26. In accord: Amalgamated Sugar Co. v. Hempe (1915) 226 F. 1012; Miocene Ditch Co. v. Jacobsen (1906) 146 F. 680, 682, 77 C.C.A. 106; Hough v. Porter (1908) 51 Ore. 318, 427, 95 P. 732, 98 P. 1083, 1087, 102 P. 728; Whited v. Caven (1909) 55 Ore. 98, 104, 105 P. 396.

> posting . . . a notice. . . . If notice is not provided for by statute, or if provided for, is not given, the title of the appropriator by relation, must be regarded as commencing at the time when he began his dam, ditch, flume, or other appliance."

The court holds that statutes similar to ours afford protection to the appropriator only if he choose to take advantage of them. If he does not choose to take advantage of them, then the holding is the same as if they had never been enacted, and the same line of reasoning is applied as was applied before the code, i.e., the first person to commence work in such manner as to give notice of his intended appropriation secures, upon completion of his work with reasonable diligence, a right which relates back to the commencement of his work.

This rule is not adopted in Montana. Mr. Justice Buck, in *Murray* v. *Tingley,*[33] where neither party had posted a notice which satisfied the statutory requirements, expressed the Montana opinion, saying:

> "Neither complied with the statute, but as between Charles Murray and the defendant appellants, the right of defendant appellants is a superior one. The latter had their ditch completed, and water flowing over their land, a year before the former did. Defendant appellants and Charles Murray both acquired valid water rights, despite a noncompliance with the statute; but the right of defendants is superior to that of Charles Murray, although he commenced work on his ditch first."

Mr. Chief Justice Callaway in a situation wherein an appropriation notice was filed in 1902, and an actual application to beneficial use was made in 1916, said:

> ". . . but the evidence is not sufficient to apply to it the doctrine of relation back. It seems to us after a careful consideration of the evidence, that the right must date from 1916, when the water was put to a beneficial use."

Again in 1929 the Supreme Court of Montana, in a case in which the notice was not entitled to be recorded because of faulty verification, held that the doctrine of relation did not apply, and that the right to water took effect as of the time of actual diversion and beneficial use.[34] The same result is reached in the principal case, *Clausen* v. *Armington,* supra.

[33] *Supra,* note 15.
[34] Musselshell Valley Farming and Livestock Co. v. Cooley (1929) 86 Mont. 276, 283 P. 213.

Thus, in Montana, compliance with the statute is a condition precedent to application of the doctrine of relation back. A failure to comply does not render a completed appropriation invalid. It does, however, date the acquired right as of the date of actual application of the water to a beneficial use. In order to secure the benefit of relation back, it is necessary to comply with the provisions of the statute, for a failure to comply therewith amounts to a waiver of the doctrine of relation.

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VARIANCE AND FAILURE OF PROOF IN MONTANA

In Montana, and in code states generally, there are three recognized degrees of deviation between pleading and proof. They are in the order of their seriousness, immaterial variance, material variance, and failure of proof. Material variance is defined as any variance which "has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits,"[1] and when such variance occurs the court may order the pleadings to be amended upon such terms as may be just. A variance which does not so mislead the adverse party is deemed immaterial, and the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.[2] A failure of proof arises where the allegation of the claim or defense is unproved, not in some particular or particulars only, but in its general scope and meaning.[3]

There is a well defined distinction between material and immaterial variance. Formal, technical or slight variances will be considered immaterial and either disregarded or amended by the court's order.[4] Material variances must be objected to, and before a variance will be treated as material the injured party must show to the court's satisfaction that he has actually been misled and in what particulars.[5] If the objection is not made, the point is waived and the pleading will be held to be amended to conform to the proof, if necessary, on appeal.[6]

There is more difficulty in marking the line between vari-

[1]R.C.M. 1947, § 93-3901 (9183).
[2]R.C.M. 1947, § 93-3902 (9184).
[3]R.C.M. 1947, § 93-3903 (9185).
[4]Baker v. Briscoe (1888) 8 Mont. 214, 19 P. 589.
[5]Wilcox v. Newman (1920) 58 Mont. 54, 190 P. 138.
[6]Mosher v. Sutton's New Theatre Co. (1913) 48 Mont. 137, 137 P. 534.