1-1-1967

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APPLICATION OF THE DOCTRINE OF CORRELATIVE RIGHTS
BY THE STATE CONSERVATION AGENCY IN THE ABSENCE
OF EXPRESS STATUTORY AUTHORIZATION.

One objective of conservation legislation is to adjust conflicting
private and public interests in our natural resources so that both may be
adequately protected.¹ Largely because of their peculiar physical character-
tistics, this adjustment has been particularly difficult in the area of oil
and gas. Unlike solid minerals, oil and gas are fugacious or they tend to
migrate from areas of high pressure to areas of low pressure.² This
characteristic is very important to the oil and gas producer, because cre-
ation of low pressure areas by drilling wells is the primary means of
recovery. Migration is significant in another way. The owner³ of land
overlying an oil and gas pool is unable to enforce a legal claim to any
physically identifiable portion of the minerals.⁴ Thus, it is possible for
an adjoining landowner over a common source of supply to take all the
oil and gas from beneath his neighbor’s land.

To the characteristic of migration must be added that of irreplace-
ability. Unlike underground water, petroleum does not replenish itself.
It has taken millions of years to produce the supply now known to exist.⁵
Consequently the scarcity and the present high demand for these min-
erals make their production a highly competitive industry. One of the
problems, then, has been to determine the nature of the legally protected
interest in these minerals. The other problem has been to balance that
interest with the interest of the public in preserving oil and gas as a
natural resource so that the greatest ultimate economic recovery may be
realized.⁶

The term “correlative rights” may be said to encompass the land-
owner’s legally protected interest in the oil and gas beneath his prop-

¹American Institute of Mining and Metallurgical Engineers, Petroleum Con-
serveration, 6, 7 (1951). Fundamentally, the interests of the profit motivated petro-
leum industry and those of the public are not in conflict. Both are advanced when
measures insuring the greatest ultimate economic recovery of the oil and gas are pro-
mulgated. See also, Ely, The Conservation of Oil, 51 Harv. L. Rev. 1209, 1218
(1937-38).
²See generally 1 Summers, Oil and Gas § 4 (2d. ed. 1954) and Sullivan, Oil and
Gas Law § 7 (1955).
³In this paper the word “landowner” or “owner” will include all those people who
have a legal right to reduce to possession the oil and gas beneath a given piece of
land.
⁴Sullivan, op. cit. supra note 2, § 9.
L. Rev. 185, 193 (1939-40); Seventh Annual Institute on Mineral Law 86, 88
(1960); and Sullivan, op. cit. supra note 2, § 3, at 7. “The crude oil being pro-
duced today was formed between 1,000,000 and 350,000,000 years ago.”
⁶Summers, The Modern Theory and Practical Application of Statutes for the Conser-
vation of Oil and Gas, 13 Tul. L. Rev. 1, 4 (1938-39). “[T]he legal relations of
a landowner respecting oil and gas should be such as to encourage their production
and consumption, but at the same time safeguard the interest of the public against
loss of their economic values through wasteful production methods, and afford some
proportionate adjustment of these values between the owners in a common source of
supply.”

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Published by The Scholarly Forum @ Montana Law, 1966
Since the existence of any right is concomitant to the means available to enforce it, the objective of this paper is to examine the statutory means of enforcing correlative rights. Moreover, primary emphasis will be placed on the protection of such rights in the face of a statute expressly denying the oil and gas conservation agency the authority to protect them. This is the problem found in Montana's oil and gas conservation legislation, and it provides the basis for this paper. Necessarily incident to this examination will be an analysis of the legal basis for state regulation of oil and gas.

When oil and gas were first produced, the courts turned to the common law concepts of real property in settling all questions of ownership. Probably one reason for adopting this course rather than one designed to deal with the peculiar physical characteristics of oil and gas was a lack of scientific knowledge. Another reason was the abundance of analogous substances already dealt with by real property law which made it easy for the courts to find precedent for their decisions. But decisions by

Definitions of correlative rights are extensive. For examples of textual definitions see, Southwestern Legal Foundation, 17th Oil and Gas Institute 217, 225 (1968).

'The term 'correlative rights' is simply a term to describe... reciprocal rights and duties of the owners in a common source of supply.' Summers, Legal Rights Against Drainage of Oil and Gas, 18 Texas L. Rev. 27, 32 (1939-40). 'Correlative rights is... a convenient term to indicate that adjoining landowners in the exercise of legal privileges of user of land have mutual correlative right-duty relations with each other respecting the oil and gas and other component parts of the land.' Kellam, A Century of Correlative Rights, 12 Baylor L. Rev. 1, 5 (1960). 'It is probably better to think of them (correlative rights) positively as reciprocal legal relationships pertaining to the privilege to acquire and the ownership of property.' And Sullivan, op. cit. supra note 2, § 145. 'Correlative rights means that the privileges of each landowner in a common source of supply are limited by the duties to the other owners therein, not to injure the reservoir nor to take an undue proportion of the oil and gas found therein, nor to commit waste in the production thereof.'

Judicial definitions are typified by Kingwood Oil Company v. Hall-Jones Oil Corporation, 396 P.2d 510, 512 (Okla. 1964). 'The term 'correlative rights' embraces the relative rights of owners in a common source of supply to take oil or gas by legal operations limited by duties to the other owners (1) not to injure the common source of supply and (2) not to take an undue proportion of the oil and gas.' Alphonzo E. Bell Corp. v. Bell View Oil Syndicate, 137 Cal. 333, 76 P.2d 167, 174 (1938). 'Correlative rights is... the right of each individual surface owner to take from the oil strata lying beneath his properties oil, gas, and other hydrocarbons intercepted by wells sunk beneath his own property, in such a manner as not to commit waste.' Ohio Oil Company v. Indiana, 177 U.S. 190, 209, 210 (1900), which was the first judicial recognition of correlative rights. 'There is a coequal right in them all to take from a common source of supply, the two substances which in the nature of things are united, though separate.'

Statutory definitions of correlative rights are generally worded in terms of what is to be accomplished. 17th Oil & Gas Inst., op. cit. supra note 7, at 225-26.

Montana is the only state we can find that produces substantial quantities of oil and gas, has a modernized Conservation Act, and belongs to the Interstate Oil Compact Commission, but has no specific reference to correlative or private rights in the legislation. Pattie v. Oil and Gas Conservation Commission, 145 Mont. 331, 402 P.2d 596, 599 (1965).

See Appeal of Stoughton, 88 Pa. 198 (1879); Hague v. Wheeler, 157 Pa. 324, 27 Atl. 714 (1893); Kelly v. Ohio Oil Co., 57 Ohio St. Rep. 317, 49 N.E. 399 (1897); and Gas Products Co. v. Rankin, 63 Mont. 372, 207 Pac. 993, 24 A.L.R. 294 (1922). The Montana case is an example of the extremes some courts went to in this early period. A waste statute prohibiting the production of carbon black was struck down as being an unconstitutional taking of property without compensation. The court cited Blackstone's maxim "Cujus est solum, ejus est usque ad coelum" (the owner of the realty owns not just the surface, but everything over and under it as well), and concluded that the state has no legal interest in natural gas after it has been reduced to possess-
analogy also created problems. The biggest problem was the dilemma caused by saying a landowner had absolute title to the minerals beneath his land and yet recognizing that title did not follow the petroleum if it should migrate to a neighbor's well. In spite of the difficulties, there developed during this period of time three separate theories of ownership.

The ownership in place theory analogized oil and gas to solid minerals. The analogy was supported by a number of similarities, the principal one being the fact that oil and gas were subsurface minerals. The nonownership theory compared oil and gas to animals ferae naturae. Petroleum, because of its fugacious nature, was said to wander about at will like a wild animal. The third theory was known as the qualified ownership theory and it was based on water law. Its adherents noted that both water and oil and gas moved in subterranean channels.

Whether these three theories of ownership could be reconciled was a question the courts did not have to decide. For no matter which theory a particular court might use, the result was always the same. Or, regardless of what point in time ownership was said to attach, only when the oil and gas were captured did such ownership become meaningful. Thus, the legally protected interest in oil and gas in situ became each landowner's right of appropriation. And this right eventually became a rule of law known as the rule of capture.

17TH OIL AND GAS INST., op. cit. supra note 7, at 218-21.

"Stoughton, supra note 9, at 201. "[I]t is like coal or any other natural product which in situ forms part of the land." See other cases in note 9 for similar reasoning.

The theories of ownership of oil and gas utilized by the various states are examined in SUMMERS, op. cit. supra note 2, § 61. Montana is apparently an ownership in place state. See Gas Products Co. v. Rankin, supra note 9; Williard v. Federal Surety Co., 91 Mont. 465, 8 P.2d 633 (1932), and Stokes v. Tutvet, 134 Mont. 250, 328 P.2d 1096 (1958).


Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as mineral ferae naturae. In common with animals and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. . . . They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone.

See Brown v. Vandergrift, 80 Pa. 142 (1875); and Manufacturers Gas and Oil Co. v. Indiana Gas and Oil Co., 155 Ind. 461, 57 N.E. 912, 50 L.R.A. 768 (1900).

It has been argued that the theory of correlative rights began in water law. "In that branch of the law . . . the rule has been developed . . . that owners of land overlying an underground lake or artesian water belt have reciprocal and correlative rights to the reasonable use of the waters percolating or lying beneath them." Andrews, supra note 5, at 193. "Reasonable use" is defined in Katz v. Wilkinshaw, 141 Cal. 116, 70 Pac. 683 (1902); and Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811 (1907).

This peculiar situation is aptly characterized in SUMMERS, op. cit. supra note 2, § 61. "When reasons so diverse result in the same conclusion, two situations become apparent, one, that there is error in some of the assigned reasons, and the other, that the real reasons for the decisions were not disclosed in the opinions."

The alternatives to the rule of capture were no better than the rule itself. One alternative was to recognize absolute ownership in the oil and gas in situ. But if this were accepted, then any migration of the minerals would be enjoinable. Or if each owner over a common supply was to be guaranteed a proportionate share of the
The rule of capture was a rule of convenience. It was a substitute for the court’s inability to determine accurately the source of oil and gas after it had been produced. Essentially the rule gave each landowner the absolute right to reduce to possession by any means, all the oil and gas beneath his property, and once the substances have been appropriated, absolute title vested in the possessor regardless of their source.\(^{18}\)

A necessary corollary to the rule of capture was the offset drilling rule.\(^{19}\) If every landowner had the unlimited right to drill for oil and gas, then the only way to prevent drainage was to drill enough wells to counter the wells on adjoining lands. Therefore, any drainage caused by a failure to drill offset wells left the aggrieved party without a remedy. He could not prove that the oil and gas captured by his neighbor were his property. Because of the importance of the right to drill offset wells, no owner could deprive another of this right.\(^{20}\)

The immediate result of the two rules was unlimited production. For every landowner exercising his right to capture, there was another drilling offset wells. Soon only the quantity of petroleum produced was important. The unfettered competition had no place for prudent means of production. Perhaps the emphasis on production at the expense of conservation was justifiable at a period of time when the petroleum supply was undeveloped. For when supply seems unlimited and demand small, there is very little reason to worry about overproduction and waste.\(^{21}\)

However, as oil and gas became important to both private and public interests as a valuable irreplaceable natural resource, several adverse effects of the rules of capture and offset drilling became obvious.\(^{22}\) First, the landowner was incurring great expense by drilling useless wells. He not only had to drill enough wells to get maximum production from his land, but also had to counter the drilling of his neighbor. Exces-
sive drilling also had the effect of reducing the ultimate recovery possible from a common supply. Before modern methods of secondary recovery, effective production of oil and gas was dependent on sustained high pressure within the reservoir. The excessive number of wells caused unnecessary loss of reservoir energy. This was largely the result of the unrestricted waste of natural gas. Overproduction also kept the oil and gas market unstable. In two states, the market price became so low that martial law was declared and all oil sales were prohibited until remedial legislation to curb oversupply and waste could be enacted. Clearly neither the public nor the private oil producer was benefiting from the unlimited application of the rules of capture and offset drilling. To protect both interests, it would be necessary to limit these rules, and conservation legislation seemed to be the only answer.

The need for conservation legislation was obvious, but a legal basis for such legislation was not so evident. The Fourteenth Amendment to the United States Constitution forbids the taking of private property without due process of law. Under the rule of capture, each landowner’s right to drill was a property interest. But because of the importance of oil and gas as a natural resource, the private property interests in these resources could not be absolute. And now the state’s power to formulate reasonable conservation measures under its police powers is undisputed. The rule of capture had to bend to the superior right of the state.

Three theories upon which to base the power were available—nuisance law, prevention of waste, and protection of correlative rights. The common law method for controlling the excesses of oil and gas production was found in nuisance law. Before the recognition of correlative rights, and aside from the right to drill offset wells, an action for the abatement of a nuisance was the only legal remedy an oil producer had against the wasteful operations of his neighbor. The typical instance arose when the defendant producer conducted his operations in such a manner that his neighbor’s property was injured. But this would have been a very unsatisfactory basis for conservation legislation, since the greatest evils to be prevented occurred beneath the surface of the land.

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25See for example Comanche Duke Oil Co. v. Texas Pac. Coal and Oil Co., 298 S.W. 554, (Tex. Com. App. 1927); reversing 274 S.W. 193 (Tex. Civ. App. 1925). Defendant had used nitroglycerin in his drilling operations and it injured plaintiff’s well, which was located on adjoining property. In Delhi-Taylor Oil Corp. v. Gregg, 337 S.W.2d 216, (Tex. Civ. App. 1960), aff’d, 344 S.W.2d 411 (1961), sand fracturing of a well was enjoined because it caused gas flow from plaintiff’s to defendant’s property to increase.
26For a general survey of the remedies available to the individual landowner see Annot., 4 A.L.R.2d 198 (1949).
27Is nuisance law the real basis for the existence of correlative rights? Everyone has a duty to use his property in such a way that his neighbor will not be injured. Therefore, a petroleum producer could not drill in such a manner as to cause the reservoir under his neighbor’s land to be injured. More specifically reservoir energy could not be wasted, nor an inequitable share of the oil and gas taken. In other words, one producer could not interfere with another’s right to drill for the minerals on his land. This was argued by Summers, supra note 6, at 12-13.
It would be extremely difficult to prove that a producer's operations were causing damage to the common source of supply particularly when the rule of capture permitted each producer to drill in any manner he saw fit.27

A better basis, and one that is utilized by every major oil and gas producing state today, is that of waste prevention.28 The theory is that oil and gas are a natural resource in which the public has an interest. This collective interest is greater than that of any individual landowner.29 Consequently, the state may make reasonable regulations designed to promote the “greatest ultimate economic recovery of the oil and gas from the earth.”30 The result is not a hoarding of the oil and gas in place, but rather a regulation of production. In this way each landowner was guaranteed the opportunity to capture all the oil and gas beneath his property, subject to reasonable conservation regulations.31 Or, in other words, production was still unlimited as long as waste was not committed.32

Waste statutes performed another function.33 By limiting production to prevent waste it also became necessary to allocate the allowable production among the producers. The waste statutes did not purport to abolish the rule of capture. Every landowner over a common source no matter how small his holdings, still had the right to drill for some por-

27United Carbon Co. v. Campbellsville Gas Co., 230 Ky. 275, 18 S.W.2d 1110 (1929). Use of a compressor was permitted even though it caused a neighboring well to dry up. In Higgins Oil and Fuel Co. v. Guaranty Oil Co., 146 La. 233, 82 So. 206 (1919), the court not only sustained plaintiff's right to use a pump in his drilling operations, but said, "So far as artificiality is concerned, we do not see the difference between a well and a pump; both are artificial . . . ."

28SULLIVAN, op. cit. supra note 2, § 149.

29Cases affirming the constitutionality of waste legislation include: Champlin Refining Co. v. Corporation Commission, 285 U.S. 210 (1932). The statute prohibited economic, underground and surface waste, and waste incident to production in excess of transportation or marketing facilities; Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179 (1950), affirmed conservation agency orders setting minimum prices for natural gas and requiring a pipe line company to take gas ratably from the producers at that price; C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 Pac. 841, 844 (1930). After sustaining conservation agency orders preventing waste the court said, "Notwithstanding the magnitude and importance of the oil industry, it is one of the natural resources which is peculiarly susceptible to waste and dissipation, and when it once escapes can never be recovered." The case of People v. Associated Oil Co., 211 Cal. 93, 294 Pac. 717 (1930) upheld a statute preventing "unreasonable waste" as not being too vague a standard.

30SULLIVAN, op. cit. supra note 2 at § 135.

31See Patterson v. Stanolind Oil and Gas Co., 182 Okla. 155, 77 P.2d 83 (1938), appeal denied 305 U.S. 376 (1939), where the provisions in a mineral deed were limited by a waste prevention order; Elliff v. Teton Drilling Co., 146 Tex. 575, 210 S.W.2d 558, 562 (1948), which allowed a producer to use any legitimate means to capture the oil and gas beneath his property as long as he does it "within the spirit and purposes of [the] conservation statutes . . . ."; and Delatte v. Woods, 232 La. 341, 94 So.2d 281, 287 (1957), which stated that conservation legislation must be interpreted with due regard to public and private interests, but the latter must always yield to a proper exercise of the state's police power.

32For some of the complications surrounding the application of conservation statutes, see Davis, Judicial Emasculation of Administrative Action and Oil Production: Another View, 19 Texas L. Rev. 29 (1940-41), and Summers, Does the Regulation of Oil Production Require the Denial of Due Process and Equal Protection of the Laws?, 19 Texas L. Rev. 1 (1940-41).

33AMERICAN INSTITUTE OF MINING AND METALLURGICAL ENGINEERS, op. cit. supra note 1, p. 252. Under a waste prevention statute, the protection of correlative rights is a secondary function.
tion of the oil and gas beneath his property. The waste statutes only pro-
vided that in exercising his right to capture, a producer owed a duty to
the public to operate in a non-wasteful manner. Therefore, as long as
the producer conducted his operations in an approved manner, the state
guaranteed him the opportunity to capture a measurable amount of oil
and gas. However, like the rule of capture, the waste statutes did not
create a property interest in the minerals while they were in situ. If a
producer did not choose to exercise his right to drill, then he could not
complain if the oil and gas beneath his property migrated to his neigh-
or's property.34

A common method of protecting private rights under a waste statute
is the provision for granting exceptions to well spacing units. For ex-
ample, Montana's statute provides that one well shall be drilled per unit
"with such exception as may be reasonably necessary where it is shown
. . . that the spacing unit is located on the edge of a pool or field and
adjacent to a producing unit, or, for some other reason the requirement
to drill the well at the authorized location in the spacing unit would be
inequitable or unreasonable."35 Another method is to include the protec-
tion of correlative rights within the definition of waste. Illustrative is
the Arkansas statute which provides that waste includes "(a)buse of the
correlative rights and opportunities of each owner of oil and gas in a
common reservoir due to nonuniform, disproportionate, and unratable
withdrawals causing undue drainage between tracts of land."36

Judicial recognition of correlative rights as a basis for sustaining
conservation legislation was given in the case of Ohio Oil Company v.
Indiana.37 The cause of the litigation was a statute which prohibited the
uncontrolled escape of oil and gas from producing wells.38 The statute
was challenged on the ground that it deprived plaintiff of his property
without due process of law. In answer to this argument the United States
Supreme Court said there was no property interest in oil and gas while
it was in its natural state. Refuting first the cases which analogized the
property interest in oil and gas to that of solid minerals, the Court said
that not only did oil and gas migrate, but even more importantly, drilling
by one owner diminished the supply available to his neighbors. Conse-
quently, there could be no absolute property interest in the oil and gas
in place, and legislation prohibiting waste of the minerals in situ was
not a taking of property.39

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34 These restrictions "do not . . . positively prohibit an owner from taking an undue
proportion of the oil and gas in a common source of supply." Summers, supra note 6, at 15.
35 Revised Codes of Montana, 1947, § 60-129(C). Revised Codes of Montana are
hereinafter cited as R.C.M.
(12)(d) (1963); Fla. Stat. § 377.19(10)(k) (1965); Miss. Code Ann. § 6132-
08(k)(3) (1942); and Neb. Rev. Stat. § 57-902(1)(c) (1943).
37 177 U.S. 190 (1900).
38 Id. at 190-191.
39 Id. at 211.
Neither were oil and gas entirely like animals *ferae naturae*. The court recognized that both might move and neither could be owned until they were appropriated. But the analogy broke down when the question of regulation arose. There was no question that any state government could prohibit absolutely the appropriation of wild animals.

On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common source of supply, the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things, as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them, of their privilege to reduce to possession, and to reach the like end by preventing waste.40

The concept of correlative rights is essentially a recognition that each landowner over a common source of supply is subject to a mutual right-duty relationship.41 His rights are those guaranteed by the rule of capture. The right to claim as property all the oil and gas that can be appropriated beneath one’s land is still fundamental. But the landowner also has duties. Under the waste prevention statutes the primary duty consisted of preserving for the public valuable natural resources by prohibiting wasteful operations. Under the correlative rights approach the duty is owed to the adjoining landowners. The difference is attributable to the emphasis placed on ownership. Where waste prevention statutes emphasize the public interest over private ownership, the correlative rights approach recognizes that co-ownership between private interests is the crucial relationship.42 If all the owners over a common supply have a co-equal right to take from a common source, then it is within the power of the state to protect it. For if one owner could appropriate all the oil and gas in a particular reservoir, then the adjoining owner’s right to capture would be meaningless.43 Therefore, the state may make any law reasonably designed to insure each landowner a fair opportunity to appropriate the oil and gas beneath his land.44

40 Id. at 209-210.  
41 See definitions supra note 7.  
42 Of course, any valid conservation regulation will prevail over inconsistent private interests. See Denver Producing and Refining Co. v. State, 199 Okla. 171, 184 P.2d 961 (1947); and Application of Champlin Refining Co., 296 P.2d 176 (Okla. 1956).  
43 Even in the absence of a statute correlative rights have been recognized. Manufacturer’s Gas and Oil Co. v. Indiana Gas and Oil Co., supra note 14; Louisville Gas Co. v. Kentucky Heating Co., 117 Ky. 71, 77 S.W. 368 (1903), and 132 Ky. 435, 111 S.W. 374 (1908); Higgins Oil and Fuel Co. v. Guaranty Oil Co., supra note 27; and Marrs v. City of Oxford, 32 F.2d 134 (8th Cir. 1929).  
44 Ohio Oil Co. v. Indiana, supra note 37; Commonwealth v. Trent, 117 Ky. 34, 77 S.W. 390 (1903); C. C. Julian Oil and Royalties Co. v. Capshaw, supra note 29; People v. https://scholarship.law.uh.edu/mlr/vol28/iss2/3
Statutory protection of correlative rights is accomplished in a variety of ways. In some states it is made a matter of public policy and the conservation agency is guided by statutory definitions of these rights. Other states do not explicitly define correlative rights, but do require each producer to be guaranteed his just and equitable share. The emphasis placed on and the method used in protecting correlative rights depends on whether the conservation legislation is primarily for the protection of these rights or for the preservation of oil and gas as a natural resource.

Oil and gas conservation efforts have a long history in Montana. As early as 1917, modest efforts were made to control wasteful production methods. However, receptiveness to comprehensive conservation legislation was lacking and in both 1937 and 1947, proposed modifications or replacement of existing laws were struck down. It was not until 1953 that Montana's present comprehensive oil and gas statute was enacted. One reason for its acceptance at that time was because it was patterned after a statute proposed by the Interstate Oil Compact Commission. But the Montana law also made significant departures from the model statute, one of which was the failure to provide for the protection of

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It is hereby declared to be in the public interest to foster, encourage and promote the development, production and utilization of the natural resources of oil and gas . . . and to protect the public and private interests against the evils of waste . . . to safeguard, protect and enforce the coequal and correlative rights of owners and producers in a common source . . .

And § 100-6-3(13) defines the term ‘correlative rights’ as meaning ‘that each owner and producer in a common pool or source of supply of oil and gas shall have an equal opportunity to obtain and produce his just and equitable share of the oil and gas underlying such pool or source of supply.’


An interesting situation is created by the California conservation statute. Although it contains no express reference to correlative rights, interpretation of the provisions preventing ‘unreasonable waste’ indicates that its primary purpose is to protect correlative rights. See People v. Associated Oil Co., supra note 44, and Bandini Petroleum Co. v. Superior Court., supra note 44. Also see Ely, supra note 1.

For a brief history of the developmental period see Conservation of Oil and Gas, A Legal History, 1945, Section Of Mineral Law, American Bar Association 300-309 (1949).

correlative rights. It has already been noted that correlative rights can
be protected even in the absence of express statutory authority if such
is the intent of the legislature. However, Montana's legislation seems
to negate this possibility as a comparison with the model statute will
indicate.

The first indication of an intention to preclude recognition of cor-
relative rights is found in the Montana legislature's failure to adopt the
model statute's Declaration of Policy. Among other things, this statement
of policy provided for the "operation and development of oil and gas
properties in such a manner that a greater ultimate recovery of oil and
gas be had and that the correlative rights of all owners be fully pro-
tected ...." Whatever the legal effect of a policy declaration, it does
spell out the legislative purpose underlying the adoption of a particular
law. Consequently, this omission at least indicates that unlike many other
states, protection of correlative rights is not an expressed policy reason
for the enactment of the Montana oil and gas conservation laws.

Another significant omission is found in the well spacing unit pro-
visions. Montana's legislation provides that the commission may estab-
lish a well spacing unit for a pool in order to "prevent or to assist in
preventing waste of oil or gas ...." The same section in the model
statute makes prevention of waste and protection of correlative rights
alternative bases for establishing a spacing unit. In a subdivision of
the well spacing provisions, the Montana statute allows the commission
to grant an exception whenever "the requirement to drill the well at the
authorized location in the spacing unit would be inequitable or unreason-
able." The comparable section in the model statute would allow an
exception "to prevent the production from the spacing unit of more than
its just and equitable share of the oil and gas in the pool." Finally,
modification of spacing orders in order to include additional areas is
allowed in Montana only to prevent waste, whereas the model statute
accepts protection of correlative rights as a sufficient basis.

Indicative of careful drafting, the differences in the well spacing
provisions show a definite scheme on the part of the Montana legislators
to exclude not only express recognition of correlative rights, but im-
plicit recognition as well. The words "correlative rights" are not used.

Other differences include lack of a provision for compulsory unitization and failure
to allow "restriction of production according to reasonable market demand."
See supra note 47.
51 See supra note 45.
52 INTERSTATE OIL COMPACT COMMISSION, A Form for an Oil and Gas Conservation
Statute, Declaration of Policy (hereafter cited as the MODEL ACT).
53 Supra note 45.
54 R.C.M. 1947, § 60-129(A).
55 MODEL ACT § 5(A).
56 R.C.M. 1947, § 60-129(C).
57 MODEL ACT § 5(C).
58 R.C.M. 1947 § 60-129(D).
59 MODEL ACT § 5(D).
Modification of the area included in existing units may be had only if the conservation agency is convinced that otherwise waste will result. In other words, waste prevention is the sole criterion to be used by the oil and gas commission in making its well spacing determinations.

The only provision upon which an argument for the existence of correlative rights could be based is that granting an exception to the unit in order to avoid "inequitable or unreasonable" results. This argument was successfully made to the Montana Supreme Court in the case of *Pattie v. Oil and Gas Conservation Commission.*

In the *Pattie* case, a petroleum company owned an oil and gas lease adjacent to that held by petitioners. The petroleum company while drilling for oil unexpectedly hit natural gas in commercial quantities. Since the company's well had been spaced in conformity with the oil well spacing regulations, the gas producing well was in violation of the gas well spacing requirements. The petroleum company then petitioned the Montana Oil and Gas Conservation Commission for an exception which would allow the gas well to remain where it was originally drilled. The petitioner also asked the Commission for an exception to the spacing regulations. He showed the Commission that unless an offset well could be drilled at a point closer to the petroleum company's boundaries than permitted by the spacing orders, he would be unable to prevent the drainage from beneath his land. The Commission granted the petroleum company's request and denied the petitioner's. The Commission justified its decision on the ground that the Montana legislature had not given it authority to determine correlative rights.

Petitioner brought an action against the Commission in district court alleging that the Commission's order was "unreasonable and inequitable." The district court sustained petitioner's contention by finding that the Commission had the authority and duty to "adjudicate" correlative rights. Thereupon the Commission appealed to the Montana Supreme Court where the judgment against the Commission was affirmed.

The Montana Supreme Court assumed that unless the conservation legislation recognized private rights it would be unconstitutional. Since the legislation did not expressly mention these rights, and because the court did not feel the legislation was unconstitutional, only one conclusion remained. "... (C)onsideration of correlative rights and other private rights of the landowners insofar as spacing and regulatory orders..."
and requirements are concerned is a power necessarily arising by implication from the legislation."\textsuperscript{66}

One critical problem not considered by the Court was that of legislative intent. The promoters of the 1953 legislation indicate that the conservation agency was not to consider correlative rights. In the words of one of the promoters, "From the very outset, it was apparent that, if an oil and gas conservation act were to be passed, it would have to be . . . without a provision recognizing the right of the Commission to determine correlative rights."\textsuperscript{67} Although complete committee reports are unavailable, it would seem that the \textit{Pattie} case achieved a result not contemplated by the people responsible for Montana's Oil and Gas Conservation Act. Considering the action of the Montana Supreme Court, the question then is whether a state legislature can enact conservation legislation which is designed to keep from the conservation agency any authority to consider correlative rights.

The power to enact conservation legislation is based on the assumption that the state has an interest superior to that of any individual landowner. The interest is superior in the sense that the state may make regulatory measures as long as they are not arbitrary.\textsuperscript{68} In the area of oil and gas, the test of arbitrariness is dependent on whether there is a reasonable relation between the conservation measure and the dual objectives of conservation legislation. That is, whether waste is prevented

\textsuperscript{66}Id. at 600. The court cited 1A \textsc{Summers}, \textsc{Oil and Gas}, § 106, n.44, (1954) as its authority.

\textsuperscript{67}The Court noted that the United States Supreme Court faced a similar problem in \textit{Ohio Oil Co. v. Indiana}, \textit{supra} note 37. The statute in that case was a waste prevention statute with no reference to correlative rights, and yet in was the first conservation measure to be sustained on a correlative rights basis.

\textsuperscript{68}\textit{Supra} note 60, at 601.

\textsuperscript{69}Letter from R. F. Hibbs, dated Oct. 28, 1966, to Sidney J. Strong. He also suggests some of the reasons which required this position.

[B]efore the enactment of this statute, Montana had virtually no statutes for the prevention of waste or the control of oil and gas fields . . . [and] virtually all of the production in Montana had been through small, independent, locally-owned producers. Their efforts had been great and their rewards were meager. They were most apprehensive of the encroachment of major oil companies into the area on the crest of the boom which was then developing.

These small independent operators were, in many instances, hard to convince that any governmental encroachment on their right to produce was good. Many independents who had been in the production of oil in other states were wary of the power that major oil companies can exert . . . .

Even without the insistence of the independent operators in 1953, I question whether the inclusion in the Act of these two items in an area which is undeveloped, would have been good. The independent oil companies represent the group which is most apt to bring in new fields. Such companies have a fear that they may not be able to produce sufficiently to warrant the wildcatting which is necessary to start new fields. Montana still needs to invite the independents.

Inquiries were sent to the five Montana Senators who introduced the 1953 conservation legislation. Reply was received from only three, but they were in agreement as to the intentional exclusion of correlative rights from the purview of the statute.

in order to promote the greatest ultimate economic recovery and protect the correlative rights of adjoining owners over a common source of supply. 69

However, legislation may be oriented toward only one of the objectives. Some states, like Montana, prohibit waste so that there will be no wasteful depletion of oil and gas as a natural resource. 70 Other states, like California, are more concerned with protecting the property rights of all the owners over a common source and thus, the purpose of waste prevention is primarily for the protection of correlative rights. 71 But regardless of their orientation, no state favors one of the dual objectives to the complete exclusion of the other. And as the following will indicate, such a conservation policy is not possible as the dual objectives are inseparable.

As previously noted, Montana’s conservation legislation is to a large extent a typical example of legislation oriented toward waste prevention. Beginning with an absolute prohibition of waste 72 and followed by a comprehensive statement of all those acts included within the definition of waste, 73 the conservation statute proceeds to define all authority of the oil and gas commission in terms of waste prevention. 74 Illustrative is the establishment of well spacing units 75 and the provisions allowing pooling of individual interests within the spacing unit. 76 Clearly the import of the provisions, taken as a whole, is the desire to obtain the greatest ultimate economic recovery of oil and gas. No consideration is given to private property rights. And it is at this point that the Montana statute departs from the usual waste prevention statute.

Typically waste prevention statutes prohibit the conservation agency from adopting any policies amounting to confiscation. 77 As generally understood, “Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation.” 78 Most often the party claiming confiscation tries to obtain an exception to the well spacing unit. Exceptions are granted owners of small tracts of land, 79 when the well is located on the end of the reservoir, 80 or any type of uncom-

69 SULLIVAN, OIL AND GAS LAW § 136 (1955).
70 Infra notes 72-76.
71 For example see CAL. PUB. RESOURCES CODE § 3300 (1955), as interpreted by Bandini Petroleum v. Superior Court, supra note 44, at 21-22.
73 R.C.M. 1947, § 60-126.
74 R.C.M. 1947, § 60-127.
75 R.C.M. 1947, § 60-129.
76 R.C.M. 1947, § 60-130.
77 See for example TEX. REV. CIV. STAT. ANN. art. 6049c, § 7 (1962).
78 Marts v. Railroad Com’n, 142 Tex. 293, 177 S.W.2d 941, 948 (1944), and Railroad Com’n v. De Bardeleben, 157 Tex. 518, 365 S.W.2d 141 (1957).
pensated drainage. In at least Texas, once confiscation is established, then an exception must be granted even though waste will result. The place of correlative rights protection in waste prevention legislation is that of “a necessary adjunct to the prevention of waste. Waste will result unless the Commission can also act to protect correlative rights.” Therefore, correlative rights are protected only to the extent that waste prevention is advanced.

The Montana Oil and Gas Commission is also authorized to grant exceptions. The claimant is only required to show that the authorized location is on the edge of the pool or for some other reason is “inequitable or unreasonable.” Pooling arrangements must allow each producer the opportunity to recover “his just and equitable share.” These provisions seem ostensibly sufficient to prevent confiscation of property and thus put Montana in line with the other waste prevention states. But the Montana legislators did not intend the Commission to consider correlative rights. And as the Pattie case indicated, the conservation agency operated on this assumption. So a dilemma is created: Either follow legislative intent and ignore the express language of the statute, or read unintended meaning into the provisions.

Statutes preventing waste in order that correlative rights may be better protected are generally very explicit. Statements of correlative rights by means of policy declaration and comprehensive definitions have already been noted. California appears to be the only exception. In that state correlative rights’ protection is not expressly mentioned. But the waste provisions have been upheld as a reasonable means to protect correlative rights. With express protection of private rights, the states with extensive correlative rights provisions have no problem with confiscation. The conservation agency is simply instructed to consider private interests in all of its action. Montana’s conservation legislation could not be classified as this type of statute.

81Railroad Com’n of Texas v. Texas Co., 298 S.W.2d 666 (Tex. Civ. App. 1957). Proving the exception raises other problems. “To justify an exception... it is necessary to show that the conditions affecting the drainage of wells on a particular tract are so peculiar, unusual and abnormal that it is removed from the same category of the surrounding area to which the general rule applies.” Wrather v. Humble Oil and Refining Co., 147 Tex. 144, 214 S.W.2d 112, 117 (1948). See also Railroad Com’n v. Shell Oil Co., 154 S.W.2d 507 (Tex. Civ. App. 1941), 139 Tex. 66, 161 S.W.2d 1022 (1942).

82Magnolia Petroleum Co. v. Railroad Com’n, 120 S.W.2d 553 (Tex. Civ. App. 1938); Marrs v. Railroad Com’n, supra note 78; and Railroad Com’n v. De Bardeleben, supra note 78. But it will not be granted if the petitioner created the situation requiring the exception. Tenneco Oil Co. v. State Industrial Com’n, 131 N.W.2d 722 (N.D. 1964). Cf. Ryan Consolidated Petroleum Corp. v. Pickens, 155 Tex. 211, 285 S.W.2d 201 (1956).

83Continental Oil Co. v. Oil Conservation Com’n, 70 N.M. 310, 373 P.2d 809 (1962).

84Supra note 56.

85R.C.M. 1947, § 60-130(A).

86Supra note 45.

87Supra note 71.

88Supra note 45.
Nor can the provisions of the Montana legislation be interpreted as being designed to protect correlative rights, even in the absence of waste. Although the court in the Pattie case noted that the Montana statute was a waste prevention statute, it also cited the Ohio Oil Company case as precedent for a judicial implication of correlative rights. It is true the Ohio Oil Company case did determine that correlative rights were to be protected by a waste prevention statute. But that did not answer the question before the court. That is, did the conservation agency have the authority to consider correlative rights? The Ohio Oil Company only said that protection of correlative rights is a legitimate basis for exercise of a state’s police power. In the Pattie case, there was no question that the state could validly enact conservation legislation. But could the state legislature enact a type of conservation legislation which endorsed non-recognition of private interests? The Montana court said no by implying a legislative intent to protect correlative rights. Realistically, it does not seem reasonable to imply that the Montana legislature used the legal basis of correlative rights protection to sustain its enactment when in fact, it intended not to protect these rights.

From this analysis, it is obvious that Montana legislation is neither a waste prevention statute with safeguards against confiscation, nor does it have provisions from which an implication of correlative rights protection can be made. The inevitable conclusion is that the legislation is not a reasonable regulatory measure. Its sole purpose is to prevent waste without regard to constitutional prohibitions against taking of property without due process of law. Nevertheless, a declaration of unconstitutionality was avoided by the Montana Supreme Court. Whether the decision in the Pattie case is supportable is arguable, but at least Montana has found a method of protecting correlative rights when none seemed to exist.

Aside from the constitutional restrictions, there are also practical reasons for questioning the wisdom of a law negating the consideration of correlative rights’ protection. According to the promoters of the legislation, the purpose of the exclusion was to protect the interests of the small independent producers. It was feared that the small operators scattered over a common source of supply would be forced to give up a large portion of their production to the large leaseholders over the same reservoir each time a spacing unit was created. But the Pattie case illustrates that correlative rights protection may also benefit the small producer. In that case, if the Montana legislation had been given a literal interpretation, the large oil company would have completely eliminated the small producer. Certainly the guarantee that all owners over a common source of supply shall have an equal opportunity to drill for some portion of the oil and gas in situ cannot be totally destructive of the small owner’s interest.

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9 Pattie v. Oil and Gas Conservation Commission, supra note 60, at 599-600.
9 Ibid.
9 Supra note 67.
It is strongly recommended that the Montana legislature note the history of the New Mexico conservation legislation. New Mexico was one of the first states to enact a "truly comprehensive conservation law" and these 1935 provisions remain today substantially unchanged. However, until 1949 the legislation did not provide for the recognition of correlative rights. Whether for fear of problems such as those created by the present Montana legislation or because of a realization that correlative rights' protection is a fundamental part of conservation legislation, adequate provision was finally made for these rights. Such an approach not only satisfies all constitutional requirements, but makes explicit what now in Montana is so vague.

Only a balancing of public and private interests can yield a satisfactory result. The Montana legislature should not assume that the appropriate balance was created by the Pattie case. That case only serves to point out the confusion inherent in the present legislation. It is therefore, incumbent upon the legislature to recognize the need for a truly modern comprehensive conservation statute. And as indicated, this requires an express direction to the conservation agency to consider correlative rights in making all its determinations. This is a necessity for Montana as one of the major petroleum producing states.

SIDNEY J. STRONG.

"Morris, Compulsory Pooling of Oil and Gas Interests in New Mexico, 3 Nat. Resources J. 316 (1963-64).

"Conservation of Oil and Gas, A Legal History, 1958, supra note 49, at 155."