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Death of the Dark Ages - The Troubled Law of Easements in Wyoming

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COMMENT

DEATH OF THE DARK AGES? THE TROUBLED LAW OF EASEMENTS IN WYOMING

INTRODUCTION

A discussion of easements is much like the blind men of Pakistan who came upon the elephant. Each blind man examined a different part of the elephant. Accordingly, each blind man thought that the elephant was something very different than did any of the others. The moral of this children's tale is, that depending upon a person's perspective, you can be right and wrong at the same time.

The law of easements is much the same. Courts have held easements to give rights across a broad spectrum, from land held in fee to a mere license, depending upon the circumstances.[1] This wide diversity of rights is reflective of the long and tortured history of easements. Consequently, the law applicable to easements is confusing to law students, practitioners, and laymen alike.

The purpose of this comment is four-fold. First, it will review the development of the law of easements in Wyoming. Second, it will analyze recent Wyoming Supreme Court decisions and their effect on Wyoming easement law. Third, the comment will suggest statutory changes to the law, and recommend a judicial interpretation of an existing statute that would simplify and reduce the number of easement disputes. Finally, this comment will hopefully provide an understanding of the legal principles which the Wyoming Supreme Court may use in the future to decide easement disputes.

What Is An Easement?

The *Restatement of Property* defines easements as:

> [A]n interest in land in the possession of another which:
>
> (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists;
>
> (b) entitles him to protection as against third persons from interference in such use or enjoyment;
>
> (c) is not subject to the will of the possessor of the land;
>
> (d) is not a normal incident of the possession of any land possessed by the owner of the interest; and
>
> (e) is capable of creation by conveyance.[2]

The basic idea that there may exist the right to use the property

1. 2 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 315 (repl. ed. 1980) [hereinafter G. THOMPSON].
2. RESTATEMENT OF PROPERTY § 450 (1944).

of another is not so difficult. The layman generally understands the most common types of easements, the way of necessity and utility easements.[3] However, beyond these initial concepts the complexities begin. The complexities of easement law manifest themselves in disputes that arise because of disagreements over the creation or the scope of the easement.[4]

Therefore, a review of how easements are created is in order. This review will then be followed by a discussion of the scope, which is the extent of the permissible use.

Creation of Easements

An easement is an interest in land. As with any interest in real property, creating an easement generally requires a person to comply with the Statute of Frauds.[5] An easement results from a conveyance in which one party to the conveyance either grants or reserves a use of one parcel for the benefit of another parcel.[6] The recording acts of the state also mandate that an easement be recorded.[7] Failure to record the easement should result in the easement being considered void.[8] Generally, easements may only arise through (1) express conveyance, (2) prescription, (3) necessity, (4) implied grant or reservation where a quasi easement existed when the two tracts were one, (5) irrevocable license, (6) estoppel, and (7) filing of plats.[9]

REVIEW OF EASEMENT CREATION

Express Conveyance

An express conveyance of an easement needs little explanation. The creation and scope of an easement by express grant is only lim-

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3. John W. Weaver, *Easements are Nuisances*, 25 REAL PROP., PROB. & TR. J. 103, 106 (1990) [hereinafter *Nuisances*].

4. *Id.*

5. RICHARD R. POWELL, POWELL ON REAL PROPERTY ¶ 413 (rev. 1991) [hereinafter R. POWELL]. The Wyoming Statute of Frauds states in pertinent part: "In the following cases, every agreement shall be void unless such agreement, or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith: . . . [e]very agreement or contract for the sale of real estate[.]" WYO. STAT. § 1-23-105 (1977).

6. The conveyance may expressly provide for an easement within the terms of the agreement, or the law may imply an easement under certain circumstances. In either case, the easement will have resulted from the conveyance of an interest in real property, or will itself be the subject of the conveyance.

7. WYO. STAT. § 34-1-141(c) (1977). The statute states in pertinent part:

> For purposes of this act [section] an easement or agreement which does not specifically describe the location of the easement . . . shall be valid for a period of one (1) year from the date of execution of the easement or agreement. If the specific description is not recorded within one (1) year then the easement or agreement shall be of no further force and effect.

WYO. STAT. § 34-1-141(c) (1977).

8. *Id. See infra* notes 159-164 and accompanying text.

9. G. THOMPSON, *supra* note 1, § 330.

ited by public policy. A written agreement may be assumed to reflect the intent of the parties to the conveyance. If the agreement is signed by the parties, the basic requirements of the Statue of Frauds are satisfied.[10] The writing is also easily recorded in the county filing system. A writing that embodies the parties' intent will generally show that the easement is either a gratuitous conveyance by the grantor, or was a negotiated part of the exchange between the parties.[11] In addition to creating the easement, the writing should also define any limitations on how the easement may be used by the dominant estate owner (the scope). If the intent of the parties is disputed with regard to either the creation or the scope of the easement, the court looks to the language of the easement agreement to resolve the dispute.[12] If the language is ambiguous, then the court applies the general principles of contract interpretation and construction to determine the intent, including the parol evidence rule.[13]

While the outcome of any such dispute may not be satisfactory to one or both of the parties, at least one important principle is certain. The writing that embodies an express conveyance shows that the parties intended to create the easement and exchanged some consideration.

Prescriptive Easements

A prescriptive easement at common law is established by the open, exclusive, continued and uninterrupted use of the land of another under a claim of right.[14] The use must be adverse to and with the knowledge of the owner of the property.[15] The use also must continue for the prescriptive period.[16]

The elements that evidence a prescriptive claim have a long history. Under early English law, prescription was acquisitive[17] only. Prescription applied to incorporeal hereditaments which were governed by common law.[18] The body of common law that governs prescription converges from two origins. One of the origins is based in old English

10. *See supra* note 5.

11. *Nuisances, supra* note 3, at 113.

12. *Id.* (citing W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY § 32 (3d ed. 1965)).

13. *Id.* (citing 2 AMERICAN LAW OF PROPERTY § 8.66 (A. Casner ed., 1952)).

14. G. THOMPSON, *supra* note 1, § 344; R. POWELL, *supra* note 5, ¶ 413. Though the elements for adverse possession and prescriptive easements are very similar, they are not the same. The main difference is the difference between use and possession. Prescription only requires use, not possession of the land of another.

15. G. THOMPSON, *supra* note 1, § 344.

16. *Id.*

17. 2 *Id.* § 335. Acquisitive in this context means the obtaining of an interest in the property of another.

18. 2 *Id.* § 336. Incorporeal hereditaments are "anything, the subject of property, which is inheritable and not tangible or visible." More specifically, it is a "right growing out of . . . [land], but not the substance of the thing itself." BLACK'S LAW DICTIONARY 726 (6th ed. 1990).

statutes.[19] A large body of case law then developed that applied the statutes to disputes between the dominant and servient landowners.[20] Generally, the applicable statutes allowed rights of way to arise after thirty years of uninterrupted use, and other easements after forty years, but only if the owners of the servient estates were considered capable of protecting their own interests in the land.[21]

The other origin of prescription was based solely in the common law. One could acquire an easement by "prescrib[ing] that he and his ancestor had from time immemorial exercised . . . as appendant or appurtenant to their own lands . . . rights of . . . way over certain other lands."[22] The common law implied a grant from the servient estate to the dominant estate because of the customary use.[23] However, because no express grant existed, a court created the fiction that an express grant had been created, but that it had been lost.[24]

The court-created fiction of the lost grant solved the conflict between prescription and the statute of frauds. The lost grant was the writing which conveyed the interest in real property. However, since the writing could not be found, the court accepted the customary use as extrinsic evidence of the location and scope of the easement.[25]

Wyoming has long recognized the lost grant theory. In *Metcalf v. Hart*, the Wyoming Supreme Court stated that "the claim for easement must be founded upon a deed or writing, or upon a prescription that supposes one."[26] The court then affirmed the trial court's verdict which denied the servient landowner the right to revoke the parol license that he had given to a building owner to occupy and maintain his building. The court held that to allow the servient owner to revoke the license would work a fraud upon the licensee, and therefore, the use had ripened into a prescriptive easement.[27]

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19. G. THOMPSON, *supra* note 1, § 337. The first statutory basis for modern prescription is generally believed to be the Statute of Westminster I, which prohibited a person's demanding the right of seisin of his ancestors prior to Richard I (1189 A.D.). 2 *Id.* § 335. The second statutory basis was the Prescription Act of 1832 which prescribed that certain incorporeal rights could not be defeated if such rights had existed for the statutorily designated period of limitations. *Id.* The act did not apply to servient estates that were held by mental incompetents, a married woman, or tenants for life. *Id.*

20. Dominant in this context refers to the parcel of land that is benefitted by the easement. Servient refers to the parcel that bears the burden of the easement.

21. G. THOMSPON, *supra* note 1, § 337.

22. *Id.*

23. *Id.*

24. *Id.* (commonly known as the lost-grant or implied-grant theory).

25. *Id.*

26. 27 P. at 900, 906-907 (Wyo. 1891). *Metcalf* was a suit for specific performance by the owner of a building against the owner of the land upon which the building was constructed. The court held that the parol license granted by the landowner to allow a building to be built upon his land could not be revoked without working fraud upon the licensee. *Id.*

27. *Id.*

Nineteen years later, Justice Potter, writing for the majority in *Gustin v. Harting*, stated that "the actual and continuous use of an easement, as of right, for the period of limitation for bringing an action to dispossess the claimant, creates the presumption of a grant."[28] The court found that a parol license was given by the servient estate owner to an adjacent landowner (licensee) to construct an irrigation flume across the servient estate to the licensee's farmlands.[29] The court held that the improvements made by the licensee to build the flume had created a transfer of rights for value in the servient estate. The transfer for value, coupled with use for the ten-year prescriptive period, had created a prescriptive easement in favor of the licensee.[30] The licensee's use had thus ripened into a prescriptive easement for the licensee's irrigation flume. The licensee had permanent permission to maintain his flume across the lands of his neighbor.

The Wyoming Supreme Court has also recognized that the presumption of a grant in prescriptive easement cases also circumvents the statute of frauds. In *Coumas v. Transcontinental Garage, Inc.*[31], Justice Blume explained why the court needed to apply the fiction of the lost grant. Such fiction was necessary because the statute of frauds prohibits the creation of an interest in land of another except by grant, reservation, or covenant.[32] The court understood that no grant ever existed. However, the court concluded that the legislature had not considered the law in the area of prescriptive easements.[33] Therefore, the common law of England applied.[34]

While Wyoming courts have accepted the common law requirements of prescription, they have given it a different twist. Initially, Wyoming courts followed the common law presumption that if the user could show an open, visible, continuous and uninterrupted use for the prescriptive period, the use would be presumed to be adverse and under a claim of right.[35] The owner of the servient estate could rebut this presumption by showing that the use was permissive.[36] Later cases recognize that the presumption now runs in favor of permissive use, and that the permissive presumption will only be rebutted upon a clear showing of hostility.[37] Such a presumption is in ac-

28. 121 P. 522, 527 (Wyo. 1912).
29. *Id.* at 530.
30. *Id.* at 531.
31. 230 P.2d 748, 754 (Wyo. 1951).
32. *Id.* at 754 (citing 28 C.J.S. *Easements* § 5 (1941)).
33. Haines v. Galles, 303 P.2d 1004, 1006 (Wyo. 1956) (dispute over the right to continue unobstructed use of a right of way over the lands of another after more than ten years).
34. *Id.*
35. Auchmuty v. Chicago, Burlington & Quincy R.R. 349 P.2d 193, 197 (Wyo. 1960) (action by City of Sheridan and the named railroad for a mandatory injunction against Auchmuty to remove a dam from a ditch that had been used for drainage by the city and the railroad).
36. *Id.*
37. Shumway v. Tom Sanford, Inc., 637 P.2d 666, 669 (Wyo. 1981) (citing Gray v.

cordance with the Wyoming Supreme Court's announced policy that prescriptive easements are not favored by the law.[38]

Easement of Necessity

An easement of necessity arises when the grantor alienates a portion of his property, and the transfer landlocks one of the parcels. In order to have access to the landlocked parcel (the dominant estate), it is necessary for the landlocked owner to cross the other parcel of land (the servient estate). It is the need for access that motivated the courts to imply an easement by necessity as an additional condition to the conveyance of land.

At common law, if the owner of the landlocked parcel is to establish an easement of necessity, he must meet the following four criteria: (1) Prior common ownership of the dominant and the servient estates; (2) Transfer of one of the parcels (severance); (3) Necessity for an easement at severance; and (4) continuing necessity for an easement.[39]

The first element, common ownership, is important because the common law does not allow the owner of landlocked property to obtain an easement over the property of a third party.[40] The second element, severance, stems from the principle that an owner cannot have an easement over his own property because any lesser estates would merge into the owner's fee simple.[41] The third element, necessity, arises because one of the severed parcels has no means of ingress or egress except across the other parcel.[42] It is this necessity for access, which arises at the time of the conveyance, that creates the need for the easement.[43] The last element, continuing necessity, requires that the pre-severance need for access must continue to exist thereafter.[44]

Early English common law implied that an easement was granted as a condition of the sale of land because if the easement wasn't granted, the owner would not be able to possess his property.[45] The courts also implied easements by necessity because it promoted the public policy that land should be put to full and productive use.[46]

Fitzhugh, 576 P.2d 88 (Wyo. 1978)). *See also* Yeckel v. Connell, 508 P.2d 1200 (Wyo. 1973); Caribou Four Corners, Inc. v. Chapple-Hawkes, Inc., 643 P.2d 468 (Wyo. 1982).

38. Gregory v. Sanders, 635 P.2d 795, 800-01 (Wyo. 1981); Prazma v. Kaehne, 768 P.2d 586, 589 (Wyo. 1989).

39. 3 HERBERT T. TIFFANY, TIFFANY ON REAL PROPERTY § 352 (3d ed. 1939) [hereinafter H. TIFFANY].

40. JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND ¶ 4.02[2][a] (1988) [hereinafter J. BRUCE & J. ELY, JR.]. A third party in this context is one who does not own land that came from a common grantor.

41. *Id.* ¶ 4.02[2][b].

42. R. POWELL, *supra* note 5, ¶ 410.

43. H. TIFFANY, *supra* note 39, § 793.

44. J. BRUCE & J. ELY, JR., *supra* note 39, ¶ 4.02[2][d].

45. *Id.* ¶ 4.02[1].

46. R. POWELL, *supra* note 5, ¶ 410.

This implied grant theory continued to persist until courts both in England and in the United States began to focus on the contractual relationship between the parties.[47] The courts then inferred from the contract that the intent of the parties was to grant an easement.[48] The significance of this change in focus is that the easement became a condition of the contract for the sale of real property. If the contract was silent as to creation and scope of the easement, then the court could construe the intent of the parties from extrinsic evidence.[49] Since access to property is a reasonable condition of the sale, the courts could presume that an easement was a reasonable construction of the intent of the parties.[50] However, regardless of whether a court implied a grant or inferred contractual intent, the fictional implications of an easement by necessity continued to be based on the public policy that land be put to full and productive use.[51]

The Wyoming Supreme Court has recognized common law easements by necessity for many years.[52] For example, in *McIlquham v. Anthony Wilkinson Live Stock Company*, the court sustained a demurrer granted against a plaintiff who was seeking an easement by necessity. The plaintiff claimed it was necessary for his cattle to cross a third party's land to get from public grazing land to water on his own land.[53] In *McIlquham*, the court recognized the implied grant theory which created an easement by necessity, but held that the plaintiff could not meet the criteria needed to establish an easement by necessity.[54]

The common law doctrines of easements by necessity continued unabated until they were first questioned by the Wyoming Supreme Court in 1975.[55] In *Snell*, the plaintiff purchased land that had no established access route.[56] The most convenient route of access to a public road was across the defendant's land.[57] The plaintiff tried, with no success, to negotiate with the defendant for an express easement across the defendant's land.[58] The plaintiff next tried to use a state statute which would enable the plaintiff to establish a private road across the land of the defendant.[59] The defendant contended that the

47. J. BRUCE & J ELY, JR., *supra* note 40, ¶ 4.02[1].
48. *Id.* Sometimes the inferred intent theory is expressed in terms of the presumption of a grant. *Id.* ¶ 4.02[1] n.5.
49. *See supra* notes 10-12 and accompanying text.
50. J. BRUCE & J. ELY, JR., *supra* note 40, ¶ 4.01[1].
51. R. POWELL, *supra* note 5, ¶ 410.
52. McIlquham v. Anthony Wilkinson Live Stock Co., 104 P. 20 (Wyo. 1909).
53. *Id. at 21.*
54. *Id.* at 22.
55. Snell v. Ruppert, 541 P.2d 1042 (Wyo. 1975).
56. *Id.* at 1044.
57. *Id.*
58. *Id.*
59. *Id.* (referring to WYO. STAT. § 29-92 (1957) (presently WYO. STAT. § 24-9-101 (1977)). This statute provides that any person who does not have access from his land to a public road may apply to the county commissioners for a private road. The statute also provides for notice to affected landowners, and for the commission to hold a hear-

plaintiff did not have the necessity required by the statute because the plaintiff had a common law easement by necessity through the lands of another that shared a common grantor with the plaintiff.[60] Accordingly, the defendant argued that an action to establish a common law way of necessity was a condition precedent to the plaintiff's seeking statutory relief.[61]

The Wyoming Supreme Court held that the common law of easements had been modified by the state courts and by the Wyoming Legislature.[62] The court concluded that the common law had been superseded by state statute, and that the plaintiff did not have to seek an easement by necessity as a condition precedent before he could seek to establish a private road under the statute.[63] The plaintiff only had to comply with the statutory provisions designed to provide access, which is exactly what he had done.[64]

The Wyoming Supreme Court concluded that the concept of the common law way of necessity was inconsistent with the Wyoming Constitution in two major respects.[65] First, the common law implies that the owner of the servient estate has consented to an outlet over his lands to benefit the dominant estate. However, the court reasoned that to imply consent when easements by necessity are revived after several intervening grantors is inconsistent with the state constitution which generally requires that land cannot be taken for private use without the consent of the landowner.[66] Second, in contrast to the common law, the state constitution anticipates that compensation will be paid for the outlet.[67] The United States Supreme Court interpreted the court's opinion in *Snell* as an express rejection of easements by necessity in *Leo Sheep v. United States*.[68]

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ing in which the necessity for the road will be determined. If the private road is necessary, then the commission will appoint independent appraisers and viewers to locate the road where it will do the least damage and assess the value of the damage sustained by the owner or owners of the condemned land. WYO. STAT. § 24-9-101 (1977).

60. *Snell*, 541 P.2d at 1044.

61. *Id.* at 1046.

62. *Id.*

63. *Id.* (citing Schlattman v. Stone, 511 P.2d 959, 961 (Wyo. 1973)).

64. *Id.*

65. *Id.* (referring to WYO. CONST. art. I, § 32). The Wyoming Constitution article I, § 32 provides as follows: "[p]rivate property shall not be taken for private use unless by consent of the owner, except for private ways of necessity . . . nor in any case without due compensation." The Wyoming Constitution article I, § 33 provides as follows: "[p]rivate property shall not be taken or damaged for public or private use without compensation."

66. *Id.* (referring to WYO. CONST. art. I, § 32). An easement by necessity is revived when a grantee, who is separated from the common grantor by intervening conveyances, tries to claim that the easement exists even though it was not claimed by previous grantees to the chain of title.

67. *Id.*

68. 440 U.S. 668, 680 (1979) (Court held that the federal government did not reserve an easement by necessity when it conveyed lands to the Union Pacific Railroad, and therefore, the government could not take land for a public access road to Seminole Reservoir, Carbon County, Wyoming without compensating the current owners). The

In 1980, the Wyoming Supreme Court examined the procedural mechanisms of the statute which provided for the establishment of roads across the lands of another. In *McGuire v. McGuire*, the plaintiff applied to the county commission to establish a private road over the land of the defendant in accordance with state statute, but the plaintiff's application was denied because the purpose for which the road was to be used was never specified.[69] The plaintiff appealed to the district court which reversed the commission's finding of insufficient necessity.[70] The district court also remanded the matter to the commission with some specific orders on where the road should be located.[71]

The defendants appealed the district court's decision to the Wyoming Supreme Court.[72] The Wyoming Supreme Court affirmed the district court's reversal on the necessity issue, but held that the legislature had vested original jurisdiction over the establishment of private roads, and the associated rule-making power, in the county commissioners.[73] Accordingly, the Wyoming Supreme Court ordered the district court to vacate its order which specifically instructed the commission on where to establish the access road.[74]

In 1980, the Wyoming Supreme Court reiterated that the district court did not have jurisdiction to grant access to landlocked property across the lands of another. In *Bush v. Duff*, Duff, the common grantor, financed the sale of several parcels of his land to McVay, and secured the unpaid balance of the purchase with a mortgage.[75] Three of the parcels were unencumbered.[76] Subsequently, McVay conveyed the unencumbered parcels of land to Bush.[77] McVay defaulted, and Duff foreclosed on the encumbered property, and terminated the easement given by McVay to Bush.[78] The easement had provided access to Bush's lands across those of McVay.[79] Duff's foreclosure on McVay's lands, and subsequent termination of the easement, left Bush's property landlocked.[80] Bush filed an action to compel a way of necessity across Duff's land.[81]

United States Supreme Court's conclusion that Wyoming no longer recognized the common law easement by necessity is interesting because the *Snell* court specifically stated that pursuing access by an easement of necessity was still available in the proper circumstances. *Snell*, 541 P.2d at 1046 n.4.

69. McGuire v. McGuire, 608 P.2d 1278, 1281 (Wyo. 1980).
70. *Id.*
71. *Id.* at 1284.
72. *Id.*
73. *Id.* at 1290.
74. *Id.* at 1291.
75. 754 P.2d 159, 160 (Wyo. 1988).
76. *Id.* at 161.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 162.
81. *Id.*

The district court quieted title in Duff, but later granted an easement to Bush on the condition that he compensate Duff for the value of the easement.[82] The Wyoming Supreme Court reversed the district court's order granting Bush an easement because the district court was without jurisdiction to do so. As it had in *Snell* and *McGuire*, the court held that the legislature had reserved the jurisdiction to grant an access road across the lands of another to the county commissioners.[83] Bush would have to apply to the county commission to obtain the relief he sought, and not to the district court.

In 1991, the Wyoming Supreme Court unequivocally held that Wyoming no longer recognized common law easements by necessity.[84] In *Ferguson Ranch v. Murray*, the plaintiffs had purchased lands from a third party that had previously been owned by Ferguson Ranch.[85] To obtain access, the plaintiffs applied to the county commissioners to establish a road across the lands of a third party pursuant to state statute.[86] The county commissioners found the requisite necessity and proceeded to survey and assess the damages that establishing the road would cause.[87] When the damage assessment was returned at $33,600, the plaintiffs were dissatisfied, and commenced an action in district court to establish a common law way of necessity over lands of Ferguson Ranch.[88]

In its discussion of applicable law, the court stated that it had already rejected common law easements by necessity in *Snell*,[89] but for clarity's sake it would specifically overrule any case which might infer that an easement by necessity might still be recognized in Wyoming.[90] The court decided that the concept of an easement by necessity was incompatible with the Wyoming Constitution, and also recognized that any person with landlocked property could seek relief under an existing statute.[91] Therefore, the relief sought by the plaintiffs could not be granted because common law easements by necessity were no longer recognized.

Quasi Easements

Quasi easements are similar to easements by necessity in that they are also implied in the conveyance of property. The historical

82. *Id.*
83. *Id.* at 167 (referring to WYO. STAT. § 24-9-101 (1977)).
84. Ferguson Ranch, Inc. v. Murray, 811 P.2d 287, 290 (Wyo. 1991). The terms easement by necessity and way of necessity are used interchangeably throughout this comment.
85. *Id.* at 288.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Snell*, 541 P.2d at 1046.
90. *Ferguson Ranch*, 811 P.2d at 290.
91. *Id.* (referring to WYO. STAT. § 24-9-101 (1977)).

origins of quasi easements are the same as those of easements of necessity. Quasi easements are based upon the intent of the parties to the conveyance, and as such, are implied by law as a part of their written agreement.[92]

Wyoming considers the following four requirements essential for the establishment of a quasi easement: (1) the parcels must have been contemporaneously held under common ownership; (2) a use must have been established which subordinated one parcel to the other; (3) such use must have been obvious from a reasonable physical inspection; and (4) the use must affect the value of the parcel being benefitted by the use, and be reasonably necessary for the enjoyment thereof.[93]

The major distinctions between an easement of necessity and a quasi easement are that a quasi easement requires (1) an apparent and continuous pre-existing use; and (2) the necessity of the use must continue for a reasonable period of time thereafter.[94] An apparent use, for example, must be detectible by the grantee upon a reasonable inspection of the property. This use will usually manifest itself as a road or trail.

The necessity arises from the need to use one of the severed parcels for the use and enjoyment of the other.[95] If the grantor needs to retain a use in the conveyed parcel in order to make full and productive use of his own, it is called a reservation.[96] If the need runs from the conveyed parcel across the retained parcel, it is called a grant. The need to continue the pre-severance use of one parcel for the benefit of the other parcel must continue after severance in order for the continuing necessity requirement to be met.[97] In the example above, use of the road or trail across the burdened parcel would have to be necessary to the use and enjoyment of the benefitted parcel. When two parcels are simultaneously conveyed by a common grantor, the same principles stated above apply, but the burden and benefits run from co-grantee to co-grantee instead of between the grantor and grantee.[98]

The most recent Wyoming case involving a quasi easement is *Corbett v. Whitney*.[99] In *Corbett*, the Wyoming Supreme Court reviewed a lower court's attempt to settle a disagreement over the use

92. J. BRUCE & J. ELY, JR., *supra* note 40, ¶ 4.01[1]-[2].

93. Corbett v. Whitney, 603 P.2d 1291, 1293 (Wyo. 1979) (citing United States v. O'Connell, 496 F.2d 1329, 1333 (2d Cir. 1974)).

94. J. BRUCE & J. ELY, JR., *supra* note 40, ¶ 4.01[2].

95. G. THOMPSON, *supra* note 1, § 356.

96. 2 *Id.* § 359.

97. 2 *Id.* § 356.

98. *Id.*

99. 603 P.2d 1291 (Wyo. 1979). In *Ferguson*, the Wyoming Supreme Court concluded that *Bush v. Duff*, which was decided in 1988, involved a quasi easement. *Ferguson Ranch*, 811 P.2d at 290 n.2. However, the *Ferguson* opinion does not discuss the law of quasi easements.

and ownership of a garage at the end of a common driveway.[100] The driveway and the garage straddled the property line between two adjoining lots, and had been built when both lots were owned by the same grantor.[101] The current owners were disputing the common use. The owner of one of the parcels had built a fence through the middle of the driveway so that the other owner's tenants could not get their car back to the garage.[102] The blocked owner brought suit to establish an easement, and for a court order to require the other owner to remove the fence.[103]

The court resolved the dispute by holding that because the common grantor had constructed the driveway where he had, he intended both parcels to have the benefit of the driveway and the garage.[104] The court found that necessity existed because the rental value of the fenced-out grantee's property declined due to loss of access to the garage.[105] The court also determined that any alternative access would be inconvenient and expensive to the blocked owner. Therefore, both owners needed continuing access in order to use and enjoy their properties through the quasi easement.[106] The offending fence had to come down.

Irrevocable License, Estoppel, and Platting

A license is generally a privilege extended to one party to enter upon the lands of another.[107] The granting of a license may be express or inferred, but it is revocable at the will of the servient landowner.[108] While the creation of a license is much like an easement in many ways, it is different in one major respect. Its duration is only as long as the owner of the servient tenant permits.[109] Once withdrawn, the presence of the licensee constitutes a trespass.[110] Licenses are revocable on any showing of the grantor's intent to end it.[111] The licensee can yield his privilege at any time.[112] The license also ends upon the death of the grantor, or upon a conveyance of the servient estate.[113]

If the revocation of a license works a fraud because the licensee was previously induced to spend money in order to benefit from the license, then the license may be determined to be irrevocable. Once

100. *Corbett*, 603 P.2d at 1292.
101. *Id.* at 1292-93.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. R. POWELL, *supra* note 5, § 428.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*

irrevocable, the license is no longer a license, but is actually an easement.[114]

An easement created by estoppel is very similar to that of an irrevocable license. Generally the owner of the servient estate is estopped from denying an easement exists if he sits by while the dominant estate owner expends funds to improve the servient estate.[115] The dominant estate holder must have changed his position so that it would work a fraud upon him to allow the servient estate holder to deny the easement.[116]

The final way that an easement arises is from filing a plat. When a developer conveys lots in a subdivision by reference to a plat, each grantee receives implied easements over streets and other common areas identified on the plat.[117] The focus is on the intent of the grantor of the subdivision and his overall plan which gives effect to the designs and developments delineated on the plat.[118]

SCOPE OF THE EASEMENT

Once it has been determined that an easement exists, disputes often arise among the parties with respect to its location, dimensions, use, and maintenance.[119] The mode of creation affects the scope of the easement.[120] For example, if the easement was an express conveyance or implied from a plat, the parties and the courts may look to the writings to determine the scope of the easement. If the easement arose from prescription, quasi easements or necessity, no writing is available for reference. Prior use usually serves as the starting point for the analysis.[121] Express conveyances that do not address the scope of the easement may also have to start from this same point.

If the location and dimensions are not fixed by the writing, or if no writing exists, the parties are presumed to have an easement at a location and of a size that is reasonably necessary and convenient under the circumstances.[122] What constitutes reasonable use is also a question of intent of the parties. Reasonable use is not fixed at a particular point in time, but may vary in type or degree from the original

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114. *Id.*; *see also* Gustin v. Harting, 121 P. 522, 531 (an irrevocable license used continually for the prescriptive period ripened into a prescriptive easement).

115. G. THOMPSON, *supra* note 1, § 330.

116. *Id.*

117. J. BRUCE & J. ELY, JR., *supra* note 40, ¶ 4.05.

118. *Id.*

119. *Id.* ¶ 7.01.

120. *Id.*

121. *Id.* Even if the location of the easement were to be recorded as required by Wyoming Statute § 34-1-141, the recorded document is not required to contain any specific terms limiting the scope to the easement. *See infra* notes 158-162 and accompanying text.

122. J. BRUCE & J. ELY, JR., *supra* note 40, ¶ 7.02[1][b]. *But cf. infra* notes 159-164 and accompanying text (WYO. STAT. § 34-1-141 (1977)).

use.[123] Unless otherwise specified, reasonable use includes a consideration of changes in the surrounding area and advancements in technology.[124]

The Wyoming Supreme Court takes a flexible approach when it analyzes the extent of the use permitted by changing circumstances. In *Bard Ranch Company v. Weber*, two long-feuding neighbors were again in court.[125] Each was complaining about the use of an easement that burdened one party's estate and benefitted the other's.[126] The easement holder complained about the servient estate holder's interference with the use of the easement.[127] The servient estate holder complained that the easement was being enlarged by upgrading the road and the installation of lateral support irrigation ditches.[128]

Although the court remanded the matter to the district court for further findings of fact, it discussed changes in use.[129] The court acknowledged the longstanding principle that the owner of an easement cannot materially increase the burden of the servient estate or impose new burdens.[130] However, the court also emphasized that it did not want the opinion to restrict the use to the precise use in effect at the time the easement was created.[131] The servient and dominant owners are allowed to adjust the use of the easement as long as the change is consistent with the purpose for which the easement was created.[132]

The court liberally applied the permissible use principle to expand easement usage in *State v. Homar*.[133] In *Homar*, the state wanted to expand its use of a highway easement to allow for a mass transit bus turnout.[134] The servient estate owner filed suit to force the state to remove the turnout claiming that the turnout constituted an impermissible increase to the burden of the servient estate.[135] The plaintiff was granted summary judgment.[136]

The Wyoming Supreme Court reversed the summary judgment because it found the grant of a public road to encompass every reasonable method of travel, whether it was under, over or along the easement.[137] The operation of mass transit bus lines were only a technological advance of traditional highway use, and, therefore, the turn-

123. *Id.*
124. *Id.* ¶ 7.04[1][a].
125. 557 P.2d 722 (Wyo. 1988).
126. *Id.* at 725.
127. *Id.*
128. *Id.*
129. *Id.* at 730-32.
130. *Id.* at 731 (citing 25 AM. JUR. 2D *Easements and Licenses* § 72 (1966)).
131. *Id.*
132. *Id.*
133. 798 P.2d 824 (1990).
134. *Id.* at 825.
135. *Id.*
136. *Id.*
137. *Id.* at 826.

out was incidental to the purpose for which the easement was created.[138] To hold otherwise would unduly restrict the easement.[139]

TRENDS AND SOLUTIONS

Constitutionality

The common law of easements has implied grants from one party to another, or implied contractual intent between the parties in order to transfer rights in land. In some types of easements, such as express easements and easements implied from filing plats, the intent is clear, and the writings at least show that the parties considered the transfer of easement rights as a part of the exchange. However, for prescriptive easements, quasi easements and ways of necessity, the intent and the exchange of consideration for easement rights are less certain, and in many cases doubtful.

Article I section 32 of the Wyoming Constitution, entitled Eminent Domain, states:

> [p]rivate property shall not be taken for private use unless by consent of the owner, except for *private ways of necessity*, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic, or sanitary purposes, *nor in any case without due compensation* (emphasis added).

In examining the structure of section 32 above, the first clause prohibits the taking of private property for private use without the consent of the owner. The second clause of section 32 enumerates a number of ways in which such takings are permissible without consent. To be considered a taking, either the state, or a private person or entity to whom the state has given the power of eminent domain, must take an action that deprives a private owner of his property. Included in the list is the private way of necessity. According to the Wyoming Supreme Court, the Wyoming Constitution expressly classifies private ways of necessity as takings that require compensation to the property owner, not as grants or givings which do not require compensation.

This is the interpretation the Wyoming Supreme Court gave the Wyoming Constitution in *Ferguson Ranch*. The majority recognized that the common law way of necessity is inconsistent with the Wyo-

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138. *Id.* The court also considered overhead power and telephone lines and underground pipelines to be other modern-day manifestations of the traditional highway use that would fall within permissible uses of a highway easement. *Id.*

139. *Id.* Wyoming's easement statute, which requires that the location of an easement be sufficiently described, does not apply to scope because it only refers to the physical location of the easement. WYO. STAT. § 34-1-141(d) (1977).

ming Constitution.[140] It also determined that the Wyoming Constitution classified the taking of private property for public or private use as a taking, and as such, requires compensation to the owner.[141]

The *Ferguson* court resolved the conflict between the Wyoming Constitution and the common law by recognizing that the landlocked property owner had access to complete relief afforded by the legislature.[142] Any landlocked person may apply to the county commissioners for relief, and if the commission finds the requisite necessity, it will condemn the land of another so as to provide the necessary access.[143]

The statutory relief complies with the mandate of the Wyoming Constitution which requires that compensation be paid.[144] The statute does this by requiring independent examiners to determine the route which will cause the least possible damage to the land of the servient estate, and assess the damages.[145] The applicant must then compensate the property owner in accordance with the assessment of damages.[146]

The Wyoming Supreme Court's interpretation of the Wyoming Constitution classifies a common law way of necessity as a taking, and thus requires compensation. If the court considers the Wyoming Constitution to always require compensation to the landowner whose land is lawfully burdened, then the other implied-in-law easements should require compensation as well. With the exception of prescription, the historical origins and public policies upon which the other easements are based are almost indistinguishable from ways of necessity. Arguably, article I section 32 of the Wyoming Constitution may be interpreted as recognizing that the list of permissible takings without consent of the owner is only representative, and not all-inclusive. Additional forms of takings of private property for private use may be included in the list because of their similar nature and origin. The Wyoming Supreme Court may have already extended the list to quasi easements.

Bush v. Duff originally decided certain issues with respect to easements by necessity and access to landlocked parcels through statutory relief.[147] However, in *Ferguson Ranch*, the court clarified its holding in *Bush*. The majority distinguished *Bush* by stating that *Bush* dealt with an implied easement, not a way of necessity.[148] The terms quasi easements and implied easements are often used inter-

140. *Ferguson Ranch*, 811 P.2d at 290. (citing *Snell*, 541 P.2d at 1046).
141. *Id.* at 290 (citing WYO. CONST. art I §§ 32, 33).
142. *Ferguson Ranch*, 811 P.2d at 290.
143. WYO. STAT. § 24-9-101 (1977).
144. WYO. CONST. art. I, § 32.
145. WYO. STAT. § 24-9-101 (1977).
146. *Id.*
147. *See supra* notes 74-82 and accompanying text.
148. *Ferguson Ranch*, 811 P.2d at 290 n.2.

changeably, and a review of the facts in *Bush* show that the *Ferguson Court*'s reclassification of *Bush* as a quasi easement was correct.[149] The *Ferguson Court* dismissed any reference in *Bush* to easements by necessity as purely dicta.[150] By this clarification, the court apparently determined that implied easements come within the application of the statutory remedy. *Bush* must now be considered to have held that the statutory remedy preempted the common law relief of a quasi easement.[151]

This conclusion is logical since an essential requirement of both implied easements and ways of necessity is that at least some necessity exist. If the statutory remedy removes necessity as a requirement for an easement by necessity, it follows that the statutory remedy would have the same effect on a quasi easement. The public policy promoting the full use of land no longer demands that an easement be implied because the statutory remedy provides full relief, and thereby removes the court's motivation and its jurisdiction to imply the fictional grant.

Prescription is another means by which the courts recognize the transfer of private property for private use without compensation. The courts have avoided recognition of a constitutional right to compensation by using the implied or lost grant[152] fiction.[153] Through the use of this fiction, the conveyance is transformed into a grant, and not a taking.[154] It is easy to understand why prescriptive easements are not favored of the law. Prescription is contrary to the statute of frauds and the recording acts, and results in forfeiture by the inattentive landowner.[155]

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149. Apply the facts in *Bush* to the four requirements of quasi easements. *See supra* notes 91-93 and accompanying text. The lands that defendant had conveyed to the plaintiffs had a road that had been used by the defendant to access other parts of his land that were subsequently sold to the plaintiffs. Without the access road, the plaintiffs' land was landlocked. Therefore, the parcels had (1) been under the contemporaneous ownership of the defendant; (2) the access road established a use that subordinated one parcel to another; (3) the use was apparent as an established road; and (4) defendant's denial of the use infringed upon the plaintiffs' enjoyment of his lands.

150. *Ferguson Ranch*, 811 P.2d at 290 n.2.

151. In the case of a quasi easement where both defendant and plaintiff have reciprocal rights in the easement, such as in *Corbett* (*see supra* notes 98-105 and accompanying text), the statute could still afford complete relief. The compensation to be paid to each property owner is the right to use of his part of the easement. In other words, the compensatory amounts to be paid each other offset, leaving each the right to use the other's property for access.

152. *See supra* notes 42-48 and accompanying text.

153. Takings also require some degree of state action. Whether the enforcement by a state court of implied-in-law easements or the operation of the period of limitations constitutes state action under the Wyoming Constitution is yet to be decided and is beyond the scope of this comment. *But cf.* Texaco v. Short, 454 U.S. 516, 530-31 (1982) (operation of a statute of limitations that deprives an owner of a property right is not state action under the U.S. Constitution).

154. *See generally* J. BRUCE & J. ELY, JR., *supra* note 40, ¶ 5.01.

155. *Id.* The same logic may extend to adverse possession, but since this comment only deals with the right to use the land of another, not to possess it in fee, analysis on this point is beyond its scope.

The Wyoming Supreme Court has recognized the harshness and unfairness associated with prescription. Wyoming now presumes that use by a non-owner is permissive, and requires the trespassing claimant to rebut the presumption by clear evidence.[156] Removed from the sophistry of the courtroom, only a lawyer could conclude that open, adverse, hostile, and continuous and uninterrupted trespass could constitute anything other than a taking. A person who is unfamiliar with the law of prescription would be repulsed at the concept that a trespasser could eventually claim the land upon which he commits his wrongful acts, and that a state court would enforce his claim.

Prescription brings two public policies into direct conflict. The policy that land should be productively used conflicts with the policy that it is unfair to permit a person to claim the land of another without compensation.[157] Article I section 32 of the Wyoming Constitution favors the policy that private property shall not be taken for private use without consent of the owner, "nor in any case without compensation."[158]

The limitation that the Wyoming Constitution imposes on the state is that if private property is taken for private use, the owner must be compensated. Assuming that the Wyoming Supreme court found sufficient state action, if this constitutional limitation is applied to prescription, both of the conflicting public policies are satisfied. The adverse user can compel that the land be put to its best, or at least its prescriptive use, and the deprived owner is compensated for his loss.

If the prescriptive use is the best use, then it should be able to bear the economic cost of that use. The person claiming the prescription would be forced to assess just how necessary the land actually is to him, and that assessment should deter frivolous claims.

The Wyoming Supreme Court thought that it was clarifying the law of easements with its decision in *Ferguson Ranch*. However, the constitutional considerations used in *Ferguson Ranch* may extend beyond the facts of the case to classify other forms of easements as takings. The court may have inadvertently raised more questions than it answered by bringing constitutional considerations into a long-established area of common law. Unfortunately this leaves Wyoming landowners with less certainty about the law of easements than they have had for many years.

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156. *See supra* notes 31-35 and accompanying text.

157. *Ferguson Ranch*, 811 P.2d at 289. Prescription also involves other public policies, such as the policy that landowners must be vigilant and assert their rights in a timely fashion or lose them.

158. WYO. CONST. art. I, § 32.

Recommended Statutory Construction

In 1981, the legislature enacted a statute that may solve most of the current problems with regard to whether or not an easement exists in any given circumstance. The statute, *Easements*, is included with the recording statutes in title 34, chapter 1.[159] It is divided in to four subsections. Subsection (a) deals with easements across land that are executed and recorded after the effective date. Any such recordings that do not specifically describe the location of the easement are void.[160] Subsection (b) applies to post-effective date agreements which grant the right to locate an easement at a later date.[161] If the location of the intended easement is not specifically described, the easement is void.[162] Subsection (c) provides a one year grace period for all easements or agreements which do not specifically describe the location of an easement. If the specific description is not recorded within one year, the easement or agreement is void.[163] Subsection (d) defines a specific description as one that is sufficient to locate the easement.[164]

The statute has a number of things that are worth specific mention. The statute does not differentiate between the various types of easements. It requires that the specific location of all easements be recorded which, in turn, requires that all easements or agreements to locate easements be in writing. Finally, it makes all easements whose descriptions have not been recorded within one year of execution void.

The Wyoming Supreme Court has never interpreted the easement statute.[165] However, if the court construed the easement statute in the

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159. WYO. STAT. § 34-1-141 (1977). The statute in its entirety follows:
(a) Except as provided by subsection (c) of this section, easements across land executed and recorded after the effective date of this act which do not specifically describe the location of the easement are null and void and of no force and effect.
(b) Except as provided in subsection (c) of this section, agreements entered into after the effective date of this act which grant the right to locate an easement at a later date and which do not specifically describe the location of the easement are null and void.
(c) For purposes of this act [section] an easement or agreement which does not specifically describe the location of the easement or which grants a right to locate an easement at a later date shall be valid for a period of one (1) year from the date of execution of the easement or agreement. If the specific description is not recorded within one (1) year then the easement or agreement shall be of no further force and effect.
(d) For purposes of this act [section] the specific description required in an easement shall be sufficient to locate the easement and is not limited to a survey.
WYO. STAT. § 34-1-141 (1977).

160. *Id.*

161. Whether the right of access necessary to develop the mineral estate is an easement or is a corporeal hereditament of the mineral estate is a separate problem and is beyond the scope of this comment. *See* LA. REV. STAT. ANN. § 31:21 (West 1989) (access is a servitude of the mineral estate).

162. *Id.*

163. *Id.*

164. *Id.*

165. Interestingly, only one case in Wyoming jurisprudence references this statute, and does so only in passing. No thought or discussion to its application was made.

following manner, most of the present uncertainties of the law of easements could be resolved. First, the inherent language of the statute requires that all easements be supported by a writing. This is logical since some writing is required to have something to record. Second, the statute should apply to all agreements which convey an interest in real property, not just to express easements. The easement statute should be construed to require that any agreement which involves the conveyance of land must also include a description[166] of the location of any easements granted or reserved as a part of the transaction. Such a construction gives full effect to the words "for purposes of this act [section] an *easement or agreement*."[167] Finally, any failure to include the description of the easement within the conveyance of land, or to separately record the easement, or to correct the oversight within one year, would result in the loss of the easement. So construed, the easement statute would put a premium on draftsmanship and would reinforce the statute of frauds. It would also replace legal fictions with legislative fiat.

Applying the recommended statutory construction to the facts of *Bush* and *Ferguson Ranch* would have simplified the analyses of the court and would give certainty to this area of the law. In *Bush*, if the location of the easement from Duff to McVay and from McVay to Bush was not described in the conveyance or otherwise recorded within a year of its grant, it would have been void under the easement statute. Since no easement would have existed, Bush's only means of access would have been through the establishment of roads statute. The same analysis would have applied in *Ferguson Ranch*. The absence of a recorded easement left Murray with only one alternative. He had to apply to the county commission to locate a private road.

Such a construction of the easement statute also solves the constitutional compensation considerations. The requirement that the easement be supported by a writing specifically describing its location ensures that parties will consider the burdens to the servient estate as a part of the exchange. Therefore, consideration for any rights exchanged in a transaction are compensated. Failure to consider the

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Carney v. Board of City Comm'rs., 757 P.2d 556 (Wyo. 1988) (dispute over the course and damage assessment of a private road pursuant to WYO. STAT. § 24-9-101 (1977)).

166. While the statute requires that the physical location be described, the statute fails to define what is a sufficient description. A sampling of cases that have dealt with sufficiency of easement descriptions may be of use. Salt River Enterprises, Inc. v. Heiner, 663 P.2d 518, 512 (Wyo. 1983) (reference to existing dirt road sufficient to find that pipeline was at location described in the easement); Guerra v. Packard, 46 Cal. Rptr. 25, 40 (Cal. Ct. App. 1965) (description must be sufficient to enable the party against whom the claim is made to know exactly what part of his property is in dispute); Dickson v. Pennsylvania Power & Light Co., 423 A.2d 711, 712 (Pa. Super. Ct. 1980) (description must be sufficient to enable a surveyor to locate and identify the property); Champion v. Neason, 136 S.E.2d 718, 719 (Ga. 1964) (description sufficient if it provides a key that enables the land to be identified).

167. WYO. STAT. § 34-1-141(c) (1977) (emphasis added); *see supra* note 159 for full text of statute.

burden on the servient estate in the initial transaction will result in compensation for those rights at a later date. Eventually they will have to become the subject of some negotiation between the parties. In the alternative, those rights will be valued by the county commission.[168]

Arguably, prescriptive easements could also be included within the reach of the easement statute. Prescription implies a lost grant or agreement.[169] If the courts recognized an implied agreement between the parties, the implied agreement would also have to comply with the provisions of the easement statute since the easement statute does not differentiate between the types of easements. Prescription helps to ensure that landowners are vigilant of their rights. The landowner that allows his property to be adversely and continually used for ten years risks having the prescriptive use burden his land permanently. Strict adherence to the recommended construction of the easement statute would also require the prescriptive user to assert his rights. At the end of the statutory period, the prescriptive user would have one year under subsection (c) in which to record the location of his easement. If he fails to do so, his easement would be void. If the servient landowner must be vigilant, then it seems fair that the prescriptive claimant must be just as vigilant in asserting his rights.[170]

The recommended application of the easement statute would give much needed certainty to the tangle of present day easement law in Wyoming. If the courts would consistently apply the easement statute in this manner, the legislature could fine tune the law to achieve the desired results.[171] Since public policy is at the root of the law of easements, it makes sense that the legislature should strike the balance between the conflicting public policies of full use of land and the right to compensation.[172]

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168. WYO. STAT. § 24-9-101 (1977).

169. *See supra* notes 22-26 and accompanying text.

170. In order to allow the prescriptive user to comply with the statute, the following subsection is recommended as an addition to the easement statute: any person claiming an easement by right of prescription must (i) record his claim (lis pendens) to the property within one year of running of the period of limitations; (ii) bring suit to quiet title; and (iii) if successful in the quiet title action, record the judgment.

171. The following language inserted at the start of subsection (c) of WYO. STAT. § 34-1-141 would make the statute's application have the broad effect needed to bring certainty to easement law: All easements, whether express or implied at law, and whether such easements are conveyed separately or included at a part of the conveyance of other real property or interests in real property, or perfected by WYO. STAT. § 1-3-103, which does not specifically describe . . . (then remainder of subsection (c) in its present form). The statute should also adopt a standard of sufficiency for the physical description of the location similar to that of Georgia. *See supra* note 166.

172. Title insurance companies are already forcing the issue. Many title insurance companies only insure property transfers based on legally recorded access, not physical access. Any implied-in-law easements or other unrecorded easements are excepted from title insurance coverage. Telephone interview with Craig Lawson, First American Title Company (Casper, Wyoming, Nov. 1, 1991).

CONCLUSION

The law of easements has a long history which is deeply rooted in English and American jurisprudence. Much of the history and development of the common law of easements, except for prescription, is very similar, and even prescription is similar to the extent that it relies upon the implied grant theory. Most of the legal fictions that have evolved from the common law of easements involves circumventing the statute of frauds. The resulting problem is that without a writing, no conclusive evidence that the parties intended to provide for an easement exists. In other situations, even if the easement is provided for as a term of the agreement, if no description of the easement's location and scope are included, little has been accomplished. In the end, the courts are left to second guess the intent of the parties.

The Wyoming Supreme Court has dealt with easement issues for many years; however, its decisions have given mixed signals. In a recent case, *Ferguson Ranch*, the court rejected the common law remedy of easements by necessity in favor of the statute for establishing private roads. The court believed its holding clarified easement law. However, the court's state constitutional takings analysis, and its attempt to clarify its earlier decisions has added to the existing confusion. To what extent the court's current constitutional analysis will affect future decisions is unknown, but it has the potential to abrogate much of the common law of easements in Wyoming.

The means to solve much of the current confusion that surrounds Wyoming's easement law already exists. If Wyoming's unique[173] easement statute was construed to apply to all conveyances of real property from which easements arise, certainty would follow. An easement, like any other agreement conveying real property, would be unenforceable unless it complied with the statute of frauds. Construing the easement statute to require a writing with a description of the location and scope of the easement would put a premium on negotiations between the parties, and on clearly drafting the intent of the parties. The cost of this certainty is the loss of the deep-rooted common law of easements. However, the cost seems reasonable if it will assure Wyoming landowners of their interests in real property by creating certainty in the law.

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173. A Westlaw search in the database comprised of all fifty states' statutes, using key words from Wyoming's easement statute, failed to identify a similar statute.