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## Real Property - Wyoming's Private Road Statutes: Approaching a Dead End - Lindt v. Murray

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**REAL PROPERTY—Wyoming's Private Road Statutes: Approaching  
A Dead End? *Lindt v. Murray*, 895 P.2d 459 (Wyo. 1995).**

In 1984, Ferguson Ranch, Inc. (Ferguson) owned Sections 18 and 19 of real property situated on the Laramie/Albany County border.<sup>1</sup> On October 19, 1984, Ferguson conveyed Section 19 to a third party without an easement or right of way that provided access to Section 19.<sup>2</sup> Ferguson maintained ownership of Section 18, which is directly north of Section 19.<sup>3</sup> On March 1, 1987, the third party conveyed Section 19 to Edward F. Murray, Jr. (Murray) and William J. Edwards (Edwards).<sup>4</sup>

Due to a lack of access from their property in Section 19 to a public road, Murray and Edwards applied to the Board of County Commissioners of Laramie County (Board) for a private road.<sup>5</sup> Murray and Edwards sought a private road across the northeast corner of Section 30 (immediately south of Section 19), owned by John and Gladys Lindt, to connect a proposed subdivision in Section 19 with a public road to the south.<sup>6</sup> At this point, a conflict developed. The dispute centered on whether Murray and Edwards were without legally enforceable access under Wyoming's private road statutes.

In 1987, the Board decided that because Murray and Edwards had no outlet to, or connection with, a public road from Section 19, a private road was necessary to afford them such access.<sup>7</sup> The Board found that both Ferguson (to the north) and the Lindts (to the south) previously denied Murray and Edwards access across each's property.<sup>8</sup> It reasoned that, because a private road across the Ferguson property would entail condemning approximately one mile of private road, and that such a road

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1. *Ferguson Ranch, Inc. v. Murray*, 811 P.2d 287, 288 (Wyo. 1991). The county border splits the sections in halves from north to south, the eastern half of each section situated in Laramie County. Brief of Appellee at App. #1, *Lindt v. Murray*, 895 P.2d 459 (Wyo. 1995) (No. 94-160) [hereinafter Brief of Appellee].

2. *Ferguson Ranch, Inc.*, 811 P.2d at 288.

3. *Id.*

4. *Id.*

5. Brief of Appellee, *supra* note 1, at 2.

6. Brief of Appellant at 4, *Lindt v. Murray*, 895 P.2d 459 (Wyo. 1995) (No. 94-160) [hereinafter Brief of Appellant]. The Lindts own the northeast one-quarter of Section 30. Messrs. Cole and Kollal own the southeast one-quarter of Section 30, and verbally agreed to allow Murray and Edwards access across this property. Such access would connect to Crystal Lake Road, which is a public road in Laramie County. *Id.* at App. #7.

7. *Id.* at App. #7.

8. *Id.*

would be situated mostly in Albany County, the most convenient location for a private road would be across the Lindts' property.<sup>9</sup> Pursuant to the private road statutes, the Board ordered the requisite viewers and appraisers to assemble, locate the private road, and assess damages against Murray and Edwards.<sup>10</sup>

The viewers and appraisers located the private road across the Lindts' property and assessed damages against Murray and Edwards in the amount of \$33,600.<sup>11</sup> The Board formally ordered that the private road be established in accordance with Wyoming Statute section 24-9-101, and adopted the viewers and appraisers' damage assessment.<sup>12</sup>

Both parties appealed the Board's establishment order to the district court.<sup>13</sup> The Lindts appealed the order to question the necessity of the private road.<sup>14</sup> Murray and Edwards appealed to contest the Board's damage assessment.<sup>15</sup>

Murray and Edwards voluntarily requested that the district court dismiss their appeal due to substantial changes in their proposed use of the land, so that they might pursue alternative access to the north across Ferguson's land via an easement by necessity.<sup>16</sup> Pursuant to Murray and Edwards' request, the district court dismissed both parties' appeals, without objection from the Lindts.<sup>17</sup>

The Wyoming Supreme Court rejected Murray and Edwards' attempt to establish an easement by necessity across Ferguson's land.<sup>18</sup> As a result, the court reinstated both parties' prior appeals in the district court.<sup>19</sup>

9. *Id.* The Board estimated that a private road across the Lindts' property would involve one-half mile of private road. *Id.*

10. *Id.*

11. *Id.* at App. #6. The viewers and appraisers first calculated the market value of the property to be taken. Then, they added an assessment to compensate the Lindts for loss of privacy, inconvenience due to increased traffic and decreased capabilities, and the disturbance of livestock. *Id.*

12. *Id.* One commissioner dissented in the order, arguing that the assessed damages did not adequately compensate the Lindts. The commissioner stated that, because of increased traffic due to Murray and Edwards' proposed subdivision, the private road would interfere with the Lindts' ability to successfully operate their cattle ranch. The dissenter advocated a higher damage award. *Id.*

13. *Id.* at 5.

14. *Ferguson Ranch, Inc.*, 811 P.2d at 288.

15. *Id.*

16. *Lindt v. Murray*, 895 P.2d 459, 461-62 (Wyo. 1995). The Wyoming Supreme Court held that the only means Murray and Edwards could utilize to obtain this type of access was the private road statutes. *Ferguson Ranch, Inc.*, 811 P.2d at 289.

17. *Ferguson Ranch, Inc.*, 811 P.2d at 288.

18. *Id.* at 289. See *supra* note 16 and accompanying text.

19. *Ferguson Ranch, Inc.*, 811 P.2d at 291.

The district court affirmed the Board's original establishment of the private road across the Lindts' property, but remanded the Board's damages determination.<sup>20</sup> On remand, the Board assessed damages at \$436.00 using only the dollars-per-acre value that the viewers and appraisers utilized in their initial damage assessment.<sup>21</sup>

The Lindts appealed the Board's remanded damages determination to the district court, claiming that the damages were inadequate and procedurally defective.<sup>22</sup> The Lindts also argued that Murray and Edwards possessed a pre-existing implied easement from Ferguson.<sup>23</sup> The district court affirmed the Board's \$436.00 damage assessment, and rejected the Lindts' implied easement argument.<sup>24</sup> The Lindts appealed this decision to the Wyoming Supreme Court.

This casenote considers the status of Wyoming's private road statutes in the context of two issues presented in *Lindt v. Murray*:

- Whether, following *Lindt v. Murray*, an implied easement is relevant to the necessity of a private road under the private road statutes, and
- The proper application of the damages standard in private road actions.

It considers what the Wyoming Supreme Court meant by the term "implied easement" in *Lindt*, and what impact that meaning has on whether a private road is "necessary" under the private road statutes. This note concludes that what the court meant by "implied easement" in *Lindt* was "quasi easement," resulting in a lower standard of necessity to establish a private road.

20. *Lindt*, 895 P.2d at 462. The district court ordered the Board to assess damages using the standard found in *Coronado Oil Co. v. Grieves*, 642 P.2d 423 (Wyo. 1982), based on before and after market values of the land to be taken. The district court ordered the Board to not consider subjective factors such as inconvenience and injury to business conducted on the land in assessing damages. Brief of Appellant, *supra* note 6, at App. #5.

21. Brief of Appellant, *supra* note 6, at App. #2. The Board used the \$200.00/acre land value which the viewers and appraisers previously established. The Board determined that the road across the Lindt property was .06 of one mile long by 30 feet wide, resulting in 95,040 feet being taken. The Board reasoned that 95,040 feet is approximately 2.18 acres, and at \$200.00/acre, the total damage amounted to \$436.00. *Id.* This reduced the Board's initial assessment by approximately 98%. *Id.* at 7.

22. *Lindt*, 895 P.2d at 462.

23. *Id.* Thus, the private road was not necessary.

24. Brief of Appellant, *supra* note 6, at App. #1. The district court also assessed both parties' appeal costs against the Lindts pursuant to Wyoming law, ruling that there was no reasonable cause for the appeal. *Id.*

This casenote also considers the confusion in determining which factors may be used to calculate damages under the private road statutes. It concludes that Wyoming's Eminent Domain Act adds more certainty to determining damages in private road actions.

## BACKGROUND

### A. THE STATUTES

In 1895, the Wyoming legislature created a statutory process to allow those whose land is without an outlet or connection to a public road to establish such a connection by condemning a private road across another's land.<sup>25</sup> The private road statutes fall under the state's general power of eminent domain.

Eminent domain is the state's right and power to appropriate private property to promote the general welfare.<sup>26</sup> The scope of eminent domain extends to all cases where, by the state's authority, a corporation, the state, or a private citizen takes another's property for a particular use without the owner's consent.<sup>27</sup> According to the Wyoming Supreme Court, the policy behind the state's constitutional or statutory right to condemn access across another's land is to avoid landlocking property and rendering it useless.<sup>28</sup>

Wyoming's private road statutes allow a landowner to exercise the state's eminent domain power to condemn a private road across another's property in order to establish access between his property and a public road.<sup>29</sup> Wyoming Statute section 24-9-101 states that:

Any person whose land has no outlet to nor connection with a public road may apply to the board of county commissioners of his county for a private road leading from his premises to some convenient public road.<sup>30</sup>

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25. WYO. STAT. §§ 24-9-101 to -104 (1993) is the current version of the private road statutes.

26. *Coronado Oil Co. v. Grieves*, 603 P.2d 406, 410 (Wyo. 1979).

27. *Id.*

28. *Id.*

29. WYO. STAT. § 24-9-101 (1993). A landowner may also utilize the state's eminent domain power to condemn public access for a particular purpose using WYO. STAT. §§ 1-26-101 to -817 (1993).

30. The statute also requires the private road applicant to provide written notice of his intent to apply for the private road to the owner, resident agent or occupant of all lands over which the private road will exist. The applicant must provide such notice sixty days prior to when he submits his application to a Board. Publication may serve as notice to nonresident owners when no resident agent exists for the applicant to personally serve. WYO. STAT. § 24-9-101 (1993).

The statute provides for a hearing, at which all interested parties may be heard as to the necessity of the private road.<sup>31</sup> If the Board finds that the applicant has complied with the statutes and that the private road is necessary, the Board will appoint three disinterested freeholders and electors of the county to serve as viewers and appraisers.<sup>32</sup> The viewers and appraisers are to meet, view, and locate the private road as they deem appropriate, but in a way that does the least possible damage to the property which it crosses.<sup>33</sup> Once the viewers and appraisers locate the private road, they must assess the damages sustained by the owner of the property to be burdened by the private road.<sup>34</sup>

The Wyoming legislature intended for the private road statutes to provide a local forum with a readily available, economically affordable, and time efficient method whereby a landowner can obtain a means of access to his property.<sup>35</sup> According to the Wyoming Supreme Court, the private road statutes are conceptually rooted in easements by necessity.<sup>36</sup>

### B. Necessity

The word necessity has plagued the private road statutes and the courts with confusion and uncertainty for many years. Confusion stems from what makes a private road necessary under the private road statutes and what consideration should be given to alternative remedies, including easements by necessity and implied easements.<sup>37</sup>

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31. *Id.* For a concise discussion and explanation of proper statutory procedure, see *McGuire v. McGuire*, 608 P.2d 1278 (Wyo. 1980). Due to the property rights involved in establishing a private road, any affected landowner may appear before the commissioners to contest the establishment of the private road or the viewers and appraisers' damage assessment. *Carney v. Board of County Comm'rs of Sublette County*, 757 P.2d 556, 559 (Wyo. 1988) (citing *Gold v. Board of County Comm'rs of Teton County*, 658 P.2d 690 (Wyo. 1983)).

32. WYO. STAT. § 24-9-101 (1993).

33. *Id.* The viewers and appraisers may not locate the private road across anyone's land that is not included in the private road application. The private road may not exceed thirty feet in width. *Id.*

34. *Id.* WYO. STAT. § 24-9-102 (1993) gives the viewers and appraisers the authority to determine whether gates should be placed on the private road, and assess damages accordingly. WYO. STAT. § 24-9-103 (1993) provides that a majority of the viewers and appraisers shall report their findings and damages to the Board. If the Board is satisfied with this report and the applicant remits payment for the costs of locating the road, the Board will declare the road as private and record the road. The parties may then appeal the Board's action to the district court within thirty days. *Id.*

35. *McGuire*, 608 P.2d at 1288.

36. *Reaves v. Riley*, 782 P.2d 1136, 1137 (Wyo. 1989).

37. See Vance T. Countryman & Drew A. Perkins, *Death of the Dark Ages? The Troubled Law of Easements in Wyoming*, 27 LAND AND WATER L. REV. 151 (1992) [hereinafter Countryman].

Generally, there are three types of easements: express, prescriptive, and implied.<sup>38</sup> Easements by necessity may constitute a fourth type of easement, or a subset of implied easements, depending on which view a particular jurisdiction follows. Express easements are expressly granted from grantor to grantee. Prescriptive easements are based on the open, visible, continuous hostile use of another's property.<sup>39</sup> Implied easements cover a variety of situations involving a conveyance of land which fails to explicitly specify an easement.<sup>40</sup> The courts, then, recognize an implied easement to effectuate the presumed intent of the parties to the conveyance.<sup>41</sup>

Implied easements generally exist in two different forms. A quasi easement is implied when a grantor uses part of his land to serve another dominant part of his land, and later severs the two parcels, leaving the servient parcel without access.<sup>42</sup> An easement is also implied when land is conveyed and described with reference to a plat or map to allow access to the streets, parks, etc. that are shown on the plat or map.<sup>43</sup>

Courts and scholars vary in how they characterize easements by necessity.<sup>44</sup> Some characterize easements by necessity as an implied easement, based on the parties' intent at the time of conveyance.<sup>45</sup> Others

38. 1 ARTHUR R. GAUDIO, *THE AMERICAN LAW OF REAL PROPERTY*, § 6.02 (Arthur R. Gaudio ed., 1994) [hereinafter GAUDIO].

39. Countryman, *supra* note 37, at 155.

40. GAUDIO, *supra* note 38, § 6.02[5][b].

41. *Id.*

42. *Id.* at § 6.02[5][b][i]. The casenote author uses the term "quasi" easement for semantic and clarity purposes. Although the *Corbett* case, *infra*, refers only to an "implied" easement, the elements of the "implied" easement in *Corbett* are consistent with what scholars refer to as a "quasi" easement. *Id.* In Wyoming, a quasi easement is established by: (1) Unitary ownership of the relevant parcels of land, (2) A use must have been established in which one part or parcel of the land was subordinated to another, (3) The use must be plainly and physically apparent by reasonable inspection, and (4) The use must affect the value of the estate benefitted and must be necessary to the reasonable use of the estate. *Corbett v. Whitney*, 603 P.2d 1291, 1293 (Wyo. 1979) (citation omitted).

43. GAUDIO, *supra* note 38, § 6.02[5][b][iii].

44. One element of an easement by necessity is unity of title at some point between the dominant and servient estates. GAUDIO, *supra* note 38, § 6.02[5][b] at 6-29. Second, there must have been a severance of the parcels from the unity of title. 3 RICHARD R. POWELL, *POWELL ON REAL PROPERTY*, § 34.07 (rev. 1994) [hereinafter POWELL]. Third, reasonable or strict necessity must exist at the time of severance. *Id.* at 34-67. Reasonable necessity is satisfied if alternative accesses to the property would entail disproportionate expense or trouble. GAUDIO, *supra* note 38, § 6.02[5][b] at 6-31. Strict necessity requires that the dominant estate have no means of access other than the claimed easement. *Id.* at § 6.02[5][b]. Necessity is not mere convenience. POWELL at 34-68. The precise standards for strict and reasonable necessity vary somewhat by jurisdiction.

45. GAUDIO, *supra* note 38, § 6.02[5][b][ii]. See JAMES H. BACKMAN & DAVID A. THOMAS, *A PRACTICAL GUIDE TO DISPUTES BETWEEN ADJOINING LANDOWNERS—EASEMENTS*, § 2.02[3][b] (rev. 1992). Implied easements by necessity are based on the presumed intent of parties because parties would rarely intend to render the conveyed property useless due to a lack of access. The

characterize easements by necessity as a separate entity; a fourth type of easement based solely on public policy.<sup>46</sup> Easements by necessity, unlike quasi easements, do not require a prior apparent use.<sup>47</sup>

The Wyoming Supreme Court laid the foundation for easements by necessity in *McIlquham v. Anthony Wilkinson Live Stock Company*.<sup>48</sup> The plaintiff landowner claimed that because his livestock, located on public grazing land elsewhere, needed access to water on his land, the court should establish an easement by necessity over adjacent land to provide access from the grazing land to the plaintiff's land.<sup>49</sup> The court stated that the plaintiff could access a public highway which provided him reasonable facilities for possessing, using and enjoying his own premises.<sup>50</sup> It held that the facts did not establish a cause of action for an easement by necessity.<sup>51</sup>

In *McIlquham*, the court seemingly characterized easements by necessity as a subset of implied easements, because it elaborated that easements by necessity are based on an implied grant from the grantor to the grantee.<sup>52</sup> According to the court, access across the grantor's land to the grantee's newly acquired property is implied in the grantor's conveyance because the access is necessary for the grantee to use and enjoy his property.<sup>53</sup>

The status of easements by necessity became less certain following *Snell v. Ruppert*.<sup>54</sup> In response to an application for a private road by a subdivision lot owner whose access was cut off by other subdivision lots, the county commissioners established a private road across adjacent non-subdivision land.<sup>55</sup> The adjacent landowner contended that the private road was not necessary under the private road statutes because the private road

theory behind implied easements by necessity is that public policy favors the utilization of property. GAUDIO, *supra* note 38, § 6.02[5][b][ii].

46. 2 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 362 (rep. ed. 1980) [hereinafter THOMPSON]. According to this view, easements by necessity are separate and distinct from implied easements because, although an implied easement is based on the implied intent of the parties and necessity is a factor in determining this intent, easements by necessity are based on public policy favoring the utilization of land. *Id.*

47. *Id.* at 385. See GAUDIO, *supra* note 38, § 6.02[5][b].

48. 104 P. 20 (Wyo. 1909).

49. *Id.* at 29.

50. *Id.* at 27.

51. *Id.* Because the landowner had sufficient access to use and enjoy his property, an easement was not necessary to provide him additional access.

52. *Id.* at 63.

53. *Id.* The access is viewed as a condition of the land sale. Countryman, *supra* note 37, at 156.

54. 541 P.2d 1042 (Wyo. 1975).

55. *Id.* at 1044-45.



applicant already possessed an easement by necessity via the subdivision lots.<sup>56</sup> In addition, the adjacent landowner contended that an easement by necessity is a condition precedent to applying for a private road.<sup>57</sup>

According to the court, the common law required that a grantor convey with his property whatever is necessary for the beneficial use of the land.<sup>58</sup> This included ingress and egress over the grantor's remaining land, which is presumed to have been the intent of both parties at the time of conveyance.<sup>59</sup>

The court determined that when the parties intend to grant an easement by necessity in their conveyance, the easement is conveyed with the land.<sup>60</sup> Therefore, the grantee does not anticipate compensating the grantor for the burden imposed by the easement.<sup>61</sup> The court held that the Wyoming Constitution anticipates that burdened landowners will be compensated for access taken in the form of an easement by necessity.<sup>62</sup> It reasoned that because easements by necessity do not anticipate such compensation, the private road statutes, which do anticipate such compensation, abrogate easements by necessity.<sup>63</sup>

The court also held that the private road statutes abrogated easements by necessity because such easements are inconsistent with the Wyoming Constitution and the private road statutes.<sup>64</sup>

56. *Id.*

57. *Id.* at 1046.

58. *Id.*

59. *Id.* By this time courts shifted their focus to the contractual relationship between landowners. As a result, the theoretical focus on easements by necessity shifted from the implied grant theory to whether the parties to a land transaction intended to grant an easement by necessity over the grantor's land. The courts presume that access was a reasonable condition of the property sale and that the parties intended such in the conveyance. Countryman, *supra* note 37, at 157.

60. *Snell*, 541 P.2d at 1046.

61. *Id.*

62. *Id.*

63. *Id.* As a result, an easement by necessity is not a prerequisite to applying for a private road. The court referred to WYO. CONST. art. I, §§ 32 and 33. WYO. CONST. art. I, § 32 states that "[p]rivate property shall not be taken for private use unless by consent of the owner, except for private ways of necessity . . . without due compensation." WYO. CONST. art. I, § 33 states that "[p]rivate property shall not be taken or damaged for public or private use without just compensation." The court pointed to Arizona, Washington and Colorado, which have interpreted similar constitutional provisions to include easements by necessity. In those states, the legislature may define and establish the procedure to make the right to access available. The court stated that when a statute covers the whole subject matter, the abrogation of the common law on the same subject will be implied. *Id.* In *Leo Sheep v. United States*, 440 U.S. 668, 680 (1979), the United States Supreme Court, citing *Snell*, concluded that Wyoming no longer recognized easements by necessity.

64. *Snell*, 541 P.2d at 1046. The court determined that an easement by necessity implied that the grantor consented to an easement across his property. According to the court, when several intervening grantors separate the severance of the property from the common grantor and a subsequent grantee claiming an easement by necessity, the grantor's implied consent is contrary to the Wyoming

This seems to be a clear holding, except that footnote four of the opinion states "we do not foreclose the possibility that a common law way of necessity can be imposed in a proper case where the isolated landowner chooses that course."<sup>65</sup> This footnote is contrary to the court's opinion, which held that the private road statutes abrogated easements by necessity, and results in uncertainty as to whether an easement by necessity is a viable alternative remedy to a private road.

The Wyoming Supreme Court then issued a series of decisions in which it held that adjudicating an easement by necessity is not a prerequisite to a private road action. However, the court never held that an easement by necessity was no longer a viable alternative remedy to a private road.

In *McGuire v. McGuire*, the county commissioners ruled that a private road was not necessary under Wyoming Statute section 24-9-101 for reasons outside the scope of the private road statutes.<sup>66</sup> On appeal, the district court reversed the Board's decision and remanded with instructions to establish a private road.<sup>67</sup>

The Wyoming Supreme Court held that, after the commissioners find that the applicant has procedurally complied with the private road statutes, a private road must also be necessary under the statutes.<sup>68</sup> According to the court, to meet the requisite statutory necessity for a private road, one must only demonstrate that his land has no outlet, meaning "no legally enforceable means by which he can gain access," to a convenient public road.<sup>69</sup>

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Constitution. The court held that when the common law conflicts with Wyoming law, Wyoming law persuades the common law. *Id.*

65. *Id.* at 1046 n.4. "Easement by necessity" and "common law way of necessity" are to be used interchangeably. The *Snell* opinion actually uses "common law way of necessity" throughout, but for purposes of uniformity, the author of this casenote refers to "common law way of necessity" as "easement by necessity."

66. *McGuire v. McGuire*, 608 P.2d 1278, 1282 (Wyo. 1980). The commissioners reasoned that the private road was not necessary because the applicants had present access to their property and the adjoining landowners had not denied this access, the applicants failed to state their purpose for the road, and adjoining landowners would suffer more from the granting of a private road than refusing to grant the road. These factors are not relevant to whether a private road is necessary under the private road statutes. *Id.* The commissioners' ruling also contradicted the parties' stipulation that the private road applicant's property had no outlet to nor connection with a public road. *Id.* at 1285.

67. *Id.* at 1284. The Wyoming Supreme Court held that the district court did not have the authority to locate the private road because the legislature placed that authority in the commissioners, viewers, and appraisers. *Id.*

68. *Id.* at 1286.

69. *Id.* at 1286. The chosen route must not be the most convenient route, but simply a reasonable and convenient route. The court held that the applicant must adequately describe the private road to be taken. *Id.* The court also held that a public road under the private road statutes is one that the public generally is privileged to use. *Id.* at 1288.

If, depending on the interpretation of *Snell v. Ruppert*, an easement by necessity is a viable alternative remedy to a private road, easements by necessity could constitute legally enforceable access and render a private road unnecessary. In *McGuire v. McGuire*, the court determined that in *McIlquham*, it had implicitly found that a private road is an alternative remedy to an easement by necessity and does not abrogate easements by necessity.<sup>70</sup> The court did not address whether easements by necessity constituted legally enforceable access under the private road statutes, leaving the question unsettled.

In *Walton v. Dana*, the county commissioners denied a private road because the applicants already had an unadjudicated easement by necessity across their grantor's land.<sup>71</sup> The Wyoming Supreme Court held that the private road statutes do not require a private road applicant to overcome every obstacle, such as an easement by necessity, before petitioning for a private road.<sup>72</sup> It stated that the parties misunderstood the *Snell* footnote because the footnote recognizes that one may still choose to pursue an easement by necessity.<sup>73</sup> The court reasoned that because a landowner may choose between the two remedies, the county commissioners cannot compel a private road applicant to pursue an easement by necessity.<sup>74</sup> It held that the applicants in that case had met the requisite statutory necessity for a private road.<sup>75</sup>

In *Bush v. Duff*, the Wyoming Supreme Court opened the door to uncertainty once again.<sup>76</sup> The owner of landlocked property<sup>77</sup> sought an easement by necessity in the district court, which the district court granted and assessed damages to compensate for the easement.<sup>78</sup> The court, citing *Snell*, stated that easements by necessity do not constitute a taking under the Wyoming Constitution and are available to an owner of landlocked

70. *Id.* at 1288.

71. 609 P.2d 461, 463 (Wyo. 1980). See Warren R. Darrow, *Acquiring Access to Private Landlocked Tracts: Wyoming's Statutory Right-of-Way*, 16 LAND AND WATER L. REV. 281 (1981) [hereinafter Darrow].

72. *Walton*, 609 P.2d at 463.

73. *Id.* at 463 n.1.

74. *Id.* at 463.

75. *Id.* at 464.

76. 754 P.2d 159 (Wyo. 1988).

77. The common grantor of property in this case financed the sale of parcels of his land to another, securing the purchase balance with a mortgage. A few of these parcels were left unencumbered by the mortgage, and the buyer conveyed these to Bush and granted him an easement. The common grantor then foreclosed the mortgage, which extinguished the easement, and left Bush's land without access. *Id.* at 160-62.

78. *Id.* at 162. The Wyoming Supreme Court reversed the district court because the district court had, in effect, established a private road. The court held that establishing private roads is an action which only the county commissioners are empowered to perform. *Id.*

property.<sup>79</sup> The court reasoned that the common law presumes the parties intended to convey ingress and egress over the grantor's land to provide access to the grantee.<sup>80</sup> However, it held that the sequence of mortgage, conveyance, and mortgage foreclosure prevented the court from granting an easement by necessity in that case.<sup>81</sup>

The Wyoming Supreme Court attempted to reconcile the necessity issue once and for all in *Ferguson Ranch, Inc. v. Murray*.<sup>82</sup> The court began its reasoning by examining the two competing policies surrounding easements by necessity. First, public policy seeks to ensure that land is used productively and not wasted by being landlocked.<sup>83</sup> Second, it is inequitable to permit a landlocked landowner to claim, without compensation, an easement by necessity across the land of another when access could have been provided for at the time of conveyance.<sup>84</sup> The court concluded that the private road statutes resolve these competing policies by providing the grantee his needed access, while compensating the burdened landowner for the taking of his property.<sup>85</sup>

Recognizing that ambiguity may have existed in the *Snell* and *Walton* opinions and that it was perhaps extending its previous holdings, the court declared that the private road statutes preclude any action for an easement by necessity.<sup>86</sup> According to the court, easements by necessity force a landlocked property owner to choose an illogical, uneconomic, and unproductive road.<sup>87</sup> The court reasoned that this is nonsensical and would result in wasted space and money, as well as road development problems.<sup>88</sup>

The court then disposed of previous confusion regarding the availability of easements by necessity in the *Snell*, *Walton*, and *Bush* opinions. According to the court, the footnote in *Snell*, which stated that one may still choose to pursue an easement by necessity, merely detracted from the clear language of the opinion.<sup>89</sup> Therefore, the footnote was dicta, and the

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79. *Id.* at 163. Thus, compensation for the access was not required by the Wyoming Constitution.

80. *Id.*

81. *Id.*

82. 811 P.2d 287 (Wyo. 1991).

83. *Id.* at 289.

84. *Id.* For example, the grantee could have purchased an easement at the time of conveyance.

85. *Id.*

86. *Id.* at 289-91.

87. *Id.*

88. *Id.* at 289. The court did not elaborate further on this reasoning. Presumably, the court thought the private road statutes provided the opposite; a convenient and economic remedy.

89. *Id.*

opinion's holding was the proper view of the law.<sup>90</sup> The court also dismissed similar reasoning in *Walton* as dicta because the court, in that case, held that the facts were sufficient to establish a private road.<sup>91</sup>

The court then addressed *Bush*, the only case to hold that easements by necessity are not takings under the Wyoming Constitution. The court reasoned that it was actually referring to implied easements in the *Bush* case, not easements by necessity.<sup>92</sup> It went on to state that implied easements and easements by necessity are commonly confused, and that the distinction between the two is important.<sup>93</sup> It failed to address this issue further, leaving the question open for the court to address in *Lindt v. Murray*.<sup>94</sup>

### C. Damages

In *Coronado Oil Co. v. Grieves*, the Wyoming Supreme Court established the constitutional damages standard for determining what constitutes just compensation for property taken by condemnation under the state's eminent domain powers.<sup>95</sup> The court held that in eminent domain actions, the proper damages standard is the market value standard, or the difference between the fair market value of the entire parcel before the taking and the fair market value of the parcel after the taking.<sup>96</sup> The court reasoned that this standard is the most frequently utilized tool to achieve just compensation.<sup>97</sup>

90. *Id.*

91. *Id.*

92. *Id.* at 290 n.2.

93. *Id.* at 290 n.1-2 (citing THOMPSON, *supra* note 46, § 362).

94. Justice Thomas dissented in the opinion, arguing that the prior case law suggested no constitutional antithesis to easements by necessity. He contended that an easement by necessity is not a taking under the Wyoming Constitution because it is a doctrine of implied grant and conveyance, not eminent domain. As a result, the interest goes with the land and is implied in the conveyance, so the parties do not contemplate payment for the access. According to Justice Thomas, *Snell* only held that it was not necessary for the owner of landlocked property to pursue an easement by necessity prior to invoking the private road statutes. *Ferguson Ranch, Inc.*, 811 P.2d at 291. He criticized the majority for dismissing footnote four in *Snell* simply because it "detract[s] from the clear language used in the body of the opinion." Justice Thomas characterized the majority decision as usurping the legislative prerogative by extending prior precedents in order to eliminate an easement by necessity as an alternative remedy to a private road. *Id.* at 292.

95. *Coronado Oil Co.*, 642 P.2d 423, 433 (Wyo. 1982). The court stated that just compensation for property taken by condemnation is an equivalent in money for all property taken. *Id.* See generally I JULIUS L. SLACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN, §§ 1.1 to 2.24 (Rev. 3d. ed.) (1987) [hereinafter NICHOLS].

96. *Coronado Oil Co.*, 642 P.2d at 433. Coronado proceeded under the public eminent domain statutes, not the private road statutes.

97. *Id.*

Problems arise in determining which factors may be considered in calculating just compensation using the market value standard. Fair market value is not the value to the landowner subject to the taking personally, but is the amount of money that a willing purchaser would pay to a willing owner considering all uses for which the land is suited.<sup>98</sup> In determining fair market value, all factors that affect the fair market value may be considered.<sup>99</sup> These factors must not be too remote, imaginative, or speculative<sup>100</sup> and must be causative factors in diminishing the fair market value of the land.<sup>101</sup>

The court held that loss of business,<sup>102</sup> negligence, trespass, and fear of remote contingent injuries are not compensable elements of fair market value under the market value standard.<sup>103</sup> However, construction, operation, inspection, maintenance and the presence of the easement do affect fair market value.<sup>104</sup> Factors such as personal inconvenience, mental anguish, discomfort and annoyance are compensable if they causatively diminish the fair market value of the land.<sup>105</sup>

#### PRINCIPAL CASE

Chief Justice Golden began the court's decision in *Lindt v. Murray* by quoting the text of Wyoming Statute section 24-9-101 (1993).<sup>106</sup> He then entered a strongly worded footnote directed at the Wyoming legislature.<sup>107</sup> Footnote two in the opinion begins by stating that, despite minor amendments to the procedural and notice requirements of the private road statutes,<sup>108</sup> the "gist" of the statutes has remained the same since 1895.<sup>109</sup>

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98. *Id.* at 434. See also 4 NICHOLS, *supra* note 95, § 12.2[1].

99. *Coronado Oil Co.*, 642 P.2d at 433.

100. *Id.*

101. *Id.* at 439. Most often, the parties utilize expert testimony to establish their damage claim. In proving damages, experts should be qualified by their familiarity with the subject property, other property in the area, the state of the market, and the sale of similar property in the area to establish a sound and reasonable basis for the value. *Id.* at 436.

102. *Id.* at 435. The court reasoned that when an element of personal loss is interjected, prejudicial elements distort the actual market value. *Id.*

103. *Id.* at 438.

104. *Id.* at 433.

105. *Id.* at 439. See also 5 NICHOLS, *supra* note 95, § 18.42. See generally *Id.* §§ 12.1 to 13.34. For other applications of this standard in Wyoming, see *Miller v. Campbell County*, 854 P.2d 71, 75 (Wyo. 1993); *Energy Transportation Sys., Inc. v. Mackey*, 650 P.2d 1152 (Wyo. 1982); *State Highway Comm'n v. Scrivner*, 641 P.2d 735 (Wyo. 1982); *Continental Pipe Line Co. v. Irwin Livestock Co.*, 625 P.2d 214 (Wyo. 1981).

106. *Lindt v. Murray*, 895 P.2d 459, 462 (Wyo. 1995).

107. *Id.*

108. According to the footnote, these amendments occurred in 1901 and 1985. *Id.* at n.2.

109. *Id.*

Chief Justice Golden pointed out that, despite limited opportunities for the court to review proceedings under the statutes, landowners frequently utilize the private road procedure.<sup>110</sup>

In what appears to be a poignant directive, the Chief Justice goes on to state that “[i]t is obvious that this statute is not up to its assigned task. Legislative reassessment is imperative.”<sup>111</sup> The court bases this assessment on its review of other states’ statutes,<sup>112</sup> adding “Wyoming needs a statute capable of dealing with the complexities associated with development and progress in an essentially rural state.”<sup>113</sup>

The court began its analysis in *Lindt v. Murray* by rejecting a series of the Lindts’ arguments regarding a potential alternative remedy in the form of an implied easement.<sup>114</sup>

The Lindts first argued that a potential implied easement existed across Ferguson’s land.<sup>115</sup> Therefore, the potential implied easement negated the “necessity” for the private road across the Lindts’ property.<sup>116</sup> The court dismissed this argument, recognizing authority to the contrary.<sup>117</sup> It reasoned that since the legislature intended “convenience and reason” to govern the private road statutes, such a standard should be applied to the Lindts’ arguments.<sup>118</sup> As a result, the court held that substantial evidence supported the Board’s finding that a private road was necessary across the Lindts’ land, and that the Board had conveniently located the private road in a manner that did the least damage to the Lindts.<sup>119</sup>

In light of this holding, the court rejected the Lindts’ argument that both the Board and the district court erred by not considering the potential implied easement in their respective determinations on whether the private road was necessary.<sup>120</sup> The court held that the potential remedy of an implied easement is not relevant to the determination that a private road is necessary under the private road statutes.<sup>121</sup>

110. *Id.*

111. *Id.*

112. The opinion specifically references NEB. REV. STAT. §§ 39-1713 to -1731 (1993). *Id.*

113. *Lindt*, 895 P.2d at 462 n.2.

114. *Id.* at 462.

115. *Id.*

116. *Id.* In theory, the implied easement would constitute legally enforceable access under the private road statutes, rendering the private road unnecessary.

117. *Id.* The court did not specify what this authority was.

118. *Id.*

119. *Id.*

120. *Id.* at 462-63.

121. *Id.* The Lindts also argued that since the Board failed to consider a possible route to the Murray and Edwards property via an adjoining county, the Board had failed to ascertain facts essen-

In addition, the Lindts contested the Board's remanded damage assessment.<sup>122</sup> The court, stating that the Board failed to understand or observe the district court's instructions on damages, held that the following formula should be applied in private road actions:<sup>123</sup>

- Determine the value of the entirety of the Lindts' affected land before the private road was established;
- Determine the value of the Lindts' remaining land after the private road is in place; and
- Subtract the "after" value from the "before" value.

The court then ordered the district court to remand the damage assessment to the Board, with instructions to reassemble the previous, or a new group of viewers and appraisers, in order to re-calculate damages using the aforementioned formula.<sup>124</sup> The court affirmed all other aspects of the district court's findings, except its assessment of attorney's fees against the Lindts.<sup>125</sup>

## ANALYSIS

### A. *Necessity*

In *Lindt v. Murray*, the Wyoming Supreme Court held that implied easements are not relevant to the determination that a private road is necessary under the private road statutes.<sup>126</sup> The term "implied easement" can mean different things in the context of this holding, which ultimately affects the standard used to determine whether a private road is necessary.

The term implied easement, as it appears in *Lindt*, could mean quasi easement. If so, the holding in *Lindt* means quasi easements are no longer relevant to whether a private road is necessary. The term implied easement, as it appears in *Lindt*, could also mean easement by necessity, but using an implied theory based on the parties' intent at the time of convey-

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tial to properly exercising its authority under the private road statutes. The court dismissed this argument, ruling that the private road statutes did not require such an inquiry. The court also declined to utilize its supervisory powers over the lower tribunals in this case to force adjudication of the potential implied easement across the Ferguson Ranch property. *Id.* at 463.

122. *Id.*

123. *Id.* (citing *Coronado Oil Co. v. Grieves*, 642 P.2d 423, 433 (Wyo. 1982)).

124. *Lindt*, 895 P.2d at 463.

125. *Id.* See *supra* note 24 and accompanying text.

126. *Lindt*, 895 P.2d at 462-63.



ance.<sup>127</sup> If so, the holding in *Lindt* means easements by necessity based on an implied theory are not relevant to whether a private road is necessary. Quasi easements, then, would still be relevant to that determination.

The Wyoming Supreme Court did not elaborate on what it meant by implied easement in *Lindt v. Murray*<sup>128</sup> and collateral sources do not add much clarity to the term.<sup>129</sup> Wyoming case law is inadequate because it characterizes implied easements and easements by necessity inconsistently. Confusion stems from whether the court is using these terms to analyze how it characterizes easements by necessity (as a subset of implied ease-

127. Following *Ferguson Ranch, Inc.*, in which the court seemingly characterized easements by necessity as a separate type of easement (not an implied easement), the Lindts could have argued that Murray and Edwards possessed an easement by necessity based on an implied theory. In fact, Murray and Edwards argued that the court's description of easements by necessity in the *Snell* and *Walton* opinions constituted the classic definition of an "implied" easement. Brief of Appellee, *supra* note 1, at 11. Murray and Edwards further suggested that the court equated "implied" easements with easements by necessity in those decisions. *Id.* Thus, the holding in each case that an easement by necessity was not a prerequisite to a private road applied to, and ultimately resolved the *Lindt* case. *Id.*

128. In *Lindt v. Murray*, the court's only guidance is its reference to similar "modern" statutes in Nebraska. The Nebraska statutes are more particular in the elements required to obtain access across another's property, but do little to solve the current statutory problems in Wyoming: necessity and damages.

The relevant portions of the Nebraska statutes follow. A county board will provide a hearing to one who submits an affidavit or petition if:

- (1) He or she owns real estate within the county, (2) Such real estate is shut out from all public access (other than waterways) by being surrounded on all sides by real estate belonging to other persons or a combination of real estate and water, (3) That the shut-in landowner is unable to purchase from any surrounding landowners a right of way to a public road, or that it cannot be purchased except at an exorbitant price, and (4) the applicant is requesting public access.

NEB. REV. STAT. § 39-1713 (1993).

The applicant must also list the lowest price he can purchase a right of way for. *Id.* If the only access to a public road is via a private road, and the requirements of § 39-1713 are met, the county board will also grant a hearing. NEB. REV. STAT. § 39-1714 (1993). If the applicant complies with NEB. REV. STAT. § 19-1713 and 19-1714, the board will grant public access if:

- (1) The isolated land was not isolated at the time it was purchased by the owner, (2) the isolation of the land was not caused by the owner or by any other person with the knowledge and consent of the owner, and (3) that the access is necessary for existing utilization of the isolated land.

NEB. REV. STAT. § 39-1716 (1993).

129. The Lindts' brief does not clearly communicate their interpretation of the term. The Lindts argued that the private road statutes and easements by necessity intend to allow one to create access in the absence of any pre-existing right to other access. Brief of Appellant, *supra* note 6, at 16. Because Murray and Edwards allegedly had a pre-existing right to an implied easement created at the severance of the common grantor's property, this pre-existing right renders the private road unnecessary. *Id.* at 16-17. The Lindts attempted to distinguish easements by necessity, prescriptive easements and implied easements, but did so in confusing fashion. The Lindts' analysis of *Ferguson Ranch, Inc.* and prescriptive easements is also confusing. *Id.* at 14-15. They argued that adjudicating the implied easement first overcomes any confusion the court may have in its treatment of implied easements, prescriptive easements, or easements by necessity. *Id.* at 17. See *infra* notes 132 and 133 and accompanying text.

ments or an entirely separate type of easement), or to delineate quasi easements and easements by necessity.

For example, in the *Snell* opinion, the Wyoming Supreme Court seemed to characterize easements by necessity as implied easements based on the parties' intent at the time of conveyance.<sup>130</sup> However, in *Ferguson Ranch, Inc.*, the court stated that easements by necessity and implied easements are distinct, and easements by necessity are a separate type of easement.<sup>131</sup> The court, in *Ferguson Ranch, Inc.*, also distinguished the *Bush* case because it concerned implied easements, not easements by necessity. Implied easement in this context probably referred to a quasi easement (a type of implied easement) because the access sought in *Bush* met the elements of a quasi easement.

The most logical conclusion is that the Wyoming Supreme Court was referring to a quasi easement, rather than an easement by necessity based on an implied theory, when it used the term "implied easement" in *Lindt v. Murray*. The Lindts argued, in a brief submitted to the Board, that Murray and Edwards possessed unadjudicated access across Ferguson's land based on Ferguson's prior use of his land to access Section 19.<sup>132</sup> Similarly, in their brief to the Wyoming Supreme Court, the Lindts argued that Murray and Edwards could enforce the implied easement created by a prior common grantor (Ferguson) at the time the parcels were severed.<sup>133</sup> Since this claim is based on the grantor's prior use in accessing the dominant parcel, it more closely resembles a quasi easement, rather than an easement by necessity. Given this context, from which the Lindts argued the term implied easement, it is apparent that the court meant implied easement as quasi easement in the *Lindt* opinion.

Further, if the court had viewed implied easement as an easement by necessity using an implied theory, it would have held differently in *Lindt*. The more logical holding in that instance would be that, in *Ferguson Ranch, Inc.*, the court eliminated easements by necessity as a remedy entirely, regardless of how easements by necessity are characterized (as implied easements or a separate type of easement based on

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130. *Snell v. Ruppert*, 541 P.2d 1042, 1046 (Wyo. 1975).

131. The court cites THOMPSON, *supra* note 46, § 362. See *supra* note 46 and accompanying text.

132. Post Hearing Brief at 9,10, *Murray and Edwards v. Lindt*. This occurred while Ferguson owned both tracts.

133. Brief of Appellant, *supra* note 6, at 17-18 (referencing *Corbett* in conjunction with "implied" easement). The Lindts also stated that Ferguson's parcel was subservient to Murray and Edwards' parcel for access during the time Ferguson owned both parcels. *Id.* at 5. This buttresses the conclusion that the Lindts argued "implied" easement in the context of a "quasi" easement, based on the prior, apparent, subservient use for access.

public policy). The court, instead, based the *Lindt* decision on “convenience and reason.”<sup>134</sup> As a result, it appears that quasi easements are not relevant to whether a private road is necessary, but remain a viable alternative remedy.

The impact of this holding is important to the current status of the private road “necessity” standard. Because the court apparently meant “quasi easement” when it said “implied easement” in *Lindt*, the court’s holding, in effect, lowered the necessity required to establish a private road.<sup>135</sup> By eliminating quasi easements from the private road necessity determination, the court seems to place the standard below the court’s holding in *Ferguson Ranch, Inc.* and below what other jurisdictions consider a reasonable necessity.<sup>136</sup>

The court must draw the line somewhere, or necessity becomes circular, which could result in no access being granted to the landlocked party at all. For example, if quasi easements are relevant to whether a private road is necessary, the possible existence of a quasi easement renders a private road unnecessary. However, because necessity is also an element of quasi easements, the possibility, in the alternative, of obtaining private road renders the quasi easement unnecessary. This results in a “Catch 22.”

The court may have extended the line too far in *Lindt*.<sup>137</sup> There is little basis in Wyoming case law for the court to apply a “convenience and reason” standard in *Lindt* as a basis to eliminate quasi easements from the private road necessity determination.<sup>138</sup> There is no legal basis for the court to lower the private road necessity standard below that of *Ferguson Ranch, Inc.* either. The court gave no indication that its opinion in that case extended beyond easements by necessity.

134. *Lindt v. Murray*, 895 P.2d 459, 462 (Wyo. 1995).

135. The only remaining legally enforceable forms of access that one may consider in determining whether a private road is necessary are express, prescriptive, and implied (from a plat or map) easements. However, if one possesses an express easement granting him access, it is hard to imagine a situation in which a private road is also needed.

136. See *infra* note 137 and accompanying text for other jurisdictions’ standards of reasonable necessity. The *Lindt* standard is still above the “mere convenience” threshold, but not by much, given the few remaining easements that have not been eliminated from the necessity determination.

137. In Missouri, one must establish a strict necessity to receive a statutory right of way. JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND*, § 4.02[4] (rev. 1995). Generally, courts agree that statutory access provisions do not abrogate the common law, so property owners may still choose to pursue easements by necessity. Wyoming seems to be the exception here, following *Ferguson Ranch, Inc.* Courts also generally agree that one cannot obtain statutory access if an implied easement or easement by necessity can be established. *Id.* This seems to be the uniform standard of reasonable necessity for statutory access elsewhere.

138. The standard has never been applied to the necessity issue. It has only been used in the context of the legislature’s intent in enacting the private road statutes. See *supra* note 69.

A lower standard of necessity tips the balance in policy between the need for access and the burden to the servient landowner in favor of the need for access. By making it easier to obtain a private road, a landowner can easily burden an adjacent landowner. This increases the risk that a drastic land use change in the dominant estate may excessively burden the adjacent landowner.<sup>139</sup>

The Wyoming legislature should be the final arbiter of the necessity issue. It should legislatively establish a specific standard of necessity as a prerequisite to obtaining a private road in Wyoming. In doing so, the legislature should determine whether it desires to follow the Wyoming Supreme Court's direction in lowering the necessity for private roads, or raise the standard to that of other jurisdictions. This determination should rest on balancing the competing policies surrounding private roads and the private road statutes.

Specificity in the private road statutes would remove the burden placed on private road parties and the courts to define the necessity standard and its function within the private road statutes. As a result, a Board's decision on whether a private road is necessary will be much easier, and the statutes will be closer to fulfilling their purpose as a convenient, economic and time efficient remedy. The relatively few private road cases appealed to the Wyoming Supreme Court deal primarily with the necessity issue, and the need for further appeals on the issue could be minimized by adding more certainty legislatively to the private road statutes.

### *B. Damages*

The viewers and appraisers, county commissioners and courts often have difficulty in applying the damages standard for private road actions correctly. In *Coronado Oil Co. v. Grieves*, the Wyoming Supreme Court adopted the objective "before and after" market value standard for calculating eminent domain property damages.<sup>140</sup> In *Lindt v. Murray*, the court

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139. A subdivision or similar use is an example of such a changed use, and is a relevant concern in *Lindt* because Murray and Edwards planned to subdivide the Section 19 property. See Darrow, *supra* note 71 for relevant policy considerations. However, the lower standard of necessity encourages landowners to utilize the private road statutes, which compensate the adjacent landowner for the private road burden, compared to other forms of access which do not compensate the adjacent landowner. Perhaps this is the court's way of extending the Wyoming Constitution indirectly to other forms of access beyond easements by necessity. Because quasi easements and easements by necessity are rooted in the same concepts, the court could conceivably have eliminated quasi easements as a remedy altogether using the *Ferguson Ranch, Inc.* constitutional rationale. However, this may have extended *Ferguson Ranch, Inc.* too far.

140. 642 P.2d 423, 433 (Wyo. 1982).

adopted the same standard for private eminent domain actions under the private road statutes.<sup>141</sup>

The “before and after” market value standard is practical in theory because it only allows recovery for damages causatively affecting the market value of the land being taken. However, the standard is difficult to apply.

Confusion and uncertainty stem from what factors the respective entities may consider in calculating damages, which depends on whether the factors causatively affect the land’s market value. For example, in *Lindt v. Murray*, the viewers and appraisers included damages for loss of privacy, inconvenience due to increased traffic and decreased capabilities, and the disturbance of livestock, in addition to the value of the land itself.<sup>142</sup> The district court remanded the calculation because it violated the *Coronado Oil Co. v. Grieves* standard, so the Board re-calculated the damages using only the dollars-per-acre figure in the viewers and appraisers report.<sup>143</sup> The district court affirmed the Board’s calculation but the Wyoming Supreme Court rejected it in the *Lindt* opinion and remanded it to the Board for re-calculation.<sup>144</sup>

One source that would add more certainty to which factors the viewers and appraisers, and ultimately a Board, may consider in calculating damages in private road actions is Wyoming’s Eminent Domain Act (Act).<sup>145</sup> In *L.U. Sheep Co. v. Board of County Comm’rs of County of Hot Springs*,<sup>146</sup> the Wyoming Supreme Court interpreted the Act’s damages section and reconciled it with *Coronado Oil Co. v. Grieves*.

*L.U. Sheep Co.* involved a suit to condemn public access under the Act, and the district court instructed the jury to assess damages in accordance with *Coronado Oil Co. v. Grieves*.<sup>147</sup> The Wyoming Supreme Court

141. *Lindt v. Murray*, 895 P.2d 459, 463 (Wyo. 1995).

142. Brief of Appellant, *supra* note 6, at App. #6.

143. *Id.* at App. #5. This calculation did not consider any additional factors beyond the dollars-per-acre figure.

144. *Lindt*, 895 P.2d at 463.

145. WYO. STAT. §§ 1-26-101 to -817 (1993). *Coronado Oil Co. v. Grieves* was filed before the Eminent Domain Act’s effective date; therefore, the Act did not apply. *Coronado Oil Co. v. Grieves*, 642 P.2d 423, 433 n.4 (Wyo. 1982). Another source that helps clarify which factors are to be considered in eminent domain damage assessments is *Mettee v. Kemp*, 696 P.2d 947 (Kan. 1985), which the Wyoming Supreme Court references in *Lindt v. Murray*. In *Mettee*, a Kansas court reviewed that state’s eminent domain statute, which specified the factors that can be utilized to calculate damages. The statute allowed access, use, productivity, view, light and air, trees, destruction of use, crops, and change of grade to be considered in the damage assessment. *Mettee*, 696 P.2d at 949.

146. 790 P.2d 663 (Wyo. 1990). This was a public eminent domain action under the Eminent Domain Act. *Id.* at 665.

147. *Id.* at 669. Actions under the Act begin in the district court and don’t involve the county commissioners until a later time.

determined that the Act, contrary to *Coronado Oil Co.*, intended to compensate the landowner subject to the taking for all losses that are attributable to the taking of his land.<sup>148</sup> Thus, a landowner subject to a partial taking<sup>149</sup> under the Act may prove the value of his property rights and the market value of his property attributable to the taking.<sup>150</sup> According to the Act, the greater of these two values is used as the total compensation to such a landowner.<sup>151</sup>

The Wyoming legislature should incorporate a similar standard into the private road statutes. Uncertainty and difficulty in applying *Coronado Oil Co.* causes more appeals, which inhibits the private road process from operating as the economic, convenient, time efficient remedy the legislature intended it to be. The parties in *Lindt v. Murray*, eight years later, are still haggling over what constitutes just compensation for the half-mile private road across the Lindts' property.<sup>152</sup>

Wyoming's Eminent Domain Act provides a more certain standard for damage assessment because it separates the market value of the land to be taken and the value of the property rights to be taken. Separating the two eliminates the difficulty in deciding which factors causatively affect the lands' market value under *Coronado Oil Co.*, which lumped the two together. The Act's standard allows the viewers and appraisers to simply calculate the market value of the property to be taken, then consider which property rights are damaged by the taking, and use the greater value as the compensable damage amount.<sup>153</sup>

The Act also creates a broader, more flexible standard for the landowner subject to the taking to establish the damages attributable to the taking. More factors, like those the viewers and appraisers felt needed to be compensated for in *Lindt*, are compensable under the Act. This broad-

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148. *Id.*

149. A partial taking consists of taking less than the entire parcel of land. *Id.* at 671.

150. *Id.*

151. *Id.* The court held that any rational method of valuation may be used to establish just compensation as long as the valuation is supported by competent evidence. *Id.*

152. Currently, the parties have chosen three appraisers (one appointed by each side, these two selecting a third appraiser) to establish damages and end the case. The dispute now centers on whether the date the Board established the private road or the present time is the time of taking that the appraisers should use to calculate the Lindts' property value. The property has increased in value since the Board established the private road. Interview with John B. Rogers, Attorney for Murray and Edwards (Sep. 22, 1995). The private road statutes do not indicate what constitutes the time of taking. However, the Eminent Domain Act states that the date of valuation is the date the action was commenced. WYO. STAT. § 1-26-703 (1993).

153. *L. U. Sheep Co.*, 790 P.2d at 671. Damages still must be supported by competent evidence. *Id.* at 672.

er standard creates a healthier balance between compensation and necessity in private road actions.

By eliminating quasi easements from the determination of whether a private road is necessary in *Lindt*, the court made it easier to obtain a private road. Because the requisite statutory necessity is very low, a landowner can burden adjacent property easily. The burden may be heavy, in that the dominant estate may drastically change the use of its property to a subdivision or similar use, which would increasingly interfere with the burdened landowner's use and enjoyment of his own property. The increase in burden may not be compensable under the *Coronado Oil Co.* standard.<sup>154</sup>

As a result, one can heavily burden another's property at a low cost, without compensating for the additional damage to the burdened landowner caused by the changed use. The Act, by allowing more factors to be considered in determining the damages attributable to the taking of property, allows the landowner to prove the entire amount his property is burdened by the condemned access, and equals the balance between the burden and how easily that burden is established.

The Act's damage standard also benefits the landowner who seeks to take an adjacent landowner's property. Under *Coronado Oil Co.*, the landowner seeking to take property must compensate the landowner subject to the taking for both the value of the property taken and the damage to all property rights which causatively diminish the property's market value. The Act, by separating the two, requires the landowner seeking to take the property to remit only the greater of the two amounts.<sup>155</sup>

## CONCLUSION

Despite the Wyoming Supreme Court's negative assessment of the private road statutes, the statutes are not approaching a dead end. However, they do require some re-engineering and additional pavement. *Lindt v. Murray* demonstrated two private road problem areas: necessity and damages. The Wyoming legislature should seize upon the court's invitation in *Lindt* to reassess the private road statutes.

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154. To be compensable, the additional factors must causatively affect the market value, which limits the number of compensable factors under this standard. See *Coronado Oil Co.*, 642 P.2d at 423; Darrow, *supra* note 71, at 292 for relevant policy considerations.

155. This is balanced by the fact that the landowner subject to the taking can use more factors in the property rights damage calculation. See WYO. STAT. § 1-26-702(b)(1993); *L.U. Sheep Co.*, 790 P.2d at 671.

The legislature should evaluate the direction the Wyoming Supreme Court took in *Lindt*, which lowered the statutory necessity for a private road. This determination should seek to balance the competing policies surrounding private roads, as well as make the private road process the convenient, economic, time efficient process the legislature intended it to be.

The legislature should also evaluate the current standard for determining damages in private road actions in order to eliminate confusion and uncertainty in what factors may be considered in that determination. One possible source, which has been upheld by the Wyoming Supreme Court, is Wyoming's Eminent Domain Act. The Act, by separating property rights and market value calculations, eliminates much of the confusion. This, in turn, brings the private road process closer to functioning as a convenient, economic, time efficient remedy, and also provides a uniform damages standard for all eminent domain actions.

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