Blazer v. Wall: The Restriction of the Easement by Reservation Doctrine

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I. INTRODUCTION

The Montana Supreme Court recently decided Blazer v. Wall, an opinion that has dramatically changed the requirements of a valid property easement.1 Before Blazer, creating an easement required the certificate of survey depicting the easement to be incorporated into the deed as to give parties notice of the easement.2 Blazer greatly enhanced the standard for an adequate description by requiring a showing of the use or necessity of the easement and a specific identification of the dominant and servient tenements.3 This decision will have a tremendous impact on easement law in the future because many existing easements in Montana fail to meet these demanding new requirements.

The Montana Supreme Court’s decision in Blazer failed to follow prior case law in Montana and, instead, applied a rule cited by an Indiana appellate court. The Indiana rule provided that to create an easement, the dominant and servient tenement must be clearly identified.4 Notably, this decision impacted the specificity needed for the creation of an easement in Montana in the future.

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1. Blazer v. Wall, 183 P.3d 84 (Mont. 2008). Blazer was a split 4–3 decision. Id.
3. Blazer, 183 P.3d at 100.
This note will analyze the ramifications of the new easement require-
ments set forth in Blazer—requirements that require great specificity as to
the dominant and servient tenement. The current rule as adopted in Mon-
tana is more demanding than the rule enunciated by the Indiana Appellate
Courts. Part II provides an overview of basic easement law and the ease-
ment by reference doctrine before Blazer. Next, Part III discusses the fact-
tual and procedural background of Blazer. Part IV focuses on the holdings
of the majority and the basis of the dissent. Part V provides an analysis of
the Indiana law adopted in Blazer and the current body of case law regard-
ning this rule in Indiana. Finally, the note concludes with an examination of
the potential problems with Montana easement law as a result of this deci-
sion.

II. LEGAL BACKGROUND

A. Basic Easement Law

An easement “is a non-possessory interest in land,” meaning an eas-
ment holder may use land owned by another individual. There are two
types of easements: easements in gross and easements appurtenant. An
easement in gross is owned by a particular person and does not transfer with
the land. In contrast, an appurtenant easement “benefits a particular parcel
of land,” and the easement passes with the title of the land. An appurte-
nant easement, such as the easement at issue in Blazer, must have both a
dominant and servient tenement. The land burdened by the easement is
known as the servient tenement, while the benefitted land “to which an
easement is attached,” is known as the dominant tenement.

Under Montana law, an easement can be created in three ways: 1) by
an instrument in writing; 2) by operation of law; or 3) by prescription. The
Montana Supreme Court has “recognized the creation of easements”
through an instrument in writing “by express grant, reservation, exception,
or covenant.” An express easement can be created by using “appropriate
language in the instrument of conveyance.” An express easement can also
be created using an instrument of conveyance by referring “to a recorded
plat or certificate of survey on which the easement is adequately de-

5. Blazer, 183 P.3d at 93.
6. Id.
7. Id.
8. Id.
9. Id.
12. Id.
13. Id. at 94.
scribed.” Under Montana Code Annotated § 76–3–304, a recorded plat depicting an easement can establish such an easement. Additionally, case law expanded easement creation not only through a plat, but also a certificate of survey. Finally, an easement created through reference to a certificate of survey is an easement by reference.

B. The Law before Blazer

Prior to Blazer, the Court held an adequate description on a certificate of survey was a showing of the use or necessity of the easement that created valid easement rights. In Majers v. Shining Mountains, a purchaser of a subdivision lot had access to the private easement rights of all common areas and roadways depicted on recorded plats. In that case, the purchasers filed an action to establish and enforce Shining Mountain to construct a road and common areas as depicted on a filed plat. Because the purchasers’ sales transaction documents referenced the recorded plats depicting the roads, the Court held the plat established the easement, but did not create an obligation for Shining Mountain to create those roads. The Court stated that “selling lots with reference to a map or plat designating streets, parks, or other open areas creates an implied covenant that the streets, parks, or other open areas exist and shall be used in the manner designated.” Likewise, in Pearson v. Virginia City Ranches Assn., the Court held “an easement arises when a purchaser’s deed refers to a plat where an easement is depicted and labeled.” In that case, the subdivision owners filed a plat with a clearly depicted and labeled bridle path for the use of all homeowners, and all deeds from the sale of the lots referred to this properly recorded plat. The Court applied Majers, and ruled the bridle path was a valid easement created through the filing of the plat reference in the deed.

16. Bache, 883 P.2d at 821. In Bache, the Court held the certificate of survey “meets the definition of a ‘plat,’” as defined in the Mont. Code Ann. § 76–3–103(11) and therefore allowed a certificate of survey to establish an easement just as a plat can through Mont. Code Ann § 76–3–304. Id.
17. The Blazer majority and dissent generally reference this as the “easement-by-reference” doctrine. Blazer, 183 P.3d 84.
19. Majers, 711 P.2d at 1376.
20. Id.
21. Id.
22. Id. at 1376, 1378.
23. Id. at 1377–1378.
25. Id. at 691–692.
26. Id. at 693.
Furthermore, the Court in *Benson v. Pyfer* held that when "land is sold with reference to a properly recorded plat, the plat becomes part of (i.e., is incorporated into) the document conveying the interest in land." In *Benson*, the Court held under Montana Code Annotated § 76-3-304, an easement is created for the "purchaser's benefit with respect to improvements represented on the plat." The easement by reference doctrine clearly established that easements could be created by the depiction of a common area in a properly recorded plat. As seen in *Majers, Pearson, and Benson*, the Montana Supreme Court consistently held that reference to a properly recorded plat depicting and labeling an easement creates the easement when referenced in, and therefore incorporated into, the deed.

In addition, the Court expanded the easement by reference doctrine to allow for the creation of an easement through a recorded certificate of survey. In *Bache v. Owens*, a tract of land was divided into two parcels. Tract 2 was sold to Owens through a deed containing a metes and bounds description along with a reference stating, "Tract 2 shown on Certificate of Survey No. 1657" ("COS 1657"). COS 1657 depicted Tracts 1 and 2, along with a dotted line of 30 feet east of, and parallel to, the western boundary of Tract 2. The dotted line extended from the northern boundary of Tract 2 to the southern boundary of Tract 2. The area between the dotted line and the western boundary of Tract 2 was labeled "P[R]ivate R[oadway] E[ase ment]." In *Bache*, the plaintiffs claimed the reference in the deed to the COS depicting the easement established an easement for their use, and they asked the Court to expand the easement by reference doctrine to allow a COS to create an easement. The Court was reluctant to allow a COS to be incorporated into the deed to create an easement, but decided the COS was detailed enough to meet the requirements of a plat as used in the Code. Therefore, the Court concluded Certificate of Survey No. 1657 "identifie[d] the easement clearly and specifically" with the dotted line and a label signifying a "private roadway easement," and that it "was filed with the county clerk and recorder, as required by law." With this ruling, the

28. *Id.* at 925; *Majers*, 711 P.2d at 1377.
29. *Id.*
31. *Id.* at 819.
32. *Id.*
33. *Id.* The easement was labeled "P.R.E." which the legend stated meant Private Roadway Easement. *Id.*
34. *Bache*, 883 P.2d at 819.
35. *Id.* at 820–822.
36. *Id.* at 821.
37. *Id.* at 822.
Montana Supreme Court recognized a COS could be incorporated into a deed to establish an easement.38

Additionally, the Supreme Court ruled a map or plat can be used to “express, confirm, or amplify” a property description used on an instrument conveying title.39 In Halverson v. Turner, the deed conveying land referred to a recorded certificate of survey which depicted a roadway easement.40 By looking to the deed and COS, the Court held where the deed conveying land referenced a recorded COS, the COS was incorporated into the transfer documents and created the easement.41 However, “[i]n determining the existence of an easement by reservation in documents of conveyance, it is necessary that the grantee of the property being burdened by the servitude have knowledge of its use or its necessity.”42 Therefore, an easement can only be created through a COS by “clearly show[ing]” and “adequately describ[ing]” the roadway,43 so as to give notice to the servient tenement of the use or necessity of the easement.

Furthermore, the Court provided an important distinction for “clearly showing” and “adequately describing” an easement in a COS. In Tungsten Holdings, Inc. v. Parker, the COS showed a meandering strip of land 40 feet wide and approximately 2,700 feet long, which was identified simply as “lot 34.”44 Even though lot 34 looked very similar to a roadway, the Court held the resemblance alone was not enough to clearly show an easement.45 The Court stated “[e]asements by reservation must be created or reserved in writing,” and “Tungsten can point to no deed or plat which contains any language dedicating or identifying lot 34 as a roadway.”46 The importance of the easement being labeled a road becomes evident by looking to the Bache, Halverson, and Tungsten holdings.

III. Case Background
A. Facts of Blazer v. Wall

In Blazer, the tracts of land at issue were originally part of one large parcel owned by James McCready and Jack Davis.47 In 1979, the two men split the large parcel into seven smaller tracts, named Tract 1–Tract 7,
which were described and depicted on Certificate of Survey number 4446 ("COS 4446").\textsuperscript{48} COS 4446 depicted a dotted line originating at Whitefish Stage Road, a public road running along the northern boundary of Tract 1, and turning south along the eastern boundary of both Tract 1 and Tract 4.\textsuperscript{49} The road continued past the southern boundary of Tract 4 and turned west.\textsuperscript{50} These seven tracts underwent a series of different conveyances,\textsuperscript{51} the most important of which occurred in October of 1987.\textsuperscript{52} In this transaction, Davis conveyed Tract 1 to Robert and Connie Lockman.\textsuperscript{53} The "Davis-Lockman deed" contained a legal description of the tract and a metes and bounds description. Further, the deed stated "Subject to 30 foot road easement as shown on Certificate of Survey No. 4446, records of Flathead County, Montana."\textsuperscript{54} After a series of transfers, Blazer became the owner of the west side of Tract 4, the land which the easement touches, as well as other parcels to the south and west of the Tract 4.\textsuperscript{55} The Wahlders currently reside on Tract 1, which is owned by the Sugar Shack Land Trust of which the defendant, Wall, is the trustee.\textsuperscript{56}

Historically, Davis used this easement for agricultural and farming purposes to access Tract 4 and other parcels he owned to the south and west of Tract 4.\textsuperscript{57} The easement was later used for recreational purposes, such as motorcycle and all-terrain vehicle riding.\textsuperscript{58} The easement road is presently overgrown and farmed by Blazer on Tract 4.\textsuperscript{59} In 1999, the Wahlders placed a home by the southwest corner of Tract 1, and later added a large metal shop and two retaining walls to the west of their home.\textsuperscript{60} An encroachment survey commissioned by Blazer showed both the retaining walls, half of the shop, an electric transformer, and a propane tank were placed within the 30-foot road easement depicted in COS 4446.\textsuperscript{61}

\textbf{B. Case Procedure}

After the survey was complete, Blazer filed an action in district court "seeking a declaration that he ha[d] an express easement for ingress and

\begin{itemize}
  \item \textsuperscript{48} \textit{Id.} (see also infra nn. 192–193 and accompanying diagrams).
  \item \textsuperscript{49} \textit{Id.} at 88.
  \item \textsuperscript{50} \textit{Id.}
  \item \textsuperscript{51} \textit{Id.} at 89.
  \item \textsuperscript{52} \textit{Id.}
  \item \textsuperscript{53} \textit{Blazer}, 183 P.3d at 89.
  \item \textsuperscript{54} \textit{Id.}
  \item \textsuperscript{55} \textit{Id.}
  \item \textsuperscript{56} \textit{Id.}
  \item \textsuperscript{57} \textit{Id.}
  \item \textsuperscript{58} \textit{Id.} at 91.
  \item \textsuperscript{59} \textit{Blazer}, 183 P.3d at 89.
  \item \textsuperscript{60} \textit{Id.} at 90.
  \item \textsuperscript{61} \textit{Id.}
\end{itemize}
gress purposes along the northern and western boundaries of Tract 1."\(^{62}\) He further “requested an injunction requiring the [defendants] to remove all obstructions interfering with his use of the easement.”\(^{63}\) The defendants denied the easement existed, and raised the defenses of estoppel, waiver, statute of limitations, laches, acquiescence, and unclean hands.\(^{64}\) Also, they asserted a counterclaim of adverse possession of this land.\(^{65}\)

Blazer filed a motion for summary judgment arguing COS 4446 reserved the easement for the benefit of Tract 4 and other parcels to the south and west originally owned by Davis.\(^{66}\) The “District Court ruled that the Davis-Lockman deed and COS 4446 ‘create[d] the easement alleged by [Blazer].’”\(^{67}\) In support of this decision, the district court stated “[t]he COS was properly recorded, and it identifies the easement clearly and specifically.”\(^{68}\) However, the district court found genuine issues of material fact remained with regard to the adverse possession claim.\(^{69}\)

A non-jury trial was held on the remaining issue of adverse possession.\(^{70}\) After the district court heard testimony and the parties submitted post-trial briefs,\(^{71}\) the district court held that “Davis had intended to create an easement” and that the Davis-Lockman deed together with COS 4446, “clearly establish[ed] an easement over Tract 1 for the benefit [of] and appurtenant to Tract 4 and the other lands owned by Davis lying to the [s]outh and [w]est of Tract 4 . . . .”\(^{72}\) The adverse possession claim was denied because the statutory period had not been met.\(^{73}\) The defendants appealed the district court’s decision, alleging prior case law does not support the decision of off-survey parcels benefitting from an easement.\(^{74}\)

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62. Id.
63. Id.
64. Id.
65. Id. This decision may have come out differently had Blazer only argued for an easement across Tract 1 for the benefit of just Tract 4 and not the off-survey properties. These facts would have presented a case almost identical to Bache or Halverson, in which the easement was upheld. However, Blazer argued the off-survey property was also the dominant tenement for this easement. In no prior case had an easement been created for the benefit of parcels not depicted on the plat or certificate of survey.
66. Id. This decision may have come out differently had Blazer only argued for an easement across Tract 1 for the benefit of just Tract 4 and not the off-survey properties. These facts would have presented a case almost identical to Bache or Halverson, in which the easement was upheld. However, Blazer argued the off-survey property was also the dominant tenement for this easement. In no prior case had an easement been created for the benefit of parcels not depicted on the plat or certificate of survey.
67. Id.
68. Id.
69. Id.
70. Id.
72. Id. at 92.
73. Id.
74. Id.
IV. **Blazer v. Wall**

A. Majority

The Montana Supreme Court disagreed with the district court’s holding that COS 4446 created an express easement for both Tract 4 and the off-survey property to the southwest. The Court used the Davis-Lockman deed and COS 4446 to determine easement rights in Blazer because in easement by reference cases, the decisive transaction documents are those associated with the original land division. For a certificate of survey depiction to create an easement, the easement must be shown on the documents associated with the original division of the parcel. COS 4446 was the survey depicting the original land division by Davis and McCready and therefore was the correct document to analyze. The Davis-Lockman deed was the original deed reserving the easement rights; therefore, the Court used it to determine the easement rights at issue.

To determine the extent of the alleged express easement, the majority first analyzed the express language in the Davis-Lockman deed. The deed included a metes and bounds property description and the phrase “Subject to 30 foot road easement as shown on Certificate of Survey No. 4446.” However, according to prior Montana Supreme Court holdings, the words “subject to” alone do not create an easement. In *Wild River Adventures v. Board of Trustees*, a parcel of land was transferred through a warranty deed that stated “[s]ubject to and together with a 40 foot private road easement . . . .” The plaintiffs in *Wild River Adventures* argued this language created an easement across the defendant’s land, but the Court disagreed. It held, “[t]he words ‘subject to’ used in their ordinary sense, mean subordinate to, subservient to or limited by.” Similarly, in *Blazer*, the majority held nothing in the use of the words “subject to” in the Davis-

75. *Id.* at 107.
76. *Id.* at 98.
77. *Blazer*, 183 P.3d at 97.
78. *Id.* (citing *Ruana v. Grigonis*, 913 P.2d 1247, 1252–1253 (Mont. 1996)).
79. *Id.* at 98. Additionally, the law requires the grantor of the easement be party to the conveyance and have intended to reserve his own previously-held right to use the servient estate after he sells the divided parcel for the benefit of a third party. *Id.* at 97 (citing *Kelly*, 972 P.2d 1117, 1124 (Mont. 1998)).
80. *Id.* at 98.
81. *Id.* at 94.
82. *Id.*
83. *Blazer*, 183 P.3d at 94 (citing *Bache*, 883 P.2d at 821 (citations omitted)).
85. *Id.* at 346–347.
Lockman deed would create or reserve a property right. Therefore, the deed standing alone did not create an easement.

Because the words "subject to" were insufficient to create an easement, the majority looked to COS 4446 to determine if it could be incorporated into the deed to establish the easement. To decide if an easement was created through the reference to COS 4446, the majority developed a two-step analysis: 1) whether the Certificate of Survey was incorporated into the deed and 2) whether the description of the easement was adequate. As to the first step, the Davis-Lockman deed contained a metes and bounds description and a reference to COS 4446. The clear reference to COS 4446 on the face of the deed allowed for the incorporation of the survey into the deed and all subsequent deeds making similar references. Therefore, COS 4446 was incorporated, but before the easement could be created, Blazer also had to establish the easement was adequately described on this survey.

The Blazer majority turned to the second step of the analysis to determine whether COS 4446 had an adequate description to create the easement. Before Blazer, merely labeling an easement as a road on a COS was enough to adequately describe the easement because it gave knowledge of the use or necessity of the easement. The majority analyzed whether an easement was created for the benefit of Tract 4 or the southwest off-survey property separately but concluded the description was inadequate to create an easement for the benefit of either property.

First, in analyzing the southwest, off-survey property, it should be noted that Davis's property to the south and west of Tract 4 was not identified in the Davis-Lockman deed or on COS 4446. The majority determined "an easement appurtenant has not been 'adequately described' when the identity of the dominant tenement has been omitted and cannot be ascertained from the documents of conveyance." Since COS 4446 did not de-

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86. Blazer, 183 P.3d at 94.
87. Id. (citing Ruana, 913 P.2d at 1252–1253).
88. Id.
89. Id. at 98. The majority shifts the weight of the analysis from incorporation, as was the focus in prior cases, to specificity of the certificate of survey.
90. Id.
91. Id. at 89.
92. Blazer, 183 P.3d at 89.
93. Id. at 99 (citing Halverson, 885 P.2d at 1289; Ruana, 913 P.2d 1253). The majority states the issue of adequacy of the description in COS 4446 is the "dispositive issue" in this case. Id.
94. See Bache, 883 P.2d 817; Halverson, 885 P.2d 1285.
96. Id. at 99.
97. Id. at 100 (citing Lennertz, 79 N.E.2d at 417).
pict where the easement road ended, the majority found the easement was not adequately described. In further analyzing the adequacy of the description, the majority followed prior case law and continued to require the servient tenement know of the use or necessity of the easement. However, the majority established an additional requirement by adopting the Indiana appellate court rule requiring both the servient and dominant tenement must be ascertainable “with reasonable certainty” to create a valid easement. First, the Blazer majority found the scope of the easement cannot be defined from the depiction on COS 4446, and thus, the use and necessity are not clearly shown. Next, the dominant tenement could not be adequately described because the benefitted property was not even depicted on the COS. Because the off-survey property failed both tests for adequate description, the majority held an easement for access to off-survey property could not be clearly established by COS 4446.

Next, the majority determined a valid easement was not created for the benefit of Tract 4. Similarly to the off-survey property, the majority held COS 4446 did not clearly depict Tract 4 as the dominant tenement. The majority found COS 4446 did not clearly identify the dominant and servient tenements, leaving identification to “inference, implication, or extrinsic evidence.” The Court opined the easement depicted was ambiguous because several different interpretations of the dominant and servient tenements existed such as access to Bowdish road (a nearby public road) or access to the other Tracts depicted on COS 4446 (Tracts 2, 3, 5, 6, and 7). Tract 4 could have been a dominant or servient tenement “depending on the road’s intended use or necessity which . . . is not ascertainable with

98. Id. at 88.
100. Id. at 100 (citing Halverson, 885 P.2d at 1288; Ruana, 913 P.2d at 1251; Pearson, 993 P.2d at 692).
101. Id. (citing Lennertz, 79 N.E.2d at 417).
102. Id. at 99. Blazer argued even if the property was not shown on COS 4446, it was depicted through other deeds or could be established by testimony of historical use. Id. The use of extrinsic evidence was denied because the Court does not “recognize the creation of an easement based on unreferenced documents and post-transaction testimony as to what the parties intended.” Id. at 100. Therefore, Blazer could use nothing but COS 4446 to clearly establish the easement. Id. at 99. The majority stated “the mere fact that the grantor intended a particular property to benefit from a reserved easement is insufficient; that intent must be expressed in the written documents of conveyance.” Id. at 100. The majority held this intent “must be clearly and unmistakably communicated, and not left to inference, implication, or extrinsic evidence.” Id. at 101.
103. Id.
104. Id.
106. Id.
107. Id. at 101–102.
108. Id. at 102.
reasonable certainty from COS 4446." The Court found the description of the easement on COS 4446 was inadequate as to either parcel, so no easement was established for Blazer's use.

The Blazer holding significantly changed the standard of notice required to the servient tenement; however, had the majority simply followed previous case law in Montana, an easement would have been created by COS 4446. In Pearson, the Court determined the servient tenement must have knowledge of the use or necessity of an easement to be created. This knowledge was sufficient if the servient tenement was put on "inquiry notice." The plat in Pearson merely showed a labeled bridle path easement. The Court held the depiction of the easement was enough to give notice to the servient estate holders. If the majority in Blazer would have used the prior standard, the Court would have held the road easement pictured on COS 4446 clearly showed the use or necessity of the road. COS 4446 showed the easement, labeled as a 30 foot easement road, which began at Whitefish Stage Road continuing across Tract 1, which gave access to Tract 4. Prior to Blazer, the Court held a label on the road was enough to show the use or necessity and therefore was an adequate description. Now, the new, strict Blazer standard demands a showing of both the use or necessity of the easement and the dominant and servient tenements.

In Blazer, the majority attempted to distinguish Bache, Halverson, and Pearson from the newly adopted rule. The Blazer majority stated, "we have never recognized an easement created to benefit a dominant tenement that was not ascertainable from the referenced plat or certificate of survey." When distinguishing Bache and Halverson from Blazer, the majority emphasized the importance of a property owner's access to a public road through the easement. According to the Blazer majority's reliance on Bache, "It was clear from this depiction and labeling that the easement burdened Tract 2 for the benefit of Tract 1 to provide access from Tract 1 to the state route." Similarly, the Blazer majority's analysis of Halverson

109. Id.
110. Id. at 105-106.
111. Pearson, 993 P.2d at 692.
112. Id.
113. Id. at 691.
114. Id. at 692.
115. Blazer, 183 P.3d at 89.
116. Blazer, 183 P.3d at 100 (citing Lennertz, 79 N.E.2d at 417).
117. Id. at 100-101.
118. Id. at 100.
119. Id. at 100-101. The importance of the easements access to a public road was not analyzed in either Bache or Halverson.
120. Id. at 101.
looked to the adequate depiction of the easement by noting the dominant estate was landlocked if not for the easement, making a determination of the dominant tenement ascertainable.\footnote{Id.} The \textit{Blazer} majority also noted in examining \textit{Pearson} that the "clearly depicted and labeled" bridle path was for the use of all lot owners and showed the dominant tenement.\footnote{Id.}

In \textit{Blazer}, the easement road was the only road giving access to Tract 4 from Whitefish Stage Road.\footnote{Id. at 88-90.} If this inference was enough to establish the dominant and servient tenements in \textit{Bache} and \textit{Halverson}, it should likewise be enough to show Tract 4 is benefited by the road crossing Tract 1 to Whitefish Stage Road. However, it is clear from the strict holding in \textit{Blazer} and the denial of the easement that inferences cannot be drawn from COS 4446. The majority does not clearly define for future cases the "reasonable certainty" standard necessary to establish the dominant and servient estates. However, the Court is unlikely to hold that inferences drawn from the certificate of survey will be enough. The majority's dicta suggested any ambiguity could be clarified by inferences on the certificate of survey\footnote{Blazer at 100-101.}; however, the majority clearly stated that the intent to reserve an easement for the benefit of a dominant tenement must be "clearly and unmistakably communicated" and not left to inference or implication.\footnote{Id. at 101.}

\section*{B. Dissent}

The dissent wrote that the majority "misstate[d] our previous easement-by-reference decisions, and confound[ed] this already complicated body of law."\footnote{Id. at 108 (Morris, Leaphart, & Warner, JJ., dissenting).} Contrary to the majority's opinion, the dissent argued an easement was created across Tract 1 for the benefit of Tract 4,\footnote{Id. at 109 (Morris, Leaphart, & Warner, JJ., dissenting).} but agreed with the majority that COS 4446 could not create an easement for the benefit of the off-survey parcels.\footnote{Blazer, 183 P.3d at 108 (Morris, Leaphart, & Warner, JJ., dissenting).} The dissent pointed out the "Court previously has required little more than a simple labeled depiction of an easement on a survey or plat to create a valid easement."\footnote{Id. at 109.} COS 4446 clearly showed and labeled a roadway easement passing through Tract 1,\footnote{Id. at 88 (majority).} and because of the location of the easement the dissent states owners of Tract 1 would have had notice of the easement's use or necessity.\footnote{Id. at 109 (Morris, Leaphart, & Warner, JJ., dissenting).}
Furthermore, the dissent conceded "subject to" alone could not create an easement, but argued the words read in conjunction with COS 4446 could establish an easement for the benefit of Tract 4.\textsuperscript{132} The dissent asserted that "Wild River deems 'subject to' to be words of 'qualification,'" therefore, the language in the Davis-Lockman Deed could clarify any ambiguity on the COS.\textsuperscript{133} The dissent argued that "subject to" can differ in its meaning, depending on the circumstances surrounding the parties’ agreement. In support of this argument it cited a section of American Jurisprudence Deeds that said "subject to" can clarify the easement depiction.\textsuperscript{134} Therefore, the dissent concluded the "subject to” language could be used to clarify the intent of the parties when looking at COS 4446.\textsuperscript{135} The "'subject to' language in the Davis-Lockman deed, stating that Tract 1 is subject to the easement depicted on COS 4446, clarifies and qualifies what otherwise would be an ambiguous depiction."\textsuperscript{136} Tract 1 being subject to an easement means Tract 1 is the servient estate and Tract 4 is the dominant estate.\textsuperscript{137} According to the dissent, COS 4446 clearly depicted a roadway easement and the “subject to” language in the Davis-Lockman deed cleared up any ambiguity regarding the dominant and servient tenement.\textsuperscript{138} Therefore, the incorporation of COS 4446 into the deed created an easement for the benefit of Tract 4 but not any off-survey properties.\textsuperscript{139}

The majority and dissent in Blazer disagreed whether an easement was created for the benefit of Tract 4, but neither group relied solely on the existing case law in Montana. The dissent relied upon the second edition of American Jurisprudence Deeds to use “subject to” to clarify the dominant and servient tenements, a rule never before adopted by the Montana Supreme Court. Furthermore, the majority relied upon language from a 1948 Indiana appellate court decision, Lennertz v. Yohn, to deny COS 4446 created any easement rights. The majority merely cited the language from Lennertz, without fully analyzing the current state of this law in Indiana. In doing so, the majority created a more demanding rule than even the existing law in Indiana.

\textsuperscript{132} Blazer, 183 P.3d at 110-111.
\textsuperscript{133} Id. at 111.
\textsuperscript{134} Id. at 110 (citing 23 Am. Jur. 2d Deeds § 246 (2002)). Wild River determined “subject to” language standing alone does not create a deed. Id. at 94. This case relied upon 23 Am. Jur. Deeds § 293 (1983) for common usage of “subject to.” Id. at 185 (citing Wild River, 812 P.2d at 346–347). The dissent uses the newer edition to define “subject to.” Id. at 110 (Morris, Leaphart, & Warner, JJ., dissenting) (citing 23 Am. Jur. 2d Deeds § 246).
\textsuperscript{135} Id. at 110–111 (Morris, Leaphart, & Warner, JJ., dissenting). Blazer never argued “subject to” alone created the easement. Id.
\textsuperscript{136} Id. at 110.
\textsuperscript{137} Blazer, 183 P.3d at 110-111.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 108, 111.
V. **Lennertz v. Yohn: Indiana’s Easement Doctrine**

The strict test requiring an “adequate description” of both the dominant and servient tenement of an easement, as adopted in *Blazer*, came from an Indiana court of appeals case, *Lennertz*. Several problems arise from the Montana Supreme Court adopting language from this case. The Montana Supreme Court did not need to look to Indiana for case law because Montana’s existing body of law provided an answer to the issue. Also, the Montana Supreme Court’s interpretation of *Lennertz* was incorrectly applied for three reasons. First, *Lennertz* is distinguishable from *Blazer*. Second, the doctrine as stated in *Lennertz* does not accurately portray Indiana law. Third, the rule in *Lennertz*, though not overruled in Indiana, is not as rigid as the Montana Supreme Court construed it.

In *Lennertz*, two neighboring landowners, Carlson and Rumbaugh, signed and properly recorded an agreement stating, “We hereby enter into an agreement between Blanche Carlson and Lawrence and Dorothy Rumbaugh the right to use the present drive between properties of same for driveway purposes for ninety-nine years for sum of $10.00 and further agree to help maintain upkeep of driveway.” Thereafter, the Rumbaughers sold their property to Yohn; the deed contained no restrictions or reservations. The Carlsons executed a warranty deed selling their land to Lennertz; this deed also did not contain any restrictions or reservations. Yohn used and maintained this driveway until he eventually erected a fence blocking the passageway. The *Lennertz* court stated the issue as whether the agreement was “sufficient to create an interest easement or a covenant which runs with the land . . . .” To determine whether the easement was appurtenant, the court stated, “The instrument by which an easement by express grant is created should describe with reasonable certainty the easement created and the dominant and servient tenements.” This language

141. *Id.* at 415.
142. *Id.*
143. *Id.* at 416.
144. *Id.*
146. *Id.* This is the exact quotation the *Blazer* majority adopted in its analysis. See *Blazer*, 183 P.3d at 100.
was first adopted in Indiana by *Ross v. Valentine*,\(^{147}\) but originally comes from *Corpus Juris Secundum on Easements*.\(^{148}\)

The *Lennertz* court held that an easement in gross was created through the written agreement;\(^{149}\) therefore, the easement rights did not pass with the land to Lennertz or Yohn.\(^{150}\) The agreement was insufficient to establish an easement appurtenant because it did not describe "with reasonable certainty" the dominant and servient tenements.\(^{151}\) The agreement included no description of where the land or easement was located, contained no plat, and did not say whether it created the easement for the benefit of a specified person or land.\(^{152}\) Thereafter, when the land was conveyed to other parties, no reservations or restrictions were in the deed, showing no intent to pass an easement to new landowners.\(^{153}\) The *Lennertz* court held, "any rights created by the agreement . . . were personal in character and \[sic\] in the absence of a reservation, condition, or restriction in a deed . . . the appellees acquired no rights thereunder when they purchased their property, and said agreement . . . did not create a covenant or easement which \[sic\] runs with the land . . . ."\(^{154}\)

The written document in *Lennertz* simply stated an easement for right-of-way was created, but it did not provide any other information. The *Lennertz* court determined an easement to be in gross unless a clear showing of appurtenance to the land to be burdened had been established; "A reservation of an easement is not operative in favor of land not described in the conveyance."\(^{155}\) The court in *Lennertz* failed to find reference to any parcel of land in the conveyance of the easement; therefore, it assumed the easement was meant to benefit a person.\(^{156}\) The easement was for the use of the

\(^{147}\) *Ross v. Valentine*, 63 N.E.2d 691, 695 (Ind. App. 1945). The rule that an easement should describe with reasonable certainty the dominant and servient tenements was used by the Indiana Court of Appeals to determine whether or not an easement was meant to be appurtenant or in gross. *Id.* The court held the deed stating "[t]he grantors reserving the right of 14 feet on the west side of the above described real estate for a roadway and also hereby giving and granting to the grantees herein a roadway for ingress and egress of 14 feet on the west side of 6.91 acres immediately north of the aforesaid 5 acres hereby conveyed and also hereby giving and granting to the grantees herein a roadway for ingress and egress [sic] of 14 feet on the west side of the 3 acres immediately south of the aforesaid 5 acres hereby conveyed." *Id.* at 692. This language was sufficient to show the parties had intended an easement appurtenant to run with the land. *Id.* at 695.

\(^{148}\) *Id.* at 695.

\(^{149}\) *Lennertz*, 79 N.E.2d at 417.

\(^{150}\) *Id.* at 417.

\(^{151}\) *Id.*

\(^{152}\) *Id.*

\(^{153}\) *Id.*

\(^{154}\) *Id.*

\(^{155}\) *Lennertz*, 79 N.E.2d at 417 (citing 28 C.J.S. *Easements* § 29 (1948), at 686). This rule is stated immediately after the rule establishing a showing of the dominant and servient tenements. *Id.*

\(^{156}\) *Id.*
Carlsons and Rumbaugh's and was an easement in gross. The court's determination weighed heavily on the fact that no mention was made of land to be benefitted by the easement, it only made reference to certain people. Therefore, the court ruled the easement must have been meant to be in gross.

The distinction between Lennertz and Blazer is tremendous. First of all, Lennertz regarded a written agreement between two landowners reserving an easement and not a reference in a certificate of survey. The Lennertz agreement was not made during the split of a larger parcel of land into smaller tracts, as in Blazer, but was merely an agreement between two adjacent landowners. Next, the written agreement in Lennertz contained no land description or easement location; it merely used the word "easement." In Blazer, the location of the land and the location of the easement were not at issue; the plat clearly showed the location of both. These distinctions are important because an Indiana court would most likely not apply the Lennertz rule to the Blazer facts, if faced with such a situation.

Perhaps more importantly, the court in Lennertz and Blazer addressed different issues. In Blazer, the issue focused on the adequacy of the description of the easement in the COS; while in Lennertz, the issue turned on whether the easement was appurtenant or in gross. As stated by the court throughout Lennertz, the written agreement lacked an adequate description of the land or the easement. The purpose of the rule requiring identification of the tenements used in Lennertz was to determine the nature of the easement, not the adequacy of the description of an easement. Because of these distinctions, the rule from Lennertz should not have been applied in Blazer.

Furthermore, Indiana case law shows the rule set forth in Lennertz is not as demanding as the rule adopted by the Montana Supreme Court. The Lennertz rule in Indiana is used to determine whether an easement is appurtenant or in gross. Chase v. Nelson, a later Indiana court of appeals decision, clarified the Lennertz rule of dominant and servient tenements. In Chase, as in Lennertz, the parties tried to determine if an easement was appurtenant. The warranty deed stated, "[t]he grantors [Ledbetters] to furnish 3 feet and 5 inches off the east side of their lot 67 and the grantee [Alspaugh] to furnish 3 feet and 5 inches off the west side of her lot, . . . for the use of said driveway . . . ." From this language, the Chase court found "the dominant tenement was the Alspaugh (now Nelson) tract while

157. Id.
158. Id.
159. Id.
161. Id.
the servient tenement was the Ledbetter (now Chase) tract."\textsuperscript{162} The \textit{Chase} court stated "[i]n construing an alleged creation of an easement through grant or reservation, no particular words are necessary; any words [that] clearly show the intention to give an easement are sufficient."\textsuperscript{163} Though the language used in the warranty deed to establish the easement was not "artfully drafted," it was sufficient to identify the dominant and servient estate holders.\textsuperscript{164} The Court recognized a lack of necessity for an unequivocally clear showing of the dominant and servient tenements, and any language that showed intent to "give an easement" was sufficient to create such an easement appurtenant to run with the land.\textsuperscript{165}

In \textit{Oakes v. Hattabaugh}, the Indiana court of appeals was faced with another easement dispute because the "deeds failed to name any dominant tenement or specify that the easement was created in favor of any particular landowner."\textsuperscript{166} Big Ten owned land adjacent to two lots owned by Oakes and Kents that had a driveway easement that both parties used, but Big Ten’s deed did not contain any easement provisions concerning the adjacent property.\textsuperscript{167} The Indiana court of appeals used the \textit{Lennertz} rule to determine the existence of an appurtenant easement with the showing of the dominant and servient tenements.\textsuperscript{168} The court stated "the deeds identified the easement’s precise location on the Oakes’ property. However, the deeds failed to name any dominant tenement or specify that the easement was created in favor of any particular parcel."\textsuperscript{169} The court stated that when an easement is located on certain property, it will "inherently" identify this property as the servient tenement.\textsuperscript{170} Therefore, the court held the Oakes owned the servient tenement, as they owned the land on which the easement was located.\textsuperscript{171} However, no easement could be created for the benefit of Big Ten because Big Ten had never been mentioned in any deeds and could not be identified as the dominant tenement.\textsuperscript{172} In a footnote, the court was uncertain whether the Kent’s property was sufficiently shown as the dominant tenement to the easement, but the court was not asked to answer such a

\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id.} at 642–643 (citing 11 I.L.E. \textit{Easements} § 14 (1958); 25 Am. Jur. 2d \textit{Easements and Licenses} § 20 (1966)).
\textsuperscript{164} \textit{Id.} at 642.
\textsuperscript{165} \textit{Id.} at 642–643.
\textsuperscript{167} \textit{Id.} at 950.
\textsuperscript{168} \textit{Id.} at 951.
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Id.} at 952.
\textsuperscript{171} \textit{Id.} at 952.
\textsuperscript{172} \textit{Oakes}, 631 N.E.2d at 952.
question. This footnote left the question of the adequacy of the identity of a dominant tenement open.

Another Indiana case, *Tanton v. Grochow*, clarified the adequacy needed to show the dominant tenement, a question still remaining after *Oakes*. In *Tanton*, the Tantons's and Grochows's predecessors in title executed a "Joint Driveway Agreement and Consent to Encroach," which created a joint easement straddling their property lines to be used for ingress and egress over their respective properties. The Tantons claim the easement was unenforceable because the deed failed to "expressly identify the dominant and servient estates." The court, citing *Chase*, stated the documents do not need to expressly identify estates, but an adequate description of the dominant and servient tenements will be sufficient. The court looked to the agreement and an incorporated survey, which showed the "location of the joint driveway on the parties' respective properties." The location of the easement allowed the court to determine the part of the easement located on the Tantons' land was servient for the benefit of the dominant tenement, the Grochows, and the land owned by the Grochows was servient for the benefit of the dominant tenement, the Tantons.

In *Larry Mayes Sales, Inc. v. HSI, LLC*, the Indiana court of appeals showed how little was needed to provide an adequate description of the dominant and servient tenements. The deed containing the language, "[t]he conveyance is further subject to, and grantor further reserves and retains, for the use and benefit of Grantor (including the property owned by Grantor adjacent to the real estate herein conveyed) . . . a perpetual easement for access, ingress and egress . . . ." Again, the court faced the issue of determining whether the easement ran with the land or was appurtenant. If an easement could be "fairly construed to be appurtenant to the land, it will not be presumed to be in gross." The court ruled the dominant and servient tenements must be adequately described but do not have to contain the actual words "dominant" or "servient." Because the deed contained a location of the easement on the defendant's property, "it inherently identifie[d] the [defendant's] property as the servient tenement."

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173. *Id.* at 952 n. 3.
175. *Id.* at 1013.
176. *Id.* (citing *Chase*, 507 N.E.2d at 642).
177. *Id.*
178. *Id.*
180. *Id.* at 971 (Ind. App. 2001) (emphasis added).
181. *Id.* at 972.
182. *Id.* at 973.
183. *Id.* (citing *Tanton*, 707 N.E.2d at 1013).
184. *Id.*
Furthermore, the court determined the dominant estate was also adequately described because the language in the deed stated the easement was "for the use and benefit of [the] Grantor," therefore, a valid easement right was created.\textsuperscript{185} The court realized a property description would be better than the mere mention of "adjacent property," but a property description was enough to be an adequate description of the dominant tenement to allow for the creation of an appurtenant easement.\textsuperscript{186}

Finally, in \textit{Kopetsky v. Crews}, the Indiana court of appeals determined the physical layout of the easement provided a means to adequately show both the dominant and servient tenements.\textsuperscript{187} In \textit{Kopetsky}, the easement at issue started at a public road and continued over Tracts A, B, and C to the Kopetsky's land.\textsuperscript{188} Tracts A, B, and C were conveyed through a deed containing the language, "Tracts A, B, and C are subject to the following described Access Easement, which the Grantors herein reserve [land description of easement omitted]."\textsuperscript{189} The court stated while Indiana law "prefers" the deed contain the identity of both tenements, "if we can identify the dominant tenement with reasonable certainty \textit{based upon} the language of the deed, we are not required to find a direct description of that tenement in the conveyance."\textsuperscript{190} The deed must only provide "a means by which the dominant tenement could be identified."\textsuperscript{191} The court determined the deed stating the land is subject to the access easement as reserved by the grantors was enough to identify the dominant estate. It said, "The dominant tenement must be land to which \textit{access is gained} via the easement and that such access \textit{benefits the grantors} reserving such access."\textsuperscript{192}

Furthermore, the Montana Supreme Court erred because in Montana there was no need to apply the Indiana rule because existing Montana case law provided the answer to the issue in \textit{Blazer}, and the Indiana law was incorrectly applied. The Montana Supreme Court adopted the \textit{Lennertz} rule requirement without analyzing the scope of the rule, making the requirements for an adequate description in a COS unworkable in the future. The Montana Supreme Court seems to have adopted language from \textit{Lennertz} without determining the interpretation of the law in Indiana. The \textit{Lennertz} rule in Indiana is primarily used to determine whether an easement is appurtenant or in gross, not to determine adequacy of description.\textsuperscript{193}

\textsuperscript{185} \textit{Id.} at 973.
\textsuperscript{186} \textit{Larry Mayes Sales}, 744 N.E.2d. at 973–974.
\textsuperscript{188} \textit{Id.} at 1120–1121.
\textsuperscript{189} \textit{Id.} at 1120–1122.
\textsuperscript{190} \textit{Id.} at 1125–1126 (emphasis in original).
\textsuperscript{191} \textit{Id.} at 1126.
\textsuperscript{192} \textit{Id.} (emphasis in original).
\textsuperscript{193} \textit{Lennertz}, 79 N.E.2d at 417.
Moreover, if the Montana Supreme Court applied the current Indiana interpretation of the Lennertz rule, Blazer's easement most likely would have been upheld. Under current Indiana law, the servient tenement can be inferred by looking to the location of the easement. Also, when the physical location of two parcels "leads to only one reasonable conclusion as to the identity of the dominant tenement, it is appropriate to consider that physical layout in construing a grantor's express reservation of an access easement." In Blazer, it is quite clear from the location of the easement across Tract 1, that it was the servient tenement, and the reasonable conclusion to be found by looking at COS 4446 is that Tract 4 is the dominant tenement. So, even though the Montana Supreme Court adopted the language from the Indiana court of appeals, which eventually led to the denial of an easement, the easement would most likely be upheld in the same Indiana court of appeals. The Montana Supreme Court adopted the Indiana rule, but by applying it out of context, it made the rule much more demanding than it is in other Indiana appellate court opinions.

VI. Conclusion

The newly adopted standard in Blazer greatly changed the requirements for an adequate description of an easement in a certificate of survey. While prior case law accepted as little as a labeled picture of a road, now an easement holder must show great specificity of the use and necessity of the easement, as well as the dominant and servient tenement on both the certificate of survey and the deed. This development makes the doctrine of easement by reference almost unworkable in the future, and many easements already established in an existing certificate of survey may be invalid.

The Montana Supreme Court chose not to follow prior case law in Montana when deciding Blazer. Instead, it adopted language from Lennertz but applied it in an inappropriate context. The holding in Blazer significantly restricts the use of the easement by reference doctrine. If the Montana Supreme Court had followed prior Montana case law or even the current law in Indiana, the likely holding in Blazer would be that the easement was valid because Tract 4 was benefitted by the easement burdening Tract 1.

194. See generally Lennertz, 79 N.E.2d 414; Kopetsky, 838 N.E.2d 1118; Larry Mayes Sales, 744 N.E.2d 970.
Tetrauk Road

TRACT 1

TRACT 4

TRACT 2

TRACT 3

TRACT 5

TRACT 6

TRACT 7

196. *Blazer*, 183 P.3d at 88–89 (depiction of COS 4446, not to scale).
197. *Id.* at 89–90 (depiction of Tracts 1 and 4, along with Blazer's southwest property).