CASE NOTE

PROPERTY LAW—Once a Road, Always a Road?: How the Wyoming Supreme Court is Leaving Rural Landowners in Limbo; *King v. Board of County Commissioners of Fremont,* 244 P.3d 473 (Wyo. 2010)

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INTRODUCTION

The Wyoming Supreme Court's holding in *King v. Board of County Commissioners of Fremont* dealt a significant blow to rural landowners seeking certainty in their land title.[1] Over eighty years after the Fremont County Board of County Commissioners (Commission) improperly established "Bunker Road," Edward and Janice King purchased property without actual or constructive notice of the road easement crossing their land.[2] When the Kings finally learned about the Bunker Road easement, they unsuccessfully sought a ruling from the Commission vacating the road.[3] The Kings then sought a declaration from the district court that because Bunker Road had never been properly recorded, it was never actually created.[4] On summary judgment, the district court held the Commission properly established Bunker Road and dismissed the remaining issues based on Wyoming case law.[5] The Wyoming Supreme Court affirmed.[6]

This note argues the Wyoming Supreme Court improperly decided *King*.[7] First, the court applied incorrect law in determining Bunker Road was properly

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[1] King v. Bd. of Cnty. Comm'rs of Fremont (*King*), 244 P.3d 473, 489 (Wyo. 2010).

[2] *Id.* at 475–76.

[3] *Id.* at 474, 488.

[4] *Id.* at 474.

[5] King v. Bd. of Cnty. Comm'rs of Fremont, No. 34662, 2008 WL 7727322, at ¶ 8 (Wyo. Dist. Ct., 9th Jud. Dist., Fremont Cnty. Apr. 22, 2008) (Order Denying Plaintiffs' and Intervening Plaintiff's Motion for Summary Judgment in Part and Granting Defendant's Motion for Summary Judgment in Part); King v. Bd. of Cnty. Comm'rs of Fremont, No. 34662, 2009 WL 6364902, at *2–3 (Wyo. Dist. Ct., 9th Jud. Dist., Fremont Cnty. Sept. 11, 2009) (Order Granting Defendant's Motion to Dismiss) (collectively *King I*).

[6] *King*, 244 P.3d at 489.

[7] *See infra* notes 139–223 and accompanying text.

created.[8] Second, the court relied on faulty, distinguishable precedent to dispose of the remaining issues in the case.[9] Third, in addition to being legally unfounded, the *King* decision results in poor policy by leaving rural landowners with uncertainty as to the quality of their title regarding the existence of county roads.[10] In order to remedy this uncertainty rural landowners now face, the Wyoming Legislature should reinstate protections for bona fide purchasers and should modify the existing road identification procedure.[11]

BACKGROUND

Creation and Maintenance of County Roads

"The establishment of a highway must be in a mode recognized in the jurisdiction involved, otherwise a public highway is not created."[12] In 1913, section 2514 of Wyoming's Compiled Statutes placed all county roads "under the supervision, management and control of the board of county commissioners of the county wherein such roads are located."[13] According to the statute, no county road could be established, altered, or vacated except by the authority of the respective board of county commissioners.[14] Therefore, "once shown to exist, [a highway] continues to exist."[15] However, a county road is not shown to exist when there is a defect in the proceedings that prejudices a party.[16] Additionally, a county road can be abandoned.[17] In Wyoming, the procedure for abandonment is

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[8] *See infra* notes 144–65 and accompanying text.

[9] *See infra* notes 166–94 and accompanying text.

[10] Telephone Interview with Keith Dodson, Williams, Porter, Day & Neville PC (July 11, 2012) (noting that the burden of a county road encumbrance shifts from title insurers to land owners); Interview with Alan Frank, GIS Director, Albany County, Wyoming, in Laramie, Wyo. (August 2, 2012) (stating the county doesn't know whether county roads are county roads anymore); Interview with Steven F. Freudenthal, Partner, Freudenthal & Bonds, PC, in Cheyenne, Wyo. (July 10, 2012) (noting that attorneys "cannot give clients any certainty" regarding county roads on their property); Interview with M. Gregory Weisz, Partner, Pence and MacMillan, LLC, in Laramie, Wyo. (July 12, 2012) (explaining that title insurers will now likely exempt coverage for county roads by redefining what constitutes "public record" that they must search); *see infra* notes 195–204 and accompanying text.

[11] *See infra* notes 209–23 and accompanying text.

[12] 39A C.J.S. *Highways* § 4 (2012).

[13] WYO. COMP. STAT. § 2514 (1910).

[14] *Id.*

[15] *King*, 244 P.3d 473, 489 (Wyo. 2010) (stating the maxim as, "once a road, always a road"); 39A C.J.S. *Highways* § 128 (2012).

[16] 39A C.J.S. *Highways* § 80 (2012).

[17] *Id.* § 128.

set by statute and can only be implemented through the formal acts of the board of county commissioners.[18]

Creation of a County Road Requires Recording

The policy of a recording statute is "to protect those who record first [and] to establish certainty in records."[19] Ultimately, if a recording law requires recordation in a certain manner, an instrument is generally deemed unrecorded until it follows the prescribed procedure.[20] For example, when the Commission created Bunker Road in 1913, it was required to obtain an accurate survey and to record that survey along with an official plat map with the county clerk in order for the road to be "easily ascertained."[21]

Further, in 1919, the Wyoming Legislature passed a statute requiring recordation of all existing roads by 1921.[22]

> It shall be the duty of the several Boards of County Commissioners, within their respective counties, prior to said date, to determine what if any such roads now or heretofore travelled but not heretofore officially established and recorded, are necessary or important for the public use as permanent roads, and to cause such roads to be recorded . . . and all roads recorded as aforesaid, shall be highways. No other roads shall be highways unless and until lawfully established as such by official authority.[23]

This Act provided that no road would be a public road unless officially established and recorded and that any existing road not recorded by the stated deadline of January 1, 1922 (later amended to January 1, 1924) would be vacated.[24] The Wyoming Supreme Court stated, "We do not see how any language [of the Act] could be plainer."[25]

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[18] *See id.*; WYO. COMP. STAT. § 2514 (1910) (current version at WYO. STAT. ANN. § 24-1-104 (2012)) ("[N]o county road shall hereafter be established, altered, or vacated . . . except by authority of the board of the county commissioners.").

[19] Condos v. Trapp, 717 P.2d 827, 831–32 (Wyo. 1986) (noting "a grantee should seasonably record . . . in order to effectuate this purpose"); *accord* First Interstate Bank of Sheridan v. First Wyo. Bank, N.A. Sheridan, 762 P.2d 379, 383 (Wyo. 1988).

[20] 66 AM. JUR. 2D *Records and Recording Laws* § 101 (2012).

[21] *See* WYO. COMP. STAT. § 2531 (1910). The Commission was required to record the information "in books to be provided by the county for such purpose." *Id.*

[22] 1919 Wyo. Sess. Laws 144 (current amended version at WYO. STAT. ANN. § 24-1-101 (2012)).

[23] *Id.*

[24] 1921 Wyo. Sess. Laws 139; 1919 Wyo. Sess. Laws 144; Yeager v. Forbes, 78 P.3d 241, 255 (Wyo. 2003).

[25] Nixon v. Edwards, 264 P.2d 287, 291 (Wyo. 1953).

Wyoming's legislative history further evidences the legislature's intent to require recording for the creation of county roads.[26] In 1877—before Wyoming became a state—the territorial legislature "inaugurated a policy to cause the rural public roads in this commonwealth to be spread upon the public records."[27] At the same time, the legislature required the county commissioners to make public an adequate description of the road.[28] In 1895, the Wyoming Legislature attempted to "enact a complete code relating to rural public highways" and required recording "without unnecessary delay."[29]

Additionally, a long line of Wyoming cases supports the contention that a road must be recorded.[30] If controlling precedent exists in the jurisdiction, a state court has little reason to look to other courts for persuasive authority.[31] In *Kern v. Deerwood Ranch,* the Wyoming Supreme Court explained that statutes require

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[26] *Id.* at 289 ("[C]ommencing with at least the legislative act of 1886, . . . the legislature adopted a general policy under which . . . all rural public thoroughfares thereafter established should be shown on the records of the public authorities.").

[27] *Id.*; 1877 LAWS OF WYOMING, "Wagon Roads," § 1, at 135 ("That the board of county commissioners [sic] of the several counties of the Territory of Wyoming shall have power to adopt, and by resolution entered of record, appropriate to county and public uses any road or route publicly traveled, within their respective counties."). Wyoming became a state in 1890. *Statehood*, State of Wyoming, http://wyoming.gov/history.aspx#state (last visited July 12, 2012).

[28] 1877 LAWS OF WYOMING, "Wagon Roads," § 2, at 135 (requiring "the several boards of county commissioners to keep a record of all such proceedings, and a profile or other sufficiently accurate description of the road so made public, for the information of the public, as to the precise road or route so appropriated to county and public use, which record shall always be open to inspection by the public").

[29] *Nixon*, 264 P.2d at 290; 1895 Wyo. Sess. Laws 126 (titled "An Act to revise, amend and consolidate the Statutes relating to Highways and Bridges."); 1895 Wyo. Sess. Laws 128. The Wyoming Legislature stated:

> If, upon considering and acting upon the report of the viewer, or otherwise, the Board of the County Commissioners shall decide to lay out said road, they shall cause the county surveyor to make an accurate survey thereof, if such survey is deemed necessary, and to plat and record the same in the book provided by the county for such purpose; and a copy of said plat and notes of survey shall, without unnecessary delay, be filed in the office of the county clerk.

Id.

[30] *See* Kern v. Deerwood Ranch, 528 P.2d 910, 911–12 (Wyo. 1974) (holding that defendants failed in their burden to prove the existence of a county road because they could not show the road survey and plat were filed with the county clerk); Ruby v. Shuett, 360 P.2d 170, 174 (Wyo. 1961) (holding that establishment of a county road failed because the survey filed was not sufficiently clear as to the location of the road); Rocky Mtn. Sheep Co. v. Bd. of Cnty. Comm'rs of Carbon Cnty., 269 P.2d 314, 318 (Wyo. 1954) (explaining that recording of a new road is required in order to be certain and definite as to which roads are county roads); *Nixon*, 264 P.2d at 288, 292–94; George W. Condon Co. v. Bd. of Cnty. Comm'rs of Natrona Cnty., 103 P.2d 401, 407 (Wyo. 1940) (noting an unrecorded road was not a county road, and therefore it was improper for the county to construct or maintain the road).

[31] *See* 20 AM. JUR. 2D *Courts* § 143 (2012).

road surveys, plats, and notes to be filed with the county clerk in order for county commissioners to legally establish a road.[32] Accordingly, the *Kern* court noted that failure to record a road plat and survey results in a failure to establish a county road.[33] Similarly, in *Nixon v. Edwards*, the court held a road could only be made a county road by formal establishment—including recordation.[34] The court in *Rocky Mountain Sheep Co. v. Board of County Commissioners of Carbon County* stated that "establishment by the county commissioners of a public road must be made of record, in order that it be made certain and definite as to what are public roads."[35]

In Colorado, a failure to strictly comply with a recording statute does not void the creation of a road.[36] In *Lakewood v. Mavromatis*, the Colorado Supreme Court held that even though Colorado's legislature intended for public roads to be recorded in compliance with Colorado's recording act, the county commissioners' failure to fully record the easement was not detrimental to the existence of a road.[37] The court stated, "[t]he evident purpose of the [road] statute is to give notice of the establishment of the road but it [does] not follow that recording with the recorder of deeds was necessary to the establishment of the public highway."[38] However, many nearby and neighboring states do require recording to establish a road.[39] These neighboring statutes are consistent with the policy evident in

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[32] 528 P.2d at 911.

[33] *Id.*

[34] 264 P.2d at 288, 292–94. The court here was distinguishing formal establishment from acquiring a road by prescription. *See id.*

[35] 269 P.2d 314, 318 (Wyo. 1954) (noting a road was not a county road because the records "fell far short of meeting the requirements of [the recording] statute").

[36] *See* Lakewood v. Mavromatis, 817 P.2d 90, 93 (Colo. 1991).

[37] *Id.* In *Mavromatis*, the road petition was filed in a road book with the county clerk, but the road was never entered into the grantor-grantee indices. *Id.* at 92.

[38] *Id.* at 97 (quoting Bd. of Comm'rs of Weld Cnty. v. Ingram, 73 P. 37, 37 (Colo. 1903)).

[39] *See* CAL. STS. & HIGH. CODE § 948 (2012) (explaining that "proper evidences of title to every right-of-way, and all incidents thereto" regarding county highways must be recorded with the county recorder); IDAHO CODE ANN. § 40-202 (2011) (noting that documents establishing a property interest for highway system purposes must be recorded in the county records); KAN. STAT. ANN. § 19-310 (2012) (noting that the county clerk must keep the report of the commissioners, a survey, and maps "in regard to laying out and establishing roads in the county"); NEB. REV. STAT. § 39-1710 (2008) (requiring "the county board [to] cause the plat of [a newly established road] to be recorded and platted in the road plat record of the county with a proper reference to the files in the office of the county clerk where the papers relating to the same may be found"); N.M. STAT. ANN. § 67-5-16 (2009) ("If the board of county commissioners determine to open any such road, they shall cause the full and final report . . . to be recorded in the office of the county clerk and recorded, in a book kept for that purpose."); OR. REV. STAT. § 368.106 (2012) (requiring any county governing body to record documents establishing an interest in real property for public road purposes); UTAH CODE ANN. § 72-3-107 (2010) ("The plats and specific descriptions [of all county roads] shall be kept on file in the office of the county clerk or recorder.").

Wyoming's legislative history, as well as current statutes and case law, requiring recording for the creation of a road.[40]

An Unrecorded Interest Does Not Burden a Subsequent Good-Faith Purchaser

Generally, a party who diligently searches records of real property is entitled to rely on those records.[41] Recording statutes protect purchasers who diligently search title records and have no notice of a prior interest in the land.[42] Correspondingly, in 1913, the law in Wyoming rendered unrecorded interests void against subsequent good faith purchasers who recorded first.[43] However, "[e]ach and every deed, mortgage, instrument or conveyance touching *any* interest in lands, made and recorded according to the provisions of law, [was considered] notice to . . . any subsequent purchaser."[44] A good faith or "bona fide" purchaser is a party who purchases property with "no actual, constructive or inquiry notice of any . . . infirmities in the title."[45] Actual notice comes from actual knowledge

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[40] *See supra* notes 21–39 and accompanying text.

[41] 1 JOYCE PALOMAR, PATTON AND PALOMAR ON LAND TITLES §§ 4, 12, at 14, 57–58 (3d ed. 2002); 66 AM. JUR. 2D *Records and Recording Laws* § 72 (2012); *see* C. Dent Bostick, *Land Title Registration: An English Solution to an American Problem*, 63 IND. L.J. 55, 60 (1988) ("Presently, inquiry is concerned with evidence of title obtained through recordations, actual notice, or possession.").

[42] N. Am. Uranium, Inc. v. Johnston, 316 P.2d 325, 343 (Wyo. 1957) (explaining that an unrecorded instrument is effective between the parties but not against a subsequent purchaser without notice); 66 AM. JUR. 2D *Records and Recording Laws* § 71 (2012); *see* Owen L. Anderson, *The Growing Uncertainty of Real Estate Titles*, 65 N.D. L. REV. 1, 45 (1989) (explaining that the primary purpose of race-notice systems is "to protect the investment of a prospective, innocent purchaser"); Ashley Harrell, *Mortgage Rescue Fraud and the Subsequent Purchaser*, 64 CONSUMER FIN. L.Q. REP. 387, 391 (2010) ("If the parties to private transactions cannot rely on the public recording system as evidence of ownership . . . then even the most routine transactions cannot be prudently conducted.").

[43] *See* WYO. COMP. STAT. § 3654 (1910). The statute provides, "[e]very conveyance of real estate . . . which shall not be recorded as required by law, shall be void, as against any subsequent purchaser or purchasers in good faith." *Id.* The *Meeker* court construed this language as excluding interests acquired by condemnation. *See* State *ex rel.* State Highway Comm'n v. Meeker, 294 P.2d 603, 604 (Wyo. 1956). However, Wyoming statutes include within the definition "any estate or interest in real estate . . . by which the title to any real estate may be affected in law or in equity." WYO. STAT. ANN. § 34-1-102 (2012).

[44] WYO. COMP. STAT. § 3653 (1910) (emphasis added). Recording requirements remain substantially the same today. *See* WYO. STAT. ANN. § 34-1-120 to -121 (2012); Grose v. Sauvageau, 942 P.2d 398, 403 (Wyo. 1997) ("Public policy requires that subsequent purchasers be able to rely on the title shown in public records."); Condos v. Trapp, 717 P.2d 827, 832 (Wyo. 1986) ("[A] subsequent deed, recorded first, is given priority over the prior deed to the same property recorded last."); Torgeson v. Connelly, 348 P.2d 63, 66 (Wyo. 1959) ("[E]very conveyance not recorded as required by law is void as against a subsequent purchaser in good faith for valuable consideration whose conveyance is first duly recorded.").

[45] Bentley v. Dir. of Office of State Lands and Invs., 160 P.3d 1109, 1120 (Wyo. 2007) (citing *Grose*, 942 P.2d at 402).

of an infirmity.[46] Constructive notice means a subsequent purchaser is deemed by law to have notice of any interests in land that are properly recorded.[47] A party is charged with constructive notice whether or not the purchaser has actually seen the record, because a purchaser is expected to search the record for properly recorded interests.[48] Inquiry notice is triggered when an ordinary inspection would have revealed the title defect.[49]

In many jurisdictions, a document is "not deemed filed . . . if withdrawn from its proper place among the files" or if filed in an improper book.[50] Maintaining files in the correct location "is fundamental to the scheme of providing a constructive notice through the records."[51] Accordingly, in *Torgeson v. Connelly*, the Wyoming

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[46] PALOMAR, *supra* note 41, § 12, at 58–60; 58 AM. JUR. 2D *Notice* § 4 (2012) (defining actual notice as "notice expressly and actually given"); Emily Bayer-Pacht, *The Computerization of Land Records: How Advances in Recording Systems Affect the Rationale Behind Some Existing Chain of Title Doctrine*, 32 CARDOZO L. REV. 337, 344–45 (2010); Harrell, *supra* note 42, at 392 ("Actual notice arises where one is personally aware of a conflicting interest in real property.").

[47] *See* Countrywide Home Loans, Inc. v. First Nat'l Bank of Steamboat Springs, N.A., 144 P.3d 1224, 1229 (Wyo. 2006); 58 AM. JUR. 2D *Notice* § 4 (2012) (defining constructive notice as information imputed by law to a person who has the duty to inquire into it and who could have discovered it with proper diligence); Tanya D. Marsh, *The Limits of Constructive Notice: A Call to Reform Indiana's Recording Statutes*, RES GESTAE, Oct. 2002, at 20 (noting that in a "race-notice" system, recorded and indexed documents are "valid and effectual" at the time of recording).

[48] PALOMAR, *supra* note 41, § 12, at 61–62; 58 AM. JUR. 2D *Notice* § 4 (2012) ("[G]ood faith failure to seek out the ultimate facts constitutes no defense."); 66 AM. JUR. 2D *Records and Recording Laws* § 78 (2012) (noting that it is the duty of a subsequent purchaser to examine the record in order to "know or take notice of the condition of the record title up to the time of creating the encumbrance or making the sale"); Bayer-Pacht, *supra* note 46, at 345 ("[S]ubsequent purchasers have constructive notice of all properly recorded deeds in their chains of title if they could have discovered them by conducting a reasonable title search, regardless of whether they actually discovered them.").

[49] *Grose*, 942 P.2d at 403 ("Inquiry notice is based on the premise that the failure to make inquiry by someone with sufficient knowledge to create a duty to do so will be attributed to their [sic] own negligence."); PALOMAR, *supra* note 41, § 12, at 70; Harrell, *supra* note 42, at 392 ("[I]f a subsequent purchaser at the time of conveyance had knowledge of circumstances indicating that another party might have an unrecorded interest, that purchaser is deemed to have constructive notice of any prior interest that would have been discovered upon a reasonable investigation.").

[50] 66 AM. JUR. 2D *Records and Recording Laws* § 74 (2012); *accord* PALOMAR, *supra* note 41, § 66, at 222 ("[T]he general rule is that there is no valid record, and therefore no constructive notice, unless the record is in the proper book."); 66 AM. JUR. 2D *Records and Recording Laws* § 63 (2012) ("An instrument that is not recorded in the book in which such instruments are customarily recorded is not properly recorded . . . ."); 66 AM. JUR. 2D *Records and Recording Laws* § 101 (2012) ("[A]n instrument is deemed not recorded as prescribed by law until it has been transcribed into the proper book. The policy of the law in this respect is to afford facilities for intending purchasers or mortgagees of land in examining the records for the purpose of ascertaining whether there are any claims against it. If recorded in a different book from the one directed, it is to be regarded as if not recorded at all."); Marsh, *supra* note 47, at 22 ("The 'modern trend' is to treat mis-indexed instruments as unrecorded for purposes of establishing priority and/or putting bona fide purchasers on notice.").

[51] 66 AM. JUR. 2D *Records and Recording Laws* § 101 (2012).

Supreme Court noted, "Wyoming legislative provisions are definite that the filing or leaving of a conveyance in any office other than that of the register of deeds cannot constitute constructive notice."[52]

Furthermore, the court has held that recording errors will not be charged against subsequent good faith purchasers.[53] Even in *Mavromatis*, Colorado's Supreme Court held that a failure to comply with the recording statute would not affect the creation of a road, but it would affect notice for subsequent purchasers.[54] Accordingly, the *Mavromatis* court held in favor of the landowners because they had no notice of the road due to the county commissioners' failure to strictly comply with Colorado's recording statute.[55] Therefore, when a subsequent purchaser with no notice of a prior interest records in the correct place and manner before a prior grantee records, that prior grantee must bear the loss.[56]

Conversely, one Wyoming Supreme Court case held that notice is not required to bind a subsequent good faith purchaser when a road is created by condemnation.[57] In *State ex rel. State Highway Commission v. Meeker*, the Board of County Commissioners of Laramie County condemned Nell Fowler's property to construct a highway.[58] Three years later, in 1953, construction on the highway began.[59] However, Stanley Meeker had purchased the property from Nell Fowler in 1952.[60] The State of Wyoming brought an action against Meeker enjoining him from interfering with its right of way.[61] Meeker claimed he had no actual notice of the proposed highway, and neither he nor his title insurer had found a recorded instrument establishing the highway in the county clerk's office.[62] The trial court found in favor of Meeker.[63]

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[52] 348 P.2d 63, 66 (Wyo. 1959); Bentley v. Dir. of Office of State Lands and Invs., 160 P.3d 1109, 1120 (Wyo. 2007).

[53] *In re* Estate of Hite, 829 P.2d 1173, 1176 (Wyo. 1992) (holding an improperly recorded judgment void against a subsequent purchaser when it appeared the clerk committed the error).

[54] Lakewood v. Mavromatis, 817 P.2d 90, 98–99 (Colo. 1991).

[55] *Id.* at 91, 93 ("[P]ublic highways can be created . . . without compliance with the recording act but . . . such compliance is required to give constructive notice of public highway rights to third persons.").

[56] Condos v. Trapp, 717 P.2d 827, 832 (Wyo. 1986) (noting that the prior grantee had the opportunity to avoid the loss by recording his or her interest in a timely fashion).

[57] *See* State *ex rel.* State Highway Comm'n v. Meeker, 294 P.2d 603, 605–06 (Wyo. 1956).

[58] *Id.* at 603.

[59] *Id.* at 604.

[60] *Id.*

[61] *Id.* at 603.

[62] *Id.* at 604.

[63] *Id.*

On appeal, the Wyoming Supreme Court reversed, holding eminent domain was not a conveyance within the meaning of Wyoming's recording statute.[64] The court noted that at the time Meeker purchased the property, no statute required recordation of the transfer of title by eminent domain.[65] Therefore, common law governed the dispute.[66] At common law, the first to acquire an interest in property had a better right over those who subsequently gained an interest in that property.[67] The court reasoned under common law, the State's title was superior against Meeker because the State acquired the property through its condemnation proceedings before Meeker acquired his right by conveyance.[68]

Importantly, even though the court held notice was not required, it nonetheless observed that Meeker had constructive notice of the eminent domain proceedings.[69] The court stated, "Defendant Meeker was in possession of the land in question as lessee during all of the time the eminent domain proceedings were taking place and must have had notice thereof or at least he is presumed to have had notice thereof."[70] The court noted that boards of county commissioners are agents of the legislature, and that everyone is compelled to take notice of legislative acts.[71] Therefore, the court held that published minutes of commissioner meetings are ample notice of eminent domain proceedings to subsequent purchasers.[72]

Wyoming's Voluntary Comprehensive Road Identification Procedure

In 1987, the Wyoming Legislature created a mechanism by which counties could comprehensively identify all county roads.[73] Even though recording has long been required in order to establish and to serve as notice of county roads,

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[64] *Id.* at 605; *see* WYO. COMP. STAT. §§ 66-119, -124 (1945). Section 66-119 of the Wyoming Compiled Statutes required every conveyance of real estate to be recorded in order to be valid against a subsequent good faith purchaser. Section 66-124 of the Wyoming Compiled Statutes defined "conveyance" as including "every instrument in writing by which any estate or interest in real estate is created." *See also Meeker*, 294 P.2d at 605. The *Meeker* court held that the transfer of title by eminent domain was not a conveyance within the meaning of the statute because it transferred title against the owner's consent. *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* (citing 45 AM. JUR. *Records and Recording Laws* 435 (1943); 2 MERRILL ON NOTICE § 921 (1952)). The court relied on the maxim "prior in tempore potior est in jure," meaning, "he who is first in time has the better right." *Id.*

[68] *Id.*

[69] *Id.* at 606.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] 1987 Wyo. Sess. Laws 99–100 (current version at WYO. STAT. ANN. § 24-3-201 (2012)).

the comprehensive identification process is not mandatory.[74] Nevertheless, this legislation was in response to the existence of "inaccurate and inconsistent records" of county roads.[75] In describing the purpose of the procedure, the legislature noted:

> There exist roads which are seldom used, not maintained and are not identified as or believed by the public to be county roads but are, in fact, county roads. Recognizing the numerous difficulties resulting from the existence of such county roads, the legislature finds it in the best interest of the public to create a procedure to identify county roads, thereby altering and vacating these abandoned or unnecessary county roads without survey.[76]

This statement shows the legislative intent to aid counties and landowners by clarifying which roads are county roads.[77] Notably, however, this voluntary procedure has not been implemented state-wide.[78]

PRINCIPAL CASE

In 1999, Edward and Janice King sought to purchase land in Fremont County, Wyoming.[79] Complying with standard procedure, the Kings employed a title company, Fremont Title, to research the existence of any encumbrances on the property's title.[80] The title search did not reveal the Bunker Road easement, and the Kings purchased the property.[81] However, unknown to the Kings or to Fremont Title, the Commission had created Bunker Road across the property eighty-six years earlier.[82] In 1913, the Commission filed the field notes of the survey of Bunker Road, as well as a preliminary plat map of the road, in a road folder with the Fremont County Clerk.[83] The Commission filed the official plat map separately in a cabinet folder that was moved to the Fremont County Planning

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[74] WYO. STAT. ANN. § 24-3-201 (2012); *see supra* notes 28–71 and accompanying text.

[75] WYO. STAT. ANN. § 24-3-201 (2012).

[76] *Id.*

[77] *See id.*

[78] Interview with Alan Frank, *supra* note 10; Interview with M. Gregory Weisz, *supra* note 10.

[79] *King,* 244 P.3d 473, 475 (Wyo. 2010). The Kings intended to create "King Estates Subdivision." *Id.* at 475; Brief for Appellant King at 8, King v. Bd. of Cnty. Comm'rs of Fremont, 244 P.3d 473 (Wyo. 2010) (No. S-09-227), 2009 WL 5262888, at *7.

[80] *King*, 244 P.3d at 475; Brief for Appellant King, *supra* note 79, at 8.

[81] *King*, 244 P.3d at 475; Brief for Appellant King, *supra* note 79, at 8.

[82] *See King,* 244 P.3d at 476–77.

[83] *King I*, No. 34662, 2008 WL 7727322, at ¶ 2 (Wyo. Dist. Ct., 9th Jud. Dist., Fremont Cnty. Apr. 22, 2008) (Order Denying Plaintiffs' and Intervening Plaintiff's Motion for Summary Judgment in Part and Granting Defendant's Motion for Summary Judgment in Part).

Office in the late 1970s, then to the Roads and Transportation Department, and finally back to the County Clerk's Office in 2005.[84] The road was never indexed in a manner that would give subsequent purchasers notice of its existence.[85]

In 1999, the records were housed in either the county planning office or the county roads and transportation department.[86] In researching title for the Kings, Fremont Title would have had to "inquire[] of a county clerk employee about the existence and actual location of the records pertaining to county roads" in order to find the records of Bunker Road.[87] Furthermore, it is unclear whether the road was ever physically established.[88] At the time of the Kings' purchase, the only evidence of the road was a two-track trail that was "difficult or even impossible to find or even negotiate, except on foot."[89] The faint trail ran into and out of a building, over a wellhead, and down the bed of Baldwin Creek.[90] Therefore, the Kings did not find Bunker Road in their title search and may not have seen any physical evidence of the road on the ground.[91]

When the Kings finally learned about Bunker Road, they sought a ruling from the Commission that the road had been vacated or abandoned.[92] The Commission denied the Kings' request.[93] Subsequently, the Kings filed an action in the District Court of Fremont County against the Commission seeking a declaratory judgment that the road had never been properly established, or that it had been vacated or abandoned.[94] Hansen's North Fork Ranch (Hansen) intervened as a plaintiff because it also owned land burdened by the Bunker Road easement.[95] On partial summary judgment, the district court found the Commission properly created Bunker Road, despite uncertainty about whether the road was ever properly

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[84] *Id.* at ¶ 3.

[85] *King*, 244 P.3d at 477.

[86] *Id.* at 483.

[87] *Id.*

[88] *King I*, 2008 WL 7727322, at ¶ 9. The Wyoming Supreme Court noted that, at the least, the road had been unused and unmaintained "for quite some time." *King*, 244 P.3d at 473 (quoting Memorandum from Ray Price, Fremont County Director of Planning, to the Commission (Apr. 24, 2002)).

[89] *King*, 244 P.3d at 475 (quoting Fremont Country Director of Planning Ray Price, letter to Jim Freeman, February 18, 2000).

[90] *Id.* at 477; *King I*, 2008 WL 7727322, at ¶ 9; Interview with Steven F. Freudenthal, *supra* note 10.

[91] *King*, 244 P.3d at 475.

[92] *Id.* at 474.

[93] *Id.*

[94] *Id.* at 473.

[95] *Id.*; Brief for Appellant Hansen at 5, King v. Bd. of Cnty. Comm'rs of Fremont, 244 P.3d 473 (Wyo. 2010) (No.S-09-0227), 2009 WL 5262887 at *3–4.

recorded.[96] However, two issues remained for trial: (1) whether the Kings and Hansen had actual notice of Bunker Road, and (2) whether they were subsequent purchasers in good faith of the property subject to the road easement.[97] Under the district court's ruling, if the Kings and Hansen could prove at trial that they were subsequent purchasers of their property without actual or constructive notice of the Bunker Road easement, their interests would be protected under Wyoming's bona fide purchaser protections, and the portion of Bunker Road crossing their land would be void.[98] Nevertheless, the district court later dismissed the remainder of the case relying on *Meeker*'s holding that condemnation proceedings need not be recorded in order to be valid against subsequent good faith purchasers.[99] On appeal, the Wyoming Supreme Court affirmed.[100]

Majority Opinion

First, the Wyoming Supreme Court considered the district court's holding that Bunker Road had been properly created in 1913.[101] The court acknowledged Bunker Road was not recorded in the grantor/grantee index in the Fremont County clerk's office.[102] The court also agreed with the district court's conclusion that "the Wyoming Legislature . . . intended to require the recording of the Bunker Road Petition in compliance with the Wyoming Recording Act."[103] The court, however, citing the Colorado case, *Mavromatis,* for the proposition that a road can be created despite non-compliance with a recording act, held that "there were no genuine issues of material fact as to whether Bunker Road had been created in the first instance."[104]

Having determined that Bunker Road had been created in 1913, the Wyoming Supreme Court next considered whether the Kings were entitled to the bona fide purchaser protections in Wyoming's "unrecorded conveyance" statute.[105] In doing so, the court first acknowledged the district court's reliance on *Meeker*.[106] The district court dismissed the Kings' case based on *Meeker*'s holding

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[96] *King*, 244 P.3d at 476.

[97] *Id.*

[98] *See supra* notes 41–56 and accompanying text.

[99] *King I*, No. 34662, 2009 WL 6364902 (Wyo. Dist. Ct., 9th Jud. Dist., Fremont Cnty. Sept. 11, 2009) (Order Granting Defendant's Motion to Dismiss). Bunker Road was created by condemnation. Brief for Appellee Commissioners at 4–5, 7, King v. Bd. of Cnty. Comm'rs of Fremont, 244 P.3d 473 (Wyo. 2010) (No. S-09-0227), 2010 WL 735525, at *4–7.

[100] *King*, 244 P.3d at 489.

[101] *Id.* at 476–77. The majority consisted of Justices Hill, Kite, and Golden. *See id.* at 474, 490.

[102] *Id.* at 477.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 478–89.

[106] *Id.* at 478–82.

that, before 1953, the government was not required to comply with the recording statute in order to secure its title against subsequent purchasers.[107] Therefore, the district court held that "the question of Plaintiffs' status as subsequent bona fide purchasers [was] moot" because the Commission's interest was not subject to recordation.[108] The court then noted that *Meeker* and other cases interpreting Wyoming's recording and road creation statutes suggest that nothing short of formal action on the part of the Commission could disestablish a county road.[109] Therefore, the court held that even the lack of notice to a subsequent good faith purchaser is insufficient to render a previously created county road invalid.[110]

The Wyoming Supreme Court next weighed the unrecorded conveyance statute against those statutes dealing with the creation of county roads.[111] The court first noted section 3654 of the Wyoming Compiled Statutes, providing that every unrecorded conveyance of real estate would be void against subsequent purchasers in good faith who record first.[112] The court next cited section 2514, which provided that no county road could be vacated without the authority of the county commissioners.[113] The court also acknowledged section 2513, requiring the Commission to record every necessary and important road, and providing that no unrecorded roads would be public roads unless properly established as such.[114] After introducing this tension, the court noted simply, "The records of Bunker Road were maintained in the manner mandated by these statutes."[115] Additionally, the court stated:

> The existing statutes, as well as our cases interpreting them over the years, track closely with common law principles that have long played a key role in issues such as this. Two of the most important of those are: "Once a road, always a road;" and, where a road is created by a statutory procedure such as that in play here, such a road cannot be abandoned, vacated, or disestablished without there being clear action on the part of the governmental entity that created the road to vacate, abandon, or disestablish it.[116]

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[107] *King I*, No. 34662, 2009 WL 6364902 (Wyo. Dist. Ct., 9th Jud. Dist., Fremont Cnty. Sept. 11, 2009) (Order Granting Defendant's Motion to Dismiss); *see* State *ex rel.* State Highway Comm'n v. Meeker, 294 P.2d 603, 605 (Wyo. 1956).

[108] *King I,* 2009 WL 6364902, at *1.

[109] *King*, 244 P.3d at 489.

[110] *See id.*

[111] *Id.*at 482 (calling this tension "[t]he heart of the controversy").

[112] *Id.*

[113] *Id.*

[114] *Id.* at 483.

[115] *Id.*

[116] *Id.* at 489.

Because the court found Bunker Road had been properly established and never formally vacated, abandoned, or disestablished, the court held the road was "still a county road as a matter of law," despite the Kings' lack of notice.[117] Furthermore, the court noted that the legislature's voluntary procedure for comprehensively identifying county roads was enacted to remedy this very tension.[118] However, the court explained that because the statutory procedure does not mandate counties to act, the procedure was not determinative of the issues in *King*.[119]

Concurrence in Part and Dissent in Part

The dissenting Justices concurred with the court's finding that Bunker Road was duly established.[120] They disagreed, however, with the district court's dismissal of the case based on *Meeker*.[121] First, the dissent argued *Meeker* "detours from a long line of Wyoming cases emphasizing that county road easements must be placed on the public record."[122] Second, the dissent noted that applying *Meeker* would mean landowners would not be able to rely on the quality of title as shown in the public records.[123] Instead, the dissent reasoned that "every conveyance of land would have to be accompanied by a review of all proceedings of the county commissioners back to 1890."[124]

Finally, the dissent argued *Meeker* was factually and legally distinguishable.[125] The dissent found *Meeker* factually distinguishable because Meeker possessed the property as a lessee during the condemnation proceedings.[126] Even though the *Meeker* court held that notice was immaterial, it nevertheless considered that

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[117] *Id.* at 476.

[118] *Id.* at 489; *see* WYO. STAT. ANN. §§ 24-3-201 to -206 (2012).

[119] *King*, 244 P.3d at 489.

[120] *Id.* at 490 (Burke, J., dissenting). Justice Burke authored the concurrence in part and dissent in part, joined by Justice Voigt. *Id.*

[121] *Id.*

[122] *Id.* (citing Yeager v. Forbes, 78 P.3d 241 (Wyo. 2003); Kern v. Deerwood Ranch, 528 P. 2d 910 (Wyo. 1974); Ruby v. Schuett, 360 P.2d 170 (Wyo. 1961); Rocky Mtn. Sheep Co. v. Bd. of Cnty. Comm'rs of Carbon Cnty., 269 P.2d 314 (Wyo 1954); Nixon v. Edwards, 264 P.2d 287, 294 (Wyo. 1953); George W. Condon Co. v. Bd. of Cnty. Comm'rs of Natrona Cnty., 103 P.2d 401, 407 (Wyo. 1940)).

[123] *Id.* (citing Grose v. Sauvageau, 942 P.2d 398, 403 (Wyo. 1997)).

[124] *Id.* (quoting Brief for Appellant Hansen at 16, King v. Bd. of Cnty. Comm'rs of Fremont, 244 P.3d 473 (Wyo. 2010) (No.S-09-0227), 2009 WL 5262887, at *15, which also noted, "With the greatest respect to the important and critical functions performed by each board of county commissioners, the inordinate cost and agonizing boredom of such an exercise is readily apparent.").

[125] *Id.* at 490–91.

[126] *Id.*

Meeker "must have had notice" of the condemnation proceedings.[127] In *King*, however, the Commission sought to establish Bunker Road eighty years before the Kings purchased their property.[128] Therefore, the dissent argued that the Kings could not be charged with notice of the Commission's proceedings.[129] The dissent found *Meeker* was legally distinguishable because of that court's failure to apply the correct statute.[130] The *Meeker* court concluded that common law governed because no statutes existed requiring recordation of roads created by condemnation.[131] However, the dissent argued that Chapter 112 of the Wyoming Session Laws in 1919 replaced the common law and required recordation of all roads, regardless of how the interest was acquired.[132] The dissent would have reversed and remanded the district court's decision to determine whether the Kings and Hansen had notice of the Bunker Road easement.[133]

ANALYSIS

The *King* court was incorrect to affirm the district court's decision.[134] The court improperly relied on *Mavromatis* to determine Bunker Road was properly created.[135] Furthermore, the court improperly relied on *Meeker* to dispose of the remaining issues in the case.[136] As a result, *King* leaves bona fide purchasers vulnerable to unrecorded interests on their land.[137] This analysis proposes the Wyoming Legislature should reinstate protections for bona fide purchasers and modify the existing road identification procedure in order to remedy the uncertainty for rural landowners created by *King*.[138]

Improper Reliance on Mavromatis

In *King*, the material facts regarding the recording of Bunker Road were undisputed.[139] The Commission filed the survey in the county's plat book, but

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[127] *Id.*; State *ex rel.* State Highway Comm'n v. Meeker, 294 P.2d 603, 606 (Wyo. 1956). This notice may have influenced the court's decision.

[128] *See King*, 244 P.3d at 476 (majority opinion).

[129] *Id.* at 491 (Burke, J., dissenting).

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.* at 490–91.

[134] *See infra* notes 140–223 and accompanying text.

[135] *See infra* notes 144–65 and accompanying text.

[136] *See infra* notes 166–94 and accompanying text.

[137] *See infra* notes 195–204 and accompanying text.

[138] *See infra* notes 205–23 and accompanying text.

[139] *King,* 244 P.3d 473, 477 (Wyo. 2010).

filed the official plat map in a folder kept in a cabinet.[140] Further, the road was never indexed in a manner that would allow subsequent purchasers to easily ascertain its existence.[141] Both parties agreed that a title examiner looking for evidence of Bunker Road would not have had access to the records unless he or she asked an employee of the county clerk's office about the location of the records.[142] Therefore, the court decided the case as a matter of law.[143] However, the Wyoming Supreme court incorrectly relied on *Mavromatis* to hold as a matter of law that a government entity need not comply with recording requirements when creating a road.[144] The court should have relied on Wyoming law and held that the actions of the Commission were insufficient to satisfy the requirements of Wyoming's recording laws.[145]

Wyoming statutes require recording in order to create a road.[146] The same was true when the Commission set out to establish Bunker Road in 1913.[147] Specifically, section 2531 of the 1910 Wyoming Compiled Statutes required the Commission to record a survey and plat of the road with the county clerk.[148] Moreover, only six years after Bunker Road's establishment, Chapter 112 of the 1919 Wyoming Session Laws required the recordation of all roads if "necessary or important for the public use as [a] permanent road[]."[149] Importantly, the law provided that after the amended deadline of January 1, 1924, no unrecorded road would continue to exist as a public road.[150]

Moreover, courts have found Wyoming statutes clear in requiring recording to create a county road.[151] The court in *George W. Condon Co. v. Board of County*

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[140] *King I*, No. 34662, 2008 WL 7727322, at ¶ 2, 3 (Wyo. Dist. Ct., 9th Jud. Dist., Fremont Cnty. Apr. 22, 2008) (Order Denying Plaintiffs' and Intervening Plaintiff's Motion for Summary Judgment in Part and Granting Defendant's Motion for Summary Judgment in Part).

[141] *Id.*

[142] *Id.*

[143] *See* WYO. R. CIV. P. 56(c) (2012). The rule states that if there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id.*

[144] *See King,* 244 P.3d 473, 477 (Wyo. 2010) (discussing the *Mavromatis* case); *infra* notes 147–64 and accompanying text.

[145] *See, e.g.*, George W. Condon Co. v. Bd. of Cnty. Comm'rs of Natrona Cnty., 103 P.2d 401, 407 (Wyo. 1940) (noting an unrecorded road was not a county road, and therefore it was improper for the county to construct or maintain the road); *infra* notes 147–64 and accompanying text.

[146] WYO. STAT. ANN. § 24-1-101 (2012); s*ee supra* notes 21–35 and accompanying text.

[147] WYO. COMP. STAT. § 2531 (1910).

[148] *Id.*

[149] *See* 1919 Wyo. Sess. Laws 114.

[150] *Id.* (amended by 1921 Wyo. Sess. Laws 139); Yeager v. Forbes, 78 P.3d 241, 255 (Wyo. 2003).

[151] *See, e.g.*, Kern v. Deerwood Ranch, 528 P.2d 910, 911–12 (Wyo. 1974) (holding that defendants failed in their burden to prove the existence of a county road because they could not show the road survey and plat were filed with the county clerk); *supra* notes 30–35 and accompanying text.

Commissioners of Natrona County held that an unrecorded road was not a county road.[152] In *Ruby v. Shuett*, the establishment of a county road failed because the survey recorded was not sufficiently clear.[153] Similarly, in *Kern v. Deerwood Ranch*, the Wyoming Supreme Court found that a county road did not exist because it could not be shown that the road had been recorded.[154]

The central issue regarding Bunker Road's creation, then, is whether the acts of the Commission were sufficient to affect proper recording of the road. Section 2531 required the Commission to plat the road survey and plat map in books provided by the county clerk so the road could be easily ascertained.[155] The Commission filed the survey in the county clerk's plat book, but placed the official plat map in a folder kept in a cabinet.[156] The court has previously held that such recording errors render the recording invalid against subsequent good faith purchasers.[157] Additionally, by relying on *Mavromatis* to hold that a failure to record would not defeat a road's establishment, the *King* court itself implied that the Commission failed to record.[158] Accordingly, the failure to record Bunker Road should have defeated its establishment, and furthermore rendered it vacated after 1924.[159] Therefore, the Wyoming Supreme Court improperly upheld the district court's grant of summary judgment to the Commission on the issue of Bunker Road's creation.[160]

Improper Reliance on Meeker

Next, the Wyoming Supreme Court incorrectly affirmed the district court's dismissal of the remaining issues in the *King* case based on *Meeker*.[161] The application of *Meeker* is incorrect for two reasons. First, *Meeker* departs from

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[152] 103 P.2d 401, 407 (Wyo. 1940).

[153] 360 P.2d 170, 174 (Wyo. 1961).

[154] 528 P.2d at 911–12.

[155] WYO. COMP. STAT. § 2531 (1910).

[156] *King I*, No. 34662, 2008 WL 7727322, at ¶ 2, 3 (Wyo. Dist. Ct., 9th Jud. Dist., Fremont Cnty. Apr. 22, 2008) (Order Denying Plaintiffs' and Intervening Plaintiff's Motion for Summary Judgment in Part and Granting Defendant's Motion for Summary Judgment in Part).

[157] *In re* Estate of Hite, 829 P.2d 1173, 1176 (Wyo. 1992); Ruby v. Shuett, 360 P.2d 170, 174 (Wyo. 1961); *see supra* notes 41–72 and accompanying text.

[158] *See King*, 244 P.3d 473, 477 (Wyo. 2010).

[159] *See* WYO. COMP. STAT. § 2531 (1910); 1919 Wyo. Sess. Laws 114.

[160] *Compare* Kern v. Deerwood Ranch, 528 P.2d 910, 911–12 (Wyo. 1974) (holding that defendants failed in their burden to prove the existence of a county road because they could not show the road survey and plat were filed with the county clerk, i.e., because the road was recorded incorrectly), *with King*, 244 P.3d 473, 477 (Wyo. 2010) (holding that a road can be created despite non-compliance with a recording act). *See supra* notes 146–60 and accompanying text.

[161] *King*, 244 P.3d 473, 490 (Wyo. 2010) (Burke, J., dissenting); s*ee infra* notes 162–91 and accompanying text.

established Wyoming law requiring recording to act as notice for subsequent purchasers.[162] Second, *Meeker* is factually distinguishable from *King*.[163] Therefore, the court erred in relying on *Meeker* to dismiss the case.[164]

Meeker departs from established Wyoming law requiring recording in order for an interest to be valid against a subsequent good faith purchaser.[165] The *Meeker* court determined that before 1953, no Wyoming statute required recording of an interest acquired by condemnation.[166] The court reasoned that in the absence of a statute, the common law rule of "first in time, first in right" applied to land interests.[167] Therefore, a governmental entity's interest in land acquired by condemnation would be valid, even against a subsequent purchaser who had no notice of the prior interest.[168] However, the *Meeker* court disregarded at least one statute that required recording of an interest acquired by condemnation.[169] Chapter 112 of the 1919 Wyoming Session Laws required all necessary roads—regardless of the method of their creation—to be recorded in order to be valid.[170] Therefore, the *Meeker* court incorrectly determined that the common law of "first in time, first in right" should apply. This same statute should have applied in *King*, requiring the recordation of Bunker Road by January 1, 1924 in order for it to remain a valid road.[171] Furthermore, in relying on *Meeker*, the *King* court disregarded an additional statute—section 2531 of the 1910 Wyoming Compiled Statutes—requiring the recordation of any road.[172]

Moreover, as noted by the dissent, *Meeker* ignores a long line of cases holding that recording is required for county road easements, regardless of how they are acquired.[173] In *George W. Condon Co. v. Board of County Commissioners of Natrona*

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[162] *King*, 244 P.3d at 490 (Burke, J., dissenting); *see infra* notes 165–76 and accompanying text.

[163] *King*, 244 P.3d at 491 (Burke, J., dissenting); *see infra* notes 177–89 and accompanying text.

[164] *King*, 244 P.3d at 490–91 (Burke, J., dissenting); s*ee infra* notes 165–91 and accompanying text.

[165] *King*, 244 P.3d at 490 (Burke, J., dissenting); *see infra* notes 166–76 and accompanying text.

[166] State *ex rel.* State Highway Comm'n v. Meeker, 294 P.2d 603, 605 (Wyo. 1956).

[167] *Id.*

[168] *Id.* at 605–06.

[169] WYO. COMP. STAT. § 2531 (1910); 1919 Wyo. Sess. Laws 114; *see King*, 244 P.3d at 491 (Burke, J., dissenting) (finding "at least one statute requiring the Bunker Road easement to be recorded.").

[170] 1919 Wyo. Sess. Laws 114. ("It shall be the duty of the several Boards of County Commissioners . . . to determine what if *any* such roads . . . are necessary or important for the public use as permanent roads, and to cause such roads to be recorded." (emphasis added)).

[171] *King*, 244 P.3d at 482 (majority opinion).

[172] *Id.*; WYO. COMP. STAT. § 2531 (1910) ("If . . . the board of county commissioners shall decide to lay out or alter *any* road, they shall . . . plat the same in books to be provided by the county for such purpose." (emphasis added)).

[173] *King,* 244 P.3d at 490 (Burke, J., dissenting) (citing Yeager v. Forbes, 78 P.3d 241 (Wyo. 2003); Kern v. Deerwood Ranch, 528 P. 2d 910 (Wyo. 1974); Ruby v. Schuett, 360 P.2d 170 (Wyo. 1961); Rocky Mtn. Sheep Co. v. Bd. of Cnty. Comm'rs of Carbon Cnty., 269 P.2d 314

County, the court noted that Wyoming's recording statute "indicates a policy that roads should be shown on the records."[174] In *Nixon v. Edwards*, the court noted the legislative history of recording statutes demonstrates "how thoroughly the legislature was convinced that *all* rural public roads should be shown on the public records."[175] In short, "the Wyoming Legislature and [Wyoming Supreme] Court have consistently, with the exception of *Meeker*, said that county roads must be placed on the public record."[176]

Furthermore, as discussed by the dissent, *Meeker* is factually distinguishable from *King*.[177] Initially, the condition of the road distinguishes *Meeker* from *King*.[178] The road involved in *Meeker* was "commenced and substantially . . . completed" by the time of trial.[179] In contrast, when the Kings purchased their property, Bunker Road was barely recognizable as a road.[180] The district court noted it was unclear if the road had ever been physically established.[181] Regardless, in 1999, Bunker Road had "not been used by the general public or maintained by Fremont County for quite some time."[182] It ran under existing structures and into a creek bed.[183] Furthermore, the degree of notice supplied by the condition of the roads distinguishes *Meeker*.[184] Meeker likely had actual notice of the road being built across his property.[185] On the contrary, the Kings likely had no actual notice of Bunker Road.[186] Additionally, Meeker had constructive notice of the condemnation proceedings involving his land because he possessed the property

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(Wyo 1954); Nixon v. Edwards, 264 P.2d 287, 294 (Wyo. 1953); George W. Condon Co. v. Bd. of Cnty. Comm'rs of Natrona Cnty., 103 P.2d 401, 407 (Wyo. 1940)); *see supra* notes 30–35 and accompanying text.

[174] 103 P.2d 401, 407 (Wyo. 1940).

[175] 264 P.2d 287, 294 (Wyo. 1953) (emphasis added).

[176] *King*, 244 P.3d at 491 (Burke, J., dissenting).

[177] *Id.* at 490–91; *see infra* notes 178–89 and accompanying text.

[178] *King*, 244 P.3d at 491 (Burke, J., dissenting).

[179] *Id.*; State *ex rel.* State Highway Comm'n v. Meeker, 294 P.2d 603, 604 (Wyo. 1956).

[180] *King I*, No. 34662, 2008 WL 7727322, at ¶ 9 (Wyo. Dist. Ct., 9th Jud. Dist., Fremont Cnty. Apr. 22, 2008) (Order Denying Plaintiff's and Intervening Plaintiff's Motion for Summary Judgment in Part and Granting Defendant's Motion for Summary Judgment in Part); Interview with Steven F. Freudenthal, *supra* note 10.

[181] *King I*, 2008 WL 7727322, at ¶ 9.

[182] *King*, 244 P.3d at 475 (majority opinion).

[183] *King I*, 2008 WL 7727322, at ¶ 9; Interview with Steven F. Freudenthal, *supra* note 10.

[184] *See King*, 244 P.3d at 491 (Burke, J., dissenting) (discussing the differences between the Bunker Road and the road in *Meeker*); *infra* notes 185–89 and accompanying text.

[185] *See* State *ex rel.* State Highway Comm'n v. Meeker, 294 P.2d 603, 604 (Wyo. 1956).

[186] *See King*, 244 P.3d at 491 (Burke, J., dissenting) (finding a lack of constructive notice with Bunker Road, particularly when contrasted with the facts of *Meeker*); *supra* notes 79–91 and accompanying text.

as a lessee during the proceedings.[187] In contrast, the Kings did not possess the land in question when the Commission established Bunker Road in 1913.[188] In order for the Commissioner's minutes to serve as constructive notice, the title examiner would have had to search over eighty years of board minutes.[189]

King *Leaves Rural Landowners Vulnerable to Unrecorded Encumbrances*

Not only is the *King* court's decision legally unfounded, it also results in poor policy.[190] *King* leaves rural landowners "naked to undisclosed county roads."[191] As a result, even if a diligent purchaser searched public records, he or she could be burdened by unrecorded encumbrances.[192] Like the Kings, other rural landowners now have uncertainty in the quality of their title, even after acquiring a title opinion from an attorney or a title company.[193] After *King*, the only way for a purchaser to know conclusively whether his or her land is burdened by a county road is to review all county records in all county offices.[194] The time and effort required for such a search is a substantial and impractical burden on a prospective purchaser.[195] This burden creates risk that could limit private investment in land.[196] Additionally, title insurers will likely exempt county roads from coverage or will redefine narrowly the term "public records" against which they will insure.[197] Therefore, the burden of liability for undisclosed encumbrances will

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[187] *Meeker,* 294 P.2d at 606. Meeker's actual knowledge of the proceedings may explain the court's holding the minutes of commissioner meetings sufficient for notice. *See id.*

[188] *King,* 244 P.3d at 491 (Burke, J., dissenting).

[189] *See id.* at 490–91.

[190] *See, e.g.*, Interview with Steven F. Freudenthal, *supra* note 10 (noting that attorneys "cannot give clients any certainty" regarding county roads on their property); *infra* notes 10, 193–201 and accompanying text.

[191] Interview with Steven F. Freudenthal, *supra* note 10.

[192] Telephone Interview with Keith Dodson, *supra* note 10; Interview with M. Gregory Weisz, *supra* note 10.

[193] Appellant King's Petition for Rehearing at 18, King v. Bd. of Cnty. Comm'rs of Fremont, 244 P.3d 473 (Wyo. 2010) (No. S-09-0227).

[194] Interview with M. Gregory Weisz, *supra* note 10.

[195] *Id.*; Brief for Appellant Hansen at 16 n.2, King v. Bd. of Cnty. Comm'rs of Fremont, 244 P.3d 473 (Wyo. 2010) (No. S-09-0227), 2009 WL 5262887, at *15 n.2 (citing the "inordinate cost and agonizing boredom of such an exercise").

[196] *See* Frank S. Alexander, *Louisiana Land Reform in the Storms' Aftermath*, 53 LOY. L. REV. 727, 734 (2006) (commenting that the structure of land policies can discourage private investment in land); Michael B. Kent, *Forming a Tie that Binds: Development Agreements in Georgia and the Need for Legislative Clarity*, 30 ENVIRONS ENVTL. L. & POL'Y J. 1, 32 (2006) (noting that uncertainty in future land rights discourages investment); Joyce Palomar, *Contributions Legal Scholars Can Make to Development Economics: Examples from China*, 45 WM. & MARY L. REV. 1011, 1035 (2004) (arguing that insecurity in land rights can inhibit investment in land).

[197] Interview with M. Gregory Weisz, *supra* note 10; Interview with Steven F. Freudenthal, *supra* note 10; Telephone Interview with Keith Dodson, *supra* note 10.

shift from title insurers to landowners.[198] As a result, attorneys are left without a clear standard with which to advise rural clients, since they cannot provide their clients with certainty about the condition of their title.[199]

Legislative Solutions

Counties presently have an incentive to implement the voluntary road identification procedure because any disputes that arise during the process would be decided in the counties' favor under *King*.[200] These decisions, however, would come at the expense of rural landowners who have no notice of county roads crossing their property. [201] There are two legislative solutions to remedy *King*.[202] First, bona fide purchaser protections must be reinstated to ensure no other rural landowners are faced with this situation.[203] Second, it is critical for the legislature to make the process mandatory in order to afford proper notice to landowners across the state and to create certainty of title for both counties and landowners.[204]

Wyoming's current recording statute protects good faith purchasers who record first.[205] However, the Wyoming Supreme Court in *King* effectively abrogated these statutory protections by making them inapplicable to county roads.[206] The legislature should reinstate good faith purchaser protections by passing legislation specifically subjecting county roads to Wyoming's unrecorded conveyance statute.[207] This modified statute would supersede *King*, restoring the protections afforded to those who diligently search real property records for the existence of county roads.[208] Without this first step, *King*'s precedent gives

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[198] Telephone Interview with Keith Dodson, *supra* note 10.

[199] *Id.*; Interview with M. Gregory Weisz, *supra* note 10.

[200] Baessler v. Freier, 258 P.3d 720, 725 (Wyo. 2011) (quoting Alpine Lumber Co. v. Capital W. Nat'l Bank, 231 P.3d 869, 872 (Wyo. 2010)) (explaining that "a court must follow earlier judicial decisions when the same points arise again in litigation"); Hannifan v. Am. Nat'l Bank of Cheyenne, 185 P.3d 629, 695 (Wyo. 2008) (Voigt, J., concurring).

[201] *See supra* notes 41–56, 83–102 and accompanying text.

[202] *See infra* notes 203–13 and accompanying text.

[203] *See infra* notes 205–09 and accompanying text.

[204] Interview with M. Gregory Weisz, *supra* note 10; Telephone Interview with Keith Dodson, *supra* note 10.

[205] WYO. STAT. ANN. § 34-1-120 (2012); *see supra* notes 41–56 and accompanying text.

[206] *See King*, 244 P.3d 473, 491 (Wyo. 2010) (Burke, J., dissenting) (stating that the majority should have remanded the action to determine if the Kings were bona fide purchasers without notice); *supra* notes 103–19 and accompanying text.

[207] *See* Torgeson v. Connelly, 348 P.2d 63, 67 (Wyo. 1959) (noting that complaints regarding recording statutes are properly solved by the legislature).

[208] *See* Kirby Bldg. Sys. v. Mineral Explorations Co., 704 P.2d 1266, 1277–78 (Wyo. 1985) (noting that legislation is appropriate to cure inequities created by case law); Pac. Power & Light v. Parsons, 692 P.2d 810, 814 (Wash. 1984).

counties the advantage in all road disputes, even where a subsequent purchaser has no actual or constructive notice of the road.[209]

Second, the Wyoming Legislature should amend the existing voluntary road identification procedure to make it mandatory.[210] Although the legislature intended the procedure to aid counties and landowners by clarifying which roads are county roads, the voluntary nature of the statute will not meet that goal.[211] If counties are not required to implement the requirements of the statute, there is no guarantee that "inaccurate and inconsistent records" of county roads will be cured.[212] The current statute states, "When it finds the public interest so requires, the board *may* initiate the identification procedure under this act."[213] A revised statute would instruct that the board *must* initiate the identification procedure by a specified date.

Implementing this comprehensive road identification procedure will likely require a significant investment from counties.[214] Furthermore, renewing protections for bona fide purchasers will eliminate counties' incentive to make that investment voluntarily because landowners without notice of an unrecorded county road could successfully challenge its validity.[215] However, some counties, aided by Geographic Information Services (GIS) systems, have already identified and mapped a comprehensive collection of county roads.[216] This information, already possessed by counties, will mitigate the cost of implementing a modified section 24-3-201 by fulfilling the procedure's requirement of mapping each county road.[217]

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[209] *See King*, 244 P.3d 473, 491 (Wyo. 2010) (Burke, J., dissenting) (highlighting the requirement and failure of the county to record Bunker Road and the majority's misplaced reliance on *Meeker*); *supra* notes 42–56 and accompanying text.

[210] Interview with M. Gregory Weisz, *supra* note 10; Interview with Alan Frank, *supra* note 10; Telephone Interview with Keith Dodson, *supra* note 10.

[211] Telephone Interview with Keith Dodson, *supra* note 10; Interview with M. Gregory Weisz, *supra* note 10.

[212] Telephone Interview with Keith Dodson, *supra* note 10; Interview with M. Gregory Weisz, *supra* note 10.

[213] WYO. STAT. ANN. § 24-3-203 (2012) (emphasis added).

[214] Interview with Alan Frank, *supra* note 10 (citing the cost of new surveys as one prominent concern).

[215] Telephone Interview with Keith Dodson, *supra* note 10; Interview with M. Gregory Weisz, *supra* note 10; Interview with Alan Frank, *supra* note 10.

[216] Interview with M. Gregory Weisz, *supra* note 10; Interview with Alan Frank, *supra* note 10.

[217] Interview with M. Gregory Weisz, *supra* note 10; Interview with Alan Frank, *supra* note 10; *see* WYO. STAT. ANN. § 24-3-203 (2012) (requiring a resolution referencing maps of all county roads in the area). To further alleviate counties' cost concerns, the legislature could expressly allow counties to use surveys they already possess rather than obtaining a new one for each recorded road. Interview with Alan Frank, *supra* note 10; *see supra* note 214 and accompanying text.

A mandatory comprehensive identification procedure reflects the policy inherent in Wyoming's legislative history requiring the recordation of county roads in order to afford effective notice.[218] Furthermore, mandatory implementation benefits all stakeholders—rural landowners, counties, the public, and the courts.[219] Rural landowners will be able to rely on the quality of title found in the county records.[220] Counties will know better how to allocate their limited resources for maintaining roads.[221] The public may benefit from increased maintenance of newly discovered county roads.[222] Finally, after this proposed procedure is completed, litigation stemming from the uncertainty of title due to unrecorded county roads is likely to decrease.[223]

CONCLUSION

The result of *King* is that bona fide purchasers in Wyoming have lost the protections previously afforded by Wyoming's recording statute and case law.[224] The *King* court incorrectly relied on Colorado case law, while ignoring generations of Wyoming case law, to conclude that Bunker Road was properly created.[225] Furthermore, the *King* court incorrectly relied on *Meeker* to dismiss the remaining issues in the case.[226] Wyoming's legislature should remedy the present uncertainty created by *King*.[227] First, the legislature should reinstate protections for bona fide purchasers who diligently search real property records.[228] Second, the legislature should make mandatory the existing procedure to comprehensively identify all county roads.[229] These reforms would benefit rural landowners, counties, the public, and the courts while honoring the continuity of public roads.[230]

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[218] *See, e.g.*, Nixon v. Edwards, 264 P.2d 287, 291 (Wyo. 1953) ("[C]ommencing with at least the legislative act of 1886, . . . the legislature adopted a general policy under which . . . all rural public thoroughfares thereafter established should be shown on the records of the public authorities."); *supra* notes 26–29 and accompanying text.

[219] Interview with M. Gregory Weisz, *supra* note 10; Interview with Alan Frank, *supra* note 10; Telephone Interview with Keith Dodson, *supra* note 10.

[220] Interview with Alan Frank, *supra* note 10; Interview with M. Gregory Weisz, *supra* note 10.

[221] Interview with Alan Frank, *supra* note 10.

[222] Interview with M. Gregory Weisz, *supra* note 10.

[223] *Id.*

[224] *See supra* notes 41–56, 103–21, 207–21 and accompanying text.

[225] *See supra* notes 141–62 and accompanying text.

[226] *See supra* notes 163–91 and accompanying text.

[227] *See supra* notes 205–23 and accompanying text.

[228] *See supra* notes 207–21 and accompanying text.

[229] *See supra* notes 212–23 and accompanying text.

[230] *See supra* notes 219–23 and accompanying text.