LEGAL ESTABLISHMENT OF COUNTY ROADS IN WYOMING

Final Report
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Appendix 1

1. Powder River Ranch, Inc. v. Michelena, 103 P.3d 876, 880 (Wyo. 2005).

Powder River Ranch, Inc. v. Michelena, 103 P.3d 876, 880 (Wyo. 2005).

103 P.3d 876, 2005 WY 1

Supreme Court of Wyoming.
POWDER RIVER RANCH, INC., Appellant (Intervenor/Defendant),
v.
Juaquin and Delores MICHELENA, Appellees (Plaintiffs).
No. 04-83.
Jan. 7, 2005.

Representing Appellant: John M. Daly and Matthew R. Sorenson of Daly Law Associates, P.C., Gillette, Wyoming. Argument by Mr. Daly.
Representing Appellees: Charles R. Hart and Lynn M. Smith of Davis and Cannon, Sheridan, Wyoming. Argument by Mr. Hart.

Before HILL, C.J., and GOLDEN, KITE, and VOIGT, JJ., and BROOKS, D.J.

KITE, Justice.
[¶ 1] Powder River Ranch, Inc. (PRR) appeals from the district court's order granting Juaquin and Delores Michelena (Michelenas) a prescriptive easement across its property. We agree with the district court's conclusion that the Michelenas fulfilled the difficult requirements for establishing a prescriptive easement in Wyoming, and, consequently, we affirm its decision.

ISSUES

[¶ 2] PRR articulates its issue on appeal as follows:
A. Did the district court err in finding a prescriptive easement in favor of the plaintiff?
1. Did the court err in finding sufficient proof of adverse use by the plaintiffs?
a. The Wyoming approach
b. Other states approach
2. Did the district court err in finding the plaintiffs claimed the defendant's property under a claim of right or color of title?
3. Did the district court err in finding use of a kind as to put the owner of the subservient estate on notice [a] claim existed?
a. The "Maycock incident"
b. Installation of cattle guard
c. Disagreement over placement of a chain on cattle guard
4. Did the district court err in finding continuous and uninterrupted use for ten years?
The Michelenas offer a more succinct statement of the issue:
Did the District Court err when it found that the use of the Kinney Divide Road by the Plaintiffs/Appellees was adverse, under claim of right, as opposed to permissive?

FACTS

[¶ 3] The Michelenas and PRR are long-time neighboring landowners in Johnson County. Lulu Wagoner's father purchased the Powder River Ranch in 1956, and Juaquin

Michelena's father acquired their family ranch property in 1946 or 1947. Both ranches can be accessed by the Kinney Divide Road which was designated as Johnson County Road # 54 in 1890 and crosses Johnson and Campbell counties, as well as numerous private lands, including property owned by PRR, the Maycock family, and the Hayden family. The Powder River flows in a ***879** northerly direction across the Michelenas' property. The Michelenas must either ford the Powder River or use the Kinney Divide Road to access the eastern part of their property by vehicle. In 1967, Johnson County abandoned the road, without reserving access rights for affected bordering landowners.

[¶ 4] Over the years, Wyoming weather conditions have often prevented the Michelenas from driving across the Powder River, requiring them, instead, to use the Kinney Divide Road to access the eastern part of their ranch. They have also directed their guests and invitees, including feed and fuel suppliers, hunters, and sheep shearers, to use the Kinney Divide Road. In order to facilitate their use of the Kinney Divide Road, the Michelenas have bladed and plowed the roadway and installed cattle guards on PRR property. The Michelenas did not request or receive permission from PRR to use or maintain the Kinney Divide Road.

[¶ 5] In 1976, the Maycocks placed a chain and padlock across the Kinney Divide Road where it crossed their property. The Maycocks provided a key to the Michelenas, but Mr. Michelena objected to the chain and cut it with bolt cutters in the presence of Billy Maycock and two other individuals. This altercation, which became known as the "Maycock incident," prompted a criminal action against Mr. Michelena, which was eventually dismissed. The Maycock incident was widely publicized in the region and Ms. Wagoner heard about the incident shortly after it occurred.

[¶ 6] PRR has attempted in several instances to limit traffic on the Kinney Divide Road where it crosses its property. In 1987, PRR filed with the Johnson County Clerk a document entitled "Notice to the Public Affidavit of Limited Access to Property". In November 2001, PRR constructed an earthen berm blocking the road on the boundary line between its property and the Hayden property. The Michelenas talked to Mr. Hayden, and he removed the berm. In January 2002, the Michelenas contacted Ms. Wagoner and asked her to sign, on behalf of PRR, a road easement document to formalize their access rights. Ms. Wagoner refused to sign the document. Finally, in June 2002, PRR permanently blocked the road by installing guardrail posts across the roadway.

[¶ 7] The Michelenas filed a petition for establishment of a private road with the Board of County Commissioners for Johnson County. The commissioners denied the Michelenas' petition because the Kinney Divide Road did not intersect with a public road in Johnson County. The Michelenas then filed a complaint against the Johnson County Board of Commissioners, claiming that the county had improperly vacated County Road # 54. PRR intervened in the Michelenas' suit against the county, and the Michelenas amended their complaint to include a claim for a prescriptive easement for the portion of Kinney Divide Road that traverses PRR's property. The claims against the county were

dismissed, and the district court held a bench trial on the Michelenas' prescriptive easement claim. The district court ruled in favor of the Michelenas, and PRR appealed.

DISCUSSION

A. *Standard of Review*

[¶ 8] This case was tried to the district court without a jury. Consequently, we apply our standard for reviewing a decision rendered by the district court following a bench trial:

"The factual findings of a judge are not entitled to the limited review afforded a jury verdict. While the findings are presumptively correct, the appellate court may examine all of the properly admissible evidence in the record. Due regard is given to the opportunity of the trial judge to assess the credibility of the witnesses, and our review does not entail re-weighing disputed evidence. Findings of fact will not be set aside unless they are clearly erroneous. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Harber v. Jensen, 2004 WY 104, ¶ 7, 97 P.3d 57, ¶ 7 (Wyo.2004) *quoting*, ****880** Life Care Centers of America, Inc. v. Dexter*, 2003 WY 38, ¶ 7, 65 P.3d 385, ¶ 7 (Wyo.2003). Furthermore, in reviewing a trial court's findings of fact,

"we assume that the evidence of the prevailing party below is true and give that party every reasonable inference that can fairly and reasonably be drawn from it. We do not substitute ourselves for the trial court as a finder of facts; instead, we defer to those findings unless they are unsupported by the record or erroneous as a matter of law."

Id. Of course, we review the district court's conclusions of law *de novo. Double Eagle Petroleum & Mining Corp. v. Questar Exploration & Production Co.*, 2003 WY 139, ¶ 6, 78 P.3d 679, ¶ 6 (Wyo.2003).

B. *Prescriptive Easement*

[¶ 9] A party claiming an easement by prescription bears the burden of proving each of four elements: 1) proof of adverse use; 2) claim of right under title or claim of right; 3) use which puts the owner of the subservient estate on notice of his claim; and 4) continuous and uninterrupted adverse use for at least ten years. *Coleman v. Keith*, 6 P.3d 145, 147 (Wyo.2000); *A.B. Cattle Company v. Forgey Ranches, Inc.*, 943 P.2d 1184, 1188 (Wyo.1997). Claimants have a heavy burden to establish adverse use in Wyoming, as prescriptive easements are not favored. [FN1] *Prazma v. Kaehne*, 768 P.2d 586, 589 (Wyo.1989). *See also, Yeager v. Forbes*, 2003 WY 134, ¶ 34, 78 P.3d 241, ¶ 34 (Wyo.2003). In fact, we generally presume that use of a private roadway by a neighbor is permissive. *Shumway v. Tom Sanford, Inc.*, 637 P.2d 666, 670 (Wyo.1981). "[N]eighborliness and accommodation to the needs of a neighbor are landmarks of our western life-style." *Id.*

FN1. PRR asks us to consider other states' law on prescriptive easements. Over the decades, this Court has developed a rich history of case law on prescriptive easements that is uniquely tailored to fit our way of life. We, therefore, decline PRR's invitation to stray from our precedent.

[¶ 10] The presumption of permissive use is, however, rebuttable. *Yeager*, ¶ 35. "To rebut this presumption the claimant must introduce evidence of the facts which demonstrate the

manner in which the hostile and adverse nature of his use was brought home to the owner of the adjacent land." *Id.* The claimant's use must be "inconsistent with the rights of the owner, such that the use would entitle the owner to a cause of action against the claimant, without permission asked or given." *Coleman*, 6 P.3d at 148. *See also*, *A.B. Cattle Co.*, 943 P.2d at 1188. Thus, Wyoming law "requires a manifestation of hostile and adverse intent to use a road, even though it will likely result in revocation of permission to use the road across the neighbor's land." *Coleman*, 6 P.3d at 147-48.

[¶ 11] The evidence pertaining to the first and third elements of the Michelenas' prescriptive easement claim--adverse use and notice--tends to overlap. In the interests of brevity and clarity, we will consider those elements together. The parties agree that there was no agreement, either verbal or written, between them concerning the Michelenas' use of the Kinney Divide Road. Consequently, we look to the parties' actions to determine whether the Michelenas' use was adverse or permissive and whether PRR had sufficient notice of the Michelenas' claim.

[¶ 12] The Michelenas have used the Kinney Divide Road consistently since at least 1964. They did not seek or obtain permission from PRR to cross its property. In addition, the Michelenas also directed their guests and invitees, including hunters, suppliers and sheep shearers, to use the road. After learning the county had abandoned the road, the Michelenas installed cattle guards on the Kinney Divide Road, without seeking permission from PRR. One cattle guard was located directly on property belonging to PRR, and the other was located on the boundary between PRR and the Hayden properties. Mr. Michelena testified as follows:

Q. When did you become aware of the fact that the county road had been abandoned by Johnson County?
A. 1974.
Q. How did you become aware of that?
A. When the cattleguards was put in through the Kinney Divide Road in approximately ***881*** 1958 and the Powder River Ranch properties, there was a cross fence that wasn't used at the time; and in later years they put--built that cross fence and put a gate in that road, which the gate was in a hill where if you stopped with a load or it was muddy, a little bit slick, you was done; you had to--so, my dad [went] to the County Commissioners, assuming that it was still a county road; and that's when they informed him the road had been abandoned.
...
Q. So did the county refuse to pay for a cattleguard?
A. Yes. They said they had abandoned it there, their maintenance of it.
Q. Did you put a cattleguard in the road?
A. Yes.
...
Q. Where did you put it, on whose land?
A. We put it on the Powder River Ranch land.
Q. Okay. Did you get permission from the Powder River Ranch to put it on their land?
A. No.
...

Q. Did you put any more cattleguards in the Kinney Divide Road?
A. There was an oil company--
Q. The answer is, yes, you did put--
A. Yes.
Q. Okay. And where did you put it?
A. Boundary line, fence line between the Powder River Ranch and the Hayden property.

[¶ 13] In addition to installing the cattle guards, the Michelenas routinely maintained the Kinney Divide Road, including the portion that traversed PRR property. The Michelenas plowed and bladed the roadway when necessary to facilitate travel. They did not seek or obtain permission to repair or maintain the road. Although not determinative, maintenance or repair of a road by a claimant, without permission, suggests that the use is adverse to the owner's interests. See generally, *Koontz v. Superior,* 746 P.2d 1264, 1268 (Wyo.1987) (applying the elements for establishing a prescriptive easement to public use).

[¶ 14] The Michelenas also asserted their right to use the road when they cut the chain during the Maycock incident. PRR argues that the Maycock incident does not qualify as evidence that the Michelenas adversely used the road over their property because it took place on Maycock property. Under the circumstances presented here, we do not agree with PRR. Ms. Wagoner testified that in order to get to the Maycock property where the Maycock incident took place, the Michelenas had to cross PRR property. She also testified that she heard about the Maycock incident "at the time" it happened. Thus, the Maycock incident amounted to an assertion by the Michelenas that they had the right to use the entire Kinney Divide Road.

[¶ 15] Arguably, the most telling evidence that the Michelenas' use was adverse to PRR's interest is found in PRR's own affidavit. In 1987, Ms. Wagoner, as president of PRR, recorded with the Johnson County Clerk's office an affidavit entitled: "Notice to the Public Affidavit of Limited Access to Property". The affidavit recognized that certain governmental agencies had access rights to PRR lands and specifically stated that "[n]o other persons or agencies, including members of the public, have such rights of access." That document did not exempt or, in any way, suggest that the Michelenas had permission to use the Kinney Divide Road across PRR's property. Furthermore, Ms. Wagoner testified that she intended the affidavit to notify the public and Mr. Michelena, specifically, that the Kinney Divide Road across her property was her private road.

[¶ 16] The evidence in the record convinces us that PRR did not give the Michelenas permission to use the Kinney Divide Road across its property. The district court correctly concluded that the Michelenas accomplished the difficult task of proving adverse use in Wyoming. Furthermore, it is clear from the record that the Michelenas ****882*** sufficiently informed PRR of their adverse claim.

[¶ 17] We turn next to our consideration of whether the Michelenas had a claim of right to use the road. The element of claim of right is often described as "a claim of right under color of title or claim of right." *See e.g., A.B. Cattle Co.,* 943 P.2d at 1188; *Prazma,* 768

P.2d at 589. The Michelenas started using the Kinney Divide Road when it was a county road. In 1974, they discovered that the county had abandoned the road. Nevertheless, they continued to believe they had the right to use it. Mr. Michelena testified as follows:
Q. Did you think you had the right to use the road after the county abandoned it?
...
A. Yes.
Q. (By Mr. Hart) Why?
A. Because dad bought the place with it, with the county road legal easement in there. And we felt that that wasn't--we still had [a] legal easement, and we used it in that fashion.
Thus, the Michelenas clearly claimed a continued right to use the Kinney Divide Road, even after Johnson County abandoned it. The district court correctly found that, under these facts, the Michelenas had a "reasonable expectation of claim to perpetual use of the road."

[¶ 18] Finally, there is no question that the Michelenas' use of the roadway across PRR's property was continuous and uninterrupted for a period of at least ten years. In fact, PRR admits that the Michelenas have used the road consistently since at least 1964. In 1974, the Michelenas installed the cattle guards on the road after learning that the county had abandoned the road. The Michelenas and their guests and invitees continued to use the road until 2002, when PRR constructed a barrier to prevent their further use of the road. The district court correctly found that the Michelenas fulfilled the time requirement for establishment of a prescriptive easement.

[¶ 19] The Michelenas present one of those rare circumstances where the facts support a finding of a prescriptive easement. Affirmed.

Appendix 2

2. Boykin v. Carbon County Board of Com’rs, 2005 WL 3389666 (Wyo. 2005).

Boykin v. Carbon County Board of Com'rs, 2005 WL 3389666 (Wyo. 2005).

124 P.3d 677, 2005 WL 3389666 (Wyo.), 2005 WY 158

Supreme Court of Wyoming.

Randall K. BOYKIN, Appellant (Petitioner),

v.

CARBON COUNTY BOARD OF COMMISSIONERS; Silver Spur Land and Cattle, LLC, a Colorado limited liability company; Betty Merrill; Bob Switzer; and Ted Vyvey, Appellees (Respondents).

No. 05-83.

Dec. 13, 2005.

Representing Appellant: William L. Hiser of Brown & Hiser, LLC, Laramie, Wyoming. Representing Appellees: Thomas A. Thompson, Carbon County Attorney Civil Deputy, Rawlins, Wyoming; John A. MacPherson of MacPherson, Kelly & Thompson, LLC, Rawlins, Wyoming. Argument by Mr. MacPherson.

Before HILL, C.J., and GOLDEN, KITE, VOIGT, and BURKE, JJ.

***679** KITE, Justice.

****1** [¶ 1] After a contested case hearing, the Carbon County Board of Commissioners (Board) entered an order establishing a road, a portion of which crosses Randall K. Boykin's land, as a county road and public right of way by adverse possession and prescription. Mr. Boykin filed a petition for review of the Board's order in district court. The district court affirmed the Board's decision and Mr. Boykin appeals the district court's order. We affirm.

ISSUES

[¶ 2] Mr. Boykin presents the following issues:

I. Are the Findings of Fact, Conclusions of Law and Order entered by the Board of County Commissioners of Carbon County: (A) arbitrary and capricious, an abuse of discretion or not otherwise in accordance with law; (B) in excess of statutory jurisdiction, authority of limitations or lacking statutory right; (C) contrary to a constitutional right, power, privilege or immunity; (D) without observance of procedure required by law; or (E) unsupported by substantial evidence?

II. Can the county, by establishing a county road by prescription or adverse possession, expand the right of public use of the road beyond the use which has historically been made of the road?

The Board phrases the issues as:

1. Is there substantial evidence in the record supporting the Board of Carbon County Commissioners' finding that County Road 648 was established under W.S. § 24-1-101 and the common law doctrine of adverse possession or prescription?

2. Are the rights to use a road acquired by a governmental entity under the common law doctrine of adverse possession or prescription limited to the road's historical use?

FACTS

[¶ 3] Mr. Boykin owns property located in the NE1/4, T15N, R84W, in Carbon County, Wyoming. The road at issue in this case crosses Mr. Boykin's property, passing between his ranch house and his barn. The road has existed in its present location for fifty years and the parties agree it has been used during that time by Mr. Boykin and his predecessors in interest, other landowners having property beyond the Boykin ranch to access their property, and the school district as a school bus route. The parties agree the road has also been used by the general public to some extent but disagree concerning how much the public has used it and during what time period.

[¶ 4] In 1999, the Board adopted and published Resolution 5, which was intended to identify all of the county roads in Carbon County. The road at issue here was one of the roads identified in the resolution as a county road.

[¶ 5] Sometime in 1999 or 2000, Mr. Boykin became concerned with what he perceived to be an increase in the general public's use of the road. In May 2000, he posted no trespassing signs on the north and south boundaries of his property. In November 2001, the county removed the signs and told Mr. Boykin he could not post signs on a county road. The following May, Mr. Boykin filed a complaint against the county in district court. He sought judgment declaring the road was not a county road and quieting title in his name to the portion of the road located on his property.

***2** [¶ 6] Although Resolution 5 identified the road as a county road in 1999, and people in the area historically referred to it as a county road, the Board took no formal action to establish it as a county road until after Mr. Boykin filed his action to have title to the road quieted in him. On November 19, 2002, the Board voted to formally establish the road as a county road by adverse possession or prescription pursuant to Wyo. Stat. Ann. § 24-1-101 (LexisNexis 2005). In accordance with the statute, the Board published notice of its intent in the Rawlins Daily Times and the Saratoga Sun on December 11, 18 and 25, 2002. Mr. Boykin and the Kermit Platt Revocable Trust filed objections to the establishment of the road as a public right of way. Mr. Boykin's action against ***680** the county in district court was stayed pending the outcome of the Board's proceedings.

[¶ 7] On October 28 and 29, 2003, the Board held a hearing on the objections. The county and Mr. Boykin presented evidence. Kermit Platt Revocable Trust, the other objector, did not appear at the hearing. On February 3, 2004, the Board entered findings of fact, conclusions of law and an order designating the road as a county road and public highway right-of-way pursuant to § 24-1- 101(a) and the common law doctrines of adverse possession or prescription. Most significantly, the Board concluded from the evidence presented:

[T]he general public has openly, notoriously and continuously used the road for a variety of purposes for more than fifty years. In addition, Carbon County has openly, notoriously

and continuously improved and maintained the road at public expense since 1973, and probably much longer. Although Boykin is entitled to a presumption that the general public's use and Carbon County's maintenance of the road were permissive, the proponent has established by a preponderance of the evidence that Carbon County regularly and exclusively improved, maintained and repaired the road from 1973 or earlier until 1985, a period in excess of ten years. Carbon County's regular and exclusive maintenance of the road during this period was sufficient to place the adjacent landowners on notice that it was asserting control over the road in a manner that was inconsistent with their rights of private ownership. The adjacent landowners neither interrupted nor objected to Carbon County's exclusive maintenance of the road prior to 1985. Instead, the adjacent landowners, including Boykin's predecessor in title, relied upon Carbon County to maintain the road and, over time, came to believe that the road was a county road. Carbon County has successfully rebutted the presumption of permissive use in this case.

[¶ 8] Mr. Boykin filed a petition for review of administrative action in district court, raising the same issues he presents to this Court. [FN1] Upon considering the parties' briefs and arguments, the district court issued a decision letter upholding the Board's findings. The district court stated:

FN1. Mr. Boykin asserted an additional issue before the district court that he does not present to this Court. He claimed that the hearing examiner erred in allowing counsel for the county and the Board to appear in this action when a member of said counsel's firm also represented an affected party who sought, and stood to benefit from, the establishment of a county road by prescription.

3 While this Court may have some sympathy for the problems Boykin has encountered with the ever-increasing use by the public of the road in question, particularly where the road separates his house from the barn, it cannot substitute its judgment for that of the County in the face of the substantial evidence supporting the findings.

STANDARD OF REVIEW

[¶ 9] Pursuant to § 24-1-101(b), Mr. Boykin's appeal from the Board's decision to establish County Road 648 as a public road by adverse possession or prescription is governed by the Wyoming Administrative Procedure Act. Therefore, we give no deference to the district court's decision and consider the case as though it came directly from the Board. *Lincoln County Bd. of Comm'rs v. Cook*, 2002 WY 23, ¶ 33, 39 P.3d 1076, 1084 (Wyo.2002). Both Mr. Boykin and the county presented evidence at the hearing and so our review of the factual findings is limited to determining whether they were supported by substantial evidence. *Kunkle v. State ex rel. Wyo. Workers' Safety and Comp. Div.*, 2005 WY 49, ¶ 8, 109 P.3d 887, 889 (Wyo.2005). We have stated the substantial evidence test as follows:

In reviewing findings of fact, we examine the entire record to determine whether there is substantial evidence to support an agency's findings. If the agency's decision is supported by substantial evidence, we cannot properly substitute our judgment for that of the agency and must uphold the findings on appeal. Substantial evidence is relevant evidence

which a reasonable mind might accept in support of the agency's ***681*** conclusions. It is more than a scintilla of evidence.
Id. (citations omitted).

[¶ 10] The interpretation and correct application of Wyoming statutes are questions of law over which our review is plenary. *Lincoln County*, ¶ 34, 39 P.3d at 1085. We affirm an administrative agency's conclusions of law only if they are in accord with the law. *Id.* We give no deference to the agency's determination, and will correct any error made by the agency in interpreting or applying the law. *Id.*

DISCUSSION

[¶ 11] In his first issue, Mr. Boykin argues generally that the Board's order was arbitrary, capricious, an abuse of discretion, not in accordance with Wyoming law and unsupported by substantial evidence. The thrust of his claim is that sufficient evidence was not presented to show that the county's use of the road was adverse, hostile or exclusive to his use of the road. Rather, he contends, the evidence established that the county's use was permissive, and that is not sufficient under Wyoming law to support the establishment of a county road by prescription. He cites *Lincoln County,* 39 P.3d 1076, *Yeager v. Forbes,* 2003 WY 134, 78 P.3d 241 (Wyo.2003), and other Wyoming cases cited therein as support for his claim.

[¶ 12] The county responds that the overwhelming weight of the evidence supported the Board's findings. The county points to evidence showing: the road existed in its current location for at least fifty years and all of the landowners who used the road, except Mr. Boykin, thought it was an established county road; it is a well-defined, improved gravel road and was marked with a county road sign as early as 1957; the county has worked to maintain the road for over twenty-five years, including installing and repairing culverts, installing cattle guards, hauling gravel, and grading and plowing the road; the road has been designated and used as a school bus route since the 1950s; Mr. Boykin observed the use of the road between his house and outbuildings by the county and numerous others on a daily basis; Mr. Boykin knew the county did not have a recorded easement for the road but did nothing about it; the road was identified as a county road in 1999 in Resolution 5; it was shown on maps as a county road as early as 1962; Mr. Boykin's mother, who purchased the ranch in 1957 and lived there until 1985, testified the county used and maintained the road for more than ten years and its use was inconsistent with her ownership of the road. The county asserts this evidence was sufficient to overcome the presumption that use of the road by the county and general public was permissive, making the determination of whether the use was adverse to Mr. Boykin's asserted ownership of the road a factual one for the Board based upon weighing the evidence and assessing the credibility of the witnesses.

4 [¶ 13] Section 24-1-101 provided a process whereby boards of county commissioners were to determine by January 1, 1924, what roads within their respective counties were "necessary or important for the public use as permanent roads" and to record those roads as county highways. With but one exception, roads within the state constitute public

roads only if they were lawfully established in accordance with the statute. The one exception to the statutory procedure for establishing public roads is at issue here. That exception, found in § 24-1-101(a), provides in pertinent part:

Except, nothing contained herein shall be construed as preventing the creation or establishment of a public highway right-of-way with reference to state and county highways under the common-law doctrines of adverse possession or prescription either prior to or subsequent to the enactment hereof.

By its express reference to the common law doctrines, the statute incorporates past decisions by this Court in which we settled upon the standards governing claims of adverse possession and prescription. *Lincoln County*, ¶ 38, 39 P.3d at 1086.

[¶ 14] Under the common law, a party asserting a claim of adverse possession or prescription has the burden of proving adverse use, under color of title or claim of right, such as to put the owner on notice that ***682*** an adverse right was being claimed. *Koontz v. Town of Superior*, 746 P.2d 1264, 1268 (Wyo.1987). The adverse use must be continuous and uninterrupted for the prescriptive period, which, in Wyoming, is ten years. *Id.* Adverse or hostile use is use inconsistent with the rights of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder. *Id.* If use is permissive, no easement can be acquired by prescription. *Id.* Use is presumed to be permissive absent evidence of adverse use.

[¶ 15] Open, notorious, continuous and uninterrupted use for the ten year period is not sufficient to overcome the presumption that the use was permissive. *Lincoln County*, ¶ 41, 39 P.3d at 1086. Use by permission or the absence of objection will not ripen into title no matter how long continued. *Id.*, ¶ 40, 39 P.3d at 1086. To rebut the presumption that use was permissive, the claimant has the burden of establishing that his hostile and adverse use inconsistent with the owner's interest was brought home to the owner in a clear and unequivocal way. *Powder River Ranch, Inc. v. Michelena*, 2005 WY 1, ¶ 16, 103 P.3d 876, 881- 82 (Wyo.2005). The subjective intent of the party claiming the easement is immaterial. *A.B. Cattle Co. v. Forgey Ranches, Inc.*, 943 P.2d 1184, 1188 (Wyo.1997). In cases like this one involving a public claimant, the claimant's construction or maintenance of a road is evidence of its control of and jurisdiction over the road, a necessary element to showing that its use is adverse and under a claim of right. *Lincoln County*, ¶ 41, 39 P.3d at 1086. Although not determinative, maintenance or repair of a road by a claimant suggests that the use is adverse to the owner's interest. *Powder River Ranch*, ¶ 13, 103 P.3d at 881.

***5** [¶ 16] On the basis of these principles, we held in *Koontz* that the undisputed evidence of regular public use of the road inconsistent with the owner's rights combined with evidence that the town had maintained the road since the 1950s effectively rebutted the presumption of permissive use and established sufficient notice to the owners that an adverse right was being claimed. [FN2] In *Koontz*, the owners of three lots in the town of Superior discovered in 1980 that Division Street ran across two of the lots and not, as everyone believed, south of the lots. Upon learning that the street crossed their property, the landowners blocked its passage by placing a mobile home where the street was located. The town claimed the street had been traveled continuously and in an open,

notorious and adverse manner by the general public since at least the 1950s. The town also claimed it had maintained the street since that time. The landowners did not dispute that the public had regularly used the street since the 1950s, but attempted to refute the town's claim that the use was adverse by submitting two affidavits. The first contained the landowners' statement that they permissibly allowed the property to be used as a public street. The second contained the statement of the landowners' predecessor in interest that if the town had informed him of its claim, he would have denied use of his property as a public street. We concluded neither of the affidavits demonstrated that permission was asked or given. Because the landowners presented no other evidence to refute the evidence presented by the town to rebut the presumption, we upheld the order granting a prescriptive easement.
FN2. *Koontz* involved a municipality and was not decided under § 24-1-101. Additionally, the provision in the statute allowing county roads to be established by adverse possession or prescription was added after *Koontz* was decided. Despite these distinctions, *Koontz* is pertinent authority because it applies the common law doctrines at issue here.

[¶ 17] We applied the same principles to conclude in *Lincoln County* that an administrative finding of adverse use was not supported by substantial evidence. In that case, the county sought to establish a road as a county road by prescription. The landowners objected and the board of county commissioners held a hearing. Evidence was presented that the public used the road historically for access to camping, hunting and woodcutting. Evidence was also presented that the road was used for search and rescue operations, transporting cattle and to access adjacent property. The prior owners stated they had allowed public use of the road in ****683*** recognition of an established course of dealing to facilitate the use of private and public property for ranching, governmental, recreational and other purposes. There was also evidence that those who used the road in most cases did not ask permission, use for the stated purposes was never denied, and when permission was sought it was given. The county presented evidence of county maintenance of the road. However that maintenance was performed primarily upon specific request and ended in the 1980s. Thereafter, private parties maintained the road. We concluded the evidence was insufficient to overcome the presumption of permission.

*****6*** [¶ 18] More recently, in *Powder River Ranch,* we held private claimants established a prescriptive easement by showing the requisite elements. The evidence in that case showed the claimants used the road consistently for nearly forty years, did not seek or obtain permission, directed guests and invitees to use the road, installed cattle guards and performed other maintenance and repair of the road without seeking permission. In addition, the servient estate owner filed an affidavit stating it had not given anyone permission to use the road.

[¶ 19] In the case before us, the evidence the county presented to rebut the presumption that use of the road across Mr. Boykin's property was permissive included the testimony of Bill Nation, the county road and bridge superintendent. Mr. Nation testified that in his sixteen years with the county the road at issue was known to him only as county road

648, recognized and treated as part of the county road system and identified as county road 648 on all of the maps of the county road system he had seen.

[¶ 20] Mr. Nation also testified county road 648 received at least the same regular routine maintenance that all roads within the county road system received and may have received more because it was also used by the school district as a bus route. He testified the county bladed the road at least twice a year throughout his sixteen years with the county and plowed as necessary to keep the road open and passable for the school bus and other traffic through the winter. He testified that public funds were expended to improve the road, including money for culvert and cattle guard repairs, road signs, gravel and recycled asphalt. In addition, the county expended funds for the equipment and man hours involved in maintaining the road. Mr. Nation testified that he never asked any of the landowners along the road for permission to use or maintain the road, nor did any of the landowners object to his use or maintenance of the road prior to Mr. Boykin's objection in 2001.

[¶ 21] Neighboring landowners, some of whom had lived along the road for several decades, testified they always considered the road to be a county road. They testified the road was used by the school bus, utility services, area ranchers, recreational vehicles and the general public. They testified no one ever asked them for permission to use the road. They testified it was their understanding the county was responsible for maintaining the road and the county in fact maintained it.

[¶ 22] Other county road and bridge department employees testified they considered the road to be a county road and it was treated and maintained by the county as though it was a county road. Ron Garretson, a twenty-six year employee of the road and bridge department, testified that in 1979 or 1980 he installed extensions on cattle guards on the road on the southern and northern boundaries of Mr. Boykin's property to make it easier to get the county road grader through for snow removal. He also replaced a culvert on the road at the request of Mr. Boykin's mother, who lived on the property prior to Mr. Boykin obtaining ownership. He testified the county paid for the repairs. He also testified he graveled the road for the county sometime in the 1980s. He never asked for permission to maintain or make repairs on the road because he believed it was a county road.

***7** [¶ 23] A former member of the school board for Carbon County School District No. 2 testified that school district policies and state regulations require that school buses be run only on publicly owned and maintained roads. He testified that during his tenure on the board, beginning in 1985, the school district ***684** complied with the policies and regulations and did not run buses on private roads. The school district ran a bus on county road 648 because it believed, like most people, that it was a county road.

[¶ 24] Ms. Nina Parkhurst, Mr. Boykin's mother, who lived on the ranch continuously from 1957 to 1985, testified the school bus used and the county maintained the road the entire time she lived there. She testified she asked the county about fixing the culvert to the south of her property because puddles were forming on the road. She testified she must have thought it was the county's responsibility or "something like that" to fix the

culvert or she would not have approached the county about it. She testified she never told the county not to grade the road nor did she give permission for them to grade it. She also testified the county's maintenance of the road was inconsistent with her ownership of it. In fact, she testified, she did not think the road was her property, it had been there a long time before she got there, people had always used it and she did not build it or maintain it.

[¶ 25] From this evidence, we conclude the county met its burden of rebutting the presumption that use of the road was permissive. The undisputed evidence of regular public use of the road inconsistent with Mr. Boykin's rights combined with evidence that the county expended significant public funds to consistently maintain the road beginning in at least the 1950s effectively rebutted the presumption of permissive use and established sufficient notice to Mr. Boykin that an adverse right was being claimed. The county presented substantial evidence establishing that its use was hostile and adverse, inconsistent with Mr. Boykin's claim of ownership and brought home to Mr. Boykin in a clear and unequivocal way. As a public claimant, evidence of the county's exercise of control and jurisdiction over the road for many years demonstrated its claim of right which was by its nature adverse to Mr. Boykin's title.

[¶ 26] Despite the substantial evidence of adverse use, Mr. Boykin claims the evidence was insufficient because it did not show the county's use was exclusive or inconsistent with his use. Citing *Yeager* and *Lincoln County*, Mr. Boykin contends Carbon County must present evidence of "exclusive use." Mr. Boykin's contention misses an important distinction.

[¶ 27] The authority cited in *Yeager* and *Lincoln County* made clear that a showing of exclusive use was necessary only when a claimant relied upon a presumption of adverse or hostile use. *See Shumway v. Tom Sanford Inc.* 637 P.2d 666, 669 (Wyo.1981); 28 C.J.S. *Easements* § 68, pp. 736-37 (1941). In *Shumway*, the claimant argued for a presumption of adverse and hostile use arising out of the establishment of open, visible, continuous, unmolested use. While noting such a presumption had been recognized by this court in previous cases, we addressed the inconsistency between the presumption of adverse use and the presumption of permissive use, and concluded the presumption of permissive use should prevail in Wyoming. [FN3] In discussing the presumption of adverse use we cited 28 C.J.S. *Easements* § 68, which states:

FN3. "While we recognize that this disposition has the possibility of permitting termination of long and historic uses of unimproved roads, we are firm in our conviction that the best rule for the State of Wyoming is one which requires that a landowner claiming an easement by prescription in an unimproved road crossing the lands of his neighbor must assume the burden of establishing that his intention to make a hostile use of the road adverse to the interests of his neighbor was brought home to the neighbor in a clear and unequivocal way. His subjective intent will not be considered material, and while it is likely true that a manifestation of his hostile and adverse intent will result in revocation of permission to use the road across the neighbor's land, this is the best posture for the law to assume in the State of Wyoming. *The claimant cannot rely upon a presumption arising out of the open, notorious, continuous and uninterrupted use for the*

prescriptive period, but in the absence of more that use will be presumed to have been with permission. To rebut this presumption the claimant must introduce evidence of the facts which demonstrate the manner in which the hostile and adverse nature of his use was brought home to the owner of the adjacent land." *Shumway*, 637 P.2d at 670 (emphasis added).

***8** *Presumptions arising out of user.* The continuous user of an easement under a claim of right is presumptive evidence of ownership thereof, as against anyone who ***685** does not show a superior right. While the contrary is true in some jurisdictions, sometimes by reason of statute, the general rule is that proof of an open, notorious, continuous and uninterrupted user for the prescriptive period, without evidence to explain how it began, raises a presumption that it was adverse and under a claim of right, or, as is sometimes stated, raises a presumption of a grant, and casts on the owner of the servient tenement the burden of showing that the user was permissive or by virtue of some license, indulgence, or agreement, inconsistent with the right claimed. The facts to admit of such presumption are not, however, presumed; and the presumption itself is merely prima facie and may be rebutted. The presumption does not arise where the user is shown to be permissive in its inception, or where it is not shown to have continued for the prescriptive period; nor, in the absence of some decisive act indicating separate and exclusive use, does it arise where the user is not inconsistent with the rights of the owner, as, for instance, where the user is in connection with that of the owner or the public or is claimed with respect to unoccupied, unenclosed, and unimproved lands, the use in such cases being presumed to be permissive and in subordination to the owner's title. The latter presumption is not conclusive, however, and may be rebutted. *Shumway*, 637 P.2d at 669-70. The only mention of the need to show "exclusive use" in this excerpt was in the context of a claimant seeking to rely upon the presumption of adversity. In that context, a claimant must show a decisive act of separate and exclusive use. A claimant cannot rely upon the presumption of adverse use if the use is consistent with the rights of the owner such "as, for instance, where the user is in connection with that of the owner or the public...." *Id.*

[¶ 28] This authority suggests that if Carbon County had relied upon the presumption of adverse and hostile use, it was required to present evidence of its "exclusive use" of the easement. However, Carbon County did not attempt to rely upon that presumption. In fact, in the context of a public entity's claim that a public road had been established by easement, one may wonder what kind of evidence could demonstrate "exclusive use." Perhaps it could be evidence of the county maintaining the road and preventing the owner from doing so. In any event, such musing is unnecessary because the county did not rely upon the presumption of adversity, but instead provided evidence of the lack of a permissive use.

[¶ 29] Mr. Boykin's second claim is that the establishment of the road as a county road constituted an impermissible expansion of the historic adverse use that was the basis for the prescriptive claim. His claim is twofold: first, he claims the road established as a county road is wider than the road that historically crossed his property; and, second, he claims the Board's order allows for the road to be used in a manner in which it has not

been historically used. With respect to the latter claim, he asserts the general public now has unrestricted use of the road and the property owner beyond him can subdivide his property and guarantee access to the many new residents by way of the road across his land. In support of his claim, Mr. Boykin cites a number of cases from other jurisdictions involving private parties and *Haines v. Galles,* 76 Wyo. 411, 303 P.2d 1004, (1956). Like Mr. Boykin's other authorities, *Haines* was a dispute between private landowners in which we held that the plaintiff was entitled to use the private right of way across the defendants' land only in a manner consistent with the use giving rise to the claim for prescription.

***9** [¶ 30] We have not applied the restrictive use principle from *Haines* to claims of adverse possession or prescription brought by public entities under § 24-1-101. Faced with this question, the district court concluded the restrictive use principle applicable between private parties did not apply to claims for the establishment of public highway right-of-ways under the statutory provision. The district court stated:

This Court is persuaded that Wyo. Stat. Ann. § 24-1-101(a), as used by the County, creates a "public highway right-of-way." The use of a public highway right-of-way cannot be limited to historical uses ***686** as may be the case for private claimants of particular prescriptive easements. To rule otherwise would take us down a road we should fear to travel. Boykin's argument could logically be used to prohibit *any* motor vehicle use of the road in question, since, in its early years, the road was undoubtedly used only by some form of foot or horse travel. The use of the road may well increase in the future, and the method of such increased use cannot be foreseen. Such is the nature of a "public highway right-of-way." "To rule otherwise would defeat the very nature of a public road system." *Heath v. Parker,* 30 P.3d 746, 750 (Colo.2001).

We agree with the district court's reasoning. It is consistent with the definition of "public road" found in Wyo. Stat. Ann. § 24-1- 133(b) (LexisNexis 2005), which states in pertinent part as follows: "For purposes of this section 'public road' means any passageway ... to which a governing body has acquired unrestricted legal right for the public to use the passageway." As stated by the court in *Lovvorn v. Salisbury,* 701 P.2d 142, 144 (Colo.App.1985):

While private easements, acquired by prescription, can, and have been so limited, the imposition of such restrictions on public roads or portions of public roads would defeat the very concept of a public road system. The ultimate distinction between a public road and a private easement, however acquired, is that the private easement can be, and is, limited to specific individuals and/or specific uses while a public road is open to all members of the public for *any* uses consistent with the dimensions, type of surface, and location of the roadway.

[¶ 31] Affirmed.

Appendix 3

3. Broek v. County of Washakie, 82 P.3d 269, 272 (Wyo. 2003).

Broek v. County of Washakie, 82 P.3d 269, 272 (Wyo. 2003).

82 P.3d 269, 2003 WY 164

Supreme Court of Wyoming.
Darell Ten BROEK and Bonnie Ten Broek, and Barbara G. Chaney and Jay S. Chaney, Trustees of the Barbara G. Chaney Living Trust, Dated October 3, 1997, Appellants (Defendants),
v.
COUNTY OF WASHAKIE, Appellee (Plaintiff).
No. 03-45.
Dec. 22, 2003.

Representing Appellants: Kent A. Richins, Worland, Wyoming.
Representing Appellee: G. Albert Sinn, Washakie County Attorney, Worland, Wyoming.

Before HILL, C.J., and GOLDEN, LEHMAN, KITE, and VOIGT, JJ.

HILL, Chief Justice.

[¶ 1] Darell and Bonnie Ten Broek, along with Barbara G. and Jay S. Chaney as trustees of the Barbara G. Chaney Living Trust (collectively the Defendants), appeal an order of the district court on a complaint for declaratory judgment filed by the County of Washakie (the County) to establish a stock trail over a portion of their land pursuant to a prescriptive easement. We conclude that a declaratory judgment is not the appropriate means to establish a prescriptive public easement because the legislature has established a specific statutory procedure that requires such claims to be brought initially before the respective board of county commissioners. Accordingly, we vacate the district court's order and reverse and remand with directions to dismiss the County's complaint without prejudice.

ISSUES

[¶ 2] The Defendants set forth two issues:
1. Did the district court commit reversible error when, as a matter of law, it concluded that Washakie County does have legal authority to establish a public stock trail by prescriptive easement on private property?
2. Are the findings and conclusions of the district court that a public stock trail has been established by Washakie County on private property by prescriptive easement clearly erroneous, not supported by substantial evidence and contrary to law?
The County's statement of the issues parallels that of the Defendants.

FACTS

[¶ 3] The Defendants own land in Washakie County. In October 1999, the Defendants, acting individually, purchased small strips of property adjacent to their own land. The purchased property lay between the Defendants'***270*** land and U.S. Highway 16. [FN1] The property was in a state of neglect with sinkholes, dilapidated fences, overgrowing

vegetation and abandoned vehicles on it. The Defendants cleaned up the property and moved their fence lines to encompass their purchases.
FN1. The highway was designated a county road by the Big Horn County Commissioners in 1906. Washakie County was created out of part of Big Horn County in 1911. The highway is still referred to as Big Horn County Road No. 91.

[¶ 4] In June 2000, the County filed a Declaratory Judgment action against the Defendants. The County alleged that the property purchased by the Defendants had been designated in historical documents as a stock trail. The County also asserted that the public had used the property as a stock trail continuously since at least 1904 and that the fencing of it interfered with that use. The County requested a declaration from the district court that the property was subject to an easement for a stock drive as part of the adjacent road and that the Defendants be ordered to relocate their fences. An unrecorded hearing was held before the district court. On May 4, 2001, the district court issued a decision letter concluding that the County had established a prescriptive easement over the Defendants' property. The district court held two more hearings where additional evidence was taken in response to motions for reconsideration and for rehearing filed by the Defendants. The district court issued an order on December 18, 2002 confirming its original conclusion that the County had established a prescriptive easement. The Defendants have appealed that order.

STANDARD OF REVIEW

[¶ 5] When a matter is tried before the district court without a jury, we review the court's findings of fact pursuant to a clearly erroneous standard. Any conclusions of law are reviewed *de novo. Davis v. Chadwick,* 2002 WY 157, ¶ 8, 55 P.3d 1267, ¶ 8 (Wyo.2002).

DISCUSSION

[¶ 6] The Defendants' main argument is that the County does not have any legal authority to establish a stock trail by prescription across private property. [FN2] The underlying premise to the argument is that there is no specific statutory provision authorizing a county to bring an action to establish a public stock trail by prescription. Under the facts of this case, the Defendants' argument is one of semantics. The phrase "stock trail" is just descriptive of a public use on the adjacent road. In other words, the County is claiming that the public has used U.S. Highway 16, also called Big Horn County Road No. 91, and the portion of the Defendants' land adjacent to that road to drive livestock. The allegations in the County's complaint clearly demonstrate the relationship between the Defendants' property and the road:
FN2. The Defendants' second issue challenges the sufficiency of the evidence supporting the district court's ruling. Given our conclusion that a county may not use a declaratory judgment action to establish a prescriptive easement, the issue is moot, and we will not address it in this appeal.

1. The Defendant's [sic] in this matter are owners and/or trustees in fee simple of the areas on the South portion of Section 17, Township 47N, Range 88W.

2. During the late fall of 1999, the Defendants' [sic] Chaney, removed a pole and post fence and re-erected it some feet south, where it is presently located.
3. Defendants' [sic] Ten Broek, built a post and wire fence some feet south from an old highway right-of-way fence, where it is presently located.
4. The Washakie County Commissioners commissioned R.L. Hudson, Land Surveyor, to survey this area which he did and a Letter of Transmittal and Report of Surveyor dated March 22, 2000, was given to the Washakie County Commissioners.
5. The Big Horn County Commissioners on or about July 6, 1904, declared the area on the boundary line between Section 17 and Section 20, in Tracts 65 and 55, and 56 of the re-survey Township 47N, Range 88W, to be a county road.
***271** 6. A notation appears on the 1910 Plat of Ten Sleep, Big Horn County, Wyoming, on file in the Washakie County Clerk's Office, which labels this road as main street with a 66 foot right-of way centered on the section line center of county road with a bearing of S89, 42 minutes west. The road was reconstructed in 1922 and designated as a state highway on November 25, 1929, under project number 108E. The location was easterly along the tract line, then north easterly through a curve to the left and then a curve to the right in the vicinity of the Ten Broek and Chaney property lines.
7. That highway was in use until approximately 1936, when highway 16 was constructed in its present location and designated as such on November 28, 1939, still under project number 108E.
8. U.S. Highway 16 was re-constructed in the 1960's [sic] under project F-036-1(17) on which plan the road in question was noted as a stock drive.
9. The minutes of the Washakie County Board of Commissioners meeting on September 1, 1936, record a motion by Commissioner Horel, and its adoption whereby;
"Whereas a new highway is being constructed from Big Cottonwood Creek to Ten Sleep, Wyoming, re replace from said Cottonwood Creek to Ten Sleep, the present highway No.1 16;" and "Whereas, the State Highway Department of the State of Wyoming is agreeable to leaving in place the old treated timber bridges and all of the culverts on the present Worland-Ten Sleep road from Big Cottonwood Creek into Ten Sleep provided that said present road is designated as a stock driveway and cattle run instead of the new road which is in the process of construction; now therefore, Be it Resolved by the Board of County Commissioners of the County of Washakie, State of Wyoming, that the present Worland-Ten Sleep road, being highway No. 16, from Big Cottonwood Creek into Ten Sleep, be and the same is hereby designated as a stock driveway and cattle run."
10. A Warranty Deed from Nichols to a prior predecessor of the Defendants, the Wyoming Game and Fish Commission, recorded in 1944, contains a metes and bounds description concerning the Ten Broek lands that mentions a fence line. The existence of the old fence line varies between 33 and 23 feet north of the tract line prior to March 4, 1944.
11. A certified land corner recordation report prepared by Mr. Stanton Able, Licensed Professional Surveyor for the State of Wyoming, recorded on February 4, 1985, for corner 4 of tract 54, also being corner 1 of tract 56, states that corner as being 31 feet from the north fence. The map on the reverse side dated December 19, 1984, indicates a fence to exist along the north side of the old highway route.
12. R.L. Hudson's State of Wyoming Corner Report also shows a tie to one remaining old fence post north of the road to be 31 feet north of the tract line having been measured by

Hudson on March 16, 2000.
13. The stock drive has been used as a public road and stock drive continuously since 1904 for parking cars, rodeo events, football games, driving livestock, etc. Livestock has been [sic] driven through the north 33 feet of the stock drive continuously since before 1937.
14. Sometime in the fall of 1999, the Defendants removed the old fence with the exception of one fence post on the North side and re-erected new fences further south into the 66 foot stock drive.
15. The Chaney fence encloses approximately .15 acres of the stock drive, thereby eliminating any use by the public.
16. The Ten Broek fence encloses approximately .75 acres of the stock drive, thereby eliminating any use by the public.
Whatever label is attached, the County is claiming that a portion of the Defendants' property is part of the adjacent road designated as U.S. Highway 16/Big Horn County ***272** Road No. 91. [FN3] The parties agree that the resolution of that claim is dependent on whether the County established a prescriptive use across the Defendants' property. The legislature has specifically granted counties the right to establish public highways, including by prescription. Wyo. Stat. Ann. § 24-1-101 (Lexis/Nexis 2003). Accordingly, we reject the Defendants' contention that the County lacked the authority to establish the "stock trail" in question across their lands through the common law doctrine of prescription.
FN3. We note that in Wyoming stock may be driven on any county road unless the respective board of county commissioners has specifically declared that a certain road is not to be used for that purpose. *See* Wyo. Stat. Ann. §§ 24-1-121 & 122 (Lexis/Nexis 2003).

[¶ 7] We must, however, reverse and vacate the district court's decision granting the prescriptive easement to the County. As noted in the facts above, the County prosecuted this action through a declaratory judgment claim brought in the district court. The legislature has established a specific procedure for the establishment of a public road by prescription in the above-mentioned Wyo. Stat. Ann. § 24-1-101, which provides:
(a) On and after January 1, 1924, all roads within this state shall be highways, which have been or may be declared by law to be state or county highways. 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 traveled 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, or if need be laid out, established and 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. Except, nothing contained herein shall be construed as preventing the creation or establishment of a public highway right-of-way with reference to state and county highways under the common-law doctrines of adverse possession or prescription either prior to or subsequent to the enactment hereof. If any such board shall resolve the creation or establishment of a public highway right-of-way based upon the common-law doctrines of adverse possession or prescription, it shall, following the filing of a plat and

accurate survey required in accordance with the terms and provisions of W.S. 24-3-109, proceed with the publication of the proposed road for three (3) successive weeks in three (3) successive issues of some official newspaper published in the county, if any such there be, and if no newspaper be published therein, such notice shall be posted in at least three (3) public places along the line of the proposed road, which notice shall be exclusive of all other notices and may be in the following form:
[Form omitted]
(b) The county commissioners shall cause a copy of the above notice to be mailed by registered or certified mail to all persons owning lands or claiming any interest in any lands over or across which the road is proposed to be created or established. The publication, posting and mailings of such notice shall be a legal and sufficient notice to all persons owning lands or claiming any interest in lands over which the proposed road is to be created or established. No viewers or appraisers shall be appointed, nor shall any damage claims be considered or heard, and the sole objections to be heard by the board shall be directed against the creation or establishment of such right-of-way under the common-law doctrines of adverse possession or prescription. Any objector may appeal from the final decision of the board of the county commissioners to the district court of the county in which the land is situated. Notice of such appeal must be made to the county clerk within thirty (30) days after such decision has been made by the board, or such claim shall be deemed to have been abandoned. ***273*** Within ten (10) days after the notice of an appeal is filed in his office, the county clerk shall make out and file in the office of the clerk of the district court, in his county, a transcript of the papers on file in his office, and the proceedings of the board in relation to such creation and establishment. The proceedings on appeal shall be governed by the Wyoming Administrative Procedure Act. If the appeal is upheld the appellant shall be reimbursed by the county for all reasonable costs of asserting his claim.
(c) Only that portion of the state highways actually used, travelled or fenced, which has been used by the general public for a period of ten (10) years or longer, either prior to or subsequent to the enactment hereof, shall be presumed to be public highways lawfully established as such by official authority and unavailability of records to show such to have been lawfully established shall not rebut this presumption.
(d) Only that portion of county highways, not to exceed sixty-six (66) feet in width, which was actually constructed or substantially maintained by the county and traveled and used by the general public for a period of ten (10) years or longer, either prior to or subsequent to the enactment hereof, shall be presumed to be public highways lawfully established as such by official authority.
The County asserts that a declaratory judgment action is an appropriate means of determining this matter. The County notes that a declaratory judgment action is a remedial action that is to be liberally construed and applied. It also argues that the Defendants were provided with procedural and substantive due process in the proceedings before the district court.

[¶ 8] The problem with the County's approach is that it takes the authority to make the initial decision away from the legislatively designated body and places that authority with the entity that was legislatively designated as the appellate court in the matter. We have addressed this very issue before and clearly stated that it is not a proper utilization of a

declaratory judgment action:

However, the added element which may be considered in cases such as this is the status of a declaratory judgment action filed in a court *which is an appellate court* for the same issue presented, or able to be presented, below. Here the declaratory judgment action was filed in the district court. The district court is designated the appellate court for judicial review of administrative actions.

Ordinarily, a declaratory judgment action is not a substitute for an appeal. *School Districts Nos. 2, 3, 6, 9, and 10, Campbell County v. Cook,* Wyo., 424 P.2d 751 (1967); *Stahl v. Wilson,* Fla.App., 121 So.2d 662 (1960); *Sparks v. Brock & Blevins, Inc.,* 274 Ala. 147, 145 So.2d 844 (1962); and *Bryarly v. State,* 232 Ind. 47, 111 N.E.2d 277 (1953). But such direct action is often available "even though there was a statutory method of appeal," *School Districts Nos. 2, 3, 6, 9, and 10, Campbell County v. Cook,* supra, 424 P.2d at 755. Here, there is no appeal actually pending and the issues are not moot.

However, there is a restriction on the availability of a declaratory judgment action with reference to its applicability to administrative matters. Where the action would result in a prejudging of issues that should be decided in the first instance by an administrative body, it should not lie. This is because, if it be otherwise, all decisions by the several agencies could be bypassed, and the district court would be administering the activities of the executive branch of the government. *Public Service Commission of Utah v. Wycoff Co.,* 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952); and *City of Cheyenne v. Sims,* Wyo., 521 P.2d 1347 (1974). This restriction on the scope of declaratory judgments is akin to the requirement that administrative remedies must be exhausted before judicial relief is available.

Accordingly, where the relief desired is in the nature of a substitution of judicial decision for that of the agency on issues pertaining to the administration of the subject matter for which the agency was created, ****274*** the action should not be entertained. If, however, such desired relief concerns the validity and construction of agency regulations, or if it concerns the constitutionality or interpretation of a statute upon which the administrative action is, or is to be, based, the action should be entertained. This is no more than that obviously and plainly provided for in the language of the Uniform Declaratory Judgments Act.

Rocky Mountain Oil and Gas Association v. State, 645 P.2d 1163, 1168-69 (Wyo.1982). *See also, City of Cheyenne v. Sims,* 521 P.2d 1347, 1349-50 (Wyo.1974) ("Declaratory judgment should not be used to usurp or replace specific administrative relief, particularly when the initial decision is committed to an administrative body.") A board of county commissioners is considered an agency under the Wyoming Administrative Procedure Act. Wyo. Stat. Ann. § 16-3-101(b)(i) (Lexis/Nexis 2003); *Holding's Little America v. Board of County Commissioners of Laramie County,* 670 P.2d 699, 701-02 (Wyo.1983). The subject of the County's action does not concern the validity or construction of an agency regulation or the constitutionality or interpretation of a statute. Rather, the relief requested by the County in this matter pertains to a matter that has been legislatively consigned to determination by an administrative agency. The use of a declaratory judgment action in these circumstances was improper.

CONCLUSION

[¶ 9] Since the proper procedures were not followed, we vacate the district court's order and reverse and remand the matter to the district court with instructions to dismiss the County's complaint. The County may pursue its claim, if it desires, as directed by Wyo. Stat. Ann. § 24-1-101.

Appendix 4

4. Yeager v. Forbes, 78 P.3d 241, 255 (Wyo. 2003).

Yeager v. Forbes, 78 P.3d 241, 255 (Wyo. 2003).

78 P.3d 241, 2003 WY 134

Supreme Court of Wyoming.
John YEAGER, Lawrence A. Durante, John Reilly, and George Rogers, Appellants (Defendants/Counter Claimants),
v.
Waldo E. FORBES, William C. Forbes, Sarah P. Forbes and Edith L. Forbes, as Trustees of the Beckton Trust, and Waldo E. Forbes and William C. Forbes As Trustees of the Hillside Street Trust, Appellees (Plaintiffs).
No. 02-167.
Oct. 24, 2003.

Representing Appellants: Timothy C. Kingston of Graves, Miller & Kingston, P.C., Cheyenne, Wyoming.
Representing Appellees: Tom C. Toner of Yonkee & Toner, LLP, Sheridan, Wyoming.

Before HILL, C.J., and GOLDEN, LEHMAN, KITE, and VOIGT, JJ.

HILL, Chief Justice.

[¶ 1] This is a dispute over public access along the Soldier Creek Trail or Toll Road (the Trail) that crosses private land abutting the Big Horn National Forest in Sheridan County. John Yeager, Lawrence A. Durante, John Reilly, and George Rogers (collectively the Defendants) appeal a summary judgment granted by the district court permanently enjoining them from entering upon or traveling across lands owned by Waldo E. Forbes, William C. Forbes, Sarah P. Forbes, and Edith L. Forbes, as Trustees of the Beckton Trust, and Waldo E. Forbes and William C. Forbes as Trustees of the Hillside Street Trust (collectively the Forbeses). The Defendants also appeal a summary judgment order of the district court denying a Motion to Intervene filed by the Wyoming Wildlife Federation, Raymond Hutson, Dan Biebel, Fred Kusel, and Dan Reinke (collectively interveners).

[¶ 2] Initially, we conclude that the Defendants have not timely appealed the district court's decision on the Motion to Intervene. We also find that the Trail is not a public road under Wyoming law and that the Defendants have not alleged facts sufficient to support a claim for a private or public prescriptive easement. Therefore, we affirm the summary judgment.

ISSUES

[¶ 3] The Defendants set forth three issues for review:
1. Is the Soldier Creek Toll Road or Soldier Creek Trail a public road or trail pursuant to 43 U.S.C. § 932?
2. Do the [Defendants] and the general public enjoy a prescriptive easement right in the use of the Soldier Creek Toll Road or Trail?

3. Should the proposed interveners have been allowed to intervene in the case?
The Forbeses respond with a list of seven issues:
1. Where the Board of County Commissioners never determined that the Soldier Creek Trail was necessary or important for public use and did not officially record the Soldier Creek Trail as a public road by January 1, 1924, as required by 1919 Session Laws, ch. 112 and 1921 Session Laws, ch. 100, did the District Court correctly determine that the Soldier Creek Trail is not a public road?
2. Did the District Court correctly determine that there was no public prescriptive easement over the Soldier Creek Trail?
3. Did the District Court correctly determine that the Defendants had no private prescriptive easement over the Soldier Creek Trail?
4. Did the District Court correctly refuse to grant Defendants' motion to determine that the Soldier Creek Trail was a public road as a matter of law?
5. Was the notice of appeal of the order denying intervention timely filed?
6. Do the Defendants have standing to appeal from an order denying a motion to intervene filed by a third party?
7. Did the District Court properly deny the Intervenor's [sic] motion to intervene as of right under Wyo. R. Civ. P. 24(a)(2)?

FACTS

[¶ 4] Many of the facts underlying this case are the subject of dispute between the parties, especially those relating to the establishment and historical use of the Trail. Our view of the evidence on appeal is determined by the procedural status of the case:
***244** Summary judgment is appropriate when no genuine issue as to any material fact exists and the prevailing party is entitled to have a judgment as a matter of law. A genuine issue of material fact exists when a disputed fact, if it were proven, would have the effect of establishing or refuting an essential element of the cause of action or defense which has been asserted by the parties. We examine the record from the vantage point most favorable to the party who opposed the motion, and we give that party the benefit of all favorable inferences which may fairly be drawn from the record. We evaluate the propriety of a summary judgment by employing the same standards and by using the same materials as were employed and used by the lower court. We do not accord any deference to the district court's decisions on issues of law.
Matlack v. Mountain West Farm Bureau Mutual Insurance Company, 2002 WY 60, ¶ 6, 44 P.3d 73, ¶ 6 (Wyo.2002) (quoting *Baker v. Pena*, 2001 WY 122, ¶ 6, 36 P.3d 602, ¶ 6 (Wyo.2001) (citations omitted)).

[¶ 5] The Forbeses' ranch contains lands in Sections 22, 29, 30, and 31 of Township 55 North, Range 86 West, 6th P.M., Sheridan County, Wyoming. The parcels of land were added to the Forbeses' ranch over time through patenting by their ancestors or through purchase from other parties between 1903 and 1939. The Soldier Creek Trail or Toll Road provides access to the Big Horn National Forest and adjacent state trust lands. It begins at the western terminus of the Beckton Big Horn Mountain Road (County Road No. 52 also commonly referred to as the P K Lane). The Trail begins on property owned by the Forbeses at the western terminus of the P K Lane and winds across state land and

crosses back onto the Forbeses' property before it enters the Big Horn National Forest.

[¶ 6] While there is a serious dispute between the parties as to whether or not the Trail existed prior to the Forbeses' homestead of the land, there is some evidence suggesting that The Sheridan, Bald Mountain and Big Horn Basin Toll Road Company may have constructed the Trail in 1891 or 1892 to provide miners access to the Big Horn Mountains. According to the Defendants' affidavits, the public has used the Trail since its inception. The use of the Trail has ranged from running of cattle to state grazing lands at Walker Prairie since the early 1900's to outfitters and guides taking hunters into the Big Horn National Forest. The individual Defendants also set forth their own use of the Trail. John Yeager has used it to take clients to hunting camps in the Big Horn National Forest as a licensed outfitter since the late 1970's. George Rogers has used the Trail personally and as a licensed outfitter and guide since 1981. Larry Durante and John Reilly have used the Trail for personal enjoyment since 1990 and 1981 respectively.

[¶ 7] Historically, the Forbeses have maintained signs along the Trail. While there is a dispute between the parties as to when the signs were originally put up, the Defendants acknowledged in their depositions that they have been in place since at least the early 1980's. The signs informed users that they had permission to use the Trail to access the Big Horn National Forest and if they desired to use the Trail for any other purpose, they had to obtain prior permission from the Forbeses. There were also signs prohibiting hunting on the Forbeses' property.

[¶ 8] In 2001, the Forbeses apparently became exasperated with gates being left open along the Trail, interfering with their ranching operations. Accordingly, the Forbeses rerouted the Trail at its eastern terminus at the end of the P K Lane. A new sign was erected informing the public that they could use the new route at their discretion, but that if they desired to use the old route, they had to call in advance for permission. The Defendants disputed the right to alter the Trail because they believed that it was a public road. At least two of the Defendants were cited for trespassing for using the old route without obtaining the prior permission from the Forbeses.

[¶ 9] On November 6, 2001, The Board of County Commissioners of Sheridan County held a public meeting. One of the items on the agenda was the dispute over the public or ***245*** private nature of the Trail. The Board's minutes describe the consideration given to the issue:

The Board now addressed a request from Cam and Spike Forbes regarding clarification on the Soldier Creek Toll Road. Chairman Brad Waters addressed the public, and read the following statement, which was prepared by the County Attorney, Matt Redle. "1) Interested parties have indicated their belief that the trail crossing the Forbes' property is a public road. Some have suggested that the trail lies along the route of the Soldier Creek Toll Road established by the Soldier Creek Toll Road Company in 1889 pursuant to Wyo.Rev.Stat. § 525 (1887). 2) A review of pertinent records of Sheridan County fails to show that Sheridan County ever established the trail in question as a county road pursuant to applicable Wyoming statute. 3) In 1907 Sheridan County did establish the Beckton-Big Horn Mountain Road (now known at "PK Lane") as a county road. It has been

suggested by interested parties that the Beckton-Big Horn Mountain Road overlies the lower portion of the Soldier Creek Toll Road. 4) A review of pertinent records of Sheridan County fails to disclose that the County ever claimed the portion of the trail under dispute. Neither do those records disclose that the County has ever expended any funds for construction, maintenance or other improvement to the trail in dispute. 5) This does not necessarily resolve the issue of whether the trail in question is a public thoroughfare. Neither is it within the jurisdiction of this Board to determine the rights, if any, of the Forbes' or interested members of the public to the use of the trail. Jurisdiction to determine the property rights of the interested parties lies with the courts." Attorney Charles E. Graves, representing the "Citizens for Public Access" handed out a letter and addressed the Board at this time, Mr. Graves stated that he agreed with the statement prepared by the County Attorney and requested the Commissioners urge both sides to try to settle this issue, rather than have the courts decide the issue.
The Commissioners' exhortations were apparently insufficient. On November 20, 2001, the Forbeses filed a complaint in the district court requesting a declaration that the Defendants did not have any right to enter upon or travel across the Forbeses' land and asking for a permanent injunction prohibiting them from doing so. The Defendants responded by counterclaiming that: (1) The Trail was an established public road under Federal Revised Statute 2477 (1866), later codified at 42 U.S.C. § 932 (repealed 1976); (2) public use had established a public prescriptive easement; and (3) the Defendants' use had established a private prescriptive easement.

[¶ 10] On January 16, 2002, the Wyoming Wildlife Federation, Raymond Hutson, Dan Biebel, Fred Kusel, and Dan Reinke filed a Motion to Intervene as a matter of right pursuant to W.R.C.P. 24(a)(2). The district court denied the motion. The court noted that the Forbeses' request for injunctive relief was specifically limited in scope to the named Defendants and that the proposed interveners had acknowledged in their motion that, "Even if the Court were to render a judgment in favor of one or the other side in the case, it would not have the effect of addressing any other person's or entity's use of the [Trail]." Accordingly, the district court denied the Motion to Intervene because the proposed interveners had not alleged that any of their individual rights were being harmed or that they would be precluded from pursuing legal action to enforce those rights, if any.

[¶ 11] Subsequently, both parties filed motions for summary judgment, including supporting affidavits and exhibits. Without holding a hearing, the district court granted the Forbeses' motion. The district court concluded that it did not have "the authority to declare the existence of a public road by mere public use." The court also found that the Defendants had failed to show any notice to the Forbeses to support their prescriptive easement claims. The Defendants have appealed the grant of the Forbeses' motion for summary judgment and the denial of the proposed interveners' motion to intervene as a matter of right.

***246** STANDARD OF REVIEW

[¶ 12] As noted, this is a review of a summary judgment. In addition to the standard set forth above for reviewing the factual context, we review issues of law by according no deference to the district court's conclusions and may affirm its decision on any legal

grounds appearing in the record. *WCCC v. Casper Community College,* 2001 WY 86, ¶ 11, 31 P.3d, 1242, ¶ 11 (Wyo.2001).

[¶ 13] Resolution of this matter requires application of our standards for interpreting statutory language:

> [W]e look first to the plain and ordinary meaning of the words to determine if the statute is ambiguous. *Olheiser v. State ex rel. Worker's Compensation Div.,* 866 P.2d 768, 770 (Wyo.1994), citing *Parker Land & Cattle Co. v. Game & Fish Comm'n,* 845 P.2d 1040, 1042-43 (Wyo.1993). A statute is clear and unambiguous if its wording is such that reasonable persons are able to agree on its meaning with consistency and predictability. *Parker Land & Cattle,* at 1043. Conversely, a statute is ambiguous if it is found to be vague or uncertain and subject to varying interpretations. *Id.* * * * Ultimately, whether a statute is ambiguous is a matter of law to be determined by the court. *Id.*
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> ....
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> When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction. *Tietema v. State,* 926 P.2d 952, 954 (Wyo.1996); *Butts v. State Board of Architects,* 911 P.2d 1062, 1065 (Wyo.1996). Instead, our inquiry revolves around the ordinary and obvious meaning of the words employed according to their arrangement and connection. In doing so, we view the statute as a whole in order to ascertain its intent and general purpose and also the meaning of each part. "We give effect to every word, clause and sentence and construe all components of a statute *in pari materia.*" *Parker,* 845 P.2d at 1042.
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> *In Re Termination of Parental Rights to IH,* 2001 WY 100, ¶ 17, 33 P.3d 172, ¶ 17 (Wyo.2001) (quoting *Murphy v. State Canvassing Board,* 12 P.3d 677, 679 (Wyo.2000)). "We endeavor to interpret statutes in accordance with the legislature's intent." *Wyodak Resources Development v. Board of Equalization,* 2001 WY 92, ¶ 7, 32 P.3d 1056, ¶ 7 (Wyo.2001) (quoting *Exxon Corporation v. Board of County Commissioners Sublette County,* 987 P.2d 158, 161-62 (Wyo.1999)). When examining a statute, we presume "that the legislature enacts legislation with full knowledge of existing law and with reference to other statutes and decisions of the courts. Such legislation should, therefore, be construed in a way that creates a consistency and harmony within the existing law." *Hoff v. City of Casper-Natrona Health Department,* 2001 WY 97, ¶ 30, 33 P.3d 99, ¶ 30 (Wyo.2001) (quoting *Capwell v. State,* 686 P.2d 1148, 1152 (Wyo.1984)).

DISCUSSION

Denial of Motion to Intervene

[¶ 14] A motion to intervene as a matter of right pursuant to W.R.C.P. 24(a)(2) [FN1] was filed by the Wyoming Wildlife Federation and four individuals. The district court denied the motion on April 25, 2002. The denial of a motion to intervene is a final and appealable order pursuant to W.R.A.P. 1.05. *James S. Jackson Company v. Horseshoe Creek Ltd.,* 650 P.2d 281, 284-85 (Wyo.1982). An appeal must be taken within thirty days from the entry of the appealable order. W.R.A.P. 2.01(a). The Defendants filed their notice of appeal from the district court's denial of the motion to intervene on July 19, 2002, in conjunction with their notice of appeal of the district court's summary judgment order. The Defendants' notice of appeal of the denial of the motion to intervene ***247*** was

not filed within the prescribed thirty-day period for final orders. The failure to timely file a notice of appeal deprives this Court of jurisdiction to hear the appeal. W.R.A.P. 1.03; *Harding v. Glatter,* 2002 WY 124, ¶ 6, 53 P.3d 538, ¶ 6 (Wyo.2002). Accordingly, we must dismiss the Defendants' appeal of the denial of the motion to intervene. [FN2]

FN1. **Rule 24. Intervention....**

(a) Intervention of right.--Upon timely application anyone shall be permitted to intervene in an action:

....

(2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FN2. The Forbeses also challenge the standing of the Defendants to appeal the denial of the motion to intervene. Since the notice of appeal was not timely, we need not address that issue.

R.S. 2477

[¶ 15] The Defendants contend that a company constructed the Trail across what was then federal land in 1891 or 1892 to provide access for miners and their equipment to the Big Horn Mountain and Walker Prairie areas. The public used the Trail from its inception for logging, hunting, ranching, and recreation. According to the Defendants, the public's use predated the entry and patent of the surrounding land by the Forbeses' predecessors in the early twentieth century. The Defendants assert that the public use of the Trail was sufficient to establish a public road under R.S. 2477.

[¶ 16] R.S. 2477 was enacted as Section 8 of the Act of July 26, 1866, 14 Stat. 253, and later codified at 43 U.S.C. § 932. [FN3] The provision provided simply:

FN3. The Federal Land Policy and Management Act (FLPMA) of 1976 repealed R.S. 2477 in 1976. 43 U.S.C. §§ 1701-1784. FLPMA specifically provided that any rights vested under R.S. 2477 prior to its repeal, however, remained valid.

[That] the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

The purpose of the statute was to enable the public to acquire a roadway to traverse public lands. However, the offer or grant set forth in R.S. 2477 "is but an offer of the

right of way for the construction of a public highway on some particular strip of public land, and can only become fixed when a highway is definitely established and constructed in some one of the ways authorized by the laws of the state in which the land is situated." *Richter v. Rose,* 1998 MT 165, ¶ 27, 289 Mont. 379, 962 P.2d 583, ¶ 27 (1998) (quoting *State v. Nolan,* 58 Mont. 167, 173, 191 P. 150, 152 (1920)). In other words, R.S. 2477 is merely an offer from the federal government that could be accepted by actions taken locally. Barbara G. Hjelle, *Ten Essential Points Concerning R.S. 2477 Rights-of-Way,* 14 Journal of Energy, Natural Resources, & Environmental Law, 301, 303 (1994). The question of whether a road is a public road under R.S. 2477 is answered by reference to the law of the state where the land is located. *Richter,* 962 P.2d 583, ¶ 27; *Western Aggregates, Inc. v. County of Yuba,* 101 Cal.App.4th 278, 296, 130 Cal.Rptr.2d 436 (Cal.App.3rd Dist.2002); *Sierra Club v. Hodel,* 848 F.2d 1068, 1083 (10th Cir.1988); Hjelle, *Ten Essential Points Concerning R.S. 2477 Rights-of-Way, supra,* at 305-08.

[¶ 17] Like the road system in many states in the American West, the road system in Wyoming developed from a haphazard diagram of trails established by Indians, pioneers, stockmen, miners and loggers, and more "proper" roads set out by railroads, stagecoaches, the federal government, and territorial, state, and local governments. As early as 1869, the Territorial Legislature enacted a law seeking to bring some sense of order to this system:

All roads within this Territory shall be considered public highways, which have been, or may hereafter be, declared Territorial roads by act of the Legislative Assembly, or which have been, or may be, declared public roads by the board of county commissioners of any county, within such county, or which have been, or shall hereafter be, used and traveled by the public, so that the same would, according to the course of the common law, be deemed public highways.

1876 Comp. Laws, ch. 102, Sec. 1 (1869). That law provided for the recognition of public roads through declaration by the Territorial Legislative Assembly or the relevant board of county commissioners. In a nod to the unique history of the development of roads and trails in the West, it also recognized that roads used by the public could be ***248** deemed a public highway under the common law.

[¶ 18] In 1877, the Territorial Legislature amended Chapter 102 of the 1869 law and gave the board of county commissioners broad powers to declare public roads:

That the board of county commissioners 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, whether originally opened and laid out by them or not, and any road so adopted and appropriated to public purposes shall be and is hereby declared a public or county road to all intents and purposes, the same as if originally opened or laid out by them and subject to the same laws and regulations in all respects.

Session Laws of Wyoming, Wagon Roads, Sec. 1, at 135 (1877). The 1877 law continues to recognize that roads may be created by public use beyond the ordinary planning of a county. The law, however, appears to recognize such roads as public or county roads only when the board of county commissioners adopted and appropriated the road to county

and public use. The specific language from the 1869 law authorizing the creation of roads by public use pursuant to the common law has been eliminated from this statute. This appears to be an attempt by the Territorial Legislature to impose some order on the chaotic creation of roads in the Territory's early years.

[¶ 19] The 1877 law lasted until 1886 when the Territorial Legislature again amended the statute:

That all county roads shall be under the supervision of the board of county commissioners of the county wherein said road is located, and no county road shall be hereafter established, nor shall any such road be altered or vacated in any county in this Territory except by authority of the county commissioners of the proper county.

Session Laws of Wyoming Territory, ch. 99, sec. 1 (1886). This was an obvious attempt by the legislature to further reduce the chaos in the creation of public roads. The statute placed authority for county roads under the supervision of the board of county commissioners and specifically stated that no future county roads could be created, vacated, or altered except by the authority of those commissioners.

[¶ 20] Then, in 1891 just before the Trail was constructed, the State legislature passed a law amending and re-enacting an 1890 territorial law that had slightly modified the 1869 law. That law provided:

All roads within this state shall be considered public highways, which have been or may be declared by law to be state, territorial or county roads. All county roads shall be under the supervision, management and control of the board of the county commissioners of the county wherein said road is located, and no county road shall hereafter be established, nor shall any such road be altered or vacated, in any county in this state, except by the board of the county commissioners of the county wherein such roads are located, except as is in this act provided.

Wyoming Session Laws, ch. 97, sec. 1 (1891). The 1890 law does not substantively change the 1886 law. The new statute adds the introductory phrase recognizing that some public roads are established under the law apart from the role played by the counties. The remainder of the statute simply reiterates the authority of the boards of county commissioners to establish, vacate, or alter county roads.

[¶ 21] The legislature returned to a broader definition of what constituted a public road in 1895:

§ 2513. Public roads defined. All roads within this state shall be public highways which have been or may be declared by law to be national, state, territorial or county roads. All roads that have been designated or marked as highways on government maps or plats in the record of any land office of the United States within this state, and which have been publicly used as traveled highways, and which have not been closed or vacated by order of the board of the county commissioners of the county wherein the same are located, are ***249** declared to be public highways until the same are closed or vacated by order of the board of county commissioners of the county wherein the same are located, and the board or officer charged by law with such duty shall keep the same open and in repair the same

as in the case of roads regularly laid out and opened by order of the board of the county commissioners.
1910 Wyo. Comp. Stat. Ann. ch. 168, sec. 2513 (1895). The 1895 law continues to recognize as public highways those declared by law to be national, state, territorial or county roads. However, it also contained a provision recognizing roads marked on federal and state maps or plats, which were used by the public. The law treated these roads as public highways unless and until some affirmative action was taken by the responsible board of county commissioners to vacate or close the road.

[¶ 22] The 1895 statute was in effect when this Court was called upon to consider R.S. 2477 for the first time. In *Hatch Brothers Company v. Black,* 25 Wyo. 109, 165 P. 518 (1917), *affirmed on rehearing,* 25 Wyo. 416, 171 P. 267 (1918), the plaintiff sought to enjoin the defendant from blocking access on a road running across the defendant's land. The road in question had been established around 1875 or 1876 and used continuously since that time by the public. The plaintiff used the road to transport his sheep. In 1912, the defendant made a homestead entry onto the lands over which the road ran. The defendant began fencing off the road to prevent damage to his crops from the plaintiff's sheep.

[¶ 23] Initially, we concluded that a public road could be established pursuant to R.S. 2477 through public use:
The grant [contained in R.S. 2477] is unconditional and contains no provision as to the manner of its acceptance. We think it is quite well settled that when land is granted for a right of way for a public highway, the grant may be accepted by the public without action by the public authorities. The continued use of the road by the public for such a length of time and under such circumstances as to clearly indicate an intention on the part of the public to accept the grant has generally been held sufficient.
Hatch, 165 P. at 519. The opinion then briefly reviewed Wyoming's statutory history relating to public roads noted above. *Id.,* at 519-20. We concluded that there was "nothing in these several statutes, as we understand them, prohibiting the public from accepting the grant of the right of way; but on the contrary, they appear to recognize that right." *Id.* After distinguishing between acceptance of a grant by the public and establishment of a road by prescription, the Court remanded the case for a determination by a jury whether the grant had been accepted by the public prior to the defendant's homestead entry. *Id.* at 520.

[¶ 24] On rehearing in *Hatch,* the question before the Court was the propriety of its conclusion that a public road could be established through the actions of the public without any official action by a governmental entity. 171 P. at 267. The Court's opinion expanded at length upon its conclusion that the 1895 statute did not impede public acceptance of a grant under R.S. 2477. It is worth quoting from the opinion at some length:
This dedication [R.S. 2477] by Congress to the public of rights of way for highways over the public lands of the United States is a valuable right, and **it is not to be presumed**

that the Legislature in this state, where distances are great, county funds from taxation applicable to road work comparatively small and inadequate to meet the demands of the inhabitants in different parts of the county, where roads in new and sparsely settled portions of the state of necessity have to be made and traveled by the public without the aid of the county authorities, **intended to abrogate and annul this right** and open the way to legalized blackmail of the county authorities by fencing up such used roads and requiring the county thereafter to condemn and pay damages for a way otherwise belonging to the public, **unless such intention is so clearly expressed by the enactment that no other conclusion can be reached.** ... The original act of 1869 (Laws 1869, c. 26, p. 330) in the first section mentions all the different kinds of ****250*** highways, and recognized the common-law doctrine of establishment of highways by user without declaring any specific method or enacting any new law in this regard. It will be observed that the early act, while prescribing the method by which roads might be changed, altered, or new roads laid out by the county, does not anywhere enjoin on the county authorities the duty to maintain or keep in repair the highways mentioned in the act.... This act remained in force until the act of March 12, 1886, which appears as chapter 99, Laws of 1886, and was entitled an act concerning roads and highways....

....

This is the first legislative word in Wyoming that specifically placed any roads under the supervision of the county commissioners and enjoined a duty upon the county officials to maintain and keep them in repair. This act provides for the election or appointment of road supervisors, and prescribes their duties, and the means for working the roads, but it is significant that wherever a duty is imposed by the act upon county officials in this chapter, it mentions *county* roads, and prescribes the width of *county* roads, etc. This act repeals in terms the act of 1869 which had become chapter 102 of the Compiled Statutes of 1876, but did not repeal any common-law doctrine thereby, and that it still recognized that the congressional grant could be accepted by public user, and that other highways existed and could be established besides those county roads provided for in the act ...[.]

....

... This act clearly shows that the object sought to be accomplished by the Legislature was prescribing those roads and highways in regard to which a duty was imposed to maintain or keep in repair. And this is in accord with the authorities that a dedication for a highway which is accepted by public user, while binding upon the dedicator and those holding under him, does not require the public authorities to maintain or care for the highway.

....

The act of 1890 (Laws 1890, c. 86) did not in any way change the law in this respect, and the act of 1891 (Laws 1890-91, c. 97) merely amended the act of 1890, although it amended the first section of the act of 1890 by specifically adding to the declared public highways others beside *county* roads, and then specifically declares, as in the acts of 1869 and 1890, that *county* roads shall be under the management and control of the county commissioners, and shall not be established or vacated except by them. The act of 1895 (Laws 1895, c. 69), which is the present law of the state at all affecting this matter, in Section 1, reenacts the first paragraph of the law of 1891, and adding "national" to state, territorial, and county roads then enacts, in a separate sentence, the provision which led to the instruction declared erroneous in the original opinion in this case:

"All roads that have been designated or marked as highways on government maps or

plats in the record of any land office of the United States within this state, and which have been publicly used as traveled highways, and which have not been closed or vacated by order of the board of the county commissioners of the county wherein the same are located, are declared to be public highways until the same are closed or vacated by order of the board of county commissioners of the county wherein the same are located, and the board or officer charged by law with such duty shall keep the same open and in repair the same as in the case of roads regularly laid out and opened by order of the board of the county commissioners."

This provision clearly designates such roads as are to be added to those which the county authorities are required to maintain and repair, and in no way affects other highways upon which this duty may not be imposed....

....

It is evident it was not the legislative intention to take from the public a valuable right of acceptance of the federal grant, ***251*** but to preserve to it every and all rights it had.

....

We hold, as in the original opinion, that **there is nothing in our statutes that takes away the right of the public to accept by unofficial user the federal grant of rights of way over the public domain so as to bind subsequent grantees of the government,** but our statutes seem to distinctly recognize that right.

Hatch, 171 P. at 268-69, 271 (italics in original; emphasis added). The opinion interpreted the 1895 statute and its predecessors to mean that the common law right and the right expressed in R.S. 2477 for the public to establish public rights of ways by usage was not abrogated. Instead, the legislature intended by the statutes to explicitly set forth what roads the counties were required to financially and physically maintain. The holding of the two opinions in *Hatch* was to the effect that public roads could be created by the public's use but the counties could not be forced to maintain them. There are two salient points that we can extract from the *Hatch* cases relevant to this case today: (1) the opinions make it clear that state law governs the status of public roads under R.S. 2477; and (2) the noted bold-faced passages indicate that the legislature has the power to abrogate the public's right under R.S. 2477.

[¶ 25] Eleven months after the decision on rehearing in *Hatch*, the Wyoming Legislature amended the public roads statute:

On and after January 1st, 1922, all roads within this State shall be highways, which have been or may be declared by law to be national, state, territorial or county roads or highways. 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 [sic] 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, or if need be laid out, established and 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.**

Session Laws of Wyoming, ch. 112, sec. 1 (1919) [FN4] (emphasis added). We presume that this statute was enacted with full knowledge of and with reference to the recent decisions in *Hatch. Greenwalt v. Ram Restaurant Corporation,* 2003 WY 77, ¶ 22, 71 P.3d 717, ¶ 22 (Wyo.2003) (citing *Almada v. State,* 994 P.2d 299, 306 (Wyo.1999) ("We

presume the legislature enacts statutes with full knowledge of the existing condition of the law and with reference to it.")). The legislative intent behind this statute is clear from its plain language: The various boards of county commissioners were to officially establish and record all roads necessary or important for the public use. The last sentence clearly states that ***no*** other roads were to be considered highways unless and until the respective board of county commissioners had lawfully established them as such. It would be 34 years, however, before this Court would consider R.S. 2477 within the context of the 1919 statute and, even then, no definitive ruling on the continued vitality of R.S. 2477 roads would be forthcoming.

FN4. The legislature further amended this statute in 1921 by altering the first sentence to read: "On and after January 1st, 1924, all roads within this State shall be highways, which have been or may be declared by law to be national, state, territorial or highways." Session Laws, ch. 100, Sec. 1 (1921). The remainder of the 1919 statute was retained in the identical form. For the sake of simplicity, when we refer to the 1919 statute, we are incorporating the 1921 amendment. We are also referring to the statute as it is currently codified at Wyo. Stat. Ann. § 24-1-101 (LexisNexis 2003), which retains the language of the 1919 statute and the 1921 amendment verbatim.

[¶ 26] In 1953 this Court decided the case of *Nixon v. Edwards*, 72 Wyo. 274, 264 P.2d 287 (1953). The question before us was whether or not a road was a public road. The plaintiff built a road along the east side of his property sometime between 1931 and 1934. The defendants' land lay to the north and they began using the road to access their property around 1941. There was also evidence that at least some members of the public had been using the road since 1934. The road was never established as a public road by the county pursuant to the 1919 statute. The defendants had contended that ****252*** the road was a public road through public use pursuant to R.S. 2477 and *Hatch* or a public easement had been established by prescription.

[¶ 27] We began our analysis in *Nixon* by reviewing pre-1919 legislation. We prefaced our review by affirming our statements in *Hatch* that whether or not a road was public was determined by reference to the statutes of Wyoming:

It cannot be questioned, it seems, that what shall or shall not be public roads or highways is, subject to constitutional limitations, exclusively within the province of the legislature.

Nixon, 264 P.2d at 289. After noting the progression of the statutes pre-1919, we addressed the affect of the decision in *Hatch:*

The case of *Hatch Bros. Co. v. Black, supra, ...* is in no way in conflict with our conclusion herein. The case is based on the doctrine of public dedication and acceptance of the dedication by the public. The road in question was over public land and was used by the public since about 1875. A homestead was located on the land over which the road ran in 1912, and the question was as to whether or not the road over the land could be closed by locator. By an act of 1866, the United States provided that 'right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.' 43 U.S.C.A. § 932. The court held that the grant by Congress could be accepted by user alone, and further stated that: 'We discover nothing in these several statutes, as we understand them, prohibiting the public from accepting the grant of the right of way;

but on the contrary, they appear to recognize that right.' The court, in connection with the language just quoted, relied (1) upon the fact (apparently) that the road was shown on maps of the United States as mentioned in section 1 of the legislation of 1895, and further (2) upon the provisions of section 64 which preserved all rights previously acquired. Since the road in question in that case was established as early as 1875, the decision in the case was correct. The court, it is true, also mentioned (3) the words in section 57 of the Act reading: 'When any public road heretofore laid out or traveled as such or *hereafter* to be laid out *or traveled* as a public road, * * *.' Section 57 did not relate to the establishment of any public road. It merely provided that when it was necessary in traveling on a public road to cross a stream, the crossing over the stream should be considered a part of the public road. The section is not necessarily inconsistent with section 2, when we the consider the general policy of the latter that rural public roads should hereafter be established only officially. If inconsistent, it is by reason of the use of 'or' instead of 'and'. See 82 C.J.S., Statutes, § 335, page 673. It may be, however, that the court in the foregoing decision by italicizing the words above italicized meant that section 57 indicated that roads hereafter traveled publicly need not necessarily be established officially, and thus there might be roads which, if running over public land, might become public roads by user alone, thereby accepting the grant of the government. **However this may be, it is not necessary to dwell upon the matter. It has no effect on the case at bar. The road in dispute herein does not run over public land.**
Nixon, 264 P.2d at 290-91 (internal citations omitted, underlining and bold added). The Defendants in this case have placed much stock in the underlined portion of the opinion quoted above. They suggest that this language means that the *Nixon* court upheld the continuing validity of the holding in *Hatch* that a public road could be established through public use even after the enactment of the 1919 statute. The Defendants' argument does not hold up to scrutiny when the sentence is read within the context of the paragraph quoted above. After noting an apparent inconsistency in the *Hatch* case regarding its interpretation of part of the 1895 law, the *Nixon* court noted that the inconsistency could be explained by the use of the connecting word "or" instead of "and." In the next sentence--the one cited by the Defendants--the *Nixon* court goes on to say that the court in *Hatch* **could** have meant to say section 57 of the 1895 statute "indicated that roads hereafter traveled publicly need ****253*** not necessarily be established officially" and that roads could thus be established without official action if they ran over public land. In context, the statement is merely a commentary on what the court in *Hatch* **may** have concluded in reference to the meaning of section 57 of the 1895 statute. The opinion expresses some doubt about that interpretation but then goes on to conclude that the matter is irrelevant to the case before it because the road in question was not established over public land before the land it was located on was homesteaded. Furthermore, the discussion by the *Nixon* court is in reference to the 1895 statute and does not touch at all upon the effect of the 1919 statute. Thus, contrary to the Defendants' assertions, the opinion in *Nixon* has no relevance as to whether a road established by public use but not officially recognized was still a public road in light of the 1919 statute.

[¶ 28] After dismissing the contention that the road in question could be a public road through public use under R.S. 2477, the opinion in *Nixon* turned to the effect of the 1919 statute on the claim that the road was public by virtue of a prescriptive easement. While

the specific holding on that issue is not relevant to this case, the discussion regarding the 1919 statute does provide some relevant considerations for interpreting the legislature's intent in adopting it:

It may be noted at once, that while this court in [*Board of County Commissioners of Sheridan County v. Patrick,* 18 Wyo. 130, 104 P. 531 (Wyo.1909)], construed the then existing statutes as permitting the establishment by county commissioners informally, that is by mere recognition of a road, such as working it, the legislation of 1919 required that roads recognized as public to be made of record, thus carrying to its ultimate conclusion the former policy that it should be made certain and definite as to what were public roads, and thus superseding in that respect the ruling in the *Patrick* case, supra. The Act directed the board of county commissioners to determine what roads theretofore traveled, but not officially established and recorded, were necessary for the public use, and then cause those thus found to be necessary, to be made of record. **That included all roads marked on Governmental plats and maps, as well as all roads, the rights to which had been recognized by former legislative acts. It was meant to be all inclusive, and then specifically provided that 'No other roads shall be *highways* unless and until lawfully established as such by official authority.' Highways are public roads, and substituting the synonymous term 'public roads', the act provided that no roads should be public roads unless and until duly established as the act provided. We do not see how any language could be plainer.**

....

What we have said is strengthened, if need of strengthening exists, by the provisions of Chapter 100 of the Legislative Acts of 1921, now § 48-301, W.C.S.1945. In that legislation, for the phrase at the beginning 'On and after January 1st, 1922,' the legislature substituted, 'On and after January 1st, 1924.' No other change in the legislation of 1919 was made. The purpose quite apparent. The legislature evidently found that the various boards of county commissioners had not been given sufficient time to cause all rural public roads to be shown on the records, and therefore extended the time in which that might be done for another two years. The intent to put a finishing touch to the policy inaugurated at least in 1886 is clear. **It shows how thoroughly the legislature was convinced that all rural public roads should be shown on the public records.**

Nixon, 264 P.2d at 293-94 (internal citations omitted; emphasis added). After analyzing a similar statute from Arizona, the opinion concluded:

It would seem clear that the meaning and effect of the Arizona statute that 'all roads in the territory of Arizona now in public use, which do not come within the foregoing provisions of this section, are hereby declared vacated' is substantially the same as the provisions of our statute that 'no other roads shall be highways unless and until lawfully established as such by official authority.'

***254** 264 P.2d at 295. It is clear that Justice Blume, the author of *Nixon,* considered that all roads not recognized by the respective boards of county commissioners per the requirements of the 1919 statute were effectively vacated. [FN5] This principle was not directly applied to claims under R.S. 2477, however, because that statute was not relevant to the road in question. It would be another 27 years before the issue was discussed again.

FN5. The ultimate holding in *Nixon* was that the 1919 statute eliminated the common law cause of action for public prescriptive easements. 264 P.2d at 296. The legislature reinstated the cause of action in 1955. Session Laws, ch. 199, Sec. 1 (1955). The

legislature has amended the law several times since then to expand the statute to include the elements and the legal procedures to be followed when seeking to establish a public road by prescription. *See* Session Laws, ch. 56, Sec. 1 (1967), and Session Laws, ch. 74, Sec. 1 (1973). The 1919 statute, incorporating the 1921 amendment and the subsequent additions relating to prescription, remains the law of Wyoming. Wyo. Stat. Ann. § 24-1-101(a) (LexisNexis 2003).

[¶ 29] The final case before the current one, in which the possibility of establishing public roads under R.S. 2477 and the Wyoming statutes was raised, was *McGuire v. McGuire,* 608 P.2d 1278 (Wyo.1980). In that case, the appellees filed a petition to establish a private road with the Platte County Board of Commissioners to establish a private road to provide access to their landlocked property. Since the main focus of *McGuire* was on the establishment of a private road, much of the discussion and the ultimate holding are not relevant to the case before us. However, the question of a public road was tangentially raised when the appellants claimed that the appellees "real objective is to cross the lands of the appellants ... to join up with what is identified as the BLM road across lands of the United States, which road joins with a public road." 608 P.2d at 1287. The question presented to the *McGuire* court was whether or not connecting to the BLM road satisfied the requirements of Wyo. Stat. Ann. § 24-9-101 (Michie 1977 Rep. Ed.) and constituted a convenient public road with which the appellees could connect the private road they sought to establish. *Id.* The *McGuire* court concluded that the 1919 statute and the decision in *Nixon* were not relevant to the situation before it:

The statutory section we examine does not define public road. [[[[[[FN6]] ***Nixon v. Edwards,* 1953, 72 Wyo. 274, 264 P.2d 287, cited by appellants, is not helpful because it involves no question of connecting to a federal road across public lands, such as we have here. State statutes pertaining to state and county roads and which do contain some definitions are not applicable to roads such as the BLM road, the latter being under the jurisdiction of the United States.** We cannot adjudicate its status so as to in any fashion bind the United States. [Footnote] We are limited to generally describing it in the light of the statute we have *before* us.

FN6. The statutory section referenced in this sentence is the one concerned with the establishment of private roads. Wyo. Stat. Ann. §§ 24-9-101 (Michie 1977 Rep. Ed.).

608 P.2d at 1287 (emphasis added). In the footnote cited above, the opinion stated, "As pointed out in Finding No. 21 of the county commissioners, *supra,* 43 U.S.C. 932 [R.S. 2477] was repealed effective October 21, 1976. However, a public road had been established long before that. When land is granted for a public road, the public may accept the grant without action by public authorities. *Hatch Bros. Co. v. Black,* 1917, 25 Wyo. 109, 165 P. 518." *Id.*

[¶ 30] The precise issue before us here--the effect of the 1919 statute on the establishment of public roads under R.S. 2477--was not before the court in *McGuire.* As we noted in that case, Wyoming statutes pertaining to state and county roads were simply not applicable because the road in question was located entirely on federal land. Nevertheless, the Defendants point to the *McGuire* footnote cited earlier and argue that it supports the continual validity of our decision in *Hatch.* The footnote correctly cites the holding in *Hatch.* However, neither the footnote nor the body of the opinion addresses the

impact of the 1919 statute or the *Nixon* decision. Since the road in question ***255*** was not within the jurisdiction of the State of Wyoming, it is no surprise that the *McGuire* opinion did not do so. The footnote is merely a statement of the holding in the *Hatch* case without reference to current law and, as such, is dicta. Therefore, we find the Defendants' reliance on *McGuire* to be unpersuasive.

[¶ 31] We now turn to the issue presently before us. Since this case comes to the Court on appeal from summary judgment, we view the record from the perspective most favorable to the party who opposed the motion. The Defendants have alleged that the Trail was established as a public road prior to the homesteading of the land over which it runs. Pursuant to this Court's decision in *Hatch,* public use without any official action was sufficient to establish a road under the grant from Congress in R.S. 2477. For purposes of this opinion, we will assume that the Trail was established as a public road prior to the Forbeses' predecessor's entry onto the land. Accordingly, we must determine what effect, if any, the passage of the 1919 law defining and regulating the establishment of public roads had upon roads established pursuant to R.S. 2477.

[¶ 32] We hold that the 1919 statute effectively vacated the public status of any road, including those established pursuant to R.S. 2477, which were not recorded and established by the pertinent board of county commissioners. R.S. 2477 roads are regulated under the law of the state in which the road is located. *Richter,* ¶ 27; *Western Aggregates, Inc.,* 101 Cal.App. 4th at 296, 130 Cal.Rptr.2d 436; *Hodel,* 848 F.2d at 1083. The 1919 law was clear and unambiguous: "[T]he act provided that no roads should be public roads unless and until duly established as the act provided." *Nixon,* 264 P.2d at 293. In *Nixon,* this Court interpreted the 1919 statute to mean that no road could be a public road unless it was recorded and duly established as such under the terms of the statute. We equated that prohibition with an Arizona statute that specifically stated that roads not properly recorded pursuant to statute were considered vacated as public roads. We see no reason to deviate from that interpretation today. The records of Sheridan County do not show that the Trail had ever been recorded and established as a public road as required by statute. Accordingly, we conclude that the Trail is not a public road.
Prescriptive Easement

[¶ 33] The Defendants claimed that they, individually, and that the public in general had acquired a prescriptive easement to use the Trail. To establish a prescriptive easement, one must show adverse use: (1) under color of title or claim of right; (2) such as to put the owner of the servient estate on notice that an adverse right was being claimed; and (3) that the adverse use was continuous and uninterrupted for ten years. *Lincoln County Board of Commissioners v. Cook,* 2002 WY 23, ¶ 39, 39 P.3d 1076, ¶ 39 (Wyo.2002). The Defendants contend that the district court erred in granting the Forbeses' motion for summary judgment upon their prescriptive easement claims. The district court held that the Defendants had failed to offer any evidence that they or the public had provided notice to the Forbeses of an adverse claim. The Defendants attack this ruling arguing that they had produced evidence showing continuous use of the Trail by the public since its inception in the early 1890's, and by the individual Defendants since the 1970's and 1980's. This use, they contend, was under the color of right and was adverse to the

Forbeses' interest in the land over which the Trail ran. Furthermore, the Defendants argued that there were material facts in dispute as to when the Forbeses placed signs along the Trail ostensibly giving the public permission to use the Trail and what effect, if any, these signs had on the adverse nature of their, and the public's, use of the Trail.

[¶ 34] After a careful review of the record, we affirm the district court's summary judgment ruling. The Defendants did not provide evidence sufficient to overcome the presumption that their use was permissive. [FN7] "The party claiming an easement ***256*** has the burden of proof, and such a claim is not favored." *Lincoln County,* ¶ 39 (citing *Prazma v. Kaehne,* 768 P.2d 586, 589 (Wyo.1989)). As we have explained:

FN7. The Forbeses contend that the Defendants' public prescriptive easement claim should be dismissed because they failed to follow the specific procedural and substantive requirements set forth in Wyo. Stat. Ann. § 24-1-101(a) to establish a county road by prescription. The Defendants reply that the statute is not relevant because it was enacted after the acts establishing the public prescriptive easement over the Trail were satisfied. Since we conclude that the Defendants failed to produce evidence to meet one of the elements of a claim for a prescriptive easement, we need not address this issue.

Adverse or hostile use is use inconsistent with the owner's rights, without permission asked or given, such as would entitle the owner to a cause of action against the intruder. [*Koontz v. Town of Superior,* 746 P.2d 1264, 1268 (Wyo.1987)] (*quoting* 7 R. Powell and P. Rohan, *Powell on Real Property* § 1013[2] at 91-18 (1987)). The claimant must demonstrate how its actions would give notice to the landowner of the adverse use and adverse nature of his claim. *Prazma,* 768 P.2d at 589. Use "by permission or sufferance" cannot ripen into title, "no matter how long continued." *Board of County Com'rs of Sheridan County v. Patrick,* 18 Wyo. 130, 104 P. 531, 532-33 (1909); *see Koontz,* 746 P.2d at 1268. However, a property owner's failure to interrupt or object to the public use of his property for the statutorily prescribed period cannot be equated with permissive use. *Koontz,* 746 P.2d at 1268.

Open, notorious, and continuous use is not sufficient, in and of itself, to justify granting a prescriptive easement; the use still must be adverse. *Weiss v. Pedersen,* 933 P.2d 495, 501 (Wyo.1997) (*quoting Shumway v. Tom Sanford, Inc.,* 637 P.2d 666, 670 (Wyo.1981)); [*A.B. Cattle Co. v. Forgey Ranches, Inc.,* 943 P.2d 1184, 1189 (Wyo.1997)].

Lincoln County, ¶¶ 40-41.

[¶ 35] The Defendants rely solely on the historical use of the Trail by themselves and the public to support the contention that the use was adverse. This is simply insufficient. The burden was on the Defendants to demonstrate how the public's and their individual actions gave notice to the Forbeses that the use was adverse. This could have been accomplished through deed or by words. Our precedent has made it clear that the use is presumed to be permissive. To overcome that presumption we have found the claimant must provide evidence that the landowner was aware specifically that the claimant claimed exclusive right to the easement. "To rebut this presumption the claimant must introduce evidence of the facts which demonstrate the manner in which the hostile and adverse nature of his use was brought home to the owner of the adjacent land." *A.B. Cattle Company v. Forgey Ranches, Inc.,* 943 P.2d 1184 at 1188 (Wyo.1997) (quoting

Weiss v. Pedersen, 933 P.2d 495 at 501 (Wyo.1997)). The only evidence offered by Defendants with regard to putting the Forbeses on notice was the fact that the Forbeses were aware of the use by the public and could see the Trail from their ranch. Those facts do not show the public's and Defendants' adverse claim was "brought home" to the Forbeses as those uses were not exclusive of the Forbeses' use. Further, a presumption of adverse use does not "arise where the user is shown to be permissive in its inception, or where it is not shown to have continued for the prescriptive period; *nor, in the absence of some decisive act indicating separate and exclusive use, does it arise where the user is not inconsistent with the rights of the owner, as, for instance, where the user is in connection with that of the owner or the public or is claimed with respect to unoccupied, uninclosed,* [sic] *and unimproved lands, the use in such cases being presumed to be permissive and in subordination to the owner's title." Shumway v. Tom Sanford, Inc.*, 637 P.2d 666 at 669 (Wyo.1981) (quoting 28 C.J.S. Easements § 68 at 736-37 (1941)) (emphasis in original); *Lincoln County*, ¶ 47. The Defendants' failure to present any evidence demonstrating an adverse nature of their use or notice of the landowner's knowledge of the use itself, is fatal to their claim.

CONCLUSION

[¶ 36] The district court's orders denying the motion to intervene and granting summary ****257*** judgment in favor of the Forbeses are affirmed.

Appendix 5

5. Lincoln County Bd. of Com’rs v. Cook, 39 P.3d 1076, 1087 (Wyo. 2002).

Lincoln County Bd. of Com'rs v. Cook, 39 P.3d 1076, 1087 (Wyo. 2002).

39 P.3d 1076, 2002 WY 23

Supreme Court of Wyoming.
LINCOLN COUNTY BOARD OF COMMISSIONERS, Appellant (Respondent),
v.
Lawrence L. COOK and Christy Cook, Appellees (Petitioners).
No. 00-339.
Feb. 8, 2002.

Representing Appellant: Scott A. Sargent, Lincoln County Attorney; John D. Bowers, Deputy Lincoln County Attorney; and James K. Sanderson, Deputy Lincoln County Attorney, Kemmerer, WY.
Representing Appellees: V. Anthony Vehar of Vehar Law Offices, P.C., Evanston, WY.

Before LEHMAN, C.J., and GOLDEN, HILL, KITE, and VOIGT, JJ.

VOIGT, Justice.

[¶ 1] This appeal arises from the Lincoln County Board of Commissioners' (the Board) determination that a public road should be established, by prescription, over property owned by Lawrence and Christy Cook (the Cooks). The Cooks appealed the Board's decision to the district court, which reversed the Board. The Board now appeals from that ruling. We affirm the district court's decision.

ISSUES

[¶ 2] The Board, as appellant, states the issues as follows:
I. Did the district court, erroneously substitute its judgment for the trier of facts of the first instance, the Board of Lincoln County Commissioners.
II. Did the district court err in its interpretation of Wyo. Stat. § 24-1- 101 and the doctrine of prescriptive easements in the State of Wyoming.
III. Was the "Order Establishing Little Coal Creek Road Number 12-344 Across the Property of Lawrence L. Cook and Christy Cook" by the Lincoln County Board of Commissioners (a) arbitrary and capricious, an abuse of discretion or not otherwise in accordance with law; (b) in excess of statutory jurisdiction, authority of limitations or lacking statutory right; (c) contrary to a constitutional right, power, privilege or immunity; (d) unsupported by substantial evidence.
The arguments by the Cooks, as appellees, are essentially framed in the context of the issues raised by the Board.

FACTS

[¶ 3] At issue in this appeal is a one-quarter mile section of "ungraveled" or dirt two-track road in remote Lincoln County known as the Little Coal Creek access road (Coal Creek road). The quarter-mile section crosses property owned by the Cooks. In 1995, the Cooks acquired this property from P & M Mining Company (P & M), which had acquired the

property from Kemmerer Coal Company. [FN1] Prior to the Cooks' ownership, the property was "unenclosed" or considered "open range." [FN2]
FN1. The record does not indicate when P & M or Kemmerer Coal Company acquired the property.

FN2. There is some indication that gates were recently placed on the property.

[¶ 4] Coal Creek road connects Fontenelle Creek road and Pomeroy Basin road, both of which are "considered county roads that the County maintained and the public used...." Coal Creek road provides access to private property and "good" access [FN3] from the south to the back side of "Miller Mountain and Coal Creek, Cabin Creek and the Fontenelle drainage area ..." in addition to Fort Hill. Coal Creek road is periodically impassable during the winter due to snow and during the spring due to water runoff.
FN3. At least two similar roads provide access to this area, but apparently are impassable.

[¶ 5] In the 1980s, the Board requested that Paul Scherbel, the county land surveyor, provide them an overview of the county's road system, which was in "shambles." At that time, Lincoln County had only officially dedicated one county road, which the Board later attempted to vacate, but ultimately did not due to public opposition. The Board began updating its road system, a process that included acquiring and establishing county roads by prescription. As part of this process, Mr. Scherbel recalled that in 1980 he, Edwin Kirkwood, and then-county commissioners Nancy Peternal and Jim Herschler ***1080*** viewed Coal Creek road, presumably including the section crossing what is now the Cooks' property, and considered establishing it as a county road. The Board decided not to establish Coal Creek road as a county road at that time.

[¶ 6] In July 1997, the Board elected to establish Coal Creek road as a county road based on the common law doctrine of prescription. The Board recorded a plat and published and served notice on area landowners in accordance with Wyo. Stat. Ann. § 24-1-101 (LexisNexis 2001). The Cooks objected to the county establishing a section of the road across their property, while other landowners apparently did not formally object to the Board's decision. On August 8, 1997, the Board held an open meeting to consider objections to the proposed road, and subsequently entered a formal resolution establishing the road as a county road. The Cooks appealed this determination to the district court. Both parties subsequently stipulated that the case be remanded for a contested case hearing before the Board.

[¶ 7] The Board appointed a hearing examiner and held a contested case hearing on September 3, 1998. The Board heard from several witnesses, including former county commissioners, county employees, area landowners, and members of the public. Their testimony, which tended to lack specificity, primarily concerned Lincoln County's maintenance of Coal Creek road and the public's historical use of the road.

[¶ 8] Regarding road maintenance generally, the Board found that until Lincoln County "completed the process of formally establishing its roads, the County maintained roads commonly accepted as county roads and private roads, both on a year round and seasonal

basis." Nancy Peternal, a county commissioner from 1979 to 1987 and liaison to the south Lincoln County road and bridge department, testified that when she became a commissioner, Lincoln County had been plowing ranch roads "for years" without a set schedule. In addition, there were certain county roads that were maintained during the season they were open (i.e., May to November), and other "noncounty" roads that were never graveled, but "plowed in the winter, considering it an emergency for a rancher to be able to get out or something." Regarding roads not considered to be county roads, the department "looked around to see if they could plow another road" when "they got caught up with their work...."

[¶ 9] Ms. Peternal recalled that in 1980 and thereafter, the Board discussed whether the county should continue maintaining private ranch roads, and in the mid 1980s, the Board decided that it would no longer maintain these roads. Edwin Kirkwood, county road and bridge department supervisor until 1988 and a thirty-four year employee of the department, testified:

[I]n 1985 [the Board] start[ed] cutting out going into the ranch--all these ranch roads, and working on them. We used to blade them, build them, work on them, snow removal on them and they more or less stopped--started stopping that around 1985, and it went on down to, I guess, present to what they're doing now....

Everett Cassidy, county commissioner from 1989 to 1992, testified that prior to 1989, the county had implemented an "understanding" with the road and bridge department that it would not maintain private roads, and stopped doing so.

[¶ 10] As to Coal Creek road specifically, Mr. Kirkwood recalled that in the 1950s, Continental Oil had drilling set "up in there somewhere and we, we would blade the road for them a few times," but not every year. Myles McGinnis, whose family owns land on Coal Creek road, also remembers the county making passes on Coal Creek road in the springtime during the 1950s or 1960s "when Ed Herschler was on the Commission" (the Herschlers owned property on Coal Creek road adjacent to what is now the Cooks' property).

[¶ 11] In the 1960s, the department put "some culverts" in the road, "in different places going through there." According to Mr. Kirkwood, the department would then blade the road once or twice per year, depending on the weather as "ranchers wanted, more or less, more blading to get through there." In the 1970s, the department bladed the road "on and off." However, at the time ***1081*** the county changed its maintenance policy regarding private ranch roads (in 1981, 1984, 1985 or 1986), the Board "started cutting off all this work on private roads throughout the county" because "[t]hey were starting to form their own county roads at that time," but also "more or less went back into certain other private work. It was hard to follow what the commissioners would do at that time." When asked if the continued maintenance of private roads "depended upon who was getting the most requests from ranchers," Mr. Kirkwood replied that he "imagine[d] that's how you would say it, yes." Blading continued on Coal Creek road until 1986, but not thereafter, according to Mr. Kirkwood. He considered the road to be not "as private as going into a ranch," but "public" because "everybody was using it for some reason or another."

[¶ 12] The road and bridge department informed Ms. Peternal that the county "maintained" Coal Creek road at least once per year, but she did not personally observe this maintenance, could not recall when she was so informed, or who had provided the information. According to Ms. Peternal, Kemmerer Coal Company did not object to the maintenance.

[¶ 13] Rem Borino, a longtime county road and bridge department employee, testified that for five or six years prior to 1981, he would "blade" Coal Creek road each spring "[u]nless it got really tore up bad in a rainstorm or something like that. They'd call me back down" and he would "smooth it off." After 1981, he continued to blade the road until he retired from the department (he was "too glad to retire" and could not recall the date he retired). Mr. Borino did not blade Coal Creek road of his own accord, stating "[t]hey just asked me. And I says, Ask the Commissioners. The Commissioners tell me the next day, Go to the Kralls', go to a lot of places."

[¶ 14] Ron Cattelan, a county road and bridge department employee, testified that he began working for the county in 1979 as an equipment operator. Between 1981 and 1983 or 1984, Cattelan recalled blading Coal Creek road once, and "maybe once or twice a summer" or when "it would wash out a little." He also installed a pipe in a "seep" on what is now the Cooks' property, possibly prior to 1981. Mr. Cattelan thought the county quit maintaining the road in 1985 or 1986, but was not certain.

[¶ 15] Margaret Gergen, a county road and bridge department employee, testified that she first began working for the county in 1981 as an equipment operator. Between 1981 and 1988, she worked on "that road" "usually twice a year unless somebody called and needed something done." However, when asked what type of "work" she had done, Ms. Gergen described work performed on areas of Coal Creek road that did not cross the Cooks' property and stated that the last time she had "bladed" the road was 1988, and not thereafter because she "was not told to blade the road." To Ms. Gergen's knowledge, the primary reason she worked on the road was because "the ranchers would ask for it to be done."

[¶ 16] Corby McGinnis, whose family owns land adjacent to the Cooks' property, testified that her family bladed Coal Creek road in 1986 so that they could transport hay and additionally whenever the road washed out. They continued to blade the road when necessary to transport hay or "sometimes in the spring" to get equipment to their property.

[¶ 17] In the summer of 1981, the county road and bridge department installed a flatbed railroad car bridge where Coal Creek road crosses Fontenelle Creek on what is now the Cooks' property. The bridge was placed approximately fifty to one hundred twenty feet south of the original roadway, as there were "many tracks" where people had become stuck while attempting to cross the creek.

[¶ 18] Ms. Peternal testified that "some people up there" requested the bridge and the bridge was offered to the county "to put on that road" to provide access to ranchers

because the people "using that road had--had great difficulty crossing it at times. And it seems to me it had to do with moving their cattle." She later stated that the bridge was also installed for the general public. It is not clear whether the county actually paid for ***1082*** the bridge. Mr. Kirkwood was aware that the property was owned by Kemmerer Coal Company, and did not recall asking permission to perform the work associated with installing the bridge. Ms. Peternal knew that the legal work necessary to establish Coal Creek road as a county road had not been performed, and did not determine, or ask anyone to determine, who owned the property prior to installing the bridge. She similarly did not recall Kemmerer Coal Company objecting to the bridge, but the Board did not ask permission to install it, nor did she recall Kemmerer Coal Company expressly granting the county permission to do so. She considered roads such as Coal Creek road "public roads" because "they were open to the general public."

[¶ 19] A prior board of commissioners had placed two bridges on private ranch property (interestingly, Peternal property) without the property owner's knowledge, but Ms. Peternal recalled seeing "something signed by the previous Commission saying that they had permission to do this." Calvin Barnes, a rancher who has lived north of Kemmerer since 1952, testified that pursuant to an agreement, the county also installed a bridge on his property knowing that it was private property and not a county road. The county apparently agreed to install the bridge on Barnes' property in exchange for access to a "shortcut" when transporting county equipment to LaBarge.

[¶ 20] According to Ms. Gergen, once the bridge was positioned, some roadwork was necessary to facilitate moving the department's equipment to the bridge site. The department also installed one culvert (not on the Cooks' property), extracted some road material from a corner that was straightened, built road approaches to the bridge (the area was marshy due to spring runoff and people had crossed Fontenelle Creek at multiple locations), and installed at least one culvert on each side of the bridge. Mr. Kirkwood also recalled that, at the time the bridge was installed, Coal Creek road had been widened a bit on property other than the section at issue in this appeal. He noted that the bridge increased the road's use by making the creek crossing passable and that in 1986 or 1987, the Herschler ranch, as opposed to the county, installed a new "deck" on the bridge.

[¶ 21] Several witnesses described the public's historical use of Coal Creek road. Ms. Gergen recalled first using Coal Creek road when she was "ten years old," and periodically thereafter with her family to go camping, "chicken hunt [ing]" and "exploring." She still uses the road, presumably for the same purposes, and no one informed her that she could not use the road. Mr. Borino used Coal Creek road "every once in a while, hunting chickens or doing anything" [FN4] during hunting season, but had not used the road "for a long time." Similarly, no one denied him access to the road, and it was his understanding that the landowner was being "neighborly and accommodating" in allowing hunting on the property. Mr. Cattelan began using Coal Creek road about three times per year in 1976 for hunting, and continued to use the road after the bridge was installed. The property apparently was not posted with "no trespassing" or "no hunting" signs.

FN4. Much to the Board's dismay, Mr. Borino would not reveal the "good" chicken hunting locations.

[¶ 22] Kent Connelly, Lincoln County search and rescue captain and former commander, testified that he first became aware of Coal Creek road in 1983 or 1984, and until 1997, used the road fifteen to twenty times per year (primarily in September and October) for hunting and search and rescue purposes. No one denied Mr. Connelly access to the property; however, he recalls "discussions" with P & M (he was jumping through "the hoops of going through private landowners to ask for access") regarding search and rescue's access to the property and stated that P & M gave him express permission to cross the property for such a purpose. He also recalled that approximately ten years prior to 1998, unspecified ranchers posted a no trespass sign "to keep people out of there," but it was "taken down later on."

[¶ 23] Sue Hunt, a local rancher, testified that her family has resided near Coal Creek road since 1886 and that she has resided there full time since 1976. She "thinks" that her family used the road since 1912 to transport ***1083*** cattle between their property and leased forest land. Ms. Hunt apparently still utilizes the road to transport cattle twice per week between May and November. She just "used" the road, without obtaining permission, and no one restricted her use of the road. At some point, she assumed that the property belonged to the Bureau of Land Management.

[¶ 24] Joe Krall, and his parents before him, owned a ranch adjacent to what is now the Cooks' property until the McGinnis family purchased it in 1987. He testified, without specific reference to time periods, that he used Coal Creek road when other roads were "too muddy" to get to town, and used the road to transport cattle to another ranch. He observed the county perform maintenance on the road, but could not recall when. He did not recall anyone excluding him from using the road. However, "whenever you wanted to build, you know, a portion of the road and it was better for the road to be there, Kemmerer Coal would just give you permission to--and the county permission to do it." He changed a section of the road through his property, "through P & M" and around a hill (apparently not the road's historical location). According to Mr. Krall, P & M "thought if you put the road in a better position and if they happened to move their industry up there, it would be better for them, too, to have an improved road."

[¶ 25] Myles McGinnis, whose family purchased Mr. Krall's property in 1987, is a forty-nine-year resident of Fontenelle Creek road. He has used Coal Creek road all "his life" for ranch purposes relative to his Fontenelle Creek property, leased property adjacent to what is now the Cooks' property, and the property his family purchased from Mr. Krall. He and his family still use the road in caring for their cattle, irrigating, and summer "back and forth" travel. No one has restricted Myles McGinnis' access to the road. He recalled having a "gentleman's agreement" with one of P & M's lessees that allowed McGinnis to cross the property--"the access was there." According to McGinnis, in order to be "neighborly and accommodating," one allows other ranchers to cross one's property if necessary "once a historic pattern has been set."

[¶ 26] John Povsche, a seventy-two-year-old retired welder, testified that he grew up just south of the disputed section of road, and was aware of its existence at age ten. He uses Coal Creek road every fall to retrieve wood. His father leased some nearby property from Kemmerer Coal Company, no one ever told him not to use the road (even after this lease expired), and he never had to ask permission to use the road.

[¶ 27] Ron Lockwood, a wildlife biologist for the State of Wyoming, testified that Coal Creek road is the "main access" from the south for all the hunted species in the Miller Mountain/Fort Hill area, and he has observed "mushroom collectors, recreationalists, antler collectors" and bear hunters use the road. Mr. Lockwood uses the road "[p]retty regularly" in the fall during elk and antelope season.

[¶ 28] Steven Ellinwood, senior counsel for P & M and its corporate representative for purposes of the contested case hearing, testified that P & M manages and operates several mineral properties (primarily coal-related) for Chevron USA in Lincoln County. Much of this property is considered "open range," some of which P & M leases to area ranchers. P & M restricts public access at its active mine locations for "safety" reasons, but for "open range" property, including what is now the Cooks' property, the company's policy was to "allow permissive lawful public use." "It was permissive use, primarily for the ranchers in the local area;" a "course of dealing" among area property owners to facilitate each other's use of the land, including "old trails that are used by ranchers and the public to access the various public lands and adjoining private tracts of land," and once P & M became a property owner, it "followed that practice in the area."

[¶ 29] When asked if he was aware that the road had "been bladed on an annual basis by a road grader," he replied that he was not, but was aware a bridge had been placed on the property. However, based on his discussions with land department personnel, the mine manager and mine personnel, and his review of company land records, "the ***1084*** management at the Kemmerer mine, during the period of their ownership with that tract, was aware of ... what was taking place in that area" and "regarded that to be a permissive use of that roadway." Mr. Ellinwood further testified that P & M regarded the "bridge across that portion of land that was owned by P & M to be a permissive use." [FN5]
FN5. This aspect of Mr. Ellinwood's testimony began as follows:

Q. [BY DEPUTY COUNTY ATTORNEY] Mr. Ellinwood, as far as the other aspect of it--we've covered the permissive aspect of placing a bridge on P & M property. Would you consider the placement of a bridge and annual blading
of a road to be lawful public use of P & M property?

A. No, not necessarily.

When asked by counsel for the Cooks to explain this answer, Mr. Ellinwood, who testified by telephone, replied as follows:

A. Well, I think every--every--actually, I'm frankly not sure what the question was, because you were cutting out. But if I understood the question right, you asked me

whether I would regard the blading of the road and the placing of a bridge to be lawful public use. And I said, Not necessarily. Is that a correct summary of the question and answer?

Q. It is.

A. And you want me to explain my answer?

Q. Yes, sir.

A. Well, let me explain it in the context of the particular tract in question. Those were the facts that were were obtained during the period of P & M's ownership. And P & M regarded the Larry Cook tract and the Fontenelle Road and bridge across that portion of land that was owned by P & M to be a permissive use.

Q. But it may not be under some other circumstances; is that fair?

A. I'd say that's fair.

[¶ 30] According to Mr. Ellinwood, P & M controls approximately 22,000 acres of open range and forest land in the area, which contains access routes to public land and adjoining private land "where permissive use is currently allowed." If prescriptive rights were enforced across this property, it would necessitate posting or fencing the area to ensure that the public is not allowed access without first obtaining express permission. [FN6] Nancy Peternal acknowledged that during her tenure on the Board, it was "pretty well known" to her, the Board and the "community at large" that Kemmerer Coal Company allowed public access to its "thousands of acres of property with the exception of the mine itself."
FN6. A land agent for Pacificorp testified that it has a policy similar to that of P & M's regarding its "good deal" of property in south Lincoln County, and echoed the potential implications of enforcing prescriptive rights across its property based on the circumstances of this case.

[¶ 31] The Board entered detailed factual and legal findings in its February 3, 1999, Order Establishing Little Coal Creek Access Road Number 12-344 Across the Property of Lawrence L. Cook and Christy Cook. The Board concluded that the evidence satisfied the statutory and legal requirements for establishing, by prescription, Coal Creek road as a county road across the Cooks' property, primarily because the property's prior owners had not expressly granted permission for the public's use of the road or the county's maintenance of the road, and had not otherwise restricted access to the road.

[¶ 32] The district court reversed the Board's determination due to the "abundance of supporting evidence demonstrating permissive use," and this appeal followed.

STANDARD OF REVIEW

[¶ 33] Wyo. Stat. Ann. § 24-1-101(b) provides that the "proceedings on appeal shall be governed by the Wyoming Administrative Procedure Act." Therefore, we accord no special deference to the district court's decision and will consider the case as if it came directly from the agency. *In re Jensen*, 2001 WY 51, ¶ 9, 24 P.3d 1133, 1136 (Wyo.2001). Our review is limited to a determination of the factors specified in Wyo. Stat. Ann. § 16-3- 114(c) (LexisNexis 2001). The reviewing court shall:

(ii) Hold unlawful and set aside agency action, findings and conclusions found to be:

(A) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

* * *

(E) Unsupported by substantial evidence in a case reviewed on the record ***1085*** of an agency hearing provided by statute.

Wyo. Stat. Ann. § 16-3-114(c).

[¶ 34] The interpretation and correct application of Wyoming statutes are a question of law over which our review authority is plenary. *In re Jensen*, 2001 WY 51, ¶ 10, 24 P.3d at 1136. We affirm an administrative agency's conclusions of law only if they are in accord with the law. We do not afford any deference to the agency's determination, and we will correct any error made by the agency in either interpreting or applying the law. *Id.*

[¶ 35] In reviewing findings of fact, we examine the entire record to determine whether there is substantial evidence to support an agency's findings. *Id.* If the agency's decision is supported by substantial evidence, we cannot properly substitute our judgment for that of the agency and must uphold the findings on appeal. Substantial evidence is relevant evidence which a reasonable mind might accept in support of the agency's conclusion, so long as there is more than a scintilla of evidence. *Id.* Findings of fact are supported by substantial evidence if, from the evidence preserved in the record, the reviewing court can discern a rational premise for those findings. *World Mart, Inc. v. Ditsch*, 855 P.2d 1228, 1236 (Wyo.1993) (*quoting Mekss v. Wyoming Girls' School, State of Wyoming*, 813 P.2d 185, 200 (Wyo.1991), *cert. denied*, 502 U.S. 1032, 112 S.Ct. 872, 116 L.Ed.2d 777 (1992)).

DISCUSSION

[¶ 36] The Board argues that, based on the text of Wyo. Stat. Ann. § 24-1- 101 and our decisions in *Steplock v. Board of County Com'rs for Johnson County*, 894 P.2d 599 (Wyo.1995); *Koontz v. Town of Superior*, 746 P.2d 1264 (Wyo.1987); and *Big Horn County Com'rs v. Hinckley*, 593 P.2d 573 (Wyo.1979), a claimant seeking to establish a public easement by prescription should have a different or lesser burden than a claimant seeking to establish a private easement by prescription. The Board also contends that substantial evidence supports its findings in establishing a county road, by prescription, across the Cooks' property. According to the Board, Lincoln County's maintenance of Coal Creek road rebuts any presumption of permissive use, mere silence or acquiescence by the property's owners under these circumstances is insufficient to create an inference or presumption of permissive use, and the Cooks failed to demonstrate that their predecessors expressly permitted the public's historical use, or Lincoln County's

maintenance, of Coal Creek road.

Wyo. Stat. Ann. § 24-1-101 and the Common Law

[¶ 37] Wyo. Stat. Ann. § 24-1-101 provides:

(a) On and after January 1, 1924, all roads within this state shall be highways, which have been or may be declared by law to be state or county highways. 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 traveled 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, or if need be laid out, established and 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. ***Except, nothing contained herein shall be construed as preventing the creation or establishment of a public highway right-of-way with reference to state and county highways under the common-law doctrines of adverse possession or prescription either prior to or subsequent to the enactment hereof.*** If any such board shall resolve the creation or establishment of a public highway right-of-way based upon the common-law doctrines of adverse possession or prescription, it shall, following the filing of a plat and accurate survey required in accordance with the terms and provisions of W.S. [§]24-3-109, proceed with the publication of the proposed road for three (3) successive weeks in three (3) successive ****1086*** issues of some official newspaper published in the county * * *.

* * *

(b) The county commissioners shall cause a copy of the above notice to be mailed by registered or certified mail to all persons owning lands or claiming any interest in any lands over or across which the road is proposed to be created or established. The publication, posting and mailings of such notice shall be a legal and sufficient notice to all persons owning lands or claiming any interest in lands over which the proposed road is to be created or established. No viewers or appraisers shall be appointed, nor shall any damage claims be considered or heard, and ***the sole objections to be heard by the board shall be directed against the creation or establishment of such right-of-way under the common-law doctrines of adverse possession or prescription.*** Any objector may appeal from the final decision of the board of the county commissioners to the district court of the county in which the land is situated. * * *

* * *

(d) ***Only that portion of county highways, not to exceed sixty-six (66) feet in width,*** [FN7] ***which was actually constructed or substantially maintained by the county and traveled and used by the general public for a period of ten (10) years or longer, either prior to or subsequent to the enactment hereof, shall be presumed to be public highways lawfully established as such by official authority.***

FN7. The Board found that the "width of the roadway through the [Cooks'] property is the area actually maintained by the County which is generally thirty (30) feet in width but does not exceed sixty-six (66) feet in width." In support of the district court's decision to reverse the

Board, the Cooks do not contest the width of the road as established by the Board, which is also indicated on the recorded plat.

(Emphasis added.)

[¶ 38] The statute sets forth both procedural and substantive requirements a county must satisfy to establish a county road by prescription. *Steplock,* 894 P.2d at 604-06. In support of the district court's decision to reverse the Board, the Cooks do not contend that the Board's findings as to the requisite notice, recorded plat, or the procedures used by the Board in this case are deficient. The statute's "substantive requirement" is incorporated "by alluding to the common-law doctrines of adverse possession or prescription." *Id.* at 605. "This feature was added to the statute in 1967 by express grant of authority to counties to establish such roads. In expressly referring to the common-law doctrines, the statute incorporates the prior decisions of this court." *Id.* The statute, and our prior decisions, demand that "an action to take property from private owners without compensation must be accomplished with strict adherence to the statutory requirements for the proceeding." *Id.* at 606.

[¶ 39] At common law, one must show adverse use, under color of title or claim of right, such as to put the owner of the servient estate on notice that an adverse right was being claimed, and that the adverse use was continuous and uninterrupted for ten years. *A.B. Cattle Co. v. Forgey Ranches, Inc.,* 943 P.2d 1184, 1188 (Wyo.1997); *Prazma v. Kaehne,* 768 P.2d 586, 589 (Wyo.1989); *Koontz,* 746 P.2d at 1268. The party claiming an easement has the burden of proof, and such a claim is not favored. *Prazma,* 768 P.2d at 589.

[¶ 40] Adverse or hostile use is use inconsistent with the owner's rights, without permission asked or given, such as would entitle the owner to a cause of action against the intruder. *Koontz,* 746 P.2d at 1268 (*quoting* 7 R. Powell and P. Rohan, *Powell on Real Property* § 1013 [2] at 91-18 (1987)). The claimant must demonstrate how its actions would give notice to the landowner of the adverse use and adverse nature of his claim. *Prazma,* 768 P.2d at 589. Use "by permission or sufferance" cannot ripen into title, "no matter how long continued." *Board of County Com'rs of Sheridan County v. Patrick,* 18 Wyo. 130, 104 P. 531, 532-33 (1909); *see Koontz,* 746 P.2d at 1268. However, a property owner's failure to interrupt or object to the public use of his property for the statutorily prescribed period cannot be ***1087*** equated with permissive use. *Koontz,* 746 P.2d at 1268.

[¶ 41] Open, notorious, and continuous use is not sufficient, in and of itself, to justify granting a prescriptive easement; the use still must be adverse. *Weiss v. Pedersen,* 933 P.2d 495, 501 (Wyo.1997) (*quoting Shumway v. Tom Sanford, Inc.,* 637 P.2d 666, 670 (Wyo.1981)); *A.B. Cattle Co.,* 943 P.2d at 1189. In the instant case, it is use by the public, coupled with maintenance by the county, that "gives rise to the right to establish a county road by prescription" under the statute; in other words, " 'in addition to the use of a road by the public, the assumption of control and jurisdiction over it by the board of county commissioners for the statutory period of limitation' " must be demonstrated. *Steplock,* 894 P.2d at 605, 606 (*quoting Board of Com'rs of Sheridan County v. Patrick,* 18 Wyo. 130, 107 P. 748, 750 (1910)). Maintenance by the county is necessary to show a "claim of right in the public," the extent of which need only be "as much as may be

necessary to keep the road in substantial repair or to put it in condition for public travel." *Koontz,* 746 P.2d at 1269. However, the road is not established "until the county commissioners formalize their actions in accordance with the statute" and make " 'manifest the county's purpose to acquire the lands involved.' " *Hinckley*, 593 P.2d at 579 (*quoting Rocky Mountain Sheep Co. v. Board of County Com'rs of Carbon County,* 73 Wyo. 11, 269 P.2d 314, 319 (1954)).
EVIDENTIARY PRESUMPTIONS

[¶ 42] The Board argues that our prior decisions distinguish between public and private prescriptive easements and that the statute's text, combined with our decisions regarding claimed public prescriptive easements, create a lighter burden for public prescriptive easement claimants, as well as an evidentiary presumption that the claimant's use is adverse. The Board cites to Wyo. Stat. Ann. § 24-1-101(d) ("[o]nly that portion of county highways ... actually constructed or substantially maintained by the county and travelled and used by the general public for ... [ten years] ... shall be presumed to be public highways lawfully established as such by official authority") and language in *Hinckley,* 593 P.2d at 580, that "in order to establish a public road by prescription, a county need only meet the requirements set forth in § 24-1 [the statute's prior number]...." Next, the Board quotes our discussion in *Steplock,* 894 P.2d at 605 (*quoting Patrick*, 107 P. at 750) regarding the "substantive" aspect of Wyo. Stat. Ann. § 24-1-101, namely that it " 'should be shown, in addition to the use of a road by the public, the assumption of control and jurisdiction over it by the board ...' " and that it is "[u]se by the public, coupled with maintenance by the county, [that] gives rise to the right to establish a county road by prescription...." Finally, the Board points to language in *Koontz,* 746 P.2d at 1268, that a property owner's failure to "interrupt or object to the public use" of the road "cannot be equated to permissive use" and that if

> the private landowner establishes through competent evidence that the public's use is merely permissive, the question of supervision, control or maintenance is irrelevant. If the landowner fails to establish permissive use, he is still entitled to a presumption of permissive use ***unless*** the public authority establishes that it has assumed supervision or control of the road or has kept it in repair.
> (Emphasis in original.)

[¶ 43] The authority cited by the Board does not convince us that a public claimant bears any lighter burden than a private claimant *per se.* In a case originating under Wyo. Stat. Ann. § 24-1-101, we stated that, by "expressly referring to the common-law doctrines, the statute incorporates the prior decisions of this court." *Steplock*, 894 P.2d at 605. Accordingly, neither the statutory text, nor the language cited from *Koontz* and *Steplock,* undermine this statement or qualify our prior decisions based on the common law. A county's construction or maintenance of a road is certainly evidence of its control and jurisdiction of the road, which is necessary, no matter what analytical framework is utilized in evaluating the evidence, to demonstrate that its use is adverse and under a "claim of right in the public." The Board's reliance on the additional ****1088*** sentence in *Hinckley* ("a county need only meet the requirements set forth in § 24-1") is misplaced, as that sentence concluded a discussion of whether a public claimant must, in addition to the requirements of Wyo. Stat. Ann. § 24-1-101, also pay damages for a prescriptive

easement pursuant to the condemnation statutes. *Hinckley*, 593 P.2d at 580. We held that a public claimant need only satisfy the requirements of what is now Wyo. Stat. Ann. § 24-1-101, and not those set forth in the condemnation statutes. *Hinckley*, 593 P.2d at 580.

[¶ 44] Considerable argument is devoted to the application of presumptions in evaluating the evidence adduced at the contested case hearing, which coincides with the Board's argument that a public claimant bears a lighter burden of proof. Our prior decisions refer to or apply several such presumptions. "The land in question being unimproved and unenclosed prairie land until some public authority, acting within its proper sphere, assumed supervision or control of the road or kept it in repair, the use of it by the public will be deemed to have been permissive by the owner." *Patrick*, 104 P. at 532. The Board utilized this presumption in evaluating the evidence it received in this case.

[¶ 45] In *Koontz*, 746 P.2d at 1268, which involved a claimed public prescriptive easement (though not pursuant to Wyo. Stat. Ann. § 24-1-101), we applied the following principles in reviewing the record. Public use of a road will be deemed permissive unless a public authority has assumed supervision and control of the road or has kept it in repair. *Koontz*, 746 P.2d at 1268. If the landowner establishes that the public's use is merely permissive, the question of supervision, control or maintenance is irrelevant because a prescriptive easement cannot be acquired if the use is permissive. *Id.* If permissive use is not established, the landowner is still entitled to a presumption of permissive use unless the public authority establishes that it has assumed supervision or control of the road or has kept it in repair. *Id.* The Board similarly referred to these principles in its legal findings.

[¶ 46] In cases involving a claimed private easement by prescription, we have said that a "landowner claiming an easement by prescription in an unimproved road crossing the lands of his neighbor must assume the burden of establishing that his intention to make a hostile use of the road adverse to the interests of his neighbor was brought home to the neighbor in a clear and unequivocal way. His subjective intent will not be considered material, and while it is likely true that a manifestation of his hostile and adverse intent will result in revocation of permission to use the road across the neighbor's land, this is the best posture for the law to assume in the State of Wyoming. The claimant cannot rely upon a presumption [of hostile and adverse use] arising out of the open, notorious, continuous and uninterrupted use for the prescriptive period, but in the absence of more that use will be presumed to have been with permission. To rebut this presumption the claimant must introduce evidence of the facts which demonstrate the manner in which the hostile and adverse nature of his use was brought home to the owner of the adjacent land."
A.B. Cattle Co., 943 P.2d at 1188 (*quoting Weiss*, 933 P.2d at 501). This concept stems from the fact that "neighborliness and accommodation to the needs of a neighbor are landmarks of our western life-style." *A.B. Cattle Co.*, 943 P.2d at 1189. The Board decided not to apply this presumption in evaluating the evidence before it.

[¶ 47] The authority cited by the Board does not necessarily establish an evidentiary presumption of adverse use in favor of the claimant in this case, except that, as in most

cases, once a claimant produces ***sufficient*** evidence to establish a *prima facie* case, the burden then shifts to the opposing party. *Hillard v. Marshall,* 888 P.2d 1255, 1260 (Wyo.1995); *Shumway,* 637 P.2d at 669-70. We note that in *Hinckley,* 593 P.2d at 579, 580, a case originating under a prior version of Wyo. Stat. Ann. § 24-1-101, we first cited to decisions requiring that a public claimant take formal, official action in order to establish a prescriptive easement, and ****1089*** stated the following regarding what is now Wyo. Stat. Ann. § 24-1- 101(d):

After these cases were decided, the legislature enacted legislation creating a ***presumption of official establishment*** of state highways where there was public use for the prescribed period. This presumption of official establishment was subsequently extended to county highways, and then, in 1973, specific procedures were established to govern a county's acquisition of a road by prescription.

The 1973 amendments are consistent with our previous holdings that a county must take official action--including a declaration of purpose to acquire the lands and the filing of a survey plat of the proposed roads--before it can acquire a road by prescription.

(Emphasis in original.) Further, a presumption of adverse use does not

"arise where the user is shown to be permissive in its inception, or where it is not shown to have continued for the prescriptive period; ***nor, in the absence of some decisive act indicating separate and exclusive use, does it arise where the user is not inconsistent with the rights of the owner, as, for instance, where the user is in connection with that of the owner or the public or is claimed with respect to unoccupied, uninclosed, and unimproved lands, the use in such cases being presumed to be permissive and in subordination to the owner's title.***"

Shumway, 637 P.2d at 669 (*quoting* 28 C.J.S. *Easements* § 68 at 736-37 (1941)) (emphasis in original). In this regard, we also stated in a case involving a private claimant, the following:

The appellants argue that, under *Shumway v. Tom Sanford, Inc.,* 637 P.2d 666 (Wyo.1981), they are entitled to a presumption that their use of the roadway was adverse. The appellants misread the *Shumway* case. In that case, this Court recognized that our prior decisions were inconsistent with regard to whether, in establishing prescriptive easements, a presumption existed that the use was hostile or a presumption existed that the use was permissive. 637 P.2d at 669.

Weiss, 933 P.2d at 501. The opinion went on to say that we "resolved that inconsistency" in *Shumway,* quoting the previously-referenced excerpt regarding the presumption arising from "neighborliness" (*Shumway,* 637 P.2d at 670). *Weiss,* 933 P.2d at 501. Similarly, it "must be further remembered that prescriptive easements are not favored in law, and thus entry into another's possession is presumed to have been with the landowner's permission absent evidence of a hostile entry." *Caribou Four Corners, Inc. v. Chapple-Hawkes, Inc.,* 643 P.2d 468, 471 (Wyo.1982).

SUFFICIENCY OF THE EVIDENCE

[¶ 48] It is quite easy to become lost in the "trees" of presumptions and shifting burdens of proof, and lose sight of the "forest"--the sufficiency of the evidence as to whether the claimant's use was adverse or permissive. A presumption is merely a "required conclusion in the absence of explanation." *Hillard,* 888 P.2d at 1259. Reliance on a particular presumption does not change or heighten the standard of proof; a presumption

shifts the burden of proof.
A presumption is not a magic elixir that imbues its holder with an exalted level of protection against an evidentiary attack. A presumption simply means that in the absence of any other evidence to the contrary, the fact presumed is conclusive. If, however, there is sufficient evidence to the contrary, then it becomes a question of weight and credibility for the trier of fact.
Id. at 1260. In reality, what the parties dispute in this case is the sufficiency of the evidence to support the Board's finding that the use of Coal Creek road was adverse or under a claim of right, as opposed to permissive. The Board's key factual findings in this regard include:
1. The public traveled Coal Creek road "with no permission being asked for or given;"
2. P & M's policy was to permit public access to its open range land and to only restrict public access to those areas where active mining occurred. P & M was not aware that Coal Creek road was being maintained but was aware of the construction ***1090*** of the bridge. P & M "did not" consider the installation of the bridge or the maintenance of Coal Creek road by the county to be a lawful permissive use;
3. No member of the public, county official, or county employee ever asked permission to use Coal Creek road "and none was given." P & M and Kemmerer Coal Company did not ever deny access to Coal Creek road;
4. Any lack of knowledge regarding the county's maintenance indicates that the owner was simply indifferent;
5. Because there was no express permission given by any landowner for the public use or county maintenance, and because "there is no evidence of any effort being made to restrict public use" or county maintenance, the road "was used and maintained as a public or county road until 1988."
6. The public's use and county's maintenance "was adverse to the owners' interest, was done under claim of right and in such a manner as would cause a reasonable person to know the use was adverse."

[¶ 49] In light of these findings, we consider the following facts to be dispositive. The facts are essentially undisputed or uncontradicted, and the Board did not question the credibility of any witness.

[¶ 50] Until the Cooks acquired the subject property in "remote" Lincoln County, it was "unenclosed" and considered to be "open range." This case is a bit unique in that the Cooks' predecessors were corporate owners of substantial acreage. Coal Creek road has historically served several purposes in addition to its owners' purposes, including providing access to adjacent private property, from adjacent private property to other private and public property for ranching purposes, and to private and public property for governmental and recreational purposes.

[¶ 51] Contrary to the Board's findings, the record does contain evidence of permissive use by the public and/or the county. It was P & M's policy to allow these forms of "permissive lawful public use" on its thousands of acres of open range property, as opposed to its active mine sites, in recognition of an established "course of dealing" to facilitate the use of private and public property via roads including Coal Creek road.

[FN8] This approach is not unusual among corporate owners of substantial acreage in south Lincoln County. The Board found that Kemmerer Coal Company's position "with regard to the use of the Road while it owned the property" did not appear "to be different than P & M's position," and there is no evidence that anyone else owned the subject property during the relevant time period. Significantly, Ms. Peternal acknowledged that during her tenure on the Board, it was "pretty well known" to her, the Board and the "community at large" that Kemmerer Coal Company allowed public access to its property in this manner.
FN8. Such policies might be more effectively communicated by posting or publication.

[¶ 52] The testimony of ranchers who owned, or had owned, property along Coal Creek road, and that of the public, regarding their use of Coal Creek road is entirely consistent with this policy. Most individuals did not ask permission to use the road or property, as one witness phrased it--because they never "had to," and the property's owners never denied anyone access for the stated purposes. However, when permission was asked, it was given--this case is not one of mere silence by the property's owners. The Lincoln County search and rescue unit's former commander discussed accessing this property with P & M and received express permission from P & M to cross or access the property for search and rescue purposes. Further, Mr. Krall recalled that "whenever you wanted to build, you know, a portion of the road and it was better for the road to be there, Kemmerer Coal would just give you permission to--and the county permission to do it." He also altered part of the road passing through his property and "through P & M," and P & M "thought if you put the road in a better position and if they happened to move their industry up there, it would be better for them, too, to have an improved road."

[¶ 53] A public roadway cannot be acquired by mere permissive public use, for ***1091*** if a "private landowner establishes through competent evidence that the public's use is merely permissive, the question of supervision, control or maintenance is irrelevant." *Koontz,* 746 P.2d at 1268. Based on its findings that no permission was ever "asked or given" regarding anyone's use of Coal Creek road, the Board essentially equated the landowners' "policy" with a categorical and unsupported assertion that the public's and/or county's use of Coal Creek road was permissive.

[¶ 54] In *Koontz,* 746 P.2d at 1268, an appeal from an order granting summary judgment to the claimant, the only evidence indicating permissive use by the claimant was a statement in an affidavit that the landowner " 'permissibly allow[ed]' the property to be used as a roadway," and a statement in another affidavit that " 'if the Town of Superior had in any way informed me of or expressed the intention to claim Lots 20 and 21 as its own, I would have denied use of that property as a roadway.' " We found that the first statement was a "categorical" assertion of ultimate fact without supporting evidence and that a mere failure on the part of the landowner to interrupt or object to the public use cannot be equated to permissive use. *Id.* In the absence of other evidence of permissive use, no genuine issue of material fact existed as to whether the use was adverse. *Id.*

[¶ 55] The evidence we outlined regarding the permissive use of Coal Creek road clearly exceeds that presented by the landowner in *Koontz,* and in light of this evidence, the

Board's findings that the use of the road was adverse, as opposed to permissive, were not supported by substantial evidence. Even so, the objective context in which the maintenance of Coal Creek road occurred is important in evaluating whether the maintenance was sufficient to show the county's assumption of control and jurisdiction over the road, or a "claim of right in the public." [FN9] There is no evidence that Lincoln County originally constructed Coal Creek road. The county's maintenance of Coal Creek road mainly consisted of periodic "blading." The county historically maintained roads "commonly accepted" as county roads as well as private roads, and by 1979, the county had plowed private ranch roads "for years" without a set schedule. From its inception, much of the county's maintenance of the road appears to have been performed to appease the specific requests of its constituent ranchers in that area and those with area business operations (i.e., Continental Oil).
FN9. Our consideration of this evidence does not implicate issues not expressly before us (i.e., estoppel or abandonment).

[¶ 56] By 1980, Lincoln County had only one dedicated county road, which it attempted to vacate for unspecified reasons. That same year, the Board decided not to attempt to establish Coal Creek road as a county road. The record does not indicate why the Board considered establishing the road as a county road nor precisely why it did not do so. In 1980, the Board began discussing whether it should continue to maintain private ranch roads, and quit maintaining private ranch roads in 1981, 1984, 1985, 1986, or 1988, depending on the testimony. Not coincidentally, the county quit maintaining Coal Creek road as early as 1986. The Board found that after 1988, the county "wanted to avoid the expense of maintaining and establishing the Road and simply took the position that it was not a county road." We were unable to identify substantial evidence in the record to support this finding, although the extent to which the county considered Coal Creek road a private road is consistent with the county's historical maintenance practices. Notably, once the county quit maintaining Coal Creek road, private parties continued blading the road and maintained the bridge.

[¶ 57] The only other significant maintenance the county performed on Coal Creek road was related to a flatbed railroad car bridge it installed in 1981, soon after the Board decided not to attempt to establish the road as a county road. This, too, was requested by the "people up there" to facilitate ranchers' use of the road, but purportedly also for the general public. It was not unprecedented for the county to install bridges ***1092*** on private property, having placed two bridges on Ms. Peternal's private property prior to 1981 without the property owner's knowledge, yet, according to Ms. Peternal, somehow with the owner's permission. The county also placed a bridge on Calvin Barnes' private property, although pursuant to an express agreement. The record does not indicate what other bridges the county has installed or maintained on private or public property in Lincoln County. Contrary to the Board's finding, the entirety of Mr. Ellinwood's testimony indicates that P & M was aware of the county's maintenance and regarded it as a "permissive use," which is also evidenced by Mr. Krall's testimony regarding his experience with Kemmerer Coal Company and P & M when working on portions of the road.

[¶ 58] Based on this evidence, we similarly conclude that the Board's finding that Lincoln County's maintenance sufficiently established its assumption of control and jurisdiction over the road, or a "claim of right in the public," was not supported by substantial evidence.

[¶ 59] The decision of the district court is affirmed.

Appendix 6

6. Steplock v. Board of County Comm'rs for Johnson County, 894 P.2d 599 (Wyo. 1995)

Steplock v. Board of County Comm'rs for Johnson County, 894 P.2d 599 (Wyo. 1995)

894 P.2d 599

Supreme Court of Wyoming.
Harry A. STEPLOCK; Charles C. Willis; Karen K. Willis; Garvin Taylor; August Chabot; Julia Chabot; May Chabot; and Christie Walker, Appellants (Petitioners),
v.
The BOARD OF COUNTY COMMISSIONERS FOR JOHNSON COUNTY, Wyoming, Appellee (Respondent).
Nicki TAYLOR, Executrix of the Estate of Curtis T. Taylor, Deceased, Appellant (Petitioner),
v.
The BOARD OF COUNTY COMMISSIONERS FOR JOHNSON COUNTY, Wyoming, Appellee (Respondent).
Nos. 93-270, 93-271.
April 20, 1995.

Patrick Dixon of Dixon & Despain, Casper, for appellant Steplock.
Dennis M. Kirven of Kirven & Kirven, P.C., Buffalo, for appellants Willis, Taylor, Chabot, and Walker.
Margo Harlan Sabec, Casper, for appellant Nicki Taylor.
Greg L. Goddard, County and Pros. Atty., Johnson County, Buffalo for appellee.

Before GOLDEN, C.J., and THOMAS, CARDINE, [FN*] MACY, and TAYLOR, JJ.

FN* Retired July 6, 1994.

THOMAS, Justice.

The issues in this case arise out of an effort by the Johnson County Board of County Commissioners (Johnson County) to establish a county road based upon the doctrine of prescription. Private landowners (landowners), [FN1] whose property would be traversed by the road, appealed the resolution of Johnson County to the district court and now appeal from an order affirming Johnson County. Issues pressed include the unlawful substitution of a different survey plat and legal description after the evidence at the administrative hearing was closed; the failure to establish the width of the road and the use of an arbitrary width of sixty-six feet; failure to ***600*** comply with statutory requirements including a plat that was not an accurate survey, a plat and survey that did not meet statutory requirements, and defective notice of hearing; the denial of due process; the failure of the findings of fact and conclusions of law to conform to the Wyoming Administrative Procedure Act (Wyo.Stat. § 16-3-101 to -115 (1990 &

Supp.1994)); the failure in several respects to establish adverse possession of the road; and an ultimate contention of an illegal taking. We are satisfied Johnson County failed to follow the procedure for establishing a county road by prescription and, in fact, never really did establish the county road except for a short section. We reverse this case and remand it to the district court with direction that it should reverse Johnson County and vacate the findings of fact and conclusions of law reached by the Board of County Commissioners on January 19, 1993, so far as those relate to the Barnum Mountain Road.

FN1. In Case No. 93-270, the private landowners who appealed are Harry A. Steplock, Charles C. Willis, Karen K. Willis, Garvin Taylor, August Chabot, Julia Chabot, May Chabot, and Christie Walker.
In Case No. 93-271, the appeal is taken by Nicki Taylor, the Executrix of the Estate of Curtis T. Taylor, Deceased.

In their Brief of Appellants, the landowners in No. 93-270 assert the following issues:
A. Did the Board unlawfully substitute a survey plat and legal description after the close of evidence?
B. Did the Board fail to establish any width of the route claimed to have been traveled by the public and unlawfully and arbitrarily establish the width at sixty-six (66) feet after the close of the evidence?
C. Did the Board fail to comply with all requirements of Wyo.Stat. § 24-1- 101, (1977)?
D. Were landowners unlawfully denied due process by being denied the opportunity to conduct voir dire examinations?
E. Did the findings of fact and conclusions of law fail to conform to the requirements of the Administrative Procedures Act?
F. Did the Board fail to establish the elements of adverse possession?
G. Is Wyo.Stat. § 24-1-101 (1977) unconstitutional on its face or as applied?
In her Brief of Appellant Nicki Taylor, Executrix of Estate of Curtis T. Taylor, Deceased (in No. 93-271) separately states these issues:
A. Use of Appellant's land for road was permissive, and Appellee failed to prove the elements of adverse possession of the lands taken.
B. Land to be taken must be identified.
C. Refusal by Appellee to accept gift of right of way tendered by Appellant was arbitrary, capricious and an abuse of discretion.
D. Appellee lacked jurisdiction to proceed under W.S. Section 24-1- 101 (1977).
E. Appellant was denied due process.
F. Appellee's findings, conclusions, and resolution are arbitrary, capricious and lack support of substantial evidence.
G. Appellee's actions are without observance of the procedures required by law.
H. The direct and proximate result of Appellee's Resolution No. 133 is a double taking of Appellant's property.
I. The taking of Appellant's real property interest pursuant to W.S. 24-1- 101 (1977) violated Appellant's rights under the U.S. Constitution and the Wyoming Constitution.

The issues articulated in the Brief of Appellee Board of County Commissioners (answering in both cases) are:

Was there substantial evidence to support the decision of the Board of County Commissioners in declaring County Road 241 to be a public road?
What is the effect on the public of the Johnson County Board of County Commissioners determining that the statutory requirements for establishing a public road by prescription under the dictates of Wyoming statute 24-1-101 have been met in this case?

The landowners structure an additional issue which is:
Have the Appeals No. 93-270 and No. 93-271 been consolidated?

In December of 1992, Johnson County issued a notice of hearing stating its intent to hold a hearing on December 21, 1992 to establish a county road by prescription over some thirteen miles of road in southern Johnson County. This road comprises three ***601*** segments. The first runs westerly from Freeman Draw for approximately two and one-half miles to Barnum, and this segment is known as the "Barnum Road." The second segment runs westerly across an intersecting north-south road for approximately 2,000 feet. This intersecting road is known as the "Bar C Access Road." The third segment commences at the west edge of the Bar C Access Road and continues in a westerly direction for approximately ten miles to the Washakie County line.
The segment known as the Barnum Road is elevated, crowned with drainage areas along the side, paved, and has been posted with traffic signs. The Bar C access road is elevated and crowned, an improved gravel road, and also posted with traffic signs. The final segment which the parties allude to as the Barnum Mountain Road consists primarily of a two-track road over rugged terrain with some intersecting fences along the way. On some of those fences, there are posted signs that read "Private Property No Trespassing."

The notice of hearing, which was to be held at the Johnson County Courthouse in Buffalo, stated the purpose of the hearing was to establish a "public highway right-of-way under the common-law doctrine of prescription in that road * * * commonly known as 'County Road 241' and/or the 'Barnum Mountain Road.' " That notice went on to state: Issues to be determined include public usage of said road for a period in excess of ten (10) years; the recorded plat and survey and county maintenance and control over said road. Issues involve requirements under Wyoming Statute 24-1-101 for the creation and establishment of a public highway.

The procedure for the establishment of a county road by prescription is set forth in Wyo.Stat. § 24-1-101 (1993), which provides, in pertinent part, with emphasis added:
(a) On and after January 1, 1924, all roads within this state shall be highways, which have been or may be declared by law to be state or county highways. 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 traveled 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, or if need be laid out, established and 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. **Except, nothing contained herein shall be construed as preventing the creation or establishment of a public highway right-of-way with reference to state**

and county highways under the common-law doctrines of adverse possession or prescription either prior to or subsequent to the enactment hereof. If any such board shall resolve the creation or establishment of a public highway right-of-way based upon the common-law doctrines of adverse possession or prescription, it shall, following the filing of a plat and accurate survey required in accordance with the terms and provisions of W.S. 24-3-109, proceed with the publication of the proposed road for three (3) successive weeks in three (3) successive issues of some official newspaper published in the county, if any such there be, and if no newspaper be published therein, such notice shall be posted in at least three (3) public places along the line of the proposed road, which notice shall be exclusive of all other notices and may be in the following form:

To all whom it may concern: The board of county commissioners of .... county has resolved the creation and establishment of a public highway right-of-way under the common-law doctrine of prescription in that the road was constructed or substantially maintained by the (either the state or county) for general public use for a period of (ten years or longer) said road commencing at .... in .... county, Wyoming, running thence (here describe in general terms the points and courses thereof), and terminating at..... All objections thereto must be filed in writing with the county clerk of said county ***602** before noon on the .... day of .... A.D., ..., or such road will be established without reference to such objections.

.....
County Clerk
Dated.... A.D.

(b) **The county commissioners shall cause a copy of the above notice to be mailed by registered or certified mail to all persons owning lands or claiming any interest in any lands over or across which the road is proposed to be created or established. The publication, posting and mailings of such notice shall be a legal and sufficient notice of all persons owning lands or claiming any interest in lands over which the proposed road is to be created or established.** No viewers or appraisers shall be appointed, nor shall any damage claims be considered or heard, and the sole objections to be heard by the board shall be directed against the creation or establishment of such right-of-way under the common-law doctrines of adverse possession or prescription. Any objector may appeal from the final decision of the board of the county commissioners to the district court of the county in which the land is situated. Notice of such appeal must be made to the county clerk within thirty (30) days after such decision has been made by the board, or such claim shall be deemed to have been abandoned. Within ten (10) days after the notice of an appeal is filed in his office, the county clerk shall make out and file in the office of the clerk of the district court, in his county, a transcript of the papers on file in his office, and the proceedings of the board in relation to such creation and establishment. The proceedings on appeal shall be governed by the Wyoming Administrative Procedure Act. If the appeal is upheld the appellant shall be reimbursed by the county for all reasonable costs of asserting his claim.

* * * * * *

(d) Only that portion of county highways, not to exceed sixty-six (66) feet in width, which was actually constructed or substantially maintained by the county and traveled and used by the general public for a period of ten (10) years or longer, either prior to or

subsequent to the enactment hereof, shall be presumed to be public highways lawfully established as such by official authority.

The statute references the filing of a plat and accurate survey in accordance with the terms of Wyo.Stat. § 24-3-109 (1993) which provides:
If, upon considering and acting upon the report of the viewer, or otherwise, the board of the county commissioners shall decide to lay out such 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. (Emphasis added.)

In accordance with Wyo.Stat. § 24-1-101, notice was published in the *Buffalo Bulletin,* an "official newspaper published in the county" for three successive weeks on December 3, 10, and 17 of 1992. With respect to the statutory requirement that notice be mailed, "to all persons owning lands or claiming any interest in any lands over or across which the road is proposed to be created or established * * *," it is uncontroverted A. Louis Steplock and Deborah G. Steplock, who are landowners entitled to notice, did not receive any mailed notice of the proposed hearing.
Johnson County proceeded to hold the hearing as scheduled on December 21, 1992. The county was required to file a plat and accurate survey in accordance with the requirements of Wyo.Stat. § 24-3-109, quoted above. *Kern v. Deerwood Ranch,* 528 P.2d 910 (Wyo.1974). The statute stipulates the county surveyor is to make an accurate survey of the proposed road, and plat and record that survey with the county clerk. In addition, he is to file a copy of the plat and survey notes with the clerk. To satisfy this requirement, a Bureau of Land Management (BLM) survey was utilized. The accuracy of ***603*** that survey is disputed in the record. [FN2] It is clear neither Dr. Michael Long, who performed the field work for the survey, nor Mr. Gerald Jessen, who supervised the field work, was a county surveyor.

FN2. The BLM plat and survey maintained an accuracy of two to five meters or six to sixteen feet as to the location of the Barnum Mountain Road, while Johnson County subdivision regulations require plats to be surveyed with an accuracy showing lengths to the hundredths of a foot. However, the dispute over accuracy suggests the BLM survey may well be appropriate for a survey of undeveloped land to be taken for a road; whereas, it would not be accurate for a plat and survey of a city block or for lots in a proposed subdivision. The dispute over survey accuracy in this case thus may be a futile comparison of "applies to oranges."

The statute provides a road taken by prescription cannot exceed sixty-six feet in width. The statute further limits the width of the road, however, to that portion "which was actually constructed or substantially maintained by the county and traveled and used by the general public for a period of ten (10) years or longer." With respect to that segment

of County Road 241, identified as the Barnum Mountain Road, this ten-mile segment was no more than a rocky, two-track trail up the mountain. The commissioners, however, set the width at a maximum of sixty-six feet in their conclusions of law, although no testimony in the record discloses the actual width of the road as used by either the landowners or the public.

The elements of prescription were also addressed at the hearing. With respect to the two and one-half miles of paved road known as the Barnum Road, the record discloses no dispute as to the fact it has been traveled by the public and maintained by Johnson County for a period of ten years or more. On the other hand, there is no evidence in the record to demonstrate continuous maintenance for ten years by Johnson County or public use for ten years on the unpaved Barnum Mountain Road. The landowners often required others to obtain permission from them to travel on much of that segment of the road. Even those county employees who did some maintenance on the road in the form of grading it in the spring testified the grading was not accomplished each year for a statutory period of ten years.

After the conclusion of the hearing, the commissioners adopted Resolution No. 133 and issued findings of fact and conclusions of law in accordance with the Wyoming Administrative Procedure Act. Resolution No. 133 reads:
THE JOHNSON COUNTY COMMISSIONERS do declare the Barnum Mountain Road to commence at Freeman Draw and to end at the west edge of the Bar C Access Road.
WHEREAS, the Barnum Mountain Road, sometimes known as Johnson County Road No. 241, was traveled by area ranchers and the general public continuously for at least ten years during the period from at least 1947 through 1977; *and,*
WHEREAS, Johnson County, Wyoming maintained the entire Barnum Mountain Road under a claim of right from at least 1951 through 1979 with a higher level of maintenance however on the lower portion of the road, between Freeman Draw and Bar C Road, *and,*
WHEREAS, the survey and plat of the entire Barnum Mountain Road filed in the office of the County Clerk of Johnson County, Wyoming, as part of these proceedings, are statutorily sufficient. That portion of the road between Freeman Draw and the Bar C Road being more particularly described on Exhibit "A" attached hereto and by reference incorporated herein; *and,*
WHEREAS, pursuant to W.S. 24-1-101 and 16-3-107, reasonable notice of these proceedings has been given to all required landowners; *and,*
WHEREAS, the elements of a prescriptive easement in the public as well as county control and maintenance of the Barnum Mountain Road required by W.S. 24-1-101 have been established by the evidence presented herein,
NOW THEREFORE BE IT RESOLVED that Johnson County Road No. 241 a/k/a the Barnum Mountain Road shall commence at Freeman Draw and shall end at the west edge of the Bar C Access ***604*** Road. Said road right of way is described on Exhibit "A" attached hereto and shall be a Sixty-Six Foot (66') right of way, being Thirty-Three Feet (33') on either side of the centerline of the road.
DATED this 19th day of January, 1993.
BOARD OF COUNTY COMMISSIONERS JOHNSON COUNTY, WYOMING

The findings of fact and conclusions of law which were filed simultaneously with Resolution No. 133 state, in pertinent part:

1. The Barnum Mountain Road, sometimes known as Johnson County Road No. 241, was traveled by area ranchers and the general public continuously for at least ten years during the period from at least 1947 through 1977.

2. Johnson County, Wyoming maintained the entire Barnum Mountain Road under a claim of right from at least 1951 through 1979 with a higher level of maintenance however on the lower portion of the road, between Freeman Draw and Bar C Road.

3. The survey and plat of the entire Barnum Mountain Road filed in the office of the County Clerk of Johnson County, Wyoming, as part of these proceedings, are statutorily sufficient. That portion of the road between Freeman Draw and the Bar C Road being more particularly described on Exhibit "A" attached hereto and by reference incorporated herein.

4. Pursuant to W.S. 24-1-101 and 16-3-107, reasonable notice of these proceedings has been given to all required landowners.

5. The elements of a prescriptive easement in the public as well as county control and maintenance of the Barnum Mountain Road required by W.S. 24-1- 101 have been established by the evidence presented herein.

6. The road right of way described herein shall be a Sixty-Six Foot (66') right of way, being Thirty-Three Feet (33') on either side of the centerline of the road as described on Exhibit "A" attached hereto.

DATED this 19th day of January, 1993.

BOARD OF COUNTY COMMISSIONERS JOHNSON COUNTY, WYOMING

According to the Resolution, Johnson County established the three miles from Freeman Draw to the west edge of the Bar C or BLM access road as a county road. The findings of fact and conclusions of law state a prescriptive easement existed in the public with respect to the "Barnum Mountain Road." The affected landowners filed a motion for clarification in which they requested Johnson County to amend the findings of fact and conclusions of law to state the third segment, the ten-miles of unpaved road west of the Bar C Access Road, had not been established as a county road. A hearing was held to address the motion for clarification. At the close of that hearing, the commissioners indicated they would not amend their findings or the resolution in any respect.

The landowners appealed to the district court, which affirmed the action of Johnson County. This appeal comes from the order affirming Johnson County entered in the district court.

Analysis of the record in this case discloses that, as between the landowners other than the estate of Curtis T. Taylor and Johnson County, the real issue is whether Johnson County can declare a prescriptive easement in the public. Johnson County did not purport to establish the Barnum Mountain Road as a county road beyond the west edge of the Bar C Access Road. The relief sought by those landowners is very similar to what might be achieved in a quiet title action to remove the burden of an unlawfully recorded interest from their titles. With respect to the estate of Curtis T. Taylor, the issue is whether

Johnson County should accept as a gift a road it has acquired by prescription and has established under that doctrine.

While we do not understand Johnson County purported to establish a county road under the doctrine of prescription or adverse possession beyond the west edge of the Bar C Access Road, the parties address that issue in the context of what is required to establish a county road by prescription. Clearly, Johnson County needed to follow the substantive and procedural requirements in Wyo.Stat. § 24-1-101. The initial action in such a proceeding is the filing of a plat and ***605** accurate survey in accordance with the terms and provisions of Wyo.Stat. § 24-3-109. We have discussed the requirement of filing a plat and accurate survey in accordance with Wyo.Stat. § 24-3-109. *Rocky Mountain Sheep Co. v. Bd. of County Comm'rs of Carbon County*, 73 Wyo. 11, 269 P.2d 314 (1954). There is no dispute that there was no plat and survey of this road by the county surveyor. It seems evident the statutory requirements were not complied with even without addressing the concern of the landowners that a different plat of the road was used for purposes of the resolution than was invoked at the hearing.

A comparison of the conclusions of law by Johnson County with Resolution No. 133 discloses there is no detailed description of the Barnum Mountain Road in the conclusions of law, although it is clearly delineated and limited in Resolution No. 133. In other significant respects, these two documents are substantially identical.

The confusion of the landowners with respect to the action of Johnson County is understandable. The road commencing at Freeman Draw and going west to the Bar C Access Road is the three-mile, paved portion of the road known locally as the Barnum Road. It is distinguishable from the ten-mile portion of the Barnum Mountain Road from Bar C Access Road going west to the Washakie County line. At the hearing on the Appellants' motion for clarification (filed by the landowners) held on February 17, 1993, the Johnson County Commissioners articulated the fact they intended to acquire by prescription only the three-mile portion from Freeman Draw to the Bar C Access Road. The pertinent testimony read as follows:
MR. KIRVEN: [B]ut I understand that the vote of the Board on that day was to establish a county road by prescription from Freeman Draw to the Bar-C Road.
COMMISSIONER SHUMAN: **Right.**
MR. KIRVEN: That intent is not clear in the resolution that was adopted. In fact, Mr. Goddard sent a letter following that in which he said that you had done something different. He said that you had established a county road from Freeman Draw to the Washakie County line. Now, those are two separate and distinct positions.
COMMISSIONER RHODES: As I wrote in my letter, **we did not intend to do that.** (Emphasis added.)

The next requirement found in the statute is that of furnishing notice both by publication and by mailing, through either registered or certified mail, to all persons owning lands or claiming any interest in any lands over or across which the proposed road is to be created. The record is uncontroverted that A. Louis Steplock and Deborah G. Steplock, who are landowners entitled to mailed notice under the statute, received no mailed notice of the

hearing. In fact, they are not parties to the proceedings but, in the absence of compliance with the mandatory requirements of the statute, there is no way this road could have been established across lands they owned or in which they had an interest.

Assuming the procedural requirements of the statute had been satisfied, Johnson County still encounters substantive requirements relating to the establishment of a road by prescription. The substantive requirement is incorporated in the statute by alluding to the common-law doctrines of adverse possession or prescription. This feature was added to the statute in 1967 by express grant of authority to counties to establish such roads. In expressly referring to the common-law doctrines, the statute incorporates the prior decisions of this court. As early as 1910, we said:

[W]e are of the opinion that the only reasonable rule * * * is * * * that to establish a prescriptive right * * * there should be shown, in addition to the use of a road by the public, the assumption of control and jurisdiction over it by the board of county commissioners for the statutory period of limitation.

Bd. of Comm'rs of Sheridan County v. Patrick, 18 Wyo. 130, 144, 107 P. 748, 750 (1910).

This rule has been followed consistently in Wyoming. *Nixon v. Edwards,* 72 Wyo. 274, 264 P.2d 287 (1953); *Big Horn County Comm'rs v. Hinckley,* 593 P.2d 573 (Wyo.1979).

***606** Use by the public, coupled with maintenance by the county, gives rise to the right to establish a county road by prescription pursuant to Wyo.Stat. § 24-1-101. The road is not established, however, until the county commissioners formalize their actions in accordance with the statute. For example, we have held prescriptive use is not sufficient to establish a county road and that this must be established by legal authority. *Nixon; Rocky Mountain Sheep Co.* It is clear the statute, as well as the cases, demands an action to take property from private owners without compensation must be accomplished with strict adherence to the statutory requirements for the proceeding. Johnson County did not identify the location of the Barnum Mountain Road in a way that would satisfy the statutory requirements. The duty of the commission was articulated in *Rocky Mountain Sheep Co.,* 269 P.2d at 319:

So, also, if a board of county commissioners relies upon the county's having obtained prescriptive title to lands within a right of way, or any part thereof, in order to avoid the payment of damage for their taking, the inception of such prescriptive title must be evidenced by more formal acts than the user of the road by the public or by the county's construction and maintenance of the road because, in order to be empowered to acquire such prescriptive title, the records of the county must show not only the survey plat of the road but also the proceedings of the board in relation to the road's location, establishment or alteration, thus making manifest the county's purpose to acquire the lands involved.

Even assuming these requirements had been complied with, we still find Johnson County, in formalizing the result of the proceeding, described County Road No. 241 as commencing at Freeman Draw and ending at the west edge of the Bar C Access Road. In reporting the findings of fact and conclusions of law, the Johnson County Commissioners never did purport to establish a county road beyond the west edge of the Bar C Access Road. As to the balance of the road, there is simply a declaration of a prescriptive

easement in the public together with an assertion of county maintenance. We hold, in the relevant documents, Johnson County did not establish a county road beyond the west edge of the Bar C Access Road.

Had they purported to do so, it is clear the Commissioners did not describe the Barnum Mountain Road in a way that would manifest the County's purpose to acquire it by prescription. *See Rocky Mountain Sheep Co.* Furthermore, adequate notice was not afforded to all of the landowners pursuant to the statute. There is a serious question as to the adequacy of the plat and survey filed in connection with the proceedings and, finally, the width ascribed to the road beyond the west edge of the Bar C Access Road clearly goes beyond that permitted under Wyo.Stat. § 24-1-101(d), which significantly limits acquisition to "that portion of county highways * * * which was actually constructed or substantially maintained by the county and traveled and used by the general public for a period of ten years or longer." The evidence is clear this road was a trail and was not passable driving a vehicle which was not a four-wheel drive unless it had been graded prior to travel. There was no evidence that would support the claim of a road sixty-six feet in width.

We have addressed both cases, No. 93-270 and 93-271, and considered them as being consolidated for the purposes of our decision. With respect to case No. 93-271, we find no merit in the Estate of Taylor's separate contention that the Commissioners' refusal to accept a gift of the right-of-way of the three-mile Barnum Road portion was arbitrary, capricious, and an abuse of discretion. The three-mile portion of the road known as the Barnum Road has been established pursuant to the doctrine of prescription as a county road. It would not be appropriate for Johnson County to accept a gift of an interest it had acquired by prescription. Our understanding of the record is that the interest of the Estate of Taylor relates only to the portion of the road that was successfully established as a county road by the doctrine of prescription and does not reach to any part of the Barnum Mountain Road, which we have held was not established by prescription.

***607** We perceive no merit in the contention of the landowners that they were denied due process because their right to voir dire the Board of County Commissioners was limited. The record discloses the hearing examiner's voir dire was more than adequate, and all the Commissioners articulated their willingness to hear the evidence presented with an open mind. We do not identify any specific claim of error on the part of the landowners, but simply a contention they had the right to voir dire. In that regard, their position is not consistent with what this court said in *Mendicino v. Whitchurch,* 565 P.2d 460 (Wyo.1977). We do not find any error in the claim that the landowners were deprived of voir dire.

We reverse this case and remand it with direction to the district court to reverse and vacate the findings of fact and conclusions of law relating to the ten-mile portion of County Road 241 running west from the Bar C Access Road to the Washakie County border. The district court should also reverse any intimation in the resolution or the findings of fact and conclusions of law that articulates a prescriptive easement in the

public over the Barnum Mountain Road.

Appendix 7

7. L.U. Sheep Co. v. Board of County Comm’rs, 790 P.2d 663 (Wyo. 1990)

L.U. Sheep Co. v. Board of County Comm'rs, 790 P.2d 663 (Wyo. 1990)

790 P.2d 663

Supreme Court of Wyoming.
L.U. SHEEP COMPANY, a Wyoming Corporation; Gary Kellogg and Brenda Kellogg, husband and wife; and Maxine Kellogg, Appellants (Defendants),
v.
BOARD OF COUNTY COMMISSIONERS OF the COUNTY OF HOT SPRINGS, Wyoming, Appellee
(Plaintiff).
No. 89-148.
April 11, 1990.

John W. Davis of Davis, Donnell, Worrall & Bancroft, P.C., Worland, and James L. Applegate, Hirst & Applegate, Cheyenne, for appellants.
J. John Sampson, Sheridan, for appellee.

Before CARDINE, C.J., and THOMAS, URBIGKIT, MACY and GOLDEN, JJ.

THOMAS, Justice.

The question of what is the proper instruction to be given to the jury with respect to the measure of damages to the landowner for a partial taking of a privately owned road under the Wyoming Eminent Domain Act, §§ 1-26-101 to -817, W.S.1977 (the Act), is the central issue to be resolved in this case. Collateral issues are asserted relating to the propriety of the cooperation of the United States Forest Service (USFS) in the road project; whether that cooperation resulted in the USFS being an indispensable party to the proceedings; whether Hot Springs County brought the action under the proper statutes; whether the trial court erred in excluding from evidence the report of court-appointed appraisers; and whether the trial court erred in granting motions submitted by Hot Springs County to suppress testimony concerning the involvement of the USFS in the project; certain testimony from the landowners whose property was taken; evidence about the rental value of the land; and evidence relating to road construction costs.

The trial court failed to instruct the jury about the proper measure of damages in this instance, and we must reverse and remand the case for further proceedings consistent with this opinion. Because the same issues are likely to arise upon retrial, we address the rulings of the trial court on the motions to suppress evidence. Those rulings appear to be incorrect in some instances in light of the proper measure of damages. We affirm the rulings of the trial court that established the posture of the USFS in connection with this case and excluded evidence concerning the involvement of the USFS. We also agree with the trial court that Hot Springs County could bring this case under the Act rather than under the statutes relating to the establishment ***666*** of a county road. Sections 24-3-101 to -127, W.S.1977.

In their brief on appeal, styled "Brief for Appellants/Defendants," L.U. Sheep Company, and Gary Kellogg, Brenda Kellogg, and Maxine Kellogg (Kelloggs), set forth the following issues to be addressed by the Court:
"I. Whether or not the district court erred when it refused to instruct in accordance with existing statutory law.
"II. Whether or not the district court erred when it ruled that the joint enterprise of Hot Springs County and the Forest Service regarding the Grass Creek road project did not violate either Wyoming statutes or the Wyoming Constitution.
"III. Whether or not the district court erred when it held that it was proper for Hot Springs County to proceed under §§ 1-26-105 *et seq.,* [FN1] rather than the county road statute, §§ 24-3-101, *et seq.*

FN1. We assume appellants meant section 1-26-501. Sections 1- 26-101 to -405, including § 1-26-105, were repealed in 1981.

"IV. Whether or not the district court erred when it refused to allow any evidence from the three appraisers who had been previously appointed by the court.
"V. Whether or not the district court erred by granting any of several motions in limine.
"VI. Whether or not the district court erred when it refused to hold that the Forest Service was an indispensable party to these proceedings."
The Board of County Commissioners of the County of Hot Springs, Wyoming (Hot Springs County), in its Brief for Appellee/Plaintiff, recites the same six issues as the appellants, and it adds the following statement of an additional issue:
"VII. Whether or not the jury verdict was supported by competent evidence presented at trial and should, therefore, be affirmed."

Hot Springs County filed its complaint seeking condemnation of a private road that had been constructed across the lands of L.U. Sheep Company and the Kelloggs. The action was commenced on March 3, 1988, well after the effective date of the Act, and the County did invoke its power of eminent domain pursuant to § 1-26-801. The purpose of the condemnation was to provide access to the Shoshone National Forest for recreation, the harvesting of timber, and the development and operation of oil and gas leases. The USFS had agreed to finance the acquisition of this road by Hot Springs County, and the record justifies the conclusion that the acquisition of the road was accomplished at the behest of the USFS.

The road involved in this case runs from Grass Creek in northern Hot Springs County to the border of the Shoshone National Forest. The road, which follows Grass Creek, had existed as a private road for many years. The length of the road where it crossed the Kelloggs' property was .94 of a mile and 6.84 miles where it crossed the property of L.U. Sheep Company. Significant improvements had been made to the road in the 1950s including, at the time of trial, about eighteen cattle guards and thirty-five culverts. Over the years, the landowners had permitted the road to be used for access to a youth camp

and to the sites of timber and oil and gas operations. The owners, however, had denied access to other users of the road. Most of the surrounding land is used as pasture and hay meadows.

At the time their answer was filed, the Kelloggs and L.U. Sheep Company also filed a motion to join the USFS as an indispensable party, invoking the provisions of Rule 19, W.R.C.P. That was met by a subsequent motion on the part of Hot Springs County to suppress any mention of the USFS in the condemnation proceedings. The trial court found that the agreement between Hot Springs County and the USFS did not make the USFS an indispensable party in that a determination without the involvement of the USFS would not affect its substantial rights. For that reason, it denied the motion of the Kelloggs and L.U. Sheep Company, but it granted the motion ***667*** of Hot Springs County, ruling that any reference to the USFS would be immaterial and irrelevant.

The procedural effort of Hot Springs County to confine the proceedings continued, and it filed motions to suppress evidence relating to the rental value of the private road; evidence demonstrating road construction costs; and testimony from the landowners about the collateral effects of making the road a public road. All of these motions were granted by the trial court. The judge stated that testimony from landowners concerning livestock losses and increased dust attributable to making the road public would be entirely speculative. No definite reasons were articulated for granting the other two motions. The argument of Hot Springs County was that the rental value of the road and the costs of construction were not relevant in determining the "before and after values" of the ranch properties that the partial taking affected. Hot Springs County maintained that the only proper measure of compensation in the case was to compare, in each instance, the value of the entire property before the partial taking with the value of the entire property after the partial taking.

In August of 1988, the parties stipulated to certain facts and issues in the case. The effect of that stipulation was to establish the right of Hot Springs County to condemn the road under the Act, and the only issue left to be resolved was the question of just compensation for the condemnation of the private road. The trial court entered an order that reflected the stipulation of the parties and, pursuant to Rule 71.1(e), W.R.C.P., also provided for the appointment of three independent appraisers.

The appraisers were instructed by the court with respect to making a determination of the amount of just compensation, and they were told to be guided by §§ 1-26-701 through -713, W.S.1977, which is the compensation section of the Act. [FN2] Prior to arriving at their determination of the values of the respective takings, the appraisers viewed the road, received and examined evidence, and held a hearing. The report of the appraisers was filed with the court on March 8, 1989.

FN2. The appraisers were instructed as follows:

"The measure of just compensation to be paid to Defendant is the difference between the fair market value of the Defendant's lands immediately prior to the imposition of the easement and the fair market value of the Defendant's lands immediately thereafter.

"What comparable land changes hands for on the market at about the time of taking is usually the best evidence of market value available. Sales at arm's length of similar property are the best evidence of market values. These sales are referred to as comparable sales. In taking comparables into consideration, you should give weight only to those sales which are not too remote in time and made only where general market and economic conditions were similar to those existing on the date of the taking and within the same immediate area.

"You are instructed that your assessment of the value of land actually taken in this matter shall be based on market value. Market value has been generally defined as the price the land will bring when it is offered for sale by one who desires but is not obliged to sell it, and is bought by one who desires but is not obliged to buy it. The damages cannot be enhanced by the landowner's unwillingness to sell because of any sentiment which he has for the property.

"In determining the reduction, if any, in the fair market value of the Defendant's lands, you may consider all factors which you find to have an
effect on fair market value. However, any factors which you consider must be direct and certain and may not be remote, imaginary or speculative.

"In determining damages, if any, to Defendant's remaining land, you may consider every lawful use the Plaintiff may make of the land condemned, and you may consider every element of damage affecting the fair market value of the remaining lands resulting from use and maintenance of the road on the easement or way of necessity."

The appraisers determined that the just compensation for the taking of the Kellogg lands was $33,350 and, for the taking of the lands of L.U. Sheep Company, just compensation was determined to be $128,000. In arriving at the just compensation for the value of the Kellogg lands taken, the appraisers included the loss of revenues for use of the road and damages to the remaining property caused by the general public. The appraisers relied upon these same factors in arriving at the value of the lands taken from L.U. Sheep Company, and they ***668** allowed additional compensation to that landowner for the diminution in value of its remaining lands. Hot Springs County labeled the appraisers' determinations improper and unacceptable.

Pursuant to the provisions of Rule 71.1(j), W.R.C.P., the County requested a jury trial, and one was conducted on April 18 and 19, 1989. The appraisers' report was offered in evidence by the Kelloggs and L.U. Sheep Company, but the trial court refused to receive it into evidence stating that it was hearsay and that it would not assist the jury. At the trial, both sides presented experts who testified with respect to the appropriate compensation for the lands taken. The expert presented by the Kelloggs and L.U. Sheep

Company testified that the value of the Kellogg land that was taken was $25,225 and that the value of the lands taken from L.U. Sheep Company was $201,012. Those amounts included compensation for the effect that the public road would have on the remaining lands. One of the experts called by Hot Springs County determined the value of the Kellogg taking to be $1,200 and the value of the L.U. Sheep Company taking to be $8,700. A second expert called by Hot Springs County placed those values at $1,950 for the Kellogg taking and $7,292 for the L.U. Sheep Company taking. These amounts represented the determinations made by the experts of the value per acre of the land taken multiplied by the number of acres taken.

The Kelloggs and L.U. Sheep Company offered these instructions on compensation to be given to the jury:

"Defendants' Instruction No. 24

"The fair market value of property for which there is relevant market is the price which would be agreed to by an informed Seller who is willing but not obligated to sell and informed Buyer who is willing but not obligated to buy. "The fair market value of property for which there is no relevant market is its value as determined by any method of valuation that is just and equitable.

"In addition, the fair market value of the remainder of the property on the valuation date shall reflect increases or decreases in value caused by the proposed project, including the increase in damage to property by the general public which could reasonably be expected to occur as a result of the proposed actions of Hot Springs County.

"Defendants' Instruction No. 25

"This case involves a partial taking of property and, therefore, the measure of compensation is the greater of the value of the property rights taken or the amount by which the fair market value of the entire property immediately before the taking exceeds the fair market value of the remainder immediately after the taking."

The Kelloggs and L.U. Sheep Company relied upon §§ 1-26-702, -704, and -706, W.S.1977, as authority for these instructions, but the trial court refused to give them. Instead, and over the objection of those parties, the jury was instructed that just compensation amounted to the difference between fair market value of the ranching properties as a whole immediately before and immediately after the taking. [FN3] The jury was instructed as to the definition of fair market value and a method for determining that value, [FN4] and the jury also was ***669*** instructed not to consider those factors which it might find to be too remote, imaginary, or speculative. [FN5] The jury was permitted to consider the effect of the county's use, which would be use by the public, of the road on the remaining lands. In addition, the jury was instructed that Hot Springs County was not responsible for the criminal acts of third parties on the Kellogg and L.U. Sheep Company lands due to the establishment of the public road.

FN3. Instruction No. 6, given by the court, advised the jury:

"The measure of just compensation to be paid to the Defendants is the difference between the fair market value of Defendants' land immediately prior to the imposition of the easement and the fair market value of the Defendants' land immediately thereafter."

FN4. Instruction No. 7, given by the court, advised the jury:

" * * * The market value is the price which would be agreed to by an informed seller who is willing but is not obligated, to sell it and by an informed buyer who is willing, but not obligated, to buy * * *."

Instruction No. 9, given by the court, advised the jury:

"In determining market value, you may take into consideration evidence of sales of land that you find to be comparable to the land involved in this lawsuit which occurred within a time reasonably near the date of the
taking."

FN5. Instruction No. 11, given by the court, advised the jury:

"In determining the reduction, if any, in the fair market value of Defendants' land, you may consider all factors which you find to have an effect on fair market value. However, any factors which you consider must be direct and certain and may not be remote, imaginary, or speculative.

"In determining damages, if any, to Defendants' remaining land, you may consider every lawful use the Plaintiff may make of the land condemned, and you may consider every element of damage affecting the fair market value of the remaining land resulting from construction, operation, maintenance, and the use by Plaintiff of the County road easement on Defendants' land."

The jury returned a verdict finding that just compensation to the L.U. Sheep Company for lands taken was $8,700 and just compensation to the Kelloggs for lands taken was $1,950. The district court entered a Judgment and Order reflecting that verdict.

The question of the proper factors to be taken into account in connection with a partial taking of land is also determinative of several of the evidentiary questions raised in this appeal. We cannot criticize the trial court for faithfully following the law articulated in *Coronado Oil Company v. Grieves*, 642 P.2d 423 (Wyo.1982), where we held that the trial court committed reversible error by allowing evidence of damage factors that were not related to the "before and after" rule for the valuation of property. We there quoted, at 642 P.2d 433, the following language from *Continental Pipe Line Company v. Irwin Livestock Company,* 625 P.2d 214, 216, 25 A.L.R.4th 607 (Wyo.1981):
" ' * * * [W]here there is a partial taking of property, as here, which will result in damages to the remainder not taken, the amount of just compensation to be awarded for that "taken or affected" is determined by application of the "before and after" rule, i.e. just compensation is the difference between fair market value of the entire parcel before the taking and that after the taking.' "

The trial court's instructions to the jury faithfully reflected the decision in the *Coronado*

case to the extent that the court's Instruction No. 11, relating to factors to be taken into account in determining fair market value, was taken verbatim from an instruction we cited with approval there.

The Act became effective in 1981, and is the law to be applied in this case. In *Coronado,* 642 P.2d at 433, we clearly stated in n. 4 that the Act had no application to that case. The Act covers the entire subject of eminent domain except that the provisions of the Wyoming Rules of Civil Procedure are preserved to the extent that they do not conflict with the statute. Section 1-26-501, W.S.1977. We presume that the legislature adopts statutes with full knowledge of existing state law, including court decisions and, for that reason, the legislature implicitly abrogated earlier contrary decisions in the law of eminent domain when it adopted the Act. *Matter of Voss' Adoption,* 550 P.2d 481 (Wyo.1976); *Snell v. Ruppert,* 541 P.2d 1042 (Wyo.1975). It follows that the reliance of the trial court on the rules of law articulated in *Coronado* was misplaced. In resolving the issue of the appropriate determination of compensation for a partial taking, we must define what the statute provides for damages and determine in what respects *Coronado* is not in harmony with the current statutes.

The repeal of §§ 1-26-101 to -405, W.S.1977, and their replacement with the Act was the culmination of the work of a joint legislative committee that was commenced in 1979. See Report No. 1, Eminent Domain Study, Joint Judiciary Interim Committee (1979). The impetus for the study and the subsequent revision of the eminent domain statutes was the increased use of the power of eminent domain by public ***670** utilities and energy-related industries that experienced tremendous growth in Wyoming during the preceding years. Comment, *Wyoming Eminent Domain Act: Comment on the Act and Rule 71.1 of the Wyoming Rules of Civil Procedure,* 18 Land & Water L.Rev. 739 (1983). The Committee noted that the earlier statutes pertained to compensation only in a marginal way and that the rules for compensation at that time were guided by Rule 71.1, W.R.C.P., and the decisions of the Wyoming Supreme Court. Report No. 2, Eminent Domain Study, Joint Judiciary Interim Committee, at 16 (1979). The new Act changed this aspect of the law.

The sections relating to compensation for the taking of land by the power of eminent domain are found in Art. 7 of the Act. The following sections are pertinent to the disposition of this case:
"Section 1-26-702. Compensation for taking:
"(a) Except as provided in subsection (b) of this section, the measure of compensation for a taking of property is its fair market value determined under W.S. 1-26-704 as of the date of valuation.
"(b) If there is a partial taking of property, the measure of compensation is the greater of the value of the property rights taken or the amount by which the fair market value of the entire property immediately before the taking exceeds the fair market value of the remainder immediately after the taking.
"Section 1-26-704. Fair market value defined:
"(a) Except as provided in subsection (b) of this section:
"(i) The fair market value of property for which there is a relevant market is the price

which would be agreed to by an informed seller who is willing but not obligated to sell, and an informed buyer who is willing but not obligated to buy;
"(ii) The fair market value of property for which there is no relevant market is its value as determined by any method of valuation that is just and equitable.

* * * * * *

"Section 1-26-706. Compensation to reflect project as planned.
"(a) If there is a partial taking of property, the fair market value of the remainder on the valuation date shall reflect increases or decreases in value caused by the proposed project including:
"(i) Impairment of the use of his other property caused by the condemnation; and
"(ii) The increase in damage to his property by the general public which could reasonably be expected to occur as a result of the proposed actions of the condemnor;
"(iii) Any work to be performed under an agreement between the parties.
"Section 1-26-709. Compensation for growing crops and improvements.

* * * * * *

"(b) The compensation for an interest in improvements is the higher of the fair market value of the improvements, assuming their immediate removal from the property, or the amount by which the existence of the improvements enhances the fair market value of the property.

* * * * * *

"Section 1-26-711. Taking of leasehold interest. "(a) If all or part of the property taken includes a leasehold interest, the effect of the condemnation action upon the rights and obligations of the parties to the lease is governed by the provisions of the lease, and in the absence of applicable provisions in the lease, by this section.
"(b) If there is a partial taking and the part of the property taken includes a leasehold interest that extends to the remainder, the court may determine that:
"(i) The lease terminates as to the part of the property taken but remains in force as to the remainder, in which case the rent reserved in the lease is extinguished to the extent it is affected by the taking; or
"(ii) The lease terminates as to both the part taken and the remainder, if the part taken is essential to the purposes ***671*** of the lease or the remainder is no longer suitable for the purpose of the lease.
"(c) The termination or partial termination of a lease under this section shall occur at the earlier of the date on which, under an order of the court, the condemnor is permitted to take possession of the property, or the date on which title to the property is transferred to the condemnor.
"(d) This section does not affect or impair a lessee's right to compensation if his leasehold interest is taken in whole or in part."

In an earlier appeal of the *Coronado* case, we said that eminent domain statutes are to be strictly construed in favor of the landowners to the end that no person will be deprived of the use and enjoyment of his property except by a valid exercise of that power. *Coronado Oil Company v. Grieves,* 603 P.2d 406 (Wyo.1979). We have no question that the legislature intended to continue this rule of construction when it adopted the present Act. In drafting the Act, the legislature looked to the California eminent domain law, Cal.Civ.Proc.Code §§ 1230.010-1273.050 (West 1982), and the Uniform Eminent Domain Code (U.L.A.), 13 U.L.A. 1 (1986). [FN6] Comment, *Wyoming Eminent Domain*

Act: Comment on the Act and Rule 71.1 of the Wyoming Rules of Civil Procedure, 18 Land & Water L.Rev. at 739-40. Most of Art. 7 of the Wyoming Eminent Domain Act is taken from the Uniform Eminent Domain Code, §§ 1001 to -16. We do note the difference in § 1-26-706, W.S.1977, entitled "Compensation to reflect project as planned," which is quoted above and § 1006 of the Model Eminent Domain Code which has the same title. Section 1006 of the Model Eminent Domain Code reads as follows:

FN6. The Uniform Eminent Domain Code was approved by the National Conference of Commissioners on Uniform State Laws in 1974. It became the Uniform Law Commissioners' Model Eminent Domain Code in 1984. 13 U.L.A. 1. The only state to substantially adopt the Model Eminent Domain Code has been Alabama, but its statutes contain numerous variations, omissions, and additional matter. 13 U.L.A. 4 (1986).

"(a) If there is a partial taking of property, the fair market value of the remainder on the valuation date shall reflect increases or decreases in value caused by the proposed project including any work to be performed under an agreement between the parties.
"(b) The fair market value of the remainder, as of the date of valuation, shall reflect the time the damage or benefit caused by the proposed improvement or project will be actually realized."
It was this language that was included in Report No. 3, Eminent Domain Study, Joint Judiciary Interim Committee, at 14 (1979). [FN7] In arriving at a determination of the legislative intent, we consider the plain language of the statute. E.g. *Belle Fourche Pipeline Company v. State,* 766 P.2d 537 (Wyo.1988). The overall purpose of the Act and the plain language of § 1- 26-706 demonstrate a legislative intent that the landowner should be compensated for all losses that he can establish as attributable to the taking. The adjustment in the language by the legislature from the language of the Uniform Act makes this intent quite evident.

FN7. A latter draft proposed eliminating subsection (b) of the Uniform Act from the Wyoming statute. Working Draft No. 4, Eminent Domain Study, Joint Judiciary Interim Committee, at 22 (1980).

Our decision in the second *Coronado* case, 642 P.2d 423, did not consider the expanded range of compensation factors that the legislature recognized in adopting the Act. Pursuant to the provisions of the Act, the landowner whose property is the subject of a partial taking is entitled to prove not only the difference between the fair market value of the property prior to the taking and the fair market value of the remainder after the taking, under the "before and after rule," but he also is entitled to prove the value of the property rights taken. The measure of compensation is the greater of those alternative amounts. Section 1-26-702(b), W.S.1977. The landowner may prove the fair ***672** market value of the property taken by any method of valuation that is just and equitable if there is no relevant market establishing the value. Section 1-26-704(a)(ii), W.S.1977. In § 1-26-706(a)(i), the legislature provided that the fair market value of the remainder should reflect increases or decreases in value caused by the proposed project including "impairment of the use of [the landowner's] other property caused by the condemnation" and, in the following subsection (ii), provision is made for "increase in damage to [the

landowner's] property by the general public which could reasonably be expected to occur as a result of the proposed actions of the condemnor; * * *." The effect of this statutory scheme is to permit the landowner to establish the appropriate amount of just compensation for a partial taking by any rational method so long as he is able to introduce competent evidence to that end.

The application of these concepts requires us to reverse the Judgment and Order in this case. In considering the validity of instructions to a jury, we must determine whether the instructions, taken as a whole, adequately advise the jury of the applicable law. *Banks v. Crowner,* 694 P.2d 101 (Wyo.1985). Proper instructions should be clear declarations of the pertinent law. *Short v. Spring Creek Ranch, Inc.,* 731 P.2d 1195 (Wyo.1987). The ruling of a trial court on an instruction will not constitute reversible error unless there is a showing of prejudice, which connotes a demonstration by the complaining party that the instruction misled or confused the jury with respect to the applicable principles of law. *DeJulio v. Foster,* 715 P.2d 182 (Wyo.1986). In relying upon the concepts articulated in *Coronado,* 642 P.2d 423, the trial court failed to afford adequate instruction to the jury on the proper factors to consider in awarding just compensation. Its reliance upon that case excluded the application of the Act. The two instructions offered by the Kelloggs and L.U. Sheep Company that the trial court refused to give encompassed correct statements of the law applicable in this case.

This brings us to rulings that the trial court made with respect to the motions relating to the admissibility of certain evidence. Even though we reverse for other reasons, it is appropriate to consider these rulings because of the likelihood that they will arise in connection with a new trial. The Kelloggs and L.U. Sheep Company raised the validity of these rulings in their fourth and fifth issues.

The fourth issue addresses the ruling of the district court that it would not receive the report of the appraisers into evidence. The Kelloggs and L.U. Sheep Company contend that this ruling was premised on an erroneous ground by the trial court. In our judgment, this ruling was correct, however, for at least three reasons. First, § 1-26-711, W.S.1977, sets forth the rules relating to the taking of a leasehold interest and makes no reference to compensation to the landowner, but the appraisers included compensation for loss of lease revenues in their report. Second, the clear implication of one of the holdings of the court in *Coronado,* 642 P.2d 423, is that compensation does not include any factor for loss of business, and the appraisers' report included a loss of business factor in the form of lease revenues. Third, the involvement of appraisers pursuant to Rule 71.1, W.R.C.P., in effect, constitutes a panel like a special master to advise the court, and the product of the appraisers' deliberations and consideration of just compensation should not be weighed in the balance of evidence at a jury trial which clearly is a determination *de novo* and not a review of the appraisers' recommendation.

What we have said with respect to the admissibility of the appraisers' report also serves to control the rental value of the road. In our judgment, rental value of the land taken is the

substantial equivalent of the loss of business foreclosed by *Coronado,* 642 P.2d 423, and that rule has not been adjusted by the Act. To the contrary, the specific provisions of the statute, § 1-26-711, W.S.1977, relating to the taking of a leasehold interest do not provide for compensation to the landowner.

***673** The admission of evidence is controlled generally by Rules 401, 402, and 403, W.R.E. [FN8] Rulings on the admission of evidence are within the sound discretion of the trial court and, in the absence of a clear abuse of discretion, its rulings will not be disturbed. *Taylor v. State,* 642 P.2d 1294 (Wyo.1982). This exercise of the sound discretion of the trial court includes its determinations with respect to adequacy of foundation, the relevance of the proffered evidence, the competency of the proffered evidence, the materiality of the proffered evidence, and its remoteness, and the court's ruling with respect to any factor will be upheld on appeal absent the clear abuse of that discretion.

FN8. Rule 401, W.R.E., states:

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the
evidence."

Rule 402, W.R.E., states:

"All relevant evidence is admissible, except as otherwise provided by statute, by these rules, or by other rules prescribed by the Supreme Court. Evidence which is not relevant is not admissible."

Rule 403, W.R.E., states:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Because of our reversal of this case, which will encompass a remand for a new trial, the question of admissibility of certain of this evidence does arise anew. The report of the appraisers and evidence as to the rental value of the road is not relevant with respect to the question of fair compensation under Art. 7 of the Act. Section 1-26-706, W.S.1977, however, clearly provides for the inclusion of the factors of impairment of use of the landowner's other property and the increase in damage to his property by the general public which could reasonably be expected to occur as a result of the condemnation. The evidence of the effects of the road becoming public that was offered through the testimony of the landowners is relevant so long as it does not encompass mere speculation in violation of the concept set forth in *Coronado,* 642 P.2d 423. In our

judgment, the taking of a private road encompasses the immediate removal of the road, which is an improvement within the contemplation of § 1-26-709(b), W.S.1977. Consequently, evidence of road construction costs may well be relevant as to its market value. In this regard, we emphasize that the trial court retains its discretion, and the other requirements for admissibility of evidence that also come within the discretion of the trial court may still be applicable.

We cannot discern any relevance attaching to the evidence of the involvement of the USFS in this project. A similar question has been presented to this court before. In that instance, we stated:
"Defendants argue that they should have been allowed to adduce testimony tending to show that the Federal Government rather than the State of Wyoming was paying the bill. * * * Apparently the idea underlying the request was that juries regard Federal projects as pork barrels which may be tapped without pain to the conscience or injury to the residents of the State. Our experience is that the citizens who serve on juries are fully cognizant of the harm to State taxpayers which results from unwarranted Federal spending. In any event, the argument is without merit, and no authorities are cited to warrant consideration of the point." *Barber v. State Highway Commission,* 80 Wyo. 340, 342 P.2d 723, 725-26 (1959). That concept is as applicable now as it was then and, consequently, we uphold the ruling of the trial court with respect to the evidence of the involvement of the USFS in the project.

We turn then to the contention by the Kelloggs and L.U. Sheep Company that the arrangement between Hot Springs County and the USFS transgressed the Constitution of the State of Wyoming or its statutes. The Brief of Appellants/Defendants directs us to Wyo. Const. art. 3, § 37, which provides:
"The legislature shall not delegate to any special commissioner, private corporation ***674*** or association, any power to make, supervise or interfere with any municipal improvements, moneys, property or effects, whether held in trust or otherwise, to levy taxes, or to perform any municipal functions whatever."

In our judgment, this section has no applicability to the issues presented in this case. Neither Hot Springs County nor the USFS is a "special commissioner, private corporation or association." E.g. *Lund v. Schrader,* 492 P.2d 202 (Wyo.1971). Furthermore, the property taken really had nothing to do with any municipal property or function. We are not referred to any other provisions of our Constitution to support the argument of appellants and, thus, we conclude that there is no constitutional infirmity in the arrangement between Hot Springs County and the USFS.

Neither are we persuaded of any statutory violation. Section 16-1-101, W.S.1977, upon which the Kelloggs and L.U. Sheep Company rely, states, in pertinent part:
"In exercising, performing or carrying out any power, privilege, authority, duty or function legally vested in any one (1) or more of them by Wyoming law, the state of Wyoming, and any (1) or more of its counties, * * * agencies, * * * [and] commissions * * * may cooperate * * * with like entities or authorities of * * * the United States. Cooperation may be informal or subject to resolution, ordinance or other appropriate

action, and may be embodied in a written agreement specifying purposes, duration, means of financing, methods of operations, termination, acquisition and disposition of property, employment of executive and subordinate agents and other appropriate provisions."

It is true that a county has only the power expressly granted by statute or reasonably implied from other powers that are granted. *Haddenham v. Board of County Commissioners of Carbon County,* 679 P.2d 429 (Wyo.1984). Still, the legislature can delegate a part of its powers to both cities and counties for the exercise of governmental functions. *Carter v. Board of County Commissioners of Laramie County,* 518 P.2d 142 (Wyo.1974). The legislature has expressly ceded to counties the power to acquire property through eminent domain and, furthermore, it has afforded to counties the authority to cooperate with an agency of the United States in carrying out this power. Section 16- 1-101, W.S.1977. In making its agreement with the USFS, it is clear that Hot Springs County did not go beyond its delegated powers.

The Kelloggs and L.U. Sheep Company contend that it was improper for the court to permit Hot Springs County to proceed under the Act instead of the provisions of the statutes which relate to the establishment of county roads. Sections 24-3-101 to -127, W.S.1977. It is to be recalled that the parties stipulated that Hot Springs County had the right to condemn the road under the Act. General authority teaches, however, that a stipulation between the parties as to the correct law of the case is not binding upon the court. *Cf. Aetna Casualty & Surety Company v. Langdon,* 624 P.2d 240 (Wyo.1981). See cases cited in 83 C.J.S. *Stipulations* § 10.e. (1953). For that reason, we will consider this issue on its merits.

The Kelloggs and L.U. Sheep Company argue that the more specific statutes, which they perceive to be Sections 24-3-101 to -127, W.S.1977, should have been invoked rather than the general statute, which they describe as the Act. It is true that a specific statute will govern over a general statute enacted on the same subject, but this is a rule of statutory construction that is invoked only for the purpose of determining legislative intent. *Griego v. State,* 761 P.2d 973 (Wyo.1988). We discern nothing in the statutes relating to the establishment of a county road, §§ 24-3-101 to -127, that demonstrates a legislative intent concerning the Act that is any different from that which we already have articulated. Furthermore, in the first case of *Coronado,* 603 P.2d 406, we held that, insofar as condemnation is concerned, there is no statutory declaration that any remedy is exclusive. We do not find any statutory declaration of an exclusive remedy that has ***675** been adopted subsequent to that decision. Pursuing this case under the Act was appropriate and permissible.

We turn then to the claim of error arising out of the refusal of the trial court to require the USFS to be joined as an indispensable party pursuant to Rule 19, W.R.C.P. Earlier, we commented upon the irrelevance of evidence about the involvement of the USFS in this project. The only possible reason that the USFS could be joined as an indispensable party is if "in [its] absence complete relief cannot be accorded among those already parties." Rule 19(a), W.R.C.P. The sole issue to be tried in this case was the amount of just

compensation to the Kelloggs and L.U. Sheep Company for the taking of their property. The determination of that issue affords complete relief between Hot Springs County and the landowners, and the fact that the USFS may have some financial interest in the outcome of the case does not serve to make it an indispensable party. *Rochester Methodist Hospital v. Travelers Insurance Company,* 728 F.2d 1006 (8th Cir.1984); *Venuti v. Riordan,* 702 F.2d 6 (1st Cir.1983). Consequently, the trial court did not err in this regard.

Hot Springs County took no appeal from the judgment in this case. For that reason, we normally would not consider its assertion of the sufficiency of the evidence. In any event, our judgment that the case should be reversed and remanded for a new trial makes any consideration of the sufficiency of the evidence in this instance superfluous. We simply need not discuss it.

The district court did not instruct the jury properly with respect to the measure of just compensation for a partial taking pursuant to the Act. An application of the proper measure of just compensation demands that the trial court reconsider some of its rulings with respect to evidentiary matters. We hold that the trial court correctly ruled that the USFS is not an indispensable party in this action, and that any evidence with respect to its involvement in the road project is irrelevant and, for that reason, not admissible. The cooperation of Hot Springs County with USFS does not infringe upon any constitutional or statutory requirement, and it was appropriate to permit this action to proceed under the Act.

The Judgment and Order of the district court is reversed, and the case is remanded for a new trial. Except for those aspects of the trial court's determinations that have been affirmed, the new trial should be conducted in a manner consistent with this opinion.

Appendix 8

8. Koontz v. Town of Superior, 746 P.2d 1264, 1268 (Wyo. 1987).

Koontz v. Town of Superior, 746 P.2d 1264, 1268 (Wyo. 1987).

746 P.2d 1264

Supreme Court of Wyoming.
Ira E. KOONTZ and Velma A. Koontz, Appellants (Defendants),
v.
TOWN OF SUPERIOR, Appellee (Plaintiff).
No. 87-25.
Dec. 15, 1987.

Jay Dee Schaefer of Schaefer & Newcomer, Laramie, for appellants.
Edward F. Hess of Dill & Hess, Jackson, for appellee.

Before BROWN, C.J., and THOMAS, CARDINE, URBIGKIT, and MACY, JJ.

CARDINE, Justice.

This appeal is from a summary judgment granting the town of Superior title by adverse possession to a street crossing two lots and isolating a third lot. Appellants contend (1) that as a matter of law, Wyoming municipalities cannot obtain by adverse possession an easement or title to private property for the purpose of establishing a public roadway, and (2) that it was error to grant summary judgment when issues of material fact must be determined.

We modify and affirm.

The town of Superior was organized in 1911. At some time thereafter, the Original Plat of the town of Superior was filed showing Division Street platted south of Lot 22, Block 12. Division Street is an extension of County Road 419, the historic road to Reliance and Winton, Wyoming. Ira and Velma Koontz, appellants, purchased fee title to Lots 20, 21 and 22, Block 12 in the Original Plat of the town of Superior in 1979. In 1980, as a result of a dispute with the town, not at issue here, appellants discovered that Division Street was located on Lots 20 and 21 instead of its ***1266** platted location south of Lot 22. Appellee claims that Division Street has existed in its present location since at least 1952, and possibly prior to the town's incorporation in 1911, and the street has been traveled continuously and in an open, notorious and adverse manner by the general public since at least 1952 and until 1984 when the Koontzes blocked passage with a mobile home.

On October 9, 1984, the town filed suit seeking a judicial declaration that it had acquired a prescriptive easement to the portions of the lots crossed by the road. Appellants counterclaimed, asking the town to vacate Division Street where it crossed their property. Throughout the litigation, the parties alluded to the alternative theories of adverse possession and common-law dedication in addition to the prescriptive easement theory. The district court held, after receiving briefs, that the town had acquired title by adverse possession and estopped appellants from asserting ownership. On appeal, this court held

that the district court erred by deciding the case on briefs absent a motion for judgment or stipulation of facts. *Koontz v. Town of South Superior,* Wyo., 716 P.2d 358 (1986). On remand, the district court, following the filing of additional material, granted the town's motion for summary judgment. The property owners again appeal.

Appellants claim that summary judgment should not have been granted because of the presence of issues of material fact and because summary judgment is incorrect as a matter of law. Summary judgment is only appropriate on a dual finding that there is no genuine issue of material fact and that the prevailing party is entitled to judgment as a matter of law. *Hurst v. State,* Wyo., 698 P.2d 1130 (1985). A fact is material if it would establish or refute one of the essential elements of a cause of action or defense asserted by either party. *Schepps v. Howe,* Wyo., 665 P.2d 504 (1983). The party requesting summary judgment has the burden of showing there are no issues of material fact and that he is entitled to judgement as a matter of law. *Hyatt v. Big Horn School District No. 4,* Wyo., 636 P.2d 525 (1981); *Schepps v. Howe,* supra. If the movant has adequately supported his motion for summary judgment, the opposing party must respond with competent evidence that there are genuine issues of material fact. *Schepps v. Howe,* supra; *Hyatt v. Big Horn School District No. 4,* supra. The record on appeal must be viewed in a light most favorable to the party opposing the motion, giving him all favorable inferences drawn from facts in the record. *Schepps v. Howe,* supra; *Sanders v. Lidle,* Wyo., 674 P.2d 1291 (1984). If summary judgment is sustainable on any legal ground appearing in the record, it must be sustained. *Hurst v. State,* supra.

ADVERSE POSSESSION OR PRESCRIPTION BY A MUNICIPALITY

Appellants first contend that Wyoming municipalities lack authority to obtain private property for use as roadways through adverse possession or prescription. We have not heretofore directly addressed this question. In *Town of Glenrock v. Abadie,* 71 Wyo. 414, 259 P.2d 766 (1953), we implied that towns had the ability to acquire title to property through adverse possession. In *Amick v. Elwood,* 77 Wyo. 269, 314 P.2d 944 (1957), we suggested that a town can maintain a quiet title action and described the ability of a town council to purchase, receive or sell property by saying, "[t]he power granted is broad and comprehensive." *Id.* at 946. In *Barrett v. Town of Guernsey,* Wyo., 652 P.2d 395 (1982), we held that a previous quiet title action in which a city was allowed to obtain title by adverse possession was res judicata. *Town of the City of Newcastle v. Toomey,* 78 Wyo. 432, 329 P.2d 264, 76 A.L.R.2d 525 (1958), supports the premise that municipalities may acquire roadways by prescription. In all of these cases, we have suggested adverse possession or prescription as a legitimate method for a municipality to obtain title to real property. We now affirm that a municipality may, in appropriate circumstances, acquire real property by adverse possession or prescription.

***1267** It is generally held that a government body can acquire title to land by adverse possession. Annotation, Acquisition of Title to Land by Adverse Possession by State or Other Governmental Unit or Agency, 18 A.L.R.3d 678 (1968); 7 R. Powell and P. Rohan, Powell on Real Property § 1015 at 91-72 (1987). It is also generally held that the public may acquire a right to use land for highways by prescription. 4 H. Tiffany, Law of Real

Property § 1211 (1975); 2 G. Thompson, Thompson on Real Property § 342 at 208-209 (1980). Appellants argue, however, that municipalities may only exercise those powers expressly granted them by statute or those which may be reasonably implied from statutes. *Whipps v. Town of Greybull*, 56 Wyo. 355, 109 P.2d 805, 146 A.L.R. 596 (1941). Appellants contend that because the legislature has expressly given municipalities the power to acquire property for roads and streets through eminent domain, § 1-26-801, W.S.1977 (Cum.Supp.1987) and statutory dedication, §§ 34-12-101 to 34-12-115, W.S.1977, those two means are exclusive. We disagree.

It is well established that statutes providing means by which lands may be dedicated to public uses are not exclusive. *Graff v. City of Casper*, 73 Wyo. 486, 281 P.2d 685, 52 A.L.R.2d 254 (1955); 26 C.J.S., Dedication, § 3 (1956). With respect to the exclusivity of the eminent domain statutes, § 1-26-503, W.S.1977 (Cum.Supp.1987) provides:
"(a) Nothing in this act requires that the power of eminent domain be exercised to acquire property. Whether property necessary for public use is to be acquired by purchase, other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.
"(b) Subject to any other statute relating to the acquisition of property, any person or public entity authorized to acquire property for a particular use by eminent domain may also acquire the property for the use by grant, purchase, lease, gift, devise, contract or other means."

We are aware of no statute which precludes a municipality from acquiring property through adverse possession or prescription, and we hold that municipalities may acquire property by those means.

ADVERSE POSSESSION

In its complaint, appellee sought a judicial declaration that it had acquired an easement by prescription. Alternatively, appellee argued that it obtained an easement through common-law dedication. When addressing the prescriptive easement theory, the parties and the district court applied the legal principles regarding adverse possession. Ultimately, in its order entering summary judgment, the trial court concluded that appellee had "acquired title by adverse possession" in the disputed lands.

While the requirements for establishing a prescriptive easement are similar to those for adverse possession, there is a fundamental difference between the two doctrines: "Adverse possession denotes title acquired by the manner of possession, while a prescriptive easement is a nonexclusive right acquired by the manner of use." 2 G. Thompson, Thompson on Real Property § 340 at 191 (1980).

"The chief distinction is that in adverse possession the claimant occupies or possesses the disseisee's land, whereas in prescription he makes some easement- like use of it. As with adverse possession, if the prescriptive acts continue for the period of the statute of limitations, the prescriber acquires rights that correspond to the nature of use. Possession being the right carried by an estate, adverse possession creates an estate. Use being the

right carried by an easement, adverse use creates an easement." R. Cunningham, W. Stoebuck, D. Whitman, Law of Property § 8.7 at 451 (1984).

The record contains little mention of the distinction between the two doctrines. The distinction is important, however, in determining the extent of the property right acquired by appellee. While appellee's evidence demonstrates a manner of use consistent with the establishment of a prescriptive easement, appellee has not shown ***1268*** that it adversely occupied or possessed the property. Thus, we cannot affirm the trial court's conclusion that appellee acquired fee title to the disputed property.

PRESCRIPTION

In order to acquire a prescriptive easement, the party asserting the existence of the easement carries the burden of proving adverse use, under color of title or claim of right, such as to put the owner of the servient estate on notice that an adverse right was being claimed. *Yeckel v. Connell,* Wyo., 508 P.2d 1200 (1973). The adverse use must also be continuous and uninterrupted for the prescriptive period, which, in Wyoming, is ten years. *Gregory v. Sanders,* Wyo., 635 P.2d 795 (1981); § 1-3-103, W.S.1977.

Appellants contend that genuine issues of material fact precluded the trial court's conclusion that appellee had satisfied these elements. First, they claim that appellee's use of the property was permissive and therefore not adverse. Adverse or hostile use is "use inconsistent with the rights of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder." 7 R. Powell and P. Rohan, Powell on Real Property ¶ 1013[2] at 91-18 (1987). If use is permissive, no easement can be acquired by prescription. *Yeckel v. Connell,* supra. Public use of a road will be deemed permissive unless a public authority has assumed supervision or control of the road or has kept it in repair. *Board of County Commissioners of Sheridan County v. Patrick,* 18 Wyo. 130, 139, 104 P. 531, 532 (1909).

The dissent interprets this holding "to mean that a public street can now be established merely by intermittently repairing or maintaining a private roadway *permissively used by the public* for the prescriptive period of time." (Emphasis added.) The premise of this statement is that the roadway was "permissively used by the public." It should be noted that this opinion does not change the rule which holds that a public roadway cannot be acquired by mere permissive public use. If the private landowner establishes through competent evidence that the public's use is merely permissive, the question of supervision, control or maintenance is irrelevant. If the landowner fails to establish permissive use, he is still entitled to a presumption of permissive use *unless* the public authority establishes that it has assumed supervision or control of the road or has kept it in repair.

Appellants do not dispute appellee's assertion that the public has regularly used the disputed portion of Division Street since at least the 1950's. This use was inconsistent with the rights of the owner. In addition, the town established that it had maintained the road since 1952. This evidence effectively rebutted any possible presumption of

permissive use. See *Board of County Commissioners of Sheridan County v. Patrick,* supra.

The only evidence in the record which might indicate permissive use is contained in two affidavits filed by appellants. In one, appellants stated that they "permissibly allow[ed]" the property to be used as a roadway. We have held that such categorical assertions of ultimate facts without supporting evidence cannot defeat summary judgment. *Greenwood v. Wierdsma,* Wyo., 741 P.2d 1079 (1987); *Seamster v. Rumph,* Wyo., 698 P.2d 103 (1985). Appellants also rely on an affidavit of their predecessor in interest, John Kovach, who stated that "if the Town of Superior had in any way informed me of or expressed the intention to claim Lots 20 and 21 as its own, I would have denied use of that property as a roadway." Failure on the part of the owner to interrupt or object to the public use of the street for the statutorily prescribed period of time cannot be equated to permissive use. *Boulder Medical Arts, Inc. v. Waldron,* 31 Colo.App. 215, 500 P.2d 170 (1972). Neither of the affidavits demonstrates that permission was "asked or given." Because appellants provided no other evidence indicating permissive use, no genuine issue of material fact existed on the question of adverse use.

***1269**Appellants next contend that the town failed to establish continuous use. They claim that even if the public continuously used the road for the prescriptive period, the town cannot acquire the road unless it demonstrates that it continually maintained the road for the prescriptive period. This contention finds support in *Board of County Commissioners of Sheridan County v. Patrick,* supra.

For the sake of clarity, we should point out that a showing of maintenance by the town is necessary to prove a claim of right in the public, which is separate and distinct from the element of continuous public use. See *Board of County Commissioners of Sheridan County v. Patrick,* supra. Maintenance need not be constant. The extent of maintenance required is only as much as may be necessary to keep the road in substantial repair or to put it in condition for public travel. 39A C.J.S., Highways § 10 at 694-695 (1976). In support of its motion for summary judgment, appellee filed three affidavits which demonstrate that the county maintained Division Street for the town from 1952 to the mid 1960's, and the town has maintained the road since then. This evidence, which is undisputed, sufficiently establishes a claim of right in the public. Combined with the undisputed evidence of continuous use by the public, it establishes sufficient notice to the owners of the servient estate that an adverse right was being claimed.

In its complaint, appellee sought a prescriptive easement. To the extent that the district court granted it fee title under the theory of adverse possession, the court erred. On appeal, we may correct a judgment to conform to the pleadings. 5B C.J.S., Appeal and Error § 1877 (1958). We therefore modify the judgment to reflect that the town acquired a prescriptive easement in the disputed property.

Affirmed as modified.

CARDINE, J., delivered the opinion of the court.

URBIGKIT, J., filed an opinion concurring in part and dissenting in part.

MACY, J., filed a dissenting opinion in which URBIGKIT, J., joined.

URBIGKIT, Justice, concurring in part and dissenting in part.

I concur with the well-substantiated principle enunciated by the court that a governmental unit, as well as a private entity, can acquire interest in real estate by adverse possession, including prescriptive use for roadways. However, I differ in dissent as to whether the record in this case justifies the summary-judgment relief granted to the municipality as claimant.

It is recognized that with this second appeal, economics involving roadway rights have long since been exhausted in this litigation, and some end is of considerable interest to both the litigants and the judicial system. Unfortunately, the rule enunciated extends far beyond the mislocated dirt road in the coal-mining town of Superior which diagonally crossed two lots and isolated a third.

This court has now reversed its established rule on the burden of proof of adversity, and at the same time has reversed summary-judgment principles. Thus, this court has invoked a preliminary denomination of adverseness when a summary judgment is involved so that movant need not attack respondent's position with properly supported nonconclusory affidavits in order to engender a responsive requirement. It is in these reversals of established rules and principles in this modest case of major significance that I regretfully and respectfully dissent. It is not in the initial statement of either rule with which my difference arises, but rather in actual conversion or reversion of the principles when a case is applied to those summary-judgment facts.

Ira E. Koontz and Velma A. Koontz (landowner) are the record owners of Lots 20, 21, and 22, Block 12 of the Original Plat of the Town of South Superior (the town). The original plat showed Division Street to the south of Lot 22. However, for unknown ***1270*** reasons, Division Street was routed across Lots 20 and 21 of the Koontz property. The town contends that the present passageway has been located over Lots 20 and 21 of what is now the Koontz property since at least 1952 and where the town contends it has been located since at least 1952 with continued use and maintenance. After unsuccessful negotiations to purchase Lots 20 and 21 from the Koontzes in 1981, the town located new sewer lines under the platted Division Street property rather than under the existing road. Since acquisition of their property, appellants have paid property taxes on the complete lots. As mislocated, the road essentially condemns the landowner's beneficial use of all three lots.

Appellants allege that no adverse claim to the presently located street exists, and further that no prima facie claim to a prescriptive easement demonstrating adversity was ever shown by the town. Thus, with the use not proven to be adverse, they contend the grant of summary judgment was improper. Conversely, the town claims title to the street by

adverse possession or at least right to a continued use through a prescriptive easement in the public. Use was utilized to initially show adversity.

As to the burden of proof, the majority properly state the controlling rule in part: "In order to acquire a prescriptive easement, the party asserting the existence of the easement carries the burden of proving adverse use, under color of title or claim of right, such as to put the owner of the servient estate on notice that an adverse right was being claimed. *Yeckel v. Connell,* Wyo., 508 P.2d 1200 (1973)." Majority opinion at 1268. In addition, the cited case and the recited principle as stated in *Gregory v. Sanders,* Wyo., 635 P.2d 795 (1981) provide: "If the use is permissive, no easement can be acquired." *Yeckel v. Connell,* Wyo., 508 P.2d 1200, 1202 (1973).

The dispositive issue is application of the burden to prove adversity, either to claimant in its case, or lack of adversity to landowner in resistance. It is in application of this burden that the court reverses existent precedent.

The jurisdictions vary as to whether the claimant or landowner has the burden to prove permissive use. Annot., 170 A.L.R. 776, 789 (1947). The burden shifts, depending on who is entitled to the presumption. For example, if the claimant is entitled to a presumption of adverseness, then the landowner must prove permission was given; whereas if the landowner is entitled to a presumption of permissiveness, then the claimant must prove that the use was adverse.

Some courts simply place the burden on the landowner whenever the land is used for longer than the prescriptive period. *Taylor v. O'Connell,* 50 Idaho 259, 295 P. 247 (1931). However, some courts place the burden on the landowner only when the land is of a certain kind, such as cleared land close to or contiguous to a residence or barn, *Pasley v. Hainline,* 272 Ky. 404, 114 S.W.2d 472, 473 (1938), urban or improved land, *Carlson v. Craig,* 264 Wis. 632, 60 N.W.2d 395 (1953), or occupied land, *Cupp v. Light Gin Association,* 223 Ark. 565, 267 S.W.2d 516 (1954).

The weight of authority follows the view that the claimant has the burden of proof as to the adverse nature of the use. Annot., 170 A.L.R. 776, 790 (1947), and therefore the presumption is that the use was permissive. Wyoming in recent cases has clearly followed this latter view by imposing upon the claimant the burden to prove each element of the adverse right being claimed. *Caribou Four Corners, Inc. v. Chapple-Hawkes, Inc.,* Wyo., 643 P.2d 468, 471 (1982); *Shumway v. Tom Sanford, Inc.,* Wyo., 637 P.2d 666, 670 (1981); *Gregory v. Sanders,* supra, 635 P.2d at 800; *Gray v. Fitzhugh,* Wyo., 576 P.2d 88, 91 (1978); *Yeckel v. Connell,* supra, 508 P.2d at 1202.

Two exceptions to this general rule that shift the burden of proof to the landowner have arisen in Wyoming, the first being when there is a mistake as to a boundary, *City of Rock Springs v. Sturm,* 39 Wyo. 494, 273 P. 908 (1929), and the second when there has been a "long continued possession, ****1271*** coupled with complete dominion over the property and open and visible acts of ownership," without a clear showing to the contrary. *Meyer v. Ellis,* Wyo., 411 P.2d 338, 342-343 (1966). The instant case falls into neither exception

in my opinion, since there was no mistake as to the boundary of the road nor any complete dominion exercised by the Town of Superior over the roadway. Granted the town did maintain the street; however, when it came time to lay the sewer lines, it did not do so under the present location of Division Street. Use of the platted location for town purpose, coupled with continued real estate tax payment by the landowner, could be found to show that complete dominion over the property was lacking.

Lacking a dominion-dominated decision, this court's opinion now affords a third exception to the general burden-of-proof rule:
" * * * Public use of a road will be deemed permissive unless a public authority has assumed supervision or control of the road *or* has kept it in repair. *Board of County Commissioners of Sheridan County v. Patrick*, 18 Wyo. 130, 139, 104 P. 531, 532 (1909)." (Emphasis added.) Majority opinion at ----.
and
" * * * It should be noted that this opinion does not change the rule which holds that a public roadway cannot be acquired by mere permissive public use. If the private landowner establishes through competent evidence that the public's use is merely permissive, the question of supervision, control or maintenance is irrelevant. If the landowner fails to establish permissive use, he is still entitled to a presumption of permissive use *unless* the public authority establishes that it has assumed supervision or control of the road or has kept it in repair." Majority opinion at 1268.

While *use* may put the owner on notice of some claim, it does not necessarily create a presumptive fact of *intent to make hostile use* of the road as required by *Shumway v. Tom Sanford, Inc.*, supra. Further, this court has adopted the doctrine of neighborliness, *Kammerzell v. Anderson*, 69 Wyo. 252, 240 P.2d 893 (1952); *Shumway v. Tom Sanford, Inc.*, supra, and the action of prior owners in permitting the public to use the present location of Division Street could be described as merely "a friendly mutual convenience by acts of common neighborliness" by allowing public use of an accidentally mislocated road, in exchange for the maintenance that was provided. In my view, no reason was shown to shift the presumption, and appellee would still have the burden of proof that the use was not permissive. On this summary-judgment record, no evidence of adversity was presented by the town in its supporting affidavits for summary judgment, except use itself, which then raises the second concern as a consideration of summary judgment. [FN1]
FN1. This case cannot be differentiated from *Gregory v. Sanders*, supra, the case which was actually tried where the access route had been used for at least 70 years prior to judicial intervention, in which the court dispositively quoted the *Yeckel* rule for denial of the right to the prescriptive road easement. That significant case, invoking a long-continued historical access, use and availability, had some singular interest of this writer as counsel for the denied appellant. Consistency and stare decisis do now seem to have some attributable virtue.

Disregarding Gregory, where this court ignored all three possible exceptions in rewriting the facts, I do not accommodate to the institutional desirability of this third exception now created by the court, and particularly so in review of the convoluted history in

further application or exception in *Board of County Commissioners of Sheridan County v. Patrick*, 18 Wyo. 130, 104 P. 531 (1909). In *Patrick* itself, the roadway was denied. See *Rocky Mountain Sheep Co. v. Board of County Commissioners of Carbon County*, 73 Wyo. 11, 269 P.2d 314 (1954); *Nixon v. Edwards*, 72 Wyo. 274, 264 P.2d 287 (1953); *Hatch Brothers Company v. Black*, 25 Wyo. 416, 171 P. 267 (1918). Furthermore, to reemphasize, *Patrick*, in criteria, was in the conjunctive, and as restated by this court, those criteria were in the alternative, and consequently that case as used is weak ***1272** precedent for any present majority conclusion.

The majority then affirm the grant of summary judgment because the two responsive affidavits speaking "to not granting permission if asked" were deemed conclusory by the court's analysis of substantive sufficiency of responsive affidavits. See summary judgment Stage 6 in *Cordova v. Gosar*, Wyo., 719 P.2d 625 (1986). However, it appears that Stage 3 of the summary-judgment analysis is where the focus should be made, because appellee had the burden to prove adverse use by sufficient substantial evidence as part of its case. *Meyer v. Ellis*, supra, 411 P.2d at 342. While appellee submitted affidavits concerning the maintenance of the right-of-way, the town never furnished any evidence that the use was not permissive. When the town did not establish a prima facie case for a prescriptive easement it failed to meet the Stage 3 inquiry of sufficiency of the affidavits to initially support its summary judgment. With initial failure of movant's affidavits, there remains no need to proceed to Stage 6 responsive affidavits, and summary judgment should therefore have been denied.

The significance of the subject of whether use or possession connotes adversity as a preliminary burden, invades the entire subject of adverse possession and prescription, whether involving fence lines, structure encroachment, or access routes. By its decision, as a practical result and inconsistent with well-defined precedent, the court has shifted the burden of proof of adversity. Furthermore, since the burden should have been on the claimant to prove the adverse use, summary-judgment criteria of evidence to sustain a prima facie case as a burden of movant was not met so that the responsive character of respondent's affidavits can properly be brought into issue. *Cordova v. Gosar*, supra.

I would reverse for trial, and deny present resolution on inconclusive affidavits.

Appendix 9

9. Sheridan County v. Spiro, 697 P.2d 290, 303 (Wyo. 1985).

Sheridan County v. Spiro, 697 P.2d 290, 303 (Wyo. 1985).

697 P.2d 290

Supreme Court of Wyoming.
SHERIDAN COUNTY, Sheridan County Commissioners, and W.B. Frith, Burton Kerns, and Loal R. Lorenzen, individually, Appellants (Defendants),
v.
Peggy C. SPIRO, Raymond M. Spiro, and Donis S. Klepinger, Appellees (Plaintiffs).
No. 84-121.
March 15, 1985.

Henry A. Burgess of Burgess & Davis, Sheridan, for appellants.
R.E. Rauchfuss of Beech Street Law Office, Casper, for appellees.

Before THOMAS [FN*], C.J., and ROSE, ROONEY [FN**], BROWN and CARDINE, JJ.
FN* Became Chief Justice January 1, 1985.

FN** Chief Justice at time of oral argument.

ROSE, Justice.

This is an appeal by Sheridan County, the Sheridan County Commissioners and Commissioners W.B. Frith, Burton Kerns and Loal R. Lorenzen, individually, from a judgment entered against them in the Sheridan County district court in favor of Peggy C. Spiro, Raymond M. Spiro and Donis S. Klepinger, plaintiffs-appellees, who collaterally attacked the establishment of a county road [FN1] and asked and have received equitable and other forms of relief from the trial court.

FN1. In *North Laramie Land Co. v. Hoffman,* 30 Wyo. 238, 219 P. 561, aff'd 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953 (1923), we held that a suit by the owner of land through which a county road is located against the county commissioners is a collateral attack.

Our principal concern is whether--at the time judgment was entered--a certain North Piney Creek roadway (hereinafter "Piney Creek Road") in Sheridan County, which traverses very rough and rugged canyon terrain and where a mountain stream rushes and flows, was or was not an existing county road. If Piney Creek Road, which is the only access to the appellees' properties, was a lawfully established and existing county road at the time of the court's decision, the judgment must be reversed and other issues raised by appellants need not be considered.

FACTS

On September 10, 1910, under statutory provisions then in force, the county commissioners of Sheridan County undertook to establish the county road in issue here.

The history of the Piney Creek Road reveals that in 1911, one year following its purported establishment, approximately two miles of the west end of the roadway was abandoned by the Sheridan County Commissioners through appropriate statutory abandonment proceedings, leaving the road to terminate approximately three quarters of a mile west of the properties of the appellees (see plat, infra, indicating the location of the Spiro gate). The sole access to the land of the owners known as the North Piney Group, which land lies to the west of the appellees' property, is also by way of the road in controversy here. In 1966 the commissioners received and in 1967 denied a petition to vacate a portion of the road including a section which proceeded through the claimants' properties in the North Piney Creek Canyon. These county-commissioner actions, which have involved various abandonment proceedings, speak forcefully to the effect that the road in issue here has long been regarded by the county commissioners and the public at large as a county road. The record further discloses that the county has maintained the road for many years and has, on numerous occasions, done maintenance work in response to the appeals of the appellees--although admittedly not as well or as often as they and some of the adjoining and otherwise affected landowners would ***293*** have liked. [FN2]

Further, the record shows that the county shaled the road across appellees' property at their request, repaired the bridge where the road crosses the creek, and, as the recognized owner of the road, responded to other of appellees' inquiries and requests concerning the way.

FN2. A January 19, 1968 letter from Mrs. Q.L. Klepinger, one of the appellees here, to County Commissioner Byron Collins states:

"As you recall, a petition was brought before the County Commissioners last May, requesting abandonment of the North Piney road above (west) of a wire gate bordering C.L. Crawford's land in the canyon. * * *

* * *

"Since this is a County road, and since the petition of last May was denied, we assume that the County would plan on at least some maintenance. * * *

* * *

" * * * And incidentally, it is a fact that no one, on any sort of official business, including fire-fighting, of course, has ever been denied access to this canyon by my father, C.L. Crawford, or by us. And this will continue to be the case, regardless of whether or not the road past the gate is abandoned."

A November 29, 1969 letter from Mr. and Mrs. Q.L. Klepinger to County Commissioner Byron Collins says:

" * * * Since the County has determined that the road in question is to remain a County road, then we residents are surely entitled to some maintenance, at least as far as the wire gate.

"If it were not for the unpaid efforts of our neighbor, E.A. Robinson, this road would be impassable for the major part of each winter. But since the road is used year around by seven families, it is not right or just to expect Mr. Robinson to donate his time and equipment to do a job the County
should be doing--keeping the road in usable condition."

On August 2, 1983, the commissioners considered a petition by Gulf Oil Company to upgrade a bridge over North Piney Creek and improve the Piney Creek Road so that oil-well drilling equipment might be hauled safely. This request was denied. However, on August 9, 1983, the North Piney Group appeared before the commissioners to support Gulf Oil Company's request. It was the position of these landowners that the upgrading of the road would encourage the development of their properties for recreational purposes and would insure wintertime access to their holdings.

On August 10, 1983 the county commissioners met to consider whether the road was a county or private road, but no resolution of the issue was had at this meeting. On August 30, 1983 another meeting was held, and owners of land adjacent to the road (Spiro and Robinson) disputed the county engineer's contention that the road was lawfully established as a county road. Evidence was taken, and the board agreed to hear the matter again.

The board met again in early September to consider the ownership of the road. Numerous landowners were present at this meeting, including the appellees who asked that the road west of the Spiro gate be declared a private road or that it be abandoned. The board adjourned, advising they would consult with the county attorney, and on September 7, 1983, by letter to Mr. and Mrs. Spiro, informed them that it was the commissioners' decision that the Piney Creek Road was a duly established and existing county road. This decision was spread upon the minutes of the meeting of the commissioners dated September 13, 1983, which minutes read in part as follows:

" 'The above referenced subject (North Piney Road) was established as a county road on September 6, 1910. We (the Board) have carefully reviewed the records and information available to us as well as public testimony and we are of the opinion that, due to public usage and county maintenance of the road, it is, in fact, a county road. Therefore, it is our determination that the above subject road remains a county road. Consequently, we must insist you remove your private gate and sign before September 15, 1983.' "

When the September 15 deadline, mentioned in the commissioners' minutes, had passed, and the sheriff found the gate referred to above to be locked, thus denying public access, the county-road crew undertook to remove it. The gate was replaced by the appellees, and in early October of ***294** 1983 the commissioners again ordered the county employees to remove the gate. This was accomplished by excavating the gate posts so that the gate

would present no further obstruction to travel.

On October 12, 1983, the action out of which this appeal grows was filed and the plaintiffs, appellees here, sought injunctive relief as well as actual and punitive damages. Following a trial of the issues, the court entered a judgment in their favor on April 25, 1984, from which this appeal is taken.

The judgment contains the following language:
" * * * [T]he road in contention in this lawsuit was not established lawfully west of the Spiros' gate at any time by the Sheridan Board of County Commissioners and in any event, any rights that the County may or may not have had in the road were abandoned by the County and that the County never constructed or substantially maintained any roadway on or near that in contention in this lawsuit."
This court cannot agree with the trial court in its decision concerning the establishment, the purported abandonment, and the effect of the variance between the physical location as compared to the surveyor's location of the Piney Creek Road as reflected by the county records.

We will reverse.

Who Owns the Piney Creek Road?

The Questions for Resolve

The appellants define the principal proposition for our consideration as follows:
"It was an error of law for the District Court to determine the North Piney Road was not a county road and to 'quiet the title to the road west of the Spiro gate' in the Appellees * * *."

We see the dispute raised by this assertion as centering upon a question which asks whether the Piney Creek Road, as it presently appears upon the surface of the ground, is in fact and in law the road which was purportedly established in 1910 as a county road.

An answer to this inquiry must necessarily take into account the fact that, notwithstanding appellees' efforts at dominion, the road has, for more than 70 years, been used by the public and, from time to time, maintained and repaired by the County of Sheridan. The response to ****295*** the inquiry is further bound to assume that any present or recent survey of the road necessarily will not coincide with the description contained in the county commissioners' final authorizing resolution and that modern-day expert surveyors, with all of their experience and equipment, cannot say whether the road, as it appeared upon the surface of the ground at the time of trial, did or did not track the locations described by the notes of the surveyor who layed out the Piney Creek Road in 1910.

The Law

Up until the time when, in 1983, Gulf Oil Company petitioned the county to upgrade a bridge and improve the North Piney Creek Road, this roadway was considered and, in all respects, treated as a county road by the County of Sheridan, its citizens and the adjoining landowners, including the appellees and their predecessors in interest. This perception of the road's ownership has prevailed ever since September 6 of 1910, when the Sheridan county commissioners adopted this following resolution:

"It was thereupon duly moved, seconded and carried that the following road, to-wit:-- *Beginning at the end of the present County Road being N. 1065 feet,* * * * which road has been designated the North Fork Piney Road, be and the same is hereby established as and declared to be a county road and the same is hereby ordered opened to the use of the public." (Emphasis added.)

The Commissioners' Resolution

While the appellees do not contend that the proceedings of 1910 were defective for failure to follow the appropriate statutory requirements, they do urge that the resolution of the commissioners, which undertook to finally establish and locate the road, contained a description which fatally varied from the way described by the surveyor's field notes, thus rendering the actions of the county commissioners a nullity.

It is conceded that the plats, maps and relevant writings which are of record in this appeal disclose that the road as platted from the county commissioners' minutes does not begin "at the end of the present County Road," and thus the 1065 feet figure is in error (see plat, supra). The figure should be 1605, instead of 1065, in order that it comport with physical landmarks, the intent and purpose of the commissioners' formulating resolution and published notice descriptions. That this was simply a transposition error is borne out by the fact that the old road was stated to be 1605 on the official plat and this point represented a definite physical location which has been established on the ground.

Consistent with these observations is the testimony of appellees' land surveyor, David Graham, who testified that the discrepancy appears because "[s]omebody reversed the numbers." He went on to say:

"The original legal description calls for 1605 and the minutes call for 1065. It's the zero and the six which are reversed."

It is said in 39A C.J.S. Highways § 94, pp. 801-802:

"Where it is shown that the authorities which established the road had jurisdiction, every presumption thereafter is in favor of the legality and regularity of their proceedings * * *. Also, where ancient records are offered as proof of the existence of a way, all reasonable presumptions are to be taken in favor of their validity."

In matters of this nature, where the establishment of a road or highway is under collateral attack, we have long held that the commissioners enjoy a presumption in favor of the validity of their proceedings. In *Miller v. Hagie,* 59 Wyo. 383, 140 P.2d 746 (1943), we

quoted 13 R.C.L. 56, Section 447, to the following effect:
" 'Where the body to which the statute intrusts the matter orders the opening of the way, and in doing so necessarily passes on the facts essential to its jurisdiction, every presumption is in favor of its jurisdiction and the validity of its proceedings on collateral attack.' " 140 P.2d at 750.

We will, therefore, not further concern ourselves with appellees' contention that ***296** the road, the establishment of which was undertaken according to statutes in force in 1910, was a road described by commencing at a point indicated by the erroneous figure contained in the commissioners' resolution. This was simply a transposition printing error, and when the facts upon which the appellees rely are taken into account, they fail to overcome the presumption of legality and regularity of the commissioners' proceedings by which presumption this court is bound.

We hold, therefore, that this contention has no viability and does not serve to adversely affect the proceedings of the county commissioners.

Within the context of the facts and law of this appeal, three other issues are presented for our consideration which may be described in the following way:
1. What is the legal effect of a fact situation which shows that present-day land surveyors cannot tell whether the Piney Creek Road across the surface of the land follows the 1910 survey notes? [FN3]

FN3. Actually, the evidence reveals that an on-the-ground survey was never made by either side in preparation for this case.

2. What is the effect of user in ascertaining the existence and location of a county road?
3. What conclusions must be reached as to ownership if it is to be assumed that there does, in fact, exist a variance between the course laid out by the field notes of the 1910 survey and the roadway as it appeared upon the surface of the ground at the time of trial?

Issue No. 1

What is the effect of present-day surveyors not being able to tell whether the physical Piney Creek Road follows the course shown by the 1910 survey notes?

It was said in *Merrill v. Hutchins,* 180 Iowa 1276, 164 N.W. 184 (1917), where the location of a road laid out in 1856 was in issue:
" * * * [B]ut it does not follow that every resurvey after long intervals of time is to be accepted as correct, and all highways affected thereby are to be moved to correspond to the latest conclusions of a civil engineer. If such were the case, no highway would ever have a fixed or permanent location, for it seldom happens that two surveys, which attempt to retrace original government lines to any considerable distance, ever fully coincide. That general recognition and public usage of public ways are proper to be considered in such cases, whether it be to ascertain the true line, or to show the existence of a highway dedication or prescription, or to establish an estoppel of the public, see *Orr*

v. O'Brien, 77 Iowa, 253, 42 N.W. 183, 14 Am.St.Rep. 277; *Smith v. Gorrell,* 81 Iowa, 218, 46 N.W. 992; *Rector v. Christy,* 114 Iowa 471, 87 N.W. 489; *Heller v. Cahill,* 138 Iowa, 301, 115 N.W. 1009; *Lucas v. Payne,* 141 Iowa, 592, 120 N.W. 59; *Weber v. Iowa City,* 119 Iowa, 633, 93 N.W. 637; *Carter v. Barkley,* 137 Iowa, 510, 115 N.W. 21; *Larson v. Fitzgerald,* 87 Iowa, 402, 54 N.W. 441." 164 N.W. at 185.

The professional land-survey and engineer witnesses in this case testified that it would be difficult, if not impossible, to trace the original 1910 survey; therefore, notwithstanding the plat which was offered and received in evidence and which is reproduced in this opinion, these professional witnesses could not know whether the physical Piney Creek Road and a course described by the original survey notes coincide. Typical of this testimony is that of the appellees' witness, County Engineer Hollingsworth. Preliminarily, Mr. Hollingsworth testified that there was nothing about his investigation that would lead him to the conclusion that the existing road through the appellees' properties in Section 11 (see plat, supra) was not the same county road which was established by the proceedings of 1910. ***297** He then testified that any present survey would not be capable of proving or disproving whether the roadway upon the surface of the ground was the same way as outlined by the notes of the original survey. The county engineer testified on direct examination that he advised the county commissioners as follows:
"I told them that due to the age of the survey that there could be, that there was not any practical way of retracing that survey because it was not tied to a second land corner in any way."

He went on to respond to counsel's questioning:
"Q Okay. Did you make any recommendations to the commissioners to survey or check this problem out?
"A I think my recommendation was that it would be a very expensive job and there probably would not be a significant result because of the inability to trace the old survey accurately.
"Q And it goes back to your original assessment that the notes which were on file in the county you could not survey the road from those?
"A That's right."
On recross-examination, Mr. Hollingsworth testified:
"Q Could you explain further why there is a difficulty retracing the original survey?
"A There are several reasons. The old survey was probably done with--on a magnetic, with a magnetic needle, making the turns to the angles very probable. It was also--it was not tied with any other land corner which makes it impossible to check that work so you are sure when you get to the other end that it ties in properly."
The county surveyor was then asked and he answered:
"Q Considering the difficulty of retracing the original survey because of the difference in methods and other factors described, does that lead you to the conclusion that this is not a county road?

* * *

"A * * * No, it does not."

We have seen that the presumption of the validity of the establishment of the Piney Creek Road favors the authorities who undertook to establish it, and that where ancient records are offered in proof of the existence of a way, all reasonable presumptions are to be taken in favor of their validity. 39A C.J.S. Highways § 94, pp. 801-802. Our opinion in *Miller v. Hagie* (a collateral-attack case), supra, adopts this presumption of validity where the opening of public ways is at issue. In *Board of County Com'rs of Sheridan County v. Patrick*, 18 Wyo. 130, 104 P. 531 (1909), reh. denied 107 P. 748 (1910), where the map and field notes had been on record for more than 20 years and the road had been, for that period of time, publicly used, we held that there would be grounds for a presumption that it had been legally established. As applied to this case, these rules say that, since a resurvey utilizing present-day surveying methods cannot determine whether or not the physical road follows the course described by the 1910 surveyor's notes, the physical road will be regarded in the law to be consistent with the course originally laid out unless the presumption is overcome. This burden becomes the obligation of the appellees.

In *Central Pacific Railway Company v. County of Alameda,* 284 U.S. 463, 52 S.Ct. 225, 76 L.Ed. 402 (1932), where the issue was, in all relevant ways, the same as that which concerns this court, Justice Sutherland, speaking for the Court, said:
" * * * That is to say, the respondents say, the respondents having shown the establishment by the county of a road through Niles Canyon in 1859, the continuing identity of that road must be presumed until overcome by proof to the contrary, the burden of which rests upon the petitioners. *Barnes v. Robertson,* 156 Iowa, 730, 733, 137 N.W. 1018; *Beckwith v. Whalen,* 65 N.Y. 322, 332; *Eklon v. Chelsea,* 223 Mass. 213, 216, 111 N.E. 866; *Taeger v. Riepe,* 90 Iowa, 484, 487, 57 N.W. 1125; *Oyster Bay v. Stehli,* 169 App.Div. 257, 262, 154 N.Y.Supp. 849. ***298** This is in accordance with the general principle that a condition once shown to exist is presumed to continue." 284 U.S. at 468, 52 S.Ct. at 227.

The appellees in the case at bar have not discharged their burden of proving that the roadway crossing their property does not follow the 1910 survey since their proof only goes to establish that *their* engineers, using other methods, and not having conducted an actual survey, have platted a course for the roadway which is different than the physical road. This is not sufficient to show that the Piney Creek Road and the 1910 survey are at variance, especially in view of their own expert's testimony to the effect that it cannot be said that the physical road and the 1910 survey do not describe one and the same course.

Issue No. 2

What is the effect of user in ascertaining the existence and location of a county road?

Not only must it be presumed that the established road still retains its identity until the presumption is overcome by proof to the contrary, but, even if we were to assume the location of the road to be indefinite as the appellees in the case at bar contend, a showing of long public use in the area where the road was purportedly located by statutory officers acting by authority of law will bear heavily in favor of a conclusion that the physical

location of the roadway will determine the limits and boundaries of the way.

In 1 Elliott, The Law of Roads and Streets (4th ed. revised and enlarged, 1926), the author states in § 441:
"If the location of the way is indefinite and uncertain, but there has been a user of a way answering in a general manner to the line described, the user will ordinarily determine the limits and boundaries of the road. The line opened by the highway officers, and used by the public without objection from the property owners, may be regarded as the road established, although it may deviate somewhat from the line described in the order. If public user has located a way under color of an order laying it out, the fact that the highway officers charged with the duty of surveying it and of preparing it for the public use fail to discharge their duty will not destroy the character of the way as a public road."

In *Merrill v. Hutchins,* supra, 164 N.W. at 185, the court said:
" * * * It satisfactorily appears that if an engineer were to attempt to retrace the lines given in the original record, following literally and exactly the description there given, the location thus found would not correspond with either the present traveled road or the location to which the defendants propose to move it, and except for the fact that the public for more than half a century have used, accepted, and recognized the present way as the one intended by the order of the court, the proper location would be involved in great, if not insolvable, uncertainty. Under such circumstances, the court ought to and will give much weight to the practical construction which the public generally, the people owning the property immediately affected thereby, and the public officers having charge of the highways have during all these years placed upon said order of establishment. Such was the rule applied in *Taeger v. Riepe,* 90 Iowa, 484, 57 N.W. 1125, and we regard it as reasonable and just."

In *Brammer v. Iowa Telephone Co.,* 182 Iowa 865, 165 N.W. 117, 1 A.L.R. 400 (1917), the telephone company engineer authorized construction upon what appeared to him to be the highway right-of-way but which way the plaintiff alleged was illegally upon his land.

In holding that the telephone company was not a trespasser, the court said:
"*Taeger v. Riepe,* 90 Iowa, 484, 57 N.W. 1125, is no warrant for putting defendant into such a position. In that case the landowner claimed that a highway through his land which had been used as a traveled road for 45 years was from 80 to 230 feet to one side of where it should be. To prove this he introduced an old survey in which the magnetic variations ****299*** had been omitted, and as to which survey competent surveyors testified they were unable to locate it on the ground from the plat and notes. The decision was just this and no more: That where it is uncertain where the exact situation of an established highway is, a finding that it is the traveled way, used and worked as such highway for many years, and with reference to which houses and fences have been built, will not be disturbed, though some facts appear which cannot be reconciled with such finding, other facts being irreconcilable with any other findings suggested." 165 N.W. at 118.

The rule is, then, that where a way has been established by the appropriate officials under permissive statutes, has been opened for public use, and has, for a substantial period of

time, in fact been used by the public on a course which is generally in accord with the line described in the location procedures, the user will in most instances determine the limits and boundaries of the road. Applied to this case, this rule points to a conclusion that the Piney Creek Road, having been laid out in 1910 by the proper authorities under statutes in force at the time, and the public having used the road for more than 70 years, the physically established way will not, absent overriding factors which do not appear in the case at bar, be disturbed by the court in a collateral attack such as that mounted by the appellees here.

Issue No. 3

What conclusions must be reached as to ownership if it is to be assumed that there does, in fact, exist a variance between the course laid out by the field notes of the 1910 survey and the roadway as it appeared upon the surface of the ground at the time of trial?

Even if we were to assume that there exists a variance between the 1910 survey and the physical road--all as exemplified by the plat which appears in this opinion, supra--it is the physical road which the law holds to be the established county road.

In this western country, it is more usual than unusual that county roads do not follow the platted course. The appellees' land surveyor testified as follows in the trial court:
"Q Mr. Graham, is it common in your experience for a county road to vary somewhat from the lines laid out by the original surveyor?
"A Yes.
"Q What is the reason for these variations?
"A There could be a number of reasons. One, somebody might have taken a road around a natural obstacle that was more convenient; or a change in the creek might make it necessary to move a road out of what the original survey said it was in. And it may have been a poor survey to begin with. So, any one of those.
"Q Thus, the variations from a survey in the North Piney Creek Road are not unusual; are they?
"A No.
"Q Isn't it true in the surveying profession that a public road is normally recognized as the roadway which is actually occupied?
* * *
"A (By Mr. Graham) I would say so, yes."
Mr. Carl Oslund, the appellees' surveyor and witness, testified on cross-examination:
"Q In your 40 years of experience as a surveyor, have you learned that public roads often do not follow the original surveys?
"A That is correct.
"Q Could you explain to the court why public roads sometimes do not follow original surveys?
"A Mostly because of physical conditions. If I may give an example. Let's take the Powder River. The Powder River in its many, many years has moved from bank to bank, increasing on one and secretions [accretions] on the other. ***300*** When we had the

secretions [accretions] it would cut into possibly a roadway and the roadway had to be moved and those changes have not been recorded.
"Also, you'll find that condition prevailing where roads were established without study of snows and when the snows do come they found out there was movement. It would be visible.
"You'll also find that many times they went through a creek bottom or a wet bottom where changes were visible.
"Q In your experience, can you tell me how many roads you found in Sheridan County which do precisely follow the original survey?

* * *

"A * * * I can't tell you the number. I will say many.
"Q Do or do not? Many do or do not follow the original surveys?
"A Many do not.
"Q In fact, to your knowledge, there isn't a single road in Sheridan that precisely follows the original survey, is there, to your knowledge?
"A I would say that there probably is not one that does follow it.

* * *

"Q Have you reviewed the county records with respect to the establishment of the North Piney Creek Road?
"A I have.
"Q Do you have an opinion as to whether there is a public road dedicated through the property where the Spiros and Klepingers are?

* * *

"A * * * Yes.
"Q What is your opinion?
"A North Piney Road or the Nameless Road, as it was referred to, was established by the county, by the county commissioners.
"Q Do you have an opinion as to whether that road proceeds through the property of the Spiros and Klepingers?
'A I would judge offhand that it does.
"Q In your opinion, if an existing county road varies from the original survey notes, what would you consider to be the public road?

* * *

"A The road as used."
Walter Pilch, a professional engineer and land surveyor, testified as follows:
"Q. In the course of your experience have you found that county roads tend to follow survey lines without variation?
"A. My experience indicates that they vary generally very considerably, they vary from the original surveys.
"Q. Is it feasible today to follow precisely a survey made 70 or 80 years previously?

* * *

"A. My experience tells me it's, it's almost impracticable or impossible to retrace the original surveys."

Under the statutes in force at the time the Piney Creek Road was established in 1910, the county commissioners were authorized to establish county roads (§ 2514, W.C.S.1910).

When a petition to open a road was filed as required by statute, the commissioners were directed to appoint a viewer. If the viewer found the road to be required, and the commissioners decided to lay it out, a survey was to be ordered (§ 2523, W.C.S.1910), and a notice of the location of the road published (§ 2525, W.C.S.1910). Significantly, this notice to affected property owners was duly required to indicate where the road was to commence and then to describe "*in general terms* " (emphasis added) the points and courses thereof (§ 2525, W.C.S.1910).

This review of the statutes indicates that the county commissioners had broad, general powers to establish and locate county roads in 1910, and that in the discharge of this authority the surveyor was to utilize the then existing, acceptable surveying procedures to locate the roadway in a manner that would permit a notice to be given to the public and the affected landowners so that all could know in a *general* way--i.e., "in general terms"--***301** where the road was to be located. Given these authorities and directives, the appropriate rule is:
"It is usually held that a substantial compliance with a statute describing the route of a road is all that is required. *Sale v. Road Dist.* (1923) 156 Ark. 501, 246 S.W. 843; *Currie v. Glasscock County* (1916; Tex.Civ.App.) 183 S.W. 1193; *State ex rel. McGill v. Hamilton County* (1882) 8 Ohio Dec. Reprint, 457, 8 Ohio L.J. 83 (affirmed in (1883) 39 Ohio St. 58); *Stahr v. Carter* (1902) 116 Iowa, 380, 90 N.W. 64." Annot., 63 A.L.R. 516.

It has been held that where there is a variance between the road as it was surveyed and as it was laid out, the road as it was opened and used will control, since it is presumed that a public highway was opened as legally directed. In *Kamerer v. Commonwealth,* 364 Pa. 120, 70 A.2d 305, 307 (1950), the Supreme Court of Pennsylvania said:
" * * * But, in ascertaining the center lines and sides of a highway, it is the road as actually laid out and opened to public travel that determines its location rather than the courses and distances designated by the report of viewers appointed by a court or of commissioners directed by the legislature to lay out and open the highway."

Where a party relies upon the position that the establishment of a road by the county is of no force and effect for the reason that the physical way and the way as laid out by the county authorities are in fatal variance, it is that party's burden to overcome a presumption of validity. *Central Pacific Railway Company v. County of Alameda,* supra.

Our inquiry reveals that reasonable variations between the original survey and the way the road is laid out upon the ground and used by the public is permissible and that the roadway, as it appears upon the surface, will be held to be the official road. This is particularly true where it is necessary to procure a more practicable route. *Hotovy v. Town of Ulysses Township,* 197 Neb. 16, 246 N.W.2d 718 (1976). Even in the flatlands of Nebraska, where physical obstacles such as mountainous canyon passages, with their changing creek beds, snow and ice erosions and other obstacles such as those with which this appeal concerns itself are not present, the court recognized that variations in order to procure a more practical passageway would not destroy the road's characteristic as a public way, citing as authority *State ex rel. Draper v. Freese,* 147 Neb. 147, 22 N.W.2d 556 (1946); *Richardson v. Frontier County,* 94 Neb. 27, 142 N.W. 528 (1913); *Brandt v.*

Olson, 79 Neb. 612, 113 N.W. 151 (1907), on rehearing, 79 Neb. 617, 114 N.W. 587 (1908).

In *Richardson v. Frontier County*, supra, the court said, with reference to a fact situation in which the road, as its pathway traversed the surface, was found to vary from the descriptions approved in the survey:
" * * * The mere fact that the line of road was not in exact accordance with the line prayed for is immaterial." 142 N.W. at 529.

In *State ex rel. Draper v. Freese*, supra, it was shown that the road was assigned to be laid out along the section line. Because of a meandering creek, the placement of the roadway on the section line was highly impractical. Therefore, a deviation for the creek was made by the surveyor and no part of the road described by the authorizing documents was ever made a roadway. In response to a complaint that the roadway was never established since it does not follow the section line, the court said:
"The evidence shows that Rose Creek meanders down the section line and that it would be extremely difficult and very expensive to cross it on the section line. However, the commissioner's report together with the plat and field notes show a deviation from the section line apparently to avoid that very condition. As we have said in *Richardson v. Frontier County*, 94 Neb. 27, 142 N.W. 528: 'It is not essential that a public road be laid out upon the exact line prayed for in the petition, and slight variations in order to ***302*** procure a more practicable route, are permissible.' " 22 N.W.2d at 560.

After describing the statutory steps to be followed in locating and establishing a road, the court, in *Wallace v. Desha County*, 194 Ark. 848, 109 S.W.2d 950, 951 (1937), said:
"This does not necessarily mean that in the location or establishment of the road that all portions of it shall conform with perfect exactitude to the description called for in the petition. The court may vary from the line to avoid unnecessary inconvenience, unreasonable costs of location or construction, or for other reasons justifiable as may be found and determined upon final hearing. Of course, it was never contemplated that if the line petitioned for ran into a bog or morass where it would be impracticable to build a road at such point, the line might not be varied, or if a massive boulder were found in the line or survey that the road might not be turned aside rather than encounter unnecessary expense, but such variations as these are not substantial, but may be said to be, strictly speaking, another method of locating and establishing the road as petitioned for. Section 132, 29 C.J. 457."

In *Skinner v. State*, Tex.Cr.App., 65 S.W. 1073, 1074-1075 (1901), where the issue was whether the defendant had obstructed a county road in violation of the criminal statutes, and resolution turned on which was the true road, the court said:
" * * * Where the line of a road as actually used by the public differs from the line laid out by the commissioners' court at the time of establishing it, the former is the true road. *Dodson v. State* (Tex.Cr.App.) 49 S.W. 78. It follows, therefore, that the commissioners' court in the present instance did designate the line between appellant and other parties as the line upon which the road should run, but if, as a matter of fact, said road did not run exactly upon that line, though maintained as a public road for a number of years,

designated as such by the commissioners' court, worked by hands assigned for that purpose, this would make the land actually used by the public the public road, regardless of whether or not it exactly corresponded with the order of the commissioners' court designating the line."

In *Central Pacific Railway Company v. County of Alameda,* supra, the facts reveal that the county laid a road through the bottom of a canyon in 1859 in compliance with law and subsequently, by authority of land grants from the United States, the railroad was given a right-of-way which embraced part of the land occupied by the highway. By reason of flooding of the creek running down the canyon, the highway was washed out in places. The washed-out areas were abandoned and the road was moved from one side of the creek to the other, where it then coursed upon the railroad right-of-way along lines that were not contemplated when the road was originally established.
The California court had found the question to be this:
" * * * [W]hether there had been such substantial departures from portions of the line of the road established in 1859 as to constitute an abandonment of those portions of that road and the substitution, pro tanto, of a new one so removed in location as to cause it to depend for its legality not upon the original establishment but upon independent facts and considerations." 284 U.S. at 467-468, 52 S.Ct. at 227.

Upon appeal, the United States Supreme Court held that, even though the roadway was moved to the other side of the creek to accommodate the flooding, there had not been such departures from the original road as would prevent the county from relying upon the roadway's original establishment.

Conclusion

Given these rules of law as applied to the evidence of appellees' own expert witnesses, and given the terrain which passage is forced to accommodate as the road works its way up the canyon and along ****303*** Piney Creek, we find, in the first place, that the record does not establish that the way in question does not follow the 1910 survey. Secondly, under the facts of this case, user clearly puts the established and existing county road through appellees' properties and the road is not a private way as the appellees contend. Lastly, under the facts of record in this appeal, even if the "physical road" and the "road as platted by survey notes" (see plat, supra) are at variance in the eyes of the law, the road as it appears upon the surface must be held to be in substantial compliance with the field notes upon which the commissioners and landowners relied in 1910 when the officials undertook to establish the Piney Creek Road. It follows, then, that the road, as used, is a county road, and that the county officials were within their rights when they removed the gate and exercised affirmative ownership responsibilities with respect to the way in question.

Abandonment

The trial court held that any rights that the county may have had in the road were abandoned. There are no proceedings of record in this litigation which support such a

finding. In *Board of County Commissioners, Carbon County v. White*, Wyo., 547 P.2d 1195 (1976), we held that, since the traveling public has a vested right in the use of public roads, county roads cannot be vacated without compliance with the appropriate statutes, citing *Board of Com'rs of Sheridan County v. Patrick*, supra, 104 P. at 532.

There is no showing in this case that vacation or abandonment proceedings were undertaken in compliance with relevant statutes and there is no citation of authority which supports a contention that the road, once acquired by the county, was or can be vacated or abandoned by failure to adequately maintain or by operation of law.

Therefore, since we hold that the road in question was originally established as a county road and it has never been vacated or--as the trial court says--"abandoned by the County," it follows that it still exists as a road owned by the county for the use of the public. Other issues raised by the appellants need not be addressed in view of our holding concerning the ownership of the road.

Reversed.

Appendix 10

10. Big Horn County Com’rs v. Hinckley, 593 P.2d 573 (Wyo. 1979).

Big Horn County Com'rs v. Hinckley, 593 P.2d 573 (Wyo. 1979).

593 P.2d 573

Supreme Court of Wyoming.
BIG HORN COUNTY COMMISSIONERS, Appellant (Respondent below),
v.
DeVere T. HINCKLEY, Appellee (Petitioner below).
No. 4987.
April 17, 1979.

Robert A. Gish, Big Horn County Atty., Basin, for appellant.
C. S. Hinckley, of Hinckley & Hinckley, Basin, and John W. Davis, of Davis & Donnell, Worland, for appellee.

Before RAPER, C. J., McCLINTOCK, THOMAS and ROSE, JJ., and MAIER, District Judge.[FN*]

FN* MAIER, District Judge, was assigned to sit for ROONEY, J., who recused himself because he, as Attorney General for the State, had been indirectly connected with the subject matter of the case.

ROSE, Justice.

This appeal questions the ability of the appellant, Big Horn County Commissioners, to establish a county road under the common-law doctrine of prescription without complying with the condemnation provisions set forth in s 24-60, W.S.1957, C.1967 (now s 24-3-118, W.S.1977) [FN1] and the provisions ****575*** regarding a showing of necessity set forth in s 24-6(b), W.S.1957, C.1967 (now s 24-1-105(b), W.S.1977).[FN2] The district court found that the Board must comply with these provisions and remanded the case to the Board for further proceedings. We will hold that there must be further proceedings in this case, but that the Board is not required to comply with condemnation statutes when seeking to establish a county road by prescription.

FN1. Section 24-3-118, W.S.1977, which is the same as s 24-60, W.S.1957, C.1967, provides:

"(a) Hearing; determination of damages. At the next meeting of the county commissioners after the report of the appraisers has been filed, or as soon thereafter as may be practicable, the said board may hear testimony and consider petitions for and remonstrances against the establishment or alteration, as the case may be of any road, or may establish or alter any road or may refuse so to do, as in the judgment of the said board, the public good may require, but in case there shall be no claim for damages filed, they shall act as speedily as possible in the matter. Said board may increase or diminish the damages allowed by the appraisers, and may make such establishment or alteration of any road, dependent or conditioned upon the payment, in whole or in part, of the damages

awarded or expenses incurred in relation thereto by the petitioners for such road or such alteration of any road.

"(b) Payment of damages; right of appeal. The amount of damages awarded, if any, shall immediately be paid to the person or persons entitled thereto or deposited with the county clerk for delivery to such person or persons,
which payment shall be without prejudice to the right of such person or persons to appeal to the district court as provided by law.

"(c) Entry into land. When the road has been established and the award has been paid by the board of county commissioners or by the state highway department, to the person or persons entitled thereto, or deposited with the county clerk, the highway authorities and their contractors and employees may take possession and exercise full control of the land within the right-of-way of the road so established.

"(d) Abandonment prohibited; appeal. After the county or the state highway department has taken possession of the right-of-way, there shall be no abandonment of the establishing of the highway, and in the event of an appeal by an owner of real estate affected thereby to the district court from the award finally made by the board of county commissioners, the said board shall pay the amount finally determined to be due.

"(e) Recordation of land certificate. A certificate, authorized by the board of county commissioners and signed by its chairman, setting forth the legal description of the property taken shall be recorded in the office of the county clerk, and indexed in like manner and with like effects as if it were a conveyance of the easement of right-of-way from said owners to the county.

"(f) Alteration, etc., survey of site; recordation of survey. If, upon
considering and acting upon the report of the viewers or otherwise, the board of county commissioners shall decide to lay out or alter any road, they shall cause the county surveyor to make an accurate survey thereof, if such survey is necessary, and to plat the same in books to be provided by the county for such purpose, and the county clerk shall record in the same books opposite or near to such plat so that the same may be easily ascertained to be concerning the platted road, the proceeding of the said board in relation to the location, establishment or alteration of said road, in order to keep in a separate book a record of all the county roads of that county."

FN2. Section 24-1-105(b), which is the same as s 24-6(b), W.S.1957, C.1967, provides:

"(b) Any landowner or interested party desiring to raise any question with respect to the necessity of the taking of the land for road purposes under the provisions of chapter 48, article 3, Wyoming Compiled Statutes, 1945, shall do so by filing, within thirty (30) days after the last publication of notice of the proposed location of such road, a petition in the district court of the county in which the land or any part thereof is located. The district court shall within ten (10) days, if possible, from and after the filing of said petition hear and determine the question of necessity.

Provided that when said petition is filed, the burden of showing necessity shall be sustained by the county or the state highway department. If no petition, to raise the question of necessity, is filed within the said thirty (30) day period, the necessity shall be presumed and the question cannot later be raised."

By resolution dated November 3, 1976, the Board undertook to establish a public road under and by authority of s 24-1, W.S.1957, C.1967, 1975 Cum.Supp. (now s 24-1-101, W.S.1977).[FN3] Notice of this action***576*** was published, indicating that interested persons should file their objections by December 15, 1976. During October and November, a survey was made and a map prepared, showing the location of the proposed road. Hinckley received actual notice of the Board action and filed a protest with the Board on December 6, 1976. On December 8, 1976, Hinckley's son appeared before the Board to protest the proposed road and was apparently told there would be a hearing on December 15, 1976 although the son, who is also appellee's attorney on appeal, denied receiving notice of the hearing.

FN3. Section 24-1-101, W.S.1977, which is the same as s 24-1, W.S.1957, C.1967, 1975 Cum.Supp., provides in relevant part:

"(a) . . . Except, nothing contained herein shall be construed as
preventing the creation or establishment of a public highway right-of-way with reference to state and county highways under the common-law doctrines of adverse possession or prescription either prior to or subsequent to the enactment hereof. If any such board shall resolve the creation or establishment of a public highway right-of-way based upon the common-law doctrines of adverse possession or prescription, it shall, following the filing of a plat and accurate survey required in accordance with the terms and provisions of section 24-51 (s 24-3-109) of the statutes, proceed with the publication of the proposed road for three (3) successive weeks in three (3) successive issues of some official newspaper published in the county, if any such there be, and if no newspaper be published therein, such notice shall be posted in at least three (3) public places along the lines of the proposed road, which notice shall be exclusive of all other notices and may be in the following form:

"To all whom it may concern: The board of county commissioners of ..... county has resolved the creation and establishment of a public highway right-of-way under the common-law doctrine of prescription in that the road was constructed or substantially maintained by the (either the state or county) for general public use for a period of (ten years or longer) said road commencing at ..... in ..... county, Wyoming, running thence (here described in general terms the points and courses
thereof), and terminating at .....

"All objections thereto must be filed in writing with the county clerk of said county before noon on the ..... day of ..... A.D., ..., or such road will be established without reference to such objections.

.....fil

County Clerk

dated ..... A.D.

"(b) The county commissioners shall cause a copy of the above notice to be mailed by registered or certified mail to all persons owning lands or claiming any interest in any lands over or across which the road is proposed to be created or established. The publication, posting and mailings of such notice shall be a legal and sufficient notice to all persons owning lands or claiming any interest in lands over which the proposed road is to be created or established. No viewers or appraisers shall be appointed, nor shall any damage claims be considered or heard, and the sole objections to be heard by the board shall be directed against the creation or establishment of such right-of-way under the common-law doctrines of adverse possession or prescription. Any objector may appeal from the final decision of the board of county commissioners to the district court of the county in which the land is situated. Notice of such
appeal must be made to the county clerk within thirty (30) days after such decision has been made by the board, or such claim shall be deemed to have been abandoned. Within ten (10) days after the notice of appeal is filed in his office, the county clerk shall make out and file in the office of the clerk of the district court, in his county, a transcript of the papers on file in his office, and the proceedings of the board in relation to such creation and establishment. The proceedings on appeal shall be governed by the Wyoming Administrative Procedure Act (ss 9-4-101 to 9-4-115). If the appeal is upheld the appellant shall be reimbursed by the county for all reasonable costs of asserting his claim." (Emphasis supplied) All those portions of s 24-1-101, supra, that do Not appear in italics were added by the legislature in 1973. S.L.1973, ch. 74, s 1.

On December 14, Hinckley filed a petition (Civil Case No. 12181), requesting that the Board be required to show necessity in accordance with s 24-6(b), supra. Notwithstanding notice of this petition, the Board proceeded to hold the December 15 hearing and establish by prescription the road in question, denominated County Road No. 602. On January 7, 1977, Hinckley applied for and received, after an ex parte hearing, a writ of mandamus, ordering the Board to nullify its December 15 proceedings. Prior to the Board's compliance with the writ of mandamus, the Board sought a vacation of the writ. Concluding that Hinckley had an adequate remedy at law evidence by the petition that had previously been filed the district court, on January 31, 1977, vacated the writ and ordered the December 15 proceedings reinstated until such time as the matter could be fully litigated.

On February 14, 1977, Hinckley filed a petition for review (Civil Case No. 12206), appealing the Board's December 15 decision to establish County Road No. 602. This petition, which alleged lack of notice of the December 15 hearing, was filed pursuant to s 24-1, supra, and the Wyoming Administrative Procedure Act. The district court subsequently entered an order finding that the Board had failed to comply with s 24-6(b), supra, and other related statutes; that Hinckley's petition for review in Civil Case No. 12206 was timely due to the tolling effect of the intervening mandamus action; that Civil

Case No. 12181 should be dismissed with prejudice to the Board; and that Case No. 12206 should be remanded for an administrative hearing consistent with ss 24-6(b) and 24-60, supra.

The Board asks the following questions on appeal:
1. Is the Board required to hold a hearing pursuant to the statutory condemnation provisions when it seeks to establish a county road by prescription?
2. Did the district court err in dismissing Civil Case No. 12181 with prejudice as to the Board?
3. Did the district court have jurisdiction over Hinckley's petition for review in Civil Case No. 12206?
Hinckley argues that this court has no jurisdiction over this appeal, and that the Board had no jurisdiction to establish a county road because of the allegedly defective notice.

577 Turning first to Hinckley's jurisdictional contentions, this court previously denied Hinckley's motion to dismiss. This motion, which is renewed here, is premised on the belief that the district court's order remanding the case to the Board for a hearing on necessity and other issues is not a final order under Rule 1.05, W.R.A.P., and our holding in Arp v. State Highway Commission, Wyo., 567 P.2d 736 (1977). We determine previously, and now hold, that the district court's order affects a substantial right of the Board and prevents a judgment in favor of the Board's establishment of a road by prescription under s 24-1-101, supra. It is, therefore, a final appealable order under Rule 1.05(1), W.R.A.P.

Hinckley's second jurisdictional contention is premised on the belief that the Board did not have jurisdiction to establish County Road No. 602 because the published notice failed to contain a "points and courses" description of the proposed road as required by s 24-1-101(a), supra. Hinckley relies, in support of this position, on our decision in Ruby v. Schuett, Wyo., 360 P.2d 170 (1961). In Ruby we held that a county board has no jurisdiction to establish a public road by condemnation where there has been no survey made and the published notice fails to describe the points and courses of the proposed road. This court has also held, however, that where there is a map of the proposed road on file, a defect in the description of the proposed road was a mere irregularity, not fatal to the Board's jurisdiction. Harris v. Board of County Commissioners, 76 Wyo. 120, 301 P.2d 382 (1956). In the present case, the undisputed evidence is that a map was made in November, 1976, and was available in the Big Horn County Clerk's Office for public inspection. Hinckley made reference to this map and survey in his original December 14, petition. While it might be preferable to provide a points-and-courses description, or to incorporate the file map of the proposed road, we hold that the Board had jurisdiction to proceed to establish County Road No. 602 by prescription.

ROLE OF SECTIONS 24-60 and 24-6(b)

The district court found that in order to establish a public road by prescription the Board must follow the procedures outlined in s 24-60, supra, to which s 24-6(b), supra, applies. The effect of this finding, and the resultant remand for further proceedings, was to require the Board to re-commence proceedings to establish County Road No. 602 but this time

the Board would be required to follow the procedures set forth in s 24-1, supra, And those set forth in s 24-60, supra. In addition, and in accordance with s 24-6(b), supra, the Board would be subject to a district court proceeding on the question of necessity.
The Board argues that in order to establish a public road by prescription it need only comply with the procedures set forth in s 24-1, supra, and that it would be anomalous to require the Board to show necessity under s 24-6(b), supra.

A. Section 24-60
The basis for Hinckley's and the district court's position is language contained in our decision in Board of County Commissioners of Carbon County v. White, Wyo., 547 P.2d 1195 (1965). In that case, the Board sued to enjoin the Whites from closing a road over lands owned by the Whites, claiming, inter alia, that the County had acquired title to the road by prescription. The County, to support this claim, asserted public use and county maintenance for 10 years, and other actions by the Board including the filing of a plat. The facts disclosed that the Board had commenced condemnation proceedings pertinent to the proposed road in 1960 and 1963, but had never completed such proceedings in accordance with s 24-60, supra. We refused to "countenance this behavior as granting to the county any right in this road . . . ." 547 P.2d at 1198. In the process of coming to this conclusion, we made the following statement:
"The answer to appellant's first position lies in Nixon v. Edwards, 72 Wyo. 274, 264 P.2d 287, and Rocky Mountain Sheep Co. v. Board of County Com'rs of Carbon County, 73 Wyo. 11, 269 P.2d 314. ***578*** In Nixon, Justice Blume in a thoughtful opinion, which must be interpreted as an effort to clarify the effect of what is now s 24-1, W.S.1957, C.1967, 1975 Cum.Supp., and related statutes set out the holding that prescriptive use is not sufficient to establish a public or county road and that this must be established by legal authority. This holding is reinforced in the case of Rocky Mountain Sheep Co., with the comment upon the plain language in Nixon, 269 P.2d at 320. This last case further closes the door to claims of legal title arising by prescriptive use without proper lawful establishment proceedings of the claimed road. Rocky Mountain also held that the county commissioners must comply with s 48-322, W.C.S.1945, 1957 Cum.Supp., which was amended and now appears as s 24-60, W.S.1957, C.1967, in order to effect the establishment of a public road. As will be evidenced from an examination of s 24-60, requirements were added to the section as it originally stood, evidencing legislative concern that there be a complete and specific proceeding when lands were sought to be taken for public roads. It is to be noted that this section provides that the board may hear testimony and does provide that damages, if any, be assessed and immediately paid to the persons entitled thereto or deposited with the county clerk for the use of the landowner. It provides for the right of entry only 'when the road has been established' and the award paid. It further provides for the recording of a certificate to be executed by the chairman of the board and indexed in the same manner as if it were a conveyance of the right-of-way. . . ." (Emphasis supplied) 547 P.2d at 1197.

It is the emphasized portion of this statement and the fact that our decision in that case was rendered some three years after the amendments to s 24-1, supra that led Hinckley and the district court to conclude that the Board must do something more than follow the

procedures set forth in s 24-1, supra.

We now conclude after examining the 1973 amendments to s 24-1, supra, of which there was no mention in the Board of County Commissioners v. White decision that in order to establish a road by prescription the county need only follow the procedures set forth in s 24-1, supra. In reviewing the legislative history of s 24-1, it is noted that the following language was added to the present s 24-1, supra, in 1955:
"Except, nothing contained herein shall be construed as preventing the creation or establishment of a public highway right-of-way with reference to State Highways only, under the common law doctrines of adverse possession or prescription either prior to or subsequent to the enactment hereof."

See, Session Laws of Wyoming 1955, Ch. 199, s 1. The legislature, in 1955, also created a presumption as to state highways as follows:
"(b) Only that portion of state highways actually used, traveled or fenced, which has been used by the general public for a period of ten (10) years or longer, either prior to or subsequent to the enactment hereof, shall be presumed to be public highways lawfully established as such by official authority and unavailability of records to show such to have been lawfully established shall not rebut this presumption."
See, Session Laws of Wyoming 1955, Ch. 199, s 1.

In 1967, the legislature added county highways to the exception language quoted above, and established the following presumption with respect to county highways:
"Only that portion of county highways, not to exceed sixty-six (66) feet in width, which was actually constructed and substantially maintained by the county and travelled and used by the general public for a period of twenty (20) years or longer, either prior to or subsequent to the enactment hereof, shall be presumed to be public highways lawfully established as such by official authority."

***579** See, Session Laws of Wyoming 1967, Ch. 56, s 1.[FN4] Then, in 1973, the procedures for acquisition by prescription set forth in footnote 3, supra, were added resulting in s 24-1-101, supra, as we know it today.
FN4. In 1973, the period of county maintenance and public use giving rise to a presumption that the road was a public highway lawfully
established by official authority was changed from twenty to ten years. In addition, county maintenance and public use for 10 years became An alternative way to establish the presumption, in place of the prior requirement that the county actually construct the road And then have public use and county maintenance for the prescribed period. S.L.1973, Ch. 74, s 1.

This legislative history must be compared with this court's decisions in Nixon v. Edwards, 72 Wyo. 274, 264 P.2d 287 (1953), and Rocky Mountain Sheep Co. v. Board of County Commissioners of Carbon County, 73 Wyo. 11, 269 P.2d 314 (1954) the opinions which served as the basis for our observations in Board of County Commissioners v. White, supra.

In Nixon v. Edwards, supra a case decided prior to the 1955 amendments to the predecessor of s 24-1, supra the plaintiff landowner sued to enjoin the defendants, adjoining landowners, from using a road that plaintiff had constructed on his own land. Defendants proceeded on the theory that the road was a public road by virtue of public adverse use, even though there had been no official county action recognizing it as such. We held, under s 48-301, W.C.S.1945 the provision that was subsequently amended in 1955, and after other amendments became s 24-1-101, supra that the road was not a public road. The reason for this holding was the policy, begun in 1886, that roads considered to be public should be shown on the record as public roads by official action. Since the road in question had never been officially established as a public road, it could not be a public road.

In Rocky Mountain Sheep Co. v. Board of County Commissioners, supra another case decided prior to the 1955 amendments to s 24-1, supra the county commenced a condemnation proceeding to establish a road crossing Rocky Mountain's land as a county road. After a viewer's report had been filed providing for a roadwidth of 150 feet and damages assessed for the taking of Rocky Mountain's land, Rocky Mountain appealed to the district court. The district court held that 60 feet of the proposed 150-foot right-of-way was an existing road that the county had previously acquired by prescription. On appeal, we recognized that the county had a right to acquire title to lands by prescription in furtherance of its purpose to establish a road,[FN5] but held that in order to do so the establishment of the road as a public road must be made of record through official county action. As in previous cases, we concluded that use of the road by the public was not enough. In addition, we concluded that the county's records which consisted of a plat and the report of a surveyor were insufficient evidence of official action since they failed to show that the county had ever declared the establishment of the road as a public road. In rendering this last-mentioned conclusion, we quoted A portion of s 48-322, W.C.S.1945, that prescribed the kind of record which was required. The quoted portion is identical to the provision now found in s 24-60(f), supra footnote 1. Summarizing our holding, we said:

FN5. The county's acquisition of land by prescription was authorized at that time by s 27-806, W.C.S.1945. The identical provision is now found in s 18-3-504(a)(vi), W.S.1977.

"So, also, if a board of county commissioners relies upon the county's having obtained prescriptive title to lands within a right of way, or any part thereof, in order to avoid the payment of damage for their taking, the inception of such prescriptive title must be evidenced by more formal acts than the user of the road by the public or by the county's construction and maintenance of the road because, in order to be empowered to acquire such prescriptive title, the records of the county must show not only the survey plat of the road but also the proceedings of the board in relation to the road's location, establishment or alteration, thus making manifest the county's purpose to acquire the lands involved." 269 P.2d at 319.

***580** After these cases were decided, the legislature enacted legislation creating a Presumption of official establishment of state highways where there was public use for

the prescribed period. This presumption of official establishment was subsequently extended to county highways, and then, in 1973, specific procedures were established to govern a county's acquisition of a road by prescription.

The 1973 amendments are consistent with our previous holdings that a county must take official action including a declaration of purpose to acquire the lands and the filing of a survey plat of the proposed roads before it can acquire a road by prescription.[FN6] Section 24-1, supra, requires a resolution by the county to establish a public road by prescription, and provides for publication of the proposed road after the filing of a plat and survey pursuant to s 24-3-109, W.S.1977.[FN7] This is all of the formal action required by our prior decisions. There is, therefore, no need to refer to s 24-60, supra, for the procedures to be followed when establishing a county road by prescription. Section 24-1, supra, now provides all of the necessary procedures.

FN6. It is noted, in response to one of Hinckley's contentions, that there is no indication of a legislative intent that these formalities must take place Prior to the commencement of the 10-year period of county maintenance and public use referred to in footnote 4, supra. Any language in opinions decided prior to the 1955 and 1973 amendments to s 24-1, supra, which would suggest a different conclusion is no longer pertinent.

FN7. Section 24-3-109, W.S.1977, provides:

"If, upon considering and acting upon the report of the viewer, or otherwise, the board of the county commissioners shall decide to lay out such 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."

This provision is substantially similar to s 24-3-118(f), supra fn. 1, which is the statutory provision quoted in Rocky Mountain Sheep Co. v. Board of County Commissioners, supra.

Such a conclusion is not only supported by our analysis of the pertinent legislative history, but is the only way that the inconsistencies between s 24-1, supra, and s 24-60, supra, can be rationally resolved. As noted in the Board of County Commissioners v. White, supra, decision, s 24-60 provides that damages, if any, are to be assessed and paid to the person entitled thereto. Section 24-1(b), supra footnote 3, however, states in pertinent part that

". . . (n)o viewers or appraisers shall be appointed, nor shall any damage claims be considered or heard, and the sole objections to be heard by the board shall be directed against the creation or establishment of such right-of-way under the common-law doctrines of adverse possession or prescription. . . ."

The statutes dealing expressly with the establishment of a county road by prescription preclude the consideration of damage claims. This is the way it must be, because it is axiomatic that one who acquires property by prescription is not liable for the payment of

damages. See, Rocky Mountain Sheep Co. v. Board of County Commissioners, supra, at 319. To the extent that our decision in Board of County Commissioners v. White can be read to say that a county acquiring a public road by prescription Is liable for the payment of compensation, it is hereby corrected.[FN8] We hold that in order to establish a public road by prescription, a county need only meet the requirements set forth in s 24-1, supra.
FN8. This statement should in no way be taken to mean that the holding in Board of County Commissioners v. White to the effect that the county had failed to establish the requisite formalities for the creation of a public road by prescription is hereby questioned.

B. Section 24-6(b)
Having held that s 24-60, supra, has no application to proceedings to acquire a county road by prescription, it follows that s 24-6(b), supra allowing a landowner to challenge the necessity of the taking of land for road purposes is also not applicable.

***581** Section 24-6(b), supra footnote 2, refers only to a taking of land "under the provisions of chapter 48, article 3, Wyoming Compiled Statutes, 1945." [FN9] Chapter 48, article 3, W.C.S.1945, is comprised of ss 48-301 to 48-343, W.S.1945. At the time that s 24-6(b), supra, was enacted, the statutes referred to were silent as to a county's establishment of a public road by prescription.[FN10] The only mode of acquisition contemplated by these highway statutes was the traditional condemnation-type proceeding (see, s 48-316, W.C.S.1945), except where roads could be established by consent or adjustment of damages (see, s 48-326, W.C.S.1945). There is, therefore, no indication of a legislative intent to require that a county prove a necessity under s 24-6(b), supra for the establishment of a public road by prescription.

FN9. It is noted that s 24-6(b), supra, was originally enacted in 1953, as an amendment to s 48-306, W.C.S.1945. S.L.1953, Ch. 181, s 3.

FN10. The county had the power to acquire land by prescription for the purpose of establishing a road, by virtue of s 27-806(7),
W.C.S.1945, supra fn. 5, but there is no indication of linkage between this section and the predecessor of s 24-6(b), supra.

Again, this conclusion is inevitable, since the law of adverse possession or prescription does not contemplate a showing of a person's Need for the property adversely possessed. In Stryker v. Rasch, 57 Wyo. 34, 112 P.2d 570, 576, rehearing denied 57 Wyo. 52, 113 P.2d 963 (1941), we quoted with approval from Blalock v. Webb, 190 Ga. 769, 10 S.E.2d 747, 748, to the effect that the manifest purpose of the law of adverse possession is to establish title that is good against the legal title formerly held by others, but forfeited by reason of adverse possession. In order to realize this purpose, an adverse possessor need only prove that his possession is "actual, open, notorious, exclusive, and continuous for the statutory period, hostile, and under color of title or claim of right." City of Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908, 910 (1929). We could find no case authority, and none was cited to us, that requires a showing of necessity in addition to a showing of these elements. We hold that in order to establish a public road by prescription, a county is not subject to the provisions contained in s 24- 6(b), supra.

The last-mentioned holding obviates the necessity to discuss the Board's second issue.

JURISDICTION

Although we normally discuss jurisdictional questions prior to reaching the merits of an appeal, in this case a disposition of the merits was required for a proper analysis of the Board's jurisdictional issue.

The Board contends that Hinckley failed to comply with the appeal provisions contained in s 24-1, supra, because he: (1) failed to file a notice of appeal with the county clerk; and (2) failed to timely file the petition for review that was filed. We are unable to ascertain the merit in the first part of this contention since the petition for review (Civil Case No. 12206) bears a certificate of service on the Big Horn County Clerk.

The second aspect of the Board's contention is premised on the belief that the petition for review (Civil Case No. 12206) was filed one day late. The Board calculates that there was a period of 28 days between its December 15 decision and the date on which the Board complied with the writ of mandamus, ordering it to nullify this decision. Then, the Board calculates that there were three additional days between the time the writ was vacated, "reinstating" the December 15 decision, and the time Hinckley's petition was filed on February 4, 1977. The Board adds the days in these Separate time periods, and concludes that Hinckley filed his petition on the thirty-first day after the Board's decision. In doing so, the Board assumes that the writ of mandamus tolls the time for appeal, but that the tolling effect when eliminated does not provide Hinckley with a new 30-day period within which to appeal.

***582** Rule 12.04, Wyoming Rules of Appellate Procedure, provides that if a rehearing is held in an administrative case, then the 30-day appeal period does not commence until the decision on rehearing is given to the parties through a written, certified notice. In other words, when an agency renders a second decision the full appeal period runs from the second decision, and an appealing party need not go back and calculate the days expended between the first decision and the date on which rehearing was granted to determine how many days he has left to appeal after the second decision. The same general rule is applicable to post-trial motion decisions in civil and criminal cases. Rule 2.01, W.R.A.P. It has also been held that where an administrative agency vacates a decision and enters the same decision subsequently, the time for taking an appeal begins to run from the date of the later decision. 73 C.J.S. Public Administrative Bodies and Procedure s 193, at 541 (1951). We find all of these situations analogous to the circumstances herein. It makes little difference whether the Board voluntarily vacated its own decision, or whether a court ordered it to do so the subsequent entry of the same decision begins the appeal period anew. We hold that Hinckley's petition for review was timely filed.

It might be said that all of the legal maneuvering prior to Hinckley's February 4 filing was wrong, thereby vitiating his right to pursue the appropriate procedures some 51 days after the Board's initial decision. This might be true, were it not for the language in Board

of County Commissioners v. White, supra on which Hinckley had a right to rely to the effect that s 24-60, supra, and thereby s 24-6(b), supra, provided alternate modes of proceeding in an attempt to challenge the establishment of a county road by prescription. Since this court, itself, may have set the trap into which Hinckley fell, it would be inappropriate to penalize Hinckley for his manner of proceeding. It is also for this reason that Hinckley is entitled to have his objections heard by the Board. He obviously believed that a challenge to the necessity of the road was a condition precedent to a hearing on the elements of adverse possession. Our decision today holds that this belief was erroneous, but only after clarifying one of our previous decisions.

This case is remanded to the district court for entry of an order directing the Board to provide a hearing, in accordance with s 24-1, supra, to all interested parties with objections to the establishment of the proposed road by prescription.

THOMAS, J., filed a specially concurring opinion.
THOMAS, Justice, specially concurring.
I agree with the result of and rationale for the majority opinion in this case. I can go even a step further and find an affirmative legislative intention to eliminate any requirement to demonstrate necessity in a proceeding for the creation or establishment of a public highway right-of-way based upon adverse possession or prescription. In the language of s 24-1(b), W.S.1957, as amended, 1975 Cum.Supp. (now s 24-1-101(d), W.S.1977) where it is provided, "Only that portion of county highways * * * actually constructed or substantially maintained by the county and travelled and used by the general public for a period of ten (10) years or longer * * * Shall be presumed to be public highways lawfully established as such by official authority " (emphasis supplied), I can find a conclusive legislative presumption that necessity has been demonstrated.

Why the legislature requires the county to sustain the burden of showing necessity when a county road is sought to be established by condemnation but does not impose that requirement when the board of county commissioners concludes to establish a road under the doctrine of prescription is an anomaly for me. Travel and use by the general public and even county construction and maintenance can be present as much because of convenience as because of necessity. It should not be easier for the county to dedicate private property for use as a public road when the county does not intend ***583*** to pay for the land than it is to so dedicate such property when the county is required to pay for the land. Yet I agree that this is the product of the present legislative scheme.

It may be that some future legislature will choose to re-evaluate this feature of these statutes. A similar requirement in both instances would be more fair to property owners. In addition the burdens of supervision, management and control of county roads (s 24-1-104, W.S.1977; Board of County Commissioners of County of Fremont v. State ex rel. Miller, Wyo., 369 P.2d 537 (1962)) as well as the public liability attaching to county roads (ss 1-39- 119, W.S.1977; Oroz v. Board of County Commissioners, Wyo., 575 P.2d 1155 (1978)) should not be more readily assumed in the instance of establishment by prescription than when the road is established pursuant to the condemnation procedure.

Appendix 11

11. Board of County Com'rs, Carbon County v. White, 547 P.2d 1195, 1199 (Wyo. 1976).

Board of County Com'rs, Carbon County v. White, 547 P.2d 1195, 1199 (Wyo. 1976).

547 P.2d 1195

Supreme Court of Wyoming.
BOARD OF COUNTY COMMISSIONERS, CARBON COUNTY, State of Wyoming, Appellant
(Plaintiff below),
v.
Frances WHITE and Clifford White, Appellees (Defendants below).
No. 4457.
March 22, 1976.

Oscar A. Hall, Carbon County Atty., and Kenneth W. Keldsen, Deputy Carbon County Atty., Rawlins, for appellant.
T. Michael Golden of Brimmer, MacPherson & Golden, Rawlins, for appellees.

Before GUTHRIE, C. J., and McCLINTOCK, PAPER, THOMAS, and ROSE, JJ.

UPON REARGUMENT

GUTHRIE, Chief Justice.

The Board of County Commissioners of Carbon County, appellant herein, filed this suit to enjoin Clifford B. and Frances H. White, appellees herein, from closing a road known as the McFadden-Arlington Road. Appellant sought a preliminary injunction and further asked that appellees be enjoined from obstructing travel over the lands owned by appellees. The trial court, with the assent of the parties, combined for hearing the matters of the preliminary and permanent injunctions and entered judgment adverse to appellant, finding generally against the appellant and specifically finding that the appellees owned the property over which the road passed and that appellant had no right or title thereto. The judgment further allowed appellant 90 days in which to secure rights-of-way, or to pursue other proper proceedings, and provided that during the period the road should not be closed by appellees. It further reserved jurisdiction to make other orders affecting this matter.

In its appeal from this judgment appellant depends upon three propositions stated as follows:
'1. The County of Carbon acquired title by prescription over which the McFadden-Arlington Road traverses by virtue of public use and county maintenance over a period of ten years, actions by the Board of County Commissioners to declare the same as a public road and filing a plat thereof as a matter of public record.
'2. With reference to the land over which the road traverses, Section 33 and ***1197*** 34, Township 20 North, Range 78 West of the 6th P.M. and in the North Half of Section 4, Township 19 North, Range 98 (sic) West of the 6th P.M., the County of Carbon had a

right of way easement by virtue of the right of way easement given by Lee E. and Loretta Irene McQuay given in the year 1965 and the Board of County Commissioners did not have authority to quitclaim to the McQuays said right of way easement without complying with the appropriate procedures of notice and hearing.
'3. With reference to all of Section Number 4, Township 19 North, Range 90 (sic) West of the 6th P.M., Mr. Bryan White, predecessor in title to the land involved, by consenting to a change in location of the road in order to accommodate the building of a reservoir by him and the appellees, and making a determination as to where the road should be located constituted a consent to the establishment of a public road over the changed route in accordance with Section 24-50, Wyoming Statutes, 1957.'

The answer to appellant's first position lies in Nixon v. Edwards,72 Wyo. 274, 264 P.2d 287, and Rocky Mountain Sheep Co. v. Board of County Com'rs of Carbon County, 73 Wyo. 11, 269 P.2d 314. In Nixon, Justice Blume-in a thoughtful opinion, which must be interpreted as an effort to clarify the effect of what is now s 24-1, W.S.1957, C.1967, 1975 Cum.Supp., and related statutes-set out the holding that prescriptive use is not sufficient to establish a public or county road and that this must be established by legal authority. This holding is reinforced in the case of Rocky Mountain Sheep Co., with the comment upon the plain language in Nixon, 269 P.2d at 320. This last case further closes the door to claims of legal title arising by prescriptive use without proper lawful establishment proceedings of the claimed road. Rocky Mountain also held that the county commissioners must comply with s 48-322, W.C.S.1945, 1957 Cum.Supp., which was amended and now appears as s 24-60, W.S.1957, C.1967, in order to effect the establishment of a public raod. As will be evidenced from an examination of s 24-60, requirements were added to the section as it originally stood, evidencing legislative concern that there be a complete and specific proceeding when lands were sought to be taken for public roads. It is to be noted that this section provides that the board may hear testimony and does provide that damages, if any, be assessed and immediately paid to the persons entitled thereto or deposited with the county clerk for the use of the landowner. It provides for the right of entry only 'when the road has been established' and the award paid. It further provides for the recording of a certificate to be executed by the chairman of the board and indexed in the same manner as if it were a conveyance of the right-of-way. None of these things were done in either of these two incomplete proceedings. We see no reason to depart from nor to modify what appears to be the clear and workable rules enunciated in these two cases, and to recognize and create exceptions thereto would destroy clarity and would be a disservice to the law. George W. Condon Co. v. Board of County Com'rs of Natrona County, 56 Wyo. 38, 103 P.2d 401, 407, also suggests the significance of the failure of the board to make a formal order to establish such road. The proceedings had in 1960 and in 1963[FN1] both evidence the fact that the board contemplated further proceedings to be had and were not viewed as having been completed when further hearing were mentioned. It may well be inferred that appellant here tacitly admitted the ineffectiveness of the 1960 proceedings when it reinstituted the proceedings in 1963, but the writer is unable to find any substantial difference between these proceedings in the record, which indicates particularly the failure of the board to make disposal by ***1198*** providing as follows at its August 6, 1963 meeting:

FN1. See addendum.

'A claim for damages was received from Bryan White who met with the board. It was decided that no further action would be taken at this meeting pending further investigation of possible changes in survey and width of proposed road.'
and no further board action appears. To countenance this behavior as granting to the county any right in this road would be both unfair and inequitable because of the clear inference that the proceedings are not completed. The board cannot lull the landowner into believing the proceedings are still pending and in its failure to make a final determination cannot deprive the landowner of any right of appeal. Objections to public roads or claims for damages cannot be handled in the manner that if you turn your head they will go away. The fact is that Bryan White, or anyone reading these minutes, would be forced to infer that the board had not completed its proceedings.

The trial court was in error, however, in holding that appellant had 'no legal or equitable right, title or interest' in or to the lands covered by that instrument entitled 'Right-of-Way Easement' executed by Lee E. and Loretta Irene McQuay on June 23, 1965, and recorded in the office of the county clerk June 24, 1965, which conveyed an easement to Carbon County. Since the McQuays were the then owners of the lands across which this easement was granted, the Board of County Commissioners of Carbon County (having accepted and recorded the same) had no right or authority to reconvey this right-of-way or to surrender the public's right thereunder by virtue of the quitclaim deed dated June 4, 1968. It seems evidence that the traveling public has a vested right to the use of public roads, and earlier this court recognized such right in the public and that a road could not be vacated except by official act of the board of county commissioners, Board of Com'rs of Sheridan County v. Patrick, 18 Wyo. 130, 104 P. 531, 532, rehearing denied 107 P. 748. Although the board is given very general powers to manage and control county roads, s 24-5, W.S.1957, this must be exercised in a lawful manner and the statutes governing the actions of the board with reference thereto must be construed in pari materia. Section 24-43, W.S.1957, has since its enactment provided the procedure 'for the establishment, vacation or alteration' of county roads, and the significant portion thereof is as follows:
'* * * The course and the point of termination of said road to be established, altered or vacated, as the case may be, and thereafter following out the provisions of article 2, chapter 52, Wyoming Revised Statutes, 1931, not inconsistent therewith.' (Emphasis supplied.)

Section 24-52, W.S.1957, C.1967, was included in Art. 2, Ch. 52 of the 1931 Revised Statutes therein mentioned and is the principal procedural statute contained therein. Although this section itself omits any reference to vacation, any such proposed vacation must proceed with proper notice to those interested, including the traveling public in this instance. This court has earlier suggested that the provisions of this section be utilized to alter or vacate such roads, Board of County Commissioners of County of Fremont v. State, Wyo., 369 P.2d 537, 542. In the instant case once there was a dedication to the public use by the McQuays' grant of an easement, its acceptance and recording by this board, and general use by the public, this road had been established.

We consider the case of Board of County Commissioners of County of Fremont v. State, Wyo., 369 P.2d 537, quite persuasive in this matter; and although it involved a mandamus application, in that case the court held that absent any proper vacation a writ would lie to compel the county commissioners to keep an established road open and remove from the right-of-way any fences or obstructions. There is, however, other abundant authority applicable to this case, as exemplified by ***1199*** the annotations appearing in 175 A.L.R. 760, and particularly pp. 762 and 765, which set out the rule as follows:
'While some limitations to its application are to be found, the rule appears to be quite general that where the procedure for the vacation, discontinuance or alteration of a public street or highway by direct action of public authorities is prescribed by statute, it is necessary to adhere to such procedure in order that the vacation or alteration may be effective; such a result may not be accomplished by contract (see infra, s 3) nor are the public authorities precluded by principles of estoppel from denying the termination of the existence, or alteration, of the public way in the absence of substantial compliance with the statutory procedure. This is evidenced by the many cases in which it is stated, either expressly or by strong implication, that such procedure is exclusive, or that it must be strictly followed.' (p. 762)

'Applying the rule that the procedure prescribed by statute for vacating, discontinuing, or relocating streets or highways must be substantially followed in order to terminate the existence, or change the route, of a public way, the courts in a number of cases have held or recognized that the execution of a contract or agreement contemplating such a termination or change was ineffectual to obtain such a result, where the statute had not been complied with.' (p. 765)

See also 39 C.J.S. Highways, ss 117 and

FN2. In re Petition of Lillian W. Mattison, 120

FN2. In re Petition of Lillan W. Mattison, 120 Vt. 459, 144 A.2d 778; Roberts v. Pace, 230 Ark. 280, 322 S.W.2d 75; Peers v. Cox, Ky. App., 356 S.W.2d 768; Lamartiniere v. Daigrepont, La.App., 168 So.2d
373; Park District City of Fargo v. City of Fargo, No.Dak., 129 N.W.2d 828; Arlington Heights National Bank v. Village of Arlington Heights, 33 Ill.2d 557, 213 N.E.2d 264; Bragg Apartments, Inc., v. City of Montgomery, 281 Ala. 253, 201 So.2d 510.

A case bearing considerable similarity to our instant problem is San Diego County v. California Water & Telephone Co., 30 Cal.2d 817, 186 P.2d 124, 175 A.L.R. 747, involving an action by the county to enjoin the flooding of a county road because of impounding of water in a reservoir. The defendant claimed, and it was a fact, that the county had entered into agreements with the defendant whereby the defendants granted temporary rights-of-way to the county for roads to circumvent the area to be flooded and the county waived any damages to it resulting from the flooding. The court, 186 P.2d at 128-129, determined that the cases are uniform that:

'* * * if the Legislature has provided a method by which a county or city may abandon or vacate roads, that method is exclusive. (Citing cases.) An analogous line of decisions holds that a municipality must follow the statutory procedure prescribed for the sale of public property, and an attempt to dispose of the property by contract will not be enforced. (Citing cases.) * * * Specifically, it has been held that an agreement by local officials to abandon, vacate, or sell a road is void. (Citing cases.) * * *.' The California court held that the county was not estopped by its agreements and the doctrine of estoppel cannot be invoked where the statutory procedure is the measure of the power to act, particularly where it would operate to defeat the effective operation of a policy adopted to protect the public. The various statutory procedures exist to protect citizens and taxpayers from the loss of its property.

Another case of interest is Ercanbrack v. Judd, Utah, 524 P.2d 595. There the county commissioners entered upon their records the fact that an established county road was abandoned and gave permission to a landowner to put up a notice that the road was closed. The landowner did so and placed a gate and lock to prevent access. Under very similar statutes ***1200*** that court summarized succinctly the rule, 524 P.2d at 597:
'Since there was no notice given to either the abutting landowners or the general public, the motion of the commissioner as approved was and is a nullity, and the public road will continue to be such until it is abandoned in accordance with the statutes.'
We hold that the agreements of June 4, 1968, and May 25, 1971, are null and void as an attempt to vacate an established county road by methods other than those by statute provided. We further hold that any deed to the McQuay lands, executed by the county commissioners to the appellees, is of no force and effect.

There is little force in appellant's last contention because the record definitely shows that when White in 1968 determined to build a reservoir which would flood certain portions of the road, a part of which at least lay within the boundaries of the right-of-way easement, he made a proposal to the board of commissioners that for a term of not to exceed four years or until Interstate 80 be constructed the county could build a road around the water which would extend over the then county road at a mutually agreeable location. The board accepted such proposal on June 4, 1968. On May 25, 1971, in contemplation of the expiration of the earlier permission, Bryan White again submitted to the commissioners a proposal, reciting among other things that:
'* * * It is understood and agreed that said Interstate 80 has now been constructed and the heretofore right-of-way easement for road purposes has terminated. That by reason of said termination the undersigned, Bryan White, has closed said right-of-way and road to said public at large. That the undersigned Bryan White does hereby agree to reinstate said right-of-way easement for road purposes only across the hereinafter described lands until project SC-CSM-6-13 (McFadden-Arlington Road) in Carbon County, Wyoming, is completed or until January 1, 1974, whichever period of time is shorter. In consideration thereof, the undersigned, agrees to open said road forthwith so that Carbon County, Wyoming, can enter and make certain improvements to said road for the benefit of the traveling public. It is agreed upon the part of Carbon County, Wyoming, that any and all improvements to said road shall revert to and become the property of the land owner upon the termination of this right-of-way easement as described aforesaid. And it is

further agreed that the instrument executed June 4, 1968 by the parties hereto is made a part hereof and a photo copy of the same is attached to this instrument. * * *'
It is upon this basis that appellant has asserted its third claim, which falls from its own weight by its clear recognition of the temporary status thereof and indicates quite the contrary to appellant's contentions. The temporary status of this arrangement was also recognized in the testimony of Korkow, a road supervisor employed by the Carbon County Road and Bridge Department. It is to be remembered, however, we do not find that these agreements in any manner operate to deprive the county of its claim and interest in and to the lands covered by the original McQuay easement for public use. We are unable to understand why appellant has since 1960 temporized in this matter and failed to complete any proper proceedings which would establish this as a public road. If the so-called McFadden-Arlington Road is necessary and should be established for the public use, the board of commissioners should proceed to institute and complete the necessary proceedings to effect that purpose. We hold the proceedings of 1960 and 1963 abandoned by the intervening conduct of the parties and the passage of time. Any claim of prescriptive right must be made in any new proceeding for the establishment of the road, as must the appellees' claim for damages.

***1201** The case is therefore remanded to the district court with directions to correct its finding that appellant has no right, title or claim in or to the lands and the road covered by the right-of-way easement executed by the McQuays and to enjoin the appellees from in any manner interfering with the public use thereof.

The judgment of the district court is affirmed insofar as it holds that the appellees are the owners of the land traversed by the road where it crosses the lands of the appellees in the S 1/2 of Section 4, Township 19 North, Range 78 West, Carbon County, Wyoming, acquired in 1956, subject to whatever claims the appellant has for road purposes, which we do not here decide.
The judgment is affirmed as to all the remaining portions.
Remanded with directions to modify the judgment in conformity herewith.

ROSE, Justice (specially concurring).
I concur in the result reached here but I take issue with one thought, which, to me, conveys a meaning and inference which, within itself, is anomalous and serves to dull the clarity and preciseness of the opinion. Indeed, it may mislead those who would rely on it.

I have reference to the following sentence:
'. . . Any claim of prescriptive right must be made in any new proceeding for the establishment of the road, as must the appellees' claim for damages . . .'

The opinion has previously and properly made the following observation:
'. . . prescriptive use is not sufficient to establish a public or county road and that this must be established by legal authority . . .'

Referring to Rocky Mountain Sheep Co. v. Board of County Com'rs of Carbon County, 73 Wyo. 11, 269 P.2d 314, at 320, the opinion says:

'. . . This last case further closes the door to claims of legal title arising by prescriptive use without proper lawful establishment proceedings of the claimed road . . .'

My problem arises when I attempt to correlate the holding to the effect that prescriptive use '. . . is not sufficient to establish a public or county road . . . without proper lawful establishment proceedings of the claimed road . . .,' with the inference that prescriptive acquisition might, nevertheless, be possible in a procceeding where the landowner makes a claim for damages. I cannot understand the thought.

Justice Harnsberger spoke to the subject of county road acquisition by prescription as compared to statutory acquisition which contemplates the payment of damages, when he said in Rocky Mountain Sheep Co. v. Board of County Comr's, supra, at page 319 of 269 P.2d:
'So, also, if a board of county commissioners relies upon the county's having obtained prescriptive title to lands within a right of way, or any part thereof, in order to avoid the payment of damage for their taking, the inception of such prescriptive title must be evidence by more formal acts than the user of the road by the public or by the county's construction and maintenance of the road because, in order to be empowered to acquire such prescriptive title, the records of the county must show not only the survey plat of the road but also the proceedings of the board in relation to the road's location, establishment or alteration, thus making manifest the county's purpose to acquire the lands involved.' (Emphasis supplied.)

It is my understanding that prescription forecloses the concept of the payment of damages and a proceeding which contemplates the payment of damages is alien to acquisition by prescription.

I would have deleted the questioned sentence.

1202 ADDENDUM

'October 5th, 1960

* * *

'MC FADDEN-ARLINGTON ROAD:
'A motion was made by Patton, seconded by Orton and carried whereby the Board decided to locate a road to be known as McFadden-Arlington Road and ordered the following location to the published in the Rawlins Daily Times.

'NOTICE OF LOCATION OF PUBLIC ROAD
'TO WHOM IT MAY CONCERN: The Board of County Commissioners of Carbon County, Wyoming, have decided to locate a road to be known as the McFadden-Arlington Road.
'Commencing at a point 30 ft. north of the SE Corner of the NW 1/4 SE 1/4, Section 34, T. 20 N. R. 78 W., 6th P.M.; thence westerly to a point 30 ft. north and 60 ft. west of the SW corner of the NE 1/4 SW 1/4, said Sec. 34; thence southwesterly across said Section 34 and Section 33, said Township and Range to a point 1210 west of the SE Corner of said Section 33; thence southwesterly across Sections 4, 5, 8, 17, 18 and 19, to a point

150 north of the S.W. Corner of Section 19 all in Township 19 N. R. 78 W., being 6.14 miles more or less.
'Right of Way to be 60 wide-30 each side of above described center line.
'The proposed location and width of right of way required are set forth in detail on a map on file with the County Clerk and may be examined at his office.
'Any land owner or interested party desiring to raise any question with respect to the necessity of the taking of the land for road purposes shall do so by filing, within thirty days after the last publication of this notice a petition in the District Court of the county in which the land is located. If no petition to raise the question of necessity is filed within the said thirty day period, the necessity shall be presumed and the question cannot later be raised.
'All other objections thereto or claims for damages by reason thereof must be filed in writing with the County Clerk of said County before noon on the 7th day of December, 1960, or such road will be established without reference to such objections or claims for damages.
'/s/ R. G. ENGSTROM,
COUNTY CLERK
'Dated Oct. 5, 1960, Pub. 10, 12, 19, 26, 1960.
'There being no further business the meeting was adjourned.'
PLAINTIFF'S EXHIBIT 1
'December 6, 1960

* * *

'MC FADDEN-ARLINGTON ROAD.
'On October 12, 16 and 26, 1960 a Notice of Location of Public Road was advertised in the Rawlins Daily Times. An objection and claim for damages was received from Bryan White. A motion was made by Patton, seconded by Orton and carried whereby further action was postponed until the regular meeting to be held January 4th, 1961.

* * *

'There being no further business the meeting was adjourned.'
(Duly published.)
PLAINTIFF'S EXHIBIT 8
'July 3, 1963 The Board resumed its session, all members present.

* * *

'NOTICE OF LOCATION OF PUBLIC ROAD
'McFADDEN-ARLINGTON COUNTY ROAD NUMBER 5
'The Board of County Commissioners of Carbon County, Wyoming, have decided to locate a road to be known as McFADDEN-ARLINGTON COUNTY ROAD NUMBER 5.
'Commencing at a point in section 34, T. 20 N., R. 78 W. and traverses southwesterly ***1203*** through sections 34 & T. 20 N., R. 78 W.; sections 4, 5, 8, 18 & 19 T. 19 N., R. 78 W.; and sections 22, 23, 24, 27, & 28 T. 19 N., R. 79 W. terminating at a point which is on the Boundary of the Medicine Bow National Forest in section 28, T. 19 N., R. 79 W. The right of way shall be one hundred (100) feet in width, being fifty (50) feet right and fifty (50) feet left of the centerline. The approximate length 10.42 miles more or less.
'The proposed location and width of right of way required are set forth in detail on a map on file with the County Clerk and may be examined at his office.

'Any land owner or interested party desiring to raise any question with respect to the necessity of the taking of the land for road purposes shall do so by filing, within thirty days after the last publication of this notice, a petition in the District Court of the county in which the land is located. If no petition to raise the question of necessity is filed within the said thirty day period, the necessity shall be presumed and the question cannot later be raised.

'All other objections thereto or claims for damages by reason thereof must be filed in writing with the County Clerk of said county before noon on the 6th day of August, A. D., 1963, or such road will be established without reference to such objections or claims for damages.

'There being no further business, the Board adjourned until July 22, 1963 when they will meet to adopt the 1963-1964 budgets for various County municipalities.' (Pub.: July 10, 17, 24, 1963.)

PLAINTIFF'S EXHIBIT 9

'August 6, 1963

* * *

'McFADDEN-ARLINGTON COUNTY ROAD No. 5

'In compliance with Notice of Location of the above described public road, protests and claims for damages were received until noon on August 6, 1963.

'A letter was received from Thomas M. Burns, Attorney for the Anschutz Oil Co., Denver, Colorado that they would not consent to taking any part of this land without compensation.

'A claim for damages was received from Bryan White who met with the Board. It was decided that no further action would be taken at this meeting, pending further investigation of possible changes in survey and width of proposed road.'

(Duly published.)

PLAINTIFF'S EXHIBIT 14

Appendix 12

12. Rocky Mountain Sheep Co. v. Board of County Com'rs of Carbon County, 269 P.2d 314 (Wyo. 1954).

Rocky Mountain Sheep Co. v. Board of County Com'rs of Carbon County, 269 P.2d 314 (Wyo. 1954).

73 Wyo. 11, 269 P.2d 314

Supreme Court of Wyoming.
ROCKY MOUNTAIN SHEEP CO.
v.
BOARD OF COUNTY COM'RS OF CARBON COUNTY.
No. 2616.
April 13, 1954.

Brimmer & Brimmer, Clarence A. Brimmer, Jr., Rawlins, for appellant.
William N. Brimmer, K. W. Keldsen, Rawlins, for respondent.

16 HARNSBERGER, Justice.

This is an appeal from the findings and order of the District Court of Carbon county, Wyoming, ascertaining the damages caused appellant by reason of the Board of County Commissioners of Carbon county having established as a county road a previously existing road.

****316*** From an examination of the record--including the plat exhibits--it appears that from a point about ten miles south of Walcott, Wyoming, on U. S. Highway 130, the road in question extends several miles in a general easterly direction, passing through several sections of land claimed to be owned by the appellant and which road is locally known as the 'Pass Creek Road'.

While there seems to have been some semblance of a road over at least a part of this location prior to the year 1927, for the purposes of this case it is only important to understand what occurred with respect to the road in 1927 and in subsequent years.
It was stipulated that the records of Carbon county contain a 'Road Surveyor' report dated July 5, 1927, relating to the Pass Creek Road, and that the proceedings of the Board of County Commissioners of Carbon county, dated July 7, 1927, recite: "Mr. S. S. Sharp, who was appointed viewer of the Pass Creek Road project, presented his report which was duly approved,' * * *'. The appellant also concedes that the road was surveyed in 1927 by the Carbon County Surveyor.

It is not disputed that in 1927 the county commenced the grading of the western half of the Pass Creek Road, along the line of the 1927 survey, and that thereafter ***17*** the county continued to maintain and to improve the road until in May of 1951, when the appellant notified the Board of County Commissioners that the county had never acquired a right of way for the Pass Creek Road across the lands of the appellant, Rocky Mountain Sheep Company, and demanded that the county remove its maintenance equipment from the lands claimed by the appellant. The commissioners, being uncertain as to the county's rights, complied with the demand. Thereupon, and on May 19, 1951, some forty persons

representing themselves to be residents and taxpayers of Carbon county, having ranches in the vicinity of the Pass Creek Road, petitioned the board to take appropriate action 'to establish the present Pass Creek Road as a County Highway.' The board met on May 24, 1951 and discussed the matter but took no action, and on May 28, 1951, eleven persons--but not the appellant herein--who represented themselves as being the owners of lands traversed by the Pass Creek Road, offered in writing to donate to the county a right of way for the road, providing the county would adequately bridge irrigation ditches which crossed the road, and that the road be established and maintained as a county road entirely in its then location.

Evidently considering at the time that it had been petitioned in accordance with Section 48-307, Wyoming Compiled Statutes, 1945, the board, after noting it was complying with Section 48-309, Wyoming Compiled Statutes, 1945, appointed a viewer to view the proposed Pass Creek Road.

On June 5, 1951, the viewer's report was filed, showing the general line of the road to conform with the existing Pass Creek Road, but providing for a roadwidth of 150 feet in the area of the western end, and a roadwidth of 100 feet for the balance of the road.

18 The report also made mention of the consent given by other property owners and reported that the only damages would be the sum of $150 to the appellant here. On the same day, a survey and plat of the proposed Pass Creek Road was presented to the board by the county surveyor and was placed on file in the office of the county clerk, and the Board of County Commissioners unanimously adopted a resolution reciting that 'on its own motion' the board established a county highway to be known as the 'Pass Creek Road', giving a general description conforming to the viewer's report, and directing the publication of Notice of Location of Road required by Section 48-316, Wyoming Compiled Statutes, 1945.

Pursuant to this resolution, publication of such a notice was commenced on June 9, 1951, but deeming this notice defective, another notice was commenced on June 14, 1951, and republished on June 21 and June 28, 1951; such second notice stating that the proposed location was set forth in detail on a map on file with the county clerk, where it might be examined. The record shows notices were also sent by registered mail to landowners, including the appellant, along the line of the road.

On August 7, 1951, the county surveyor submitted his report on the Pass Creek ***317*** Road, including essential plans and specifications, and, on the same day, the appellant herein filed with the board its protest and claim for damages, whereupon, on August 15, 1951, appraisers were appointed to assess such damages.

In addition to making provision for the building of necessary cattle guards, the appraisers assessed the appellant's damages at $10 per acre for 46.73 acres of land claimed to be owned by the appellant, and which ***19*** would be taken by the 150 foot right of way across appellant's lands in the western portion of the road; $10 per acre for 37.13 acres of land claimed to be owned by the appellant, and which would be taken by the roadway in

the eastern portion of the road; and, an additional $450 for damages 'caused in farm sections'.

By a formal resolution the Board of County Commissioners made reference to its former resolution of June 5, 1951, establishing the road, again resolved to establish the road, and accepted and approved the appraisers' report. From this action by the board, the Rocky Mountain Sheep Company appealed to the District Court, which found that Carbon county had theretofore acquired prescriptive rights to the land occupied by the existing sixty foot road in the western area; that the conveyance by which appellant received its title to the lands traversed by that road was made "subject to any and all roadways, stock driveways * * * over and across said premises"; that as a road had existed prior to the acquisition of appellant's rights, no general damage was occasioned to the lands not occupied by the road nor was there damage for fences, underpasses, cattle guards or otherwise by reason of the road's enlargement in that section to a width of 150 feet, and ascertained the reasonable value of the 90 additional feet of claimant's lands taken to be $30 per acre, which, computed for the distance over appellant's lands, amounted to $858.90 for 28.63 acres taken. The court also made findings and order relating to the balance of the road.

Although the Rocky Mountain Sheep Company had made claim for damages and both the county commissioners and the district court had ascertained appellant had suffered damages to lands claimed by it in the eastern area, the appellant's brief states that only the ***20*** western part of the roadway is the subject of its appeal. Our consideration will therefore be limited to that portion of the road and to lands in the three sections claimed to be owned by the appellant which are affected by the western portion of the road. Furthermore, the appellant makes no complaint about the per acre value of the land taken as ascertained by the court, but only assigns as error that in arriving at the number of acres of its lands which are being taken by the 150 foot road in the western segment, the court made allowance for a width of only 90 feet instead of the full 150 feet on the theory that the other 60 feet had already been acquired by the county by its having previously established a 60 foot road at the same place.

To justify the court's findings and order, the respondent county maintains that it acquired the disputed 60 foot road by '* * * (a) substantial compliance with the Statutes on condemnation proceedings for a public highway, and (b) by dedication, and (c) by prescription * * *'.

The appellant insists that the court was without jurisdiction to try the title to lands taken for a highway in condemnation proceedings and that in consequence there was no proper issue as to the county's claim of a prescriptive right to the disputed 60 feet. The many respectable authorities submitted in support of this position are of little value here inasmuch as they deal with condemnation proceedings instituted by various types of action wherein the name of the owner of the property to be taken or of the right sought to be taken, is affirmatively alleged. We do not, however, find among any of these authorities, or elsewhere, any support for the contention that the question of title to the lands to ***21*** be taken or damaged is not a proper issue in proceedings such as are

provided by our statutes where it is not made the duty of the county to set forth the names of persons whose property is proposed to be taken, but rather the right is extended generally to all persons to assert whatever ***318** claims for damages they may have by reason of the establishment of a road. In fact, it should be obvious that where such damage, as is here claimed, is dependent upon ownership of the property or the property right involved, proof of such ownership is a condition precedent to an award being made. It is also claimed that a governmental subdivision of the state cannot acquire a right of way by prescription nor may it expend public money upon a 'private road' in order to acquire such a prescriptive right. We fail to find anything in the record to justify the assumption that any 'private road' was sought to be taken nor is there any issue presented as to the right of the county to expend public money on such a road. With respect to the county's authority to acquire a right of way by prescription, Section 27-806, Wyoming Compiled Statutes, 1945, provides in part:

'The board of county commissioners of each county shall have power at any meeting:

* * *

'7. To lay out, alter or discontinue any road running through the county, and for such purpose may acquire title to lands therein 'either by gift, *prescription*, dedication, the exercise of the right of eminent domain, purchase or lease; and also perform such other duties respecting roads as may be required by law. * * *' (Emphasis supplied.)

The foregoing statute does authorize boards of county commissioners to acquire title to lands by prescription ***22** in furtherance of their purpose to lay out or alter a road. When, however, the county records fail to show that the board has taken the action necessary to legally establish a public road, it cannot be said that such purpose exists. Use of the road by the public is not a substitute for the affirmative action required of the board in order to establish a county road and, as was explained in Nixon v. Edwards, Wyo., 264 P.2d 287, 293, decided December 8, 1953, ever since the original enactment by our Legislature in 1919 of what is now Section 48-301, Wyoming Compiled Statutes, 1945, not only will the working of a road by the county fail to constitute it a public road but the 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, the Chief Justice saying:

'It may be noted at once, that while this court in Board of Commissioners of Sheridan County v. Patrick, supra [18 Wyo. 130, 104 P. 531, 107 P. 748], construed the then existing statutes as permitting the establishment by county commissioners informally, that is by mere recognition of a road, such as working it, the legislation of 1919 required that roads recognized as public [are] to be made of record, thus carrying to its ultimate conclusion the former policy that it should be made certain and definite as to what were public roads, and thus superseding in that respect the ruling in the Patrick case, supra. * * *'

The only evidence in this case indicating that there was any other action taken by the Board of County Commissioners of Carbon county to establish the Pass Creek Road as a public road in 1927, or as to the existence of any record of other proceedings, is testimony concerning a book which was produced in court--sometimes referred to in testimony as a 'plat book' and sometimes as 'the road book' and a stipulation. The book

was not offered nor was it received in evidence. The present county surveyor testified that there was 'another road book besides the one that is in court.' ***23*** This surveyor identified a plat exhibit which was received in evidence as being a photostat of either a tracing on file in a loose-leaf file in the county clerk's office or as being a photostat of a map in the so-called 'road book' which was then 'in court', but which was not placed in evidence, the witness saying that in either case the photostat would be exactly the same.

Nothing else in the way of a record shows or tends to show that the Board of County Commissioners of Carbon county ever resolved or took any similar action to declare or to establish the Pass Creek Road ***319*** as a County Road in 1927 or thereabouts, although, as we have previously noted, it was shown by stipulation that the records of Carbon county relating to the 'Pass Creek Road' contain the report of the 'Road Surveyor' dated July 5, 1927, and that the proceedings of the Carbon County Commissioners dated July 7, 1927, recites "Mr. S. S. Sharp, who was appointed viewer of the Pass Creek Road project, presented his report which was duly approved".

Our Section 48-322, Wyoming Compiled Statues, 1945, prescribes the kind of record which is required to be made and is, in part, as follows:
'* * * If, upon considering and acting upon the report of the viewers or otherwise, the board of county commissioners shall decide to lay out or alter any road, they shall cause the county surveyor to make an accurate survey thereof, if such survey is necessary, and to plat the same in books to be provided by the county for such purpose, and the county clerk shall record in the same books opposite or near to such plat so that the same may be easily ascertained to be concerning the platted road, the proceeding of the said board in relation to the location, establishment or alteration of said road, in order to keep in a separate book a record of all the county roads of that county.'

The stipulated contents of the county's records, plus the plat in evidence, fall far short of meeting the requirements ***24*** of this statute. Even though there was a surveyor's report relating to the Pass Creek Road, made in 1927; even though the commissioners did approve a viewer's report on this road in 1927; and, even if the plat in evidence does indicate--and it was so agreed-- that a survey of the road was made in 1927, neither nor all of these show that the Board of County Commissioners ever resolved or took other similar action to declare or to establish the Pass Creek Road as a county road. To hold from such evidence that the road was established as a county road would violate what this court found in the Nixon case, supra, was the legislative policy, requiring from and after January 1, 1924, that all public roads must be placed of record and only such roads as were so made of record would thereafter be highways. Such a holding would also be in defiance of Section 48-322, Wyoming Compiled Statutes, 1945, supra, which exactly sets forth of what the record much consist in order to make certain and definite just what roads are public roads. No such record has been shown to exist.

So, also, if a board of county commissioners relies upon the county's having obtained prescriptive title to lands within a right of way, or any part thereof, in order to avoid the payment of damage for their taking, the inception of such prescriptive title must be evidenced by more formal acts than the user of the road by the public or by the county's

construction and maintenance of the road because, in order to be empowered to acquire such prescriptive title, the records of the county must show not only the survey plat of the road but also the proceedings of the board in relation to the road's location, establishment or alteration, thus making manifest the county's purpose to acquire the lands involved.

***25** The crucial question is, can a county road be established without there being placed of record a plat of the survey of such road together with the proceedings in relation to its location, establishment or alteration? If an affirmative answer is given, we would not interfere with the order from which the appeal is taken. However, notwithstanding there are some differences between the Nixon case, supra, and the instant matter, we consider the dicision in that case to be controlling and determinative here. Although in the Nixon case the county had not constructed nor maintained the road there in dispute while here the county did construct and maintain the road, the Nixon case also disposed of this fact by pointing out that ever since the enactment of the 1919 statute, supra, the working of a road was insufficient to establish it as a public road.

The respondent acknowledges that in the Nixon case, supra, the Chief Justice has made an unusually searching and careful ***320** analysis of the history and the development of our law relating to roads. In that opinion, having concluded that our statutes and the legislative policy of this state require that there be a public record made of roads in order to establish them as highways, he quoted from our statute, § 48-301, W.C.S.1945, which states "* * * No other roads shall be highways unless and until lawfully established as such by official authority", and commented, 264 P.2d 287, 293 '* * * We do not see how any language could be plainer. * * *' It seems to be equally plain that the pertinent portion of Section 48-322 W.C.S., 1945, quoted herein, requires that a record be made of the proceedings of the lawful official authority establishing public roads, as well as a plat of the road, in order that it may be certainly and definitely ascertained just which roads are public roads.

***26** We do not doubt that if the lower court had the advantage of examining the decision in this Nixon case, which was not decided until after the instant case was disposed of below, it would have been considerably aided in solving this difficult problem, for when it is made clear that a road is not a county road unless such a record is made, and that without there being established a county road, no prescriptive title to the right of way could have been acquired by the county, it would have become apparent that a prescriptive title to the disputed 60 feet was not obtained.

We are conscious that we have variously and indiscriminately used the terms 'public roads', 'highways' and 'county roads', and this was not done entirely without intention. In the Nixon case, supra, it was noted that 'highways' are 'public roads' and the terms were considered to be synonymous. Insofar as they concern roads lawfully established by official county authority, we see no reason why these terms may not be safely used interchangeably, as we consider that all roads lawfully established for the use of the general public and placed of record in accordance with our statutes come equally well within the definition of each of them.

We have considered the respondent's claim that as the appellant received its title to the lands by a conveyance which was made subject to any and all roadways and stock driveways over and across the premises, the appellant never acquired the right to the 60 foot strip in dispute. For this claim to have merit, we must presuppose that such a right of way had been legally obtained by the county as a result of its having lawfully and officially established a road, and this we do not find was done.

27 It is also claimed that in 1927 there was a dedication of the 60 foot roadway by the predecessors in interest of the appellant. The court did not find there had been any such dedication nor does any substantial evidence support the conclusion that an offer of dedication had been expressly or impliedly made or that there was ever any adoption of such an offer by any agency authorized to accept the same in behalf of the public. See 16 Am.Jur. 379, § 32. The only lawful and official authority empowered to speak for or act in behalf of the public in such a matter was the Board of County Commissioners of Carbon County, and, as has been herein indicated, such an action on the part of the Board would be required to be made of record as a part of its proceedings in relation to the establishment of the road.

It might further be observed that when we remember that the appraisers appointed by the Board of County Commissioners, reported that 46.73 acres of the claimant's land would be taken by the establishment of the 150 foot road in the western portion; that a road 150 feet wide across the claimant's lands in the western area represented 46.73 acres and that the Board had adopted the report of the appraisers by accepting and approving the same, thus negativing any idea that the county was then claiming any part of the 150 feet being taken, it is difficult to reconcile the Board's position at that time with that which the respondent takes when it says the county already had a prescriptive title to 60 feet of the 150 foot roadway or to 18.1 acres of the same to the end that only 28.63 acres of appellant's land is being taken.

The Pass Creek Road not having been previously established by the Board of *****321*** County Commissioners as a county road, the county did not have a right of way 60 feet in width across the lands of the appellant in the ****28*** western portion of that road, and hence the appellant is entitled to have the court ascertain what, if any, damage it will suffer by the taking of the 150 foot right of way in the present proceedings to lawfully establish a county road by official authority.

The last matter challenged is the failure of the court to award the claimant its costs. Section 48-329, Wyoming Compiled Statutes, 1945, says in part:
'* * * If the appellant shall fail to recover an amount exceeding fifty dollars ($50.00) above the amount allowed to him by the board of the county commissioners, he shall pay all costs of the appeal.'

Arguing that the district court had ascertained a damage considerably in excess of the amount allowed by the county commissioners, the appellant contends that it was entitled to its costs as a matter of right.

The respondent calls our attention to Section 3-3730, Wyoming Compiled Statutes, 1945, which provides:
'In other actions the court may award and tax costs, and apportion them between the parties, on the same or adverse sides, as it may adjudge to be right and equitable.'
concluding that this is such an 'other action', and hence the matter rested wholly within the court's discretion.

It is true that our courts do and probably should award and tax costs to follow the success in an action, but because of the disposition we make of this appeal, we feel it is unnecessary at this time to decide the issue.

In order to effectuate what has been said, this cause must be remanded to the District Court for further proceedings and the making of new findings and a new ascertainment of the damage suffered by the appellant.

Remanded for further proceedings.

BLUME, C. J., and RINER, J., concur.

Appendix 13

13. Nixon v. Edwards, 264 P.2d 287 (Wyo. 1953)

Nixon v. Edwards, 264 P.2d 287 (Wyo. 1953)

72 Wyo. 274, 264 P.2d 287

Supreme Court of Wyoming.
NIXON
v.
EDWARDS et al.
No. 2571.
Dec. 8, 1953.

Harold M. Johnson, Dudley D. Miles, Rawlins, for appellant.
Robert S. Lowe, Rawlins, for respondents.

***278** BLUME, Chief Justice.

This case involves the question of whether or not the road in question herein is a public road. The action herein was brought on February 28, 1951. In an amended petition the plaintiff alleged that he is, and since February 23, 1937, has been the owner and in possession of Section 4, Township 17 North, Range 84 West of the 6th P.M.; that plaintiff constructed a road along the east side of the foregoing section but that defendants since March 25, 1941, traveled back and forth upon the road so built by him causing vehicles in which they were riding to make great ruts on plaintiff's land which interfered with the irrigation and that recently defendants raised the level of the road and built ***279** fills without plaintiff's permission. Plaintiff asked that the defendants be enjoined from using the road. Defendants denied the allegations of the amended petition and filed a cross petition in which they assert that for more than twenty years defendants and their predecessors had a stock right of way across the land of the plaintiff; ****288** that the road in question is appurtenant to the lands of the defendants which are adjacent to plaintiff's lands and for more than ten years before the commencement of the action, the defendants and their predecessors in interest have used and traveled said road, openly, notoriously, peacefully and adversely to plaintiff and in fact members of the public generally have done so in the same way and for many years prior to that time. Defendants accordingly claimed an easement over the road; they asked that plaintiff be enjoined from interfering with their use of the road. In the reply, plaintiff denied the allegations of the cross petition. The case was submitted to a jury, apparently in an advisory capacity. See § 3-2105, W.C.S.1945. At the close of the evidence in the case, the defendants, by their counsel, stated to the court that they would not proceed on the theory that the road in question was a private road in which they had an easement, but upon the theory that the road in question was a public road. The court, over objection of plaintiff, then instructed the jury, among other things, in Instruction No. 9, that a public road might be established '(1) By an acceptance of the public of a right-of-way granted by the Federal Government prior to the date of the issuance of the Homestead Patent on the said Section Four on December 22, 1888, or (2) By continuous, open, notorious and adverse use of the road for a period of ten years or more, which said use must be without the consent of the then owner.'

280 It may be noted here that recognition by the public authorities was entirely omitted, the holding being that a public road might be established by adverse use alone. The court also submitted special findings substantially to the effect as mentioned in Instruction No. 9, namely, whether or not the road in question had been used prior to December 22, 1888, when the patent to Section 4 was issued. To this question the jury answered, 'No'. The second question submitted was whether or not the road had been used adversely substantially in its present location for a continuous period of ten years after December 22, 1888, and prior to February 28, 1951. This question was answered by the jury by 'Yes', and that the road was so used from 1934 to February 28, 1951 by truckers, ranchers and the general public. Thereupon the court rendered judgment, to which plaintiff excepted, denying plaintiff any relief upon the amended petition, holding that the road in question was a public road and that the defendants had the right without let or hindrance to use the road in question as members of the general public. Plaintiff thereupon filed a motion for judgment notwithstanding the verdict which was overruled. An appeal was thereupon duly taken to this court by the plaintiff.

The town of Saratoga which lies southeast of the lands of both plaintiff and defendants is the trading center of the parties herein. A road which goes by the name of Jack Creek School Bus Road leads west and north out of the town of Saratoga until it reaches the southeast corner of Section 4 hereinbefore mentioned; then it runs north along the east line of Section 4 to a short distance north of the east quarter corner of said Section 4 and then turns west. The road in dispute in the case at bar, marked A to B on the map in evidence, extends from the northeast corner of Section 4 and runs along the east boundary line of that section in a ***281*** southerly direction to connect with the Jack Creek School Bus Road, and is accordingly slightly less than half mile in length and is west of a fence which is constructed on the east side of the road. This road was constructed by the plaintiff for his own convenience from 1931 to 1934, with the consent of the then owner of Section 4, and since that time has become the owner of the land.

The defendants' land lies directly north of Section 4 aforementioned, being Section 33, Township 18 North, Range 84 West of the 6th P.M. The dwelling of the defendants is located in about the center of Section 33. A public road runs along the west side of said Section 33 and Section 4 and which may be used by the defendants when going to the town of Saratoga. That road, however, is at times impassable during the winter time on account of snow drifts obstructing part of the road, which appears not to be true in connection with the road ***289*** in question herein. So the most convenient way, at least during the winter time, for the defendants or their tenants to go to Saratoga, is by traveling from the center of Section 33 aforesaid to the southeast corner of that section which is also the northeast corner of Section 4 and then travel south a little less than half a mile on the road in dispute to connect with the Jack Creek School Bus Road.

The evidence indicates that the road in dispute herein was used by at least some members of the public commencing with 1934 as found by the jury. Counsel for the plaintiff argues that there was not sufficient evidence to establish general public use, and all travel thereon was merely permissive and not adverse, especially in view of the fact that gates

were maintained thereon. It is not necessary, however, to consider these questions herein and for the purpose of this case we may assume that there was an adverse use by the general public commencing with 1934, as found by the ***282** jury. The road--we take it--was never officially established as a public road, nor is there any evidence in the record that the public authorities of Carbon County--the county in which the road here in question is situated--recognized the road for the period of ten years prior to the commencement of this action on February 28, 1951. On the contrary, the evidence shows that the first public work that was done on the road apparently was done in 1943, and that it was done as an accommodation to the parties and with the permission of the plaintiff. We think the outline of the facts herein mentioned will be sufficient for us to determine the questions of law involved. The parties will be designated herein as in the court below.

1. On Legislation before 1919.
It is the contention of counsel for the defendants herein that there may be public roads which need not be maintained by the public authorities, and that such roads may be established by public use alone without being recognized as such by the public authorities. Counsel for plaintiff, on the other hand, maintains that no public roads exist in the state except those established formally and directly by the statutes of this state or by the public authorities, and that in any event no public road may be established by public user alone, and must in addition to public user be recognized by the public authorities as such by doing work thereon for the full period of prescription of ten years, and that no evidence of such recognition (as is true) appears in the case at bar. Counsel for defendants contends that there is no substantial difference between past and present statutes on the subject, all favoring his contention herein. So we have deemed it advisable, if not necessary, to review our legislation on highways, in so far as necessary, nearly from the beginning, so that we have a comprehensive view of the subject. It cannot be questioned, ***283** it seems, that what shall or shall not be public roads or highways is, subject to constitutional limitations, exclusively within the province of the legislature. 39 C.J.S., Highways, § 27, page 946; 25 Am.Jur. 350, § 19.

As early as 1887, Laws of 1877, page 135, the legislature inaugurated a policy to cause the rural public roads in this commonwealth to be spread upon the public records. That was emphasized by Chapter 99 of the Session Laws of 1886, which provided in Section 1: 'That all county roads shall be under the supervision of the board of county commissioners of the county wherein said road is located, and no county road shall be hereafter established, nor shall any such road be altered or vacated in any county in this Territory except by authority of the county commissioners of the proper county.' Subsequent legislation (as shown by the legislation of 1895) slightly amended that section by adding at the end thereof 'except as is in this Act provided', thus showing that no roads could thereafter be established except by official action of the board of commissioners, namely by petition, appointment of viewers, appraisers, etc., as in the Act provided. The Act, it may be noted, refers to county roads, instead of public roads. There is, however, nothing peculiar in that, since 'public' roads might include roads in municipalities.

There may have been at that time one territorial wagon road, ***290** Laws 1877, p. 135, and possibly some private toll-wagon roads, §§ 524-526, Rev.St.1887, for miners and others but the ordinary public roads situated in the various counties in the rural districts, outside of municipalities, were not improperly designated as county roads, some of which, as implied in the Act, had not then been established officially. The Legislative Acts of 1869, 1877 are set out in Board of Commissioners of Sheridan County v. Patrick, infra, and need not be set out here.

***284** The legislature in 1895, by Chapter 69 of the Legislative Acts of that year, repealed all prior acts, and attempted to enact a complete code relating to rural public highways. In so far as pertinent herein, the provisions are as follows:
Section 1. 'All roads within this state shall be public highways which have been or may be declared by law to be national, state, territorial or county roads. All roads that have been designated or marked as highways on government maps or plats in the record of any land office of the United States within this state, and which have been publicly used as traveled highways, and which have not been closed or vacated by order of the Board of County Commissioners of the county wherein the same are located, are declared to be public highways until the same are closed or vacated by order of the Board of County Commissioners of the county wherein the same are located, and the board or officer charged by law with such duty shall keep the same open and in repair the same as in the case of roads regularly laid out and opened by order of the Board of the County Commissioners.'

Section 2. 'All county roads shall be under the supervision, management and control of the Board of County Commissioners of the county wherein such roads are located, and no county road shall hereafter be established, altered or vacated in any county in this state, except by the authority of the Board of County Commissioners of the county wherein such road is located, except as is in this Act provided.'

Section 57 of the Act, which is the same as Section 32 of the Act of 1886, provided: 'When any public road heretofore laid out or traveled as such or *hereafter* to be laid out *or traveled* as a public road, crosses any stream of water, * * *' the ford, if the stream be fordable, ***285** should be considered as a part of the road so established or traveled. (Italics supplied.) This section was considered in the case of Hatch Bros. Co. v. Black, infra. It was carried through the various compiled statutes, but was specifically repealed by Chapter 73, Section 179, of the Legislative Act of 1931 (page 137).

Chapter 69, Section 64 of the Act of 1895, after repealing all prior acts provided: '* * * but any and all proceedings heretofore instituted prior to the taking effect of this Act, under statutes hereby repealed, shall be continued and completed the same as if this Act had not been passed, and any and all rights obtained by, secured to, or vested in the public or any person, corporation or association of persons under laws existing at the time of the taking effect of this Act, are hereby preserved and continued in force the same as if this Act had not been passed.' This provision, too, was considered in Hatch Bros. Co. v. Black, infra. It was never, by oversight or otherwise, embodied in the Compiled Statutes

of 1899, 1910 or 1920, and was not embodied in the Revised Statutes of 1931, and must, accordingly, be considered as repealed.

The statute of 1895 was construed in Hatch Bros. Co. v. Black, 1917, 25 Wyo. 109, 165 P. 518; Id., 25 Wyo. 416, 171 P. 267, and Board of Commissioners of Sheridan County v. Patrick, 1909, 18 Wyo. 130, 104 P. 531 and 107 P. 748. Since counsel for plaintiff as well as counsel for defendant find comfort in these cases, we shall briefly review them.

The case of Hatch Bros. Co. v. Black, supra [25 Wyo. 109, 165 P. 519], is in no way in conflict with our conclusion herein. The case is based on the doctrine of public dedication and acceptance of the dedication by the public. The road in question was over public land and was used by the public ***286*** since about 1875. A homestead was located on the land over which the road ran in 1912, and the question was as to whether or not ****291*** the road over the land could be closed by the locator. By an act of 1866, the United States provided that 'right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.' 43 U.S.C.A. § 932. The court held that the grant by Congress could be accepted by user alone, and further stated that: 'We discover nothing in these several statutes, as we understand them, prohibiting the public from accepting the grant of the right of way; but on the contrary, they appear to recognize that right.' The court, in connection with the language just quoted, relied (1) upon the fact (apparently) that the road was shown on maps of the United States as mentioned in section 1 of the legislation of 1895, and further (2) upon the provisions of section 64 which preserved all rights previously acquired. Since the road in question in that case was established as early as 1875, the decision in the case was correct. The court, it is true, also mentioned (3) the words in section 57 of the Act reading: 'When any public road heretofore laid out or traveled as such or *hereafter* to be laid out *or traveled* as a public road, * * *.' Section 57 did not relate to the establishment of any public road. It merely provided that when it was necessary in traveling on a public road to cross a stream, the crossing over the stream should be considered a part of the public road. The section is not necessarily inconsistent with section 2, when we consider the general policy of the latter that rural public roads should hereafter be established only officially. If inconsistent, it is by reason of the use of 'or' instead of 'and'. See 82 C.J.S., Statutes, § 335, page 673. It may be, however, that the court in the foregoing decision, by italicizing the words above italicized meant that section 57 indicated that roads hereafter traveled publicly need not necessarily be established ***287*** officially, and thus there might be roads which, if running over public land, might become public roads by user alone, thereby accepting the grant of the government. Howsoever this may be, it is not necessary to dwell upon the matter. It has no effect on the case at bar. The road in dispute herein does not run over public land. Section 57 was expressly repealed as previously mentioned in 1931 and before the road in dispute herein was privately established. The provision as to maps and plats in section 1 of the Act of 1895 is no longer the law of the state, and section 64 of the Act was not embodied in the Revised Statutes of 1931, so that none of these three factors which the court considered in the foregoing decision have any bearing on the case at bar.

Counsel for plaintiff contends that the second case above mentioned, namely, Board of Commissioners of Sheridan County v. Patrick, supra, establishes the fact that the road in

dispute herein is not a public road, in that it holds that a public road may not be established by adverse public use alone for the prescriptive period, but that in addition thereto recognition of the road as a public road by the proper public authorities is necessary, and that for the prescriptive period. It appears in the Patrick case that a road had been established in the early '80s, apparently by public authorities, along section lines of land owned by Patrick. The road actually traveled, however, for some 19 years was not along section lines. Patrick discovered this fact and closed the traveled road, so that it should conform to the section lines. The question was as to whether he could be enjoined from closing the road. It was held that he could not, in view of the fact that the road had not been recognized by the county authorities by doing work thereon for the full period of prescription. It would seem that the court recognized the doctrine of ***288** prescription as applied to highways, but under the condition that it was recognized by the public authorities for the required prescriptive period. Mr. Justice Scott said in the main decision as follows: 18 Wyo. 130, 104 P. 531, 532, 'Evidence of assumption of control and of jurisdiction over the road by the public through its proper authorities, as by recognition and working the road by public authority, for the required length of time, is, we think, necessary to support the title by prescription. In other words, a claim of public right is essential, and such claim can only ***292** be made by the public through its duly constituted authorities. Stewart v. Frink, 94 N.C. 487, 55 Am.Rep. 619.'

A number of other states hold likewise. See 39 C.J.S., Highways, § 10, page 930. The foregoing statement is clear and specific. But it is claimed by counsel for the respondent that the land in the Patrick case was wild and unenclosed land, while in the case at bar, the land was enclosed, and hence the case does not apply here. It is true the court mentioned the matter. Thus in the opinion on rehearing in the Patrick case, Mr. Chief Justice Potter stated, 18 Wyo. 130, 144, 107 P. 748, 750: 'Owing to the conditions that have existed in this state, and continue to exist, we are of the opinion that the only reasonable rule, in the absence of a statute to the contrary, is, as stated in the former opinion, that to establish a prescriptive right as against the mere silence of the owner of wild, uncultivated, unoccupied, open, and uninclosed land, there should be shown, in addition to the use of a road by the public, the assumption of control and jurisdiction over it by the board of county commissioners for the statutory period of limitation.' That would seem to indicate that the court meant to limit the rule announced in the case to a public road over uncultivated and unenclosed land. Yet preceding that statement the able jurist states that had it been intended that user alone would have been sufficient to establish a highway, ***289** as provided in some statutes, that would have been clearly expressed in our own statutes. He stated as follows: 'There has never existed in this state a statute to the effect that the mere use of a road by the public may ripen into a title or right thereto by prescription, but in some states there is such a statute, which is held to qualify the common-law rule. * * * The same liberality has not been shown by our Legislature in favor of a right by prescription to a public highway. * * * Upon a review of these statutes it cannot fail to be observed that there is a very significant omission of the provision found in some other states that a road shall be deemed a public highway from the fact alone that it has been publicly traveled as such for a certain number of years. With all the legislation on the subject, has such a purpose been intended, it would, we think, have been clearly expressed.'

These statements are unequivocal. They state definitely that no public road can be established in this state by public user alone. The only way in which to escape from the force of these statements is by saying that they were obiter dicta, in view of the fact that the road involved in that case ran over unenclosed land. It is not improbable that all statements above quoted may be harmonized, in that, in the opinion of the court in the Patrick case, the fact that the land is cultivated and enclosed or uncultivated and unenclosed merely goes to the point of the amount of proof necessary to prove adverse user, it being easier to prove such adverse user in the case of land that is cultivated and enclosed but requiring recognition of the road by the public authorities in either case. However, whatever doubt there is on the point, subsequent legislation settled the matter.

2. Legislation of 1919 and 1921.
Before proceeding further, we might incidentally say that we leave out of consideration in this case matters ***290** relating to streets and alleys in municipalities or additions thereto, in connection with which the doctrine of dedication is often peculiarly applicable. The statutes involved in this case do not, we think, involve any streets or alleys, but relate only to rural public roads. See Elliott on Roads and Streets, 4th Ed. p. 24, § 22.

We have already heretofore noted, that commencing with at least the legislative act of 1886, nearly 70 years ago, the legislature adopted a general policy under which, while recognizing thoroughfares already in existence, all rural public thoroughfares thereafter established should be shown on the records of the public authorities. The legislative act of 1895, above mentioned, evinces the same general policy, enforcing it somewhat by adding that roads shown on United States maps and plats in the land offices in this state should be public highways, since these maps and ***293** plats were at least in the nature of public records. That was the situation until 1919, when the legislature passed Chapter 112, amending Section 1 of the legislative act of 1895, § 2513, Comp.St.1910, and provided as follows:
'Public Roads Defined. On and after January 1st, 1922, all roads within this State shall be highways, which have been or may be declared by law to be national, state, territorial or county roads or highways. 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, or if need be laid out, established and 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.'

***291** It may be noted at once, that while this court in Board of Commissioners of Sheridan County v. Patrick, supra, construed the then existing statutes as permitting the establishment by county commissioners informally, that is by mere recognition of a road, such as working it, the legislation of 1919 required that roads recognized as public to be made of record, thus carrying to its ultimate conclusion the former policy that it should be made certain and definite as to what were public roads, and thus superseding in that respect the ruling in the Patrick case, supra. The Act directed the board of county commissioners to determine what roads theretofore traveled, but not officially established

and recorded, were necessary for the public use, and then cause those thus found to be necessary, to be made of record. That included all roads marked on Governmental plats and maps, as well as all roads, the rights to which had been recognized by former legislative acts. It was meant to be all inclusive, and then specifically provided that 'No other roads shall be *highways* unless and until lawfully established as such by official authority.'

Highways are public roads, and substituting the synonymous term 'public roads', the act provided that no roads should be public roads unless and until duly established as the act provided. We do not see how any language could be plainer. In fact counsel for defendants herein states that 'so only those roads which are set up by official act as provided in our statutes are highways.' But in other portion of his brief he limits the public roads mentioned in the legislation to roads which the public authorities in the county must maintain, and contends, if we understand him correctly, that there are public roads which the public authorities are not compelled to maintain but must be maintained by the users thereof. But we fail to find any intimation at least in present statutes that we have any hybrid public roads, and counsel has failed to point out any ***292** provision to that effect. It is held that one of the prime requisites of a public highway is that the public authorities must maintain it. 39 C.J.S., Highways, § 1, page 916, 25 Am.Jur. 339, § 2. As stated in Bankhead v. Brown, 25 Iowa 540, 549, where the roads in question were held not to be public roads: 'The public are not bound to work or keep such roads in repair, and this is a very satisfactory test as to whether a road is public or private.' The case was cited with approval in Wild v. Deig, 43 Ind. 455, 460, 13 Am.Rep. 399. In Boston & M. R. R. v. Daniel, 2 Cir., 290 F. 916, 920, the court said: 'It must be remembered that, in determining whether or not a road or way is a public highway, the essential feature is the responsibility of the town or other governmental subdivision in which the road is situated.' Counsel mentions § 48-326, W.C.S.1945 which provides for the establishment of a road by consent (by dedication as counsel states). But that section merely contemplates the omission of the appointment of viewer, and appraisers, etc. And the road need not be established. It is established only if the commissioners in their discretion order it to be ***294** established. Counsel say that the establishment of these roads 'seems to clearly exclude the responsibility of the county to maintain them because they are 'public roads' and not 'county roads'.' We do not so read the statute. The end of the section provides that such roads 'are hereby declared to be public roads, the same as if such roads had been legally opened'. The maintenance thereof by the public authorities would seem to follow, so that that section in no way contradicts or modifies the provisions of the statute of 1919. Counsel further mentions that a private road--a road of necessity--may be established by the board of county commissioners. Such roads may be established at the expense of the parties who request them. They are strictly private roads, and we fail to see how ***293** such statutory provision in any way contradicts, modifies or affects the legislation of 1919.

When the legislation of 1919 was adopted there remained on the statute books, the provisions of § 57 of the Act of 1895. They were inconsistent with the Act of 1919, and they were found inconsistent therewith by the revisers of the Statutes of 1931, and were

not embodied in the revision of that year, so that we do not, in any event have these provisions to consider at this late date.

What we have said is strengthened, if need of strengthening exists, by the provisions of Chapter 100 of the Legislative Acts of 1921, now § 48-301, W.C.S.1945. In that legislation, for the phrase at the beginning 'On and after January 1st, 1922,' the legislature substituted, 'On and after January 1st, 1924'. No other change in the legislation of 1919 was made. The purpose is quite apparent. The legislature evidently found that the various boards of county commissioners had not been given sufficient time to cause all rural public roads to be shown on the records, and therefore extended the time in which that might be done for another two years. The intent to put a finishing touch to the policy inaugurated at least in 1886 is clear. It shows how thoroughly the legislature was convinced that all rural public roads should be shown on the public records. Our holding herein is not new. More than thirteen years ago we decided the case of George W. Condon Co. v. Board of County Commissioners, 56 Wyo. 38, 103 P.2d 401, 407, in which a contractor sought to recover for work done on a road. One of the important questions in that connection was as to whether or not the work done was in fact on a county road. In holding that it was not we stated in part: 'The board never made a formal order to establish the road in question as a county road. The legislature of this state gave the county commissioners ***294*** until January 1, 1924, to make a record of all highways in the county, and provided that 'no other roads shall be highways unless and until lawfully established as such by official authority.' Section 52-201. That indicates a policy that roads should be shown on the records.' After considering the point again from the present, different, and perhaps broader viewpoint, we have no cause to retract the statement. We built better than perhaps we knew. We might add that this is not the only state in which public roads are to be shown on the public records though perhaps not so formally. Thus the court said in Dicken v. Liverpool Salt & Coal Co., 41 W.Va. 511, 23 S.E. 582, 583: "A road dedicated to the public must in some way, directly or by inference, be accepted by the county court upon its record, or by the municipal corporation, before it can become a public road."

In Commonwealth v. Kelly, 8 Grat., Va., 632, a syllabus reads: 'A road dedicated to the public must be accepted by the County court upon its records, before it can be a public road.' See also cases cited below.

California and Montana have or had a statute which stated: 'And no route of travel used by one or more persons over another's land shall hereafter become a public road or byway by use, or until so declared by the Board of County Commissioners or by dedication by the owner of the land affected.' Rev.Code Mont.1907, § 1340; Pol.Code Cal. § 2621.

****295*** It was stated in Barnard Realty Co. v. City of Butte, 48 Mont. 102, 136 P. 1064, 1067, that this provision 'clearly evinces the intention that no highway falling within the enumeration * * * should thereafter become a public right until declared so by the public authorities or had been made so by dedication by the owner of the land affected. * * * By these enactments the Legislature explicitly declared it to be the rule that after July ***295*** 1, 1895, when the Codes went into effect, a highway could not be established by use unless

the use should be accompanied by some action on the part of the public authorities having jurisdiction of the subject, tantamount to a declaration that the particular road was a public highway.' Other cases from these states are of like effect. State ex rel. Dansie v. Nolan, 58 Mont. 167, 191 P. 150; Lantz v. City of Los Angeles, 185 Cal. 262, 196 P. 481; United States v. Rindge, D.C., 208 F. 611 (under California Law). While these statutes permitted a rural highway to be established by dedication of the owner, and our statute does not, the principle involved is the same.

The nearest cases in point herein are those from Arizona involving a statute similar to ours. In Territory v. Richardson, 8 Ariz. 336, 76 P. 456, 457, the court set out the statute of Arizona relating to public highways. The statute was as follows: 'All roads and highways in the territory of Arizona which had been located as public highways by order of the board of supervisors, and all roads in public use which have been recorded as public highways, or which may be recorded by authority of the board of supervisors, from and after the passage of this title, are hereby declared public highways; and all roads in the territory of Arizona now in public use, which do not come within the foregoing provisions of this section, are hereby declared vacated.' Rev.St.1901, § 3956. The court interpreting this statute said as follows: 'Public highways are such only as come within the express provisions of the statutes declaring them to be such. The statutes do not define a private road or way. At common law a private way is the right of passage over or under another person's ground, which belongs to and is for the use of individuals-- one or more--as distinct from a way that is used by the public in general, and such a way is an easement. 1 Am. & Eng.Enc. of Law (2d Ed.) p. 3. Such a private way may be ***296*** acquired by grant, reservation, prescription, or under a statute authorizing its establishment. In contemplation of law, therefore, though perhaps commonly known and spoken of indiscriminately as public and as private roads, many, if not a majority, of the roads and ways running throughout all parts of the territory, and frequently in general public use, are neither public highways nor private ways, but are simply roads established without authority for the convenience of individuals, and without a legal status either as public highways or private ways. Such roads, where they may have heretofore existed as public highways, and where no right has vested, have by the Legislature been declared vacated.' The holding was affirmed in later cases from that state: Champie v. Castle Hot Springs Co., 27 Ariz. 463, 233 P. 1107; Mead v. Hummel, 58 Ariz. 462, 121 P.2d 423; Calhoun v. Moore, 69 Ariz. 402, 214 P.2d 799, 801. In Curtis v. Southern Pac. Co., 39 Ariz. 570, 8 P.2d 1078, 1079, the court said: 'The complaint attempts to allege the closing of a right of way acquired by prescription. So far as the general public for whom plaintiffs alleged they sue are concerned, the complaint does not state a cause of action, for no public highway or right of way may, since 1901, be established under the law of Arizona in this manner. Territory v. Richardson, 8 Ariz. 336, 76 P. 456; Champie v. Castle Hot Springs Co., 27 Ariz. 463, 233 P. 1107.'

It would seem clear that the meaning and effect of the Arizona statute that 'all roads in the territory of Arizona now in public use, which do not come within the foregoing provisions of this section, are hereby declared vacated' is substantially the same as the provisions of our statute that 'no other roads shall be highways unless and until lawfully established as such by official authority.'

***296**Though the road in question here would be a much ***297** more convenient road for defendants than any other and Christian charity would seem to dictate that an easement over it should be granted to defendants, properly limited so that it would not injure plaintiff's land, we are forced to conclude herein that under present laws of this state the road in question here is not a public road. The judgment of the trial court must, accordingly, be reversed with direction to enter judgment for plaintiff.

Reversed.

RINER and HARNSBERGER, JJ., concur.

Appendix 14

14. Board of Com'rs of Sheridan County v. Patrick, 107 P. 748 (Wyo. 1910).

Board of Com'rs of Sheridan County v. Patrick, 107 P. 748 (Wyo. 1910).

18 Wyo. 130, 107 P. 748

Supreme Court of Wyoming.
BOARD OF COM'RS OF SHERIDAN COUNTY
v.
PATRICK.
March 14, 1910.

For former opinion, see 104 Pac. 531.

POTTER, C. J.

This case was brought to enjoin the county from interfering with a fence built by plaintiff across a traveled road claimed by the county to be a public highway. For the reasons stated in the former opinion the judgment in favor of the plaintiff was affirmed. 104 Pac. 531. A petition for rehearing has been filed on behalf of the plaintiff in error, the board of county commissioners. It seems to be supposed that the principle upon which the case was decided will tend to confusion in the matter of public roads, and interfere with other roads in a similar situation, and it is stated in the brief, in support of the petition for rehearing, that this case is unimportant so far as it affects the particular road in controversy, but that it was brought, or allowed to be brought, as a test case to have settled the rule in this state concerning the existence of a public highway by prescription.

We do not think that the serious unfortunate consequences anticipated by counsel will necessarily result from the decision heretofore announced. If such results are possible, it is a matter easily remedied by the Legislature, if deemed proper. We must declare the law as it stands, leaving the Legislature to make such changes as conditions may seem to require. The rule that where land is vacant and unoccupied, and remains free to public use and travel until circumstances induce the owners to inclose it, the mere travel across it by the public without objection from the owner does not enable the public to acquire a public road over the same, but that such use will be regarded as merely permissive and not adverse, is a rule which, as said in a Washington case cited in the former opinion, seems to be well settled. Watson v. Board, etc., 38 Wash. 662, 80 Pac. 201. It is unnecessary to rehearse the reasons upon which the rule is founded.

We think it a fact that in the earlier days of the settlement of this particular section of country it was not unusual for fences to be constructed without strict regard to boundary lines or corners, and that in addition to public lands, it was not uncommon for land which had passed into private ownership to remain open and uninclosed. Public travel, according to convenience across such uninclosed lands, was unobstructed. There has never existed in this state a statute to the effect that the mere use of a road by the public may ripen into a title or right thereto by prescription, but in some states there is such a statute, which is held to qualify the common-law rule. State v. Auchard, 22 Mont. 14, 55 Pac. 361; Township of Madison v. Gallagher, 159 Ill. 105, 42 N. E. 316. In the case last cited it was said: "Where the statute expressly says that use of the road as a highway by

the public for a certain number of years makes it a public highway, we cannot see why such use is not evidence of as high a character as are acts of recognition by the town authorities." And again: "Under such a statute the continued and uninterrupted use *** for the statutory period must, in the absence of proof to the contrary, be presumed to have been under a claim of right." The same liberality has not been shown by our Legislature in favor of a right by prescription to a public highway. Until 1877 the only statute respecting the matter was one enacted in 1869 by the first territorial Legislature, which provided as follows: "All roads within this territory shall be considered public highways, which have been, or may hereafter be, declared territorial roads by act of the Legislative Assembly, or which have been ***750** or may be, declared public roads by the board of county commissioners of any county, within such county, or which have been, or shall hereafter be, used and traveled by the public, so that the same would, according to the course of the common law, be deemed public highways." Comp. Laws 1876, c. 102, § 1.

In 1877 an act was passed providing: "That the board of county commissioners 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, whether originally opened and laid out by them or not, and any road so adopted and appropriated to public purposes shall be and is hereby declared a public or county road to all intents and purposes, the same as if originally opened or laid out by them and subject to the same laws and regulations in all respects." Section 2 of that act required a record to be kept of all such proceedings, with a description of the road, for the information of the public, and to be open to public inspection. Laws 1877, p. 135. That act continued in force until repealed by an act approved March 12, 1886, whereby it was provided that all county roads shall be under the supervision of the board of county commissioners of the county wherein the road is located, and "no county road shall be hereafter established, nor any such road be altered or vacated in any county in this territory except by authority of the county commissioners of the proper county." Laws 1886, c. 99, § 1; Rev. St. 1887, § 3859. In 1895 an act was passed "to revise, amend and consolidate the statutes relating to highways and bridges." Laws 1895, c. 69. Sections 1 and 2 of that act were as follows:

"Section 1. All roads within this state shall be public highways which have been or may be declared by law to be national, state, territorial or county roads. All roads that have been designated or marked as highways on government maps or plats in the record of any land office of the United States within this state, and which have been publicly used as traveled highways, and which have not been closed or vacated by order of the board of the county commissioners of the county wherein the same are located, are declared to be public highways until the same are closed or vacated by order of the board of county commissioners of the county wherein the same are located, and the board or officer charged by law with such duty shall keep the same open and in repair the same as in the case of roads regularly laid out and opened by order of the board of the county commissioners.

"Sec. 2. All county roads shall be under the supervision, management and control of the board of county commissioners of the county wherein such roads are located, and no

county road shall hereafter be established, altered or vacated in any county in this state, except by the authority of the board of the county commissioners of the county wherein such road is located, except as in this act provided."

Thus the only publicly traveled roads, not officially established, declared to be public highways were those designated as highways on government maps or plats in the record of a land office of the United States in this state. By the act of 1895 several former acts were repealed, including a chapter relating to roads passed in 1891 (Laws 1891, c. 97), and one enacted in 1890 (Laws 1890, c. 86). By the act of 1890 it had been provided in one section substantially as by the act of 1886, and in another section that public roads might be established without other proceedings than an order of the county board, upon the filing of the written consent of all the owners of the land to be used for that purpose.

The act of 1891 also contained provisions like those found in the act of 1886, and in section 1 of the act of 1895, preceded by the provision that: "All roads within this state shall be considered public highways, which have been or may be declared by law to be state, territorial or county roads." Sections 1 and 2 of the act of 1895 were brought into the revision of the statutes of 1899, and seem to have remained in force without material change. Rev. St. 1899, §§ 1906, 1907.

Upon a review of these statutes it cannot fail to be observed that there is a very significant omission of the provision found in some other states that a road shall be deemed a public highway from the fact alone that it has been publicly traveled as such for a certain number of years. With all the legislation on the subject, had such a purpose been intended, it would, we think, have been clearly expressed. We are left, therefore, to ascertain outside the statute the circumstances which can be held to show that the public travel of a road has been under a claim of right adverse to the owner of the land. Owing to the conditions that have existed in this state, and continue to exist, we are of the opinion that the only reasonable rule, in the absence of a statute to the contrary, is, as stated in the former opinion, that to establish a prescriptive right as against the mere silence of the owner of wild, uncultivated, unoccupied, open, and uninclosed land, there should be shown, in addition to the use of a road by the public, the assumption of control and jurisdiction over it by the board of county commissioners for the statutory period of limitation. It is evident that where, as in this state, a large proportion of the lands remain open and uncultivated, the public will freely travel across the same merely as a matter of convenience, and not necessarily with a purpose or thought of claiming a right adverse to the owner or owners, although a well-defined road may in many instances result from such travel. We think ***751** the Legislature must have had these conditions in mind, and therefore refrained from providing that such use, however long continued, independent of official action would be presumed to have been adverse or sufficient to make the route traveled a public highway. It is contended, however, that the land in question did not come within the rule above stated, for the reason that the land south of the traveled road was fenced. That fact, no doubt prevented the public from traveling over the inclosed land, but the land over which the public did travel, as well as the land north of it, was open and uninclosed, unoccupied, and uncultivated, and the case therefore comes clearly

within the rule.

It is argued that the court seems to have misapprehended the point in controversy, because it is stated in the former opinion that no question is raised as to the validity of the road as originally surveyed along the section line, and that the question presented is whether a road so located can be diverted from its original course to and over lands of another, in the absence of dedication by the owner, without official action or the assumption of control by the county board, and merely by long-continued use by the public become a public or county road. The question to be decided may not have been accurately stated, but the point was not misapprehended. Whatever inaccuracy there may have been in the statement of the question did not change the situation, nor would a mere accurate statement lead to a different result. It may be immaterial whether the road as surveyed along the section line was or was not legally located and established, except so far as it might tend to show the route over which the county board claimed or exercised control and jurisdiction. The right, if any, acquired by the public to use the road in question is quite independent of the legality of the proceedings for locating a road along the section line, or of the question whether any such proceedings were had. But, as will be explained later, the evidence relating to such a road becomes important in determining the effect of the travel south of the section line over the lands of the defendant in error.

By the statement that no question was here raised as to the validity of the road as surveyed on the section line it was intended that the validity or legal existence of that road was not a question to be decided in this case, and we repeat that it is not. That road is being traveled without objection or obstruction, as the evidence shows, and had been for two years prior to the trial. The plaintiff below, defendant in error here, was not complaining of such travel. He had obstructed the road as previously traveled, and sued to restrain the county from interfering with such obstruction, and the county's right in the case depended upon its showing that the road so obstructed was a public road. It is true that it appeared that a plat and field notes were on record showing a road along the section line, and plaintiff considered that to be the correct location of the road as originally located, and built his fence accordingly. The defendant county insisted that the road had never been located along the section line, and sought to prove that it had been located, traveled, and controlled over the defendant's land, around a hill a short distance south of the section line, though it did not attempt to show the record proceedings, if any, so locating it. On the contrary, as stated in the former opinion, the county relied upon a right by prescription. There might have been two public roads, one legally established along the section line, and one through its use by the public and control by the county board for the period sufficient to give a right by prescription.

Although the question to be decided in this case is not the validity or invalidity of a road along the section line, the field notes and map introduced in evidence from the county records are important, and were properly admitted in evidence. Counsel for plaintiff in error states in his brief that such field notes and plat are unsigned and unauthenticated; that no one pretends to say where they came from, who made them, or how they came into the clerk's office. It is true that by what particular person they were made and how they came into the office of the county clerk of Johnson county does not expressly appear

by the evidence; but it does appear that they were on record in that office, and, as provided by law, were transcribed therefrom and transmitted to the county clerk's office in Sheridan county after that county was organized. They are authorized public records, and appear to be duly authenticated as such. Comp. Laws 1876, c. 102; Id., c. 28, art. 7; Rev. St. 1887, §§ 1890-1892, 3863; Rev. St. 1899, §§ 1916, 1156, 1185-1187. The deputy county clerk of Sheridan county, testifying as a witness upon the trial, produced from the clerk's office a record book of the roads in Sheridan county, in which he testified he found at a certain page a road called "Soldier Creek Road"; that a part of it had been amended by the county commissioners, but not that part here in controversy. He stated, further, that he had the transcript papers from Johnson county of which the record was a copy. He produced them, saying: "This is the plat as transcribed from the records of Johnson county. These are the field notes of the same road transcribed from Johnson county. The field notes in starting commenced at section 24, township 56, range 85; that is, the beginning of the road."

The plat so produced has indorsed upon it a certificate dated February 4, 1886, purporting to be signed by the county surveyor of Johnson county, stating that it is a true copy of the map of the Soldier Creek road on file in his office, and also a slip attached containing a certificate signed by the county clerk of ***752** Johnson county, dated June 14, 1889; that it is a true and correct copy as the same appears of record in his office. Upon such certificate, and passing through the map, is an impression of the county seal of Johnson county authenticating the same. The field notes are entitled: "Field Notes of Soldier Creek Road." Attached thereto is a certificate of the county clerk of Johnson county similar to that on the map, and of the same date, with an impression of the county seal upon the slip upon which the certificate is written and the paper containing the field notes. A number-- 111--is stamped upon the back.

The map, evidently through a clerical mistake, gives the range at the point covered by the road in controversy as 86, instead of 85, but in pencil above the figures 86 is written 85, but by whom so written is not disclosed. The true range in which the land and road involved are located is 85, and not 86, as inadvertently stated in the previous opinion. We say that the difference in the range number was evidently a mistake, for the reason that in the field notes the range is given as 85, and it is not claimed that they and the map disagree in any other respect. The road here in dispute was referred to upon the trial by counsel and witnesses as a part of the Soldier Creek road; and it appears that from the east and west ends of the strip in controversy, running easterly and westerly, respectively, the line of the road as traveled is the same as shown on the map and by the field notes.

The field notes and map show a continuation of the road across or adjacent to the land of defendant in error along the north line of sections 29 and 30. The divergence from that line of the road as traveled before it was obstructed by the defendant in error is not great. It appears to have run "around a hill," as stated in the testimony. It leaves the section line in the N. W. 1/4 of the N. E. 1/4 of section 29, and connects with it again in the N. W. 1/4 of the N. E. 1/4 of section 30. The distance between the center of the road so traveled and the section line varies from a few feet at either end to about 400 feet at a point near the line dividing sections 29 and 30. It appears that the traveled portion of the road was at

least 70 or 75 feet wide, and some of the witnesses say that it was 100 to 150 feet wide in places, which would bring one side of it close to, if not touching, the section line, or the line shown on the map. Referring to the rule applicable to a road across land situated as the Patrick land was, it was necessary for the county to show some official control or recognition of the road in controversy, in addition to the fact that it was used by the public, in order to establish a right by prescription. As stated in the former opinion, it was attempted, on the part of the county, to make such showing. It was competent for the defendant in error, plaintiff below, to show that the county records described a road along the section line, not for the purpose merely of proving the legal location of a road there, because that in itself might be immaterial. But owing to the proximity of the traveled road and the section line, together with the fact that the road here sought to be maintained connected at each end with the road shown by the map and field notes, and was a part of that road as traveled, the records--that is to say, the map and field notes--would, in the absence of evidence to the contrary, presumptively show the line of the road as officially recognized and controlled, and tended to explain, in connection with the other facts, the use by the public of the land of Patrick along the north side of his fence.

It is unnecessary to here decide whether that record, without proof of any other proceedings, would be sufficient to establish the legal location and existence of the road so described. As the map and field notes had been on the records for more than 20 years, and the road described thereby, with the exception of the strip along the land of defendant in error, had been for the same period publicly traveled as one of the principal roads in the county, there might, perhaps, be some ground for the presumption that it had been legally established. See Town of Randall v. Rovelstad, 105 Wis. 410, 81 N. W. 819; Olwell v. Travis (Wis.) 123 N. W. 111. But the county was permitted by the trial court to show by the witness Curtis, whose testimony is referred to in the former opinion, that he was one of the viewers and locators of the Soldier Creek road, and, notwithstanding that he testified that the viewers had made a written report, he was further permitted to state that, where the road ran at the Patrick place, it was located and opened on the line subsequently traveled. He says that it was viewed and located in the spring of 1885 or 1886, and that it was opened in the following summer by laying it out and putting in culverts. He testified, further, that the question of section lines was not mentioned when the road was located, and that they (the viewers) did not know where the section line was.

Thus we have in the evidence the fact testified to by a witness for the county, and brought out on his direct examination, that the Soldier Creek road was located by viewers, and afterwards opened at a time corresponding closely with the date of the county surveyor's certificate upon the map, and by that testimony, as well as the testimony of the other witnesses, such road was thereafter continuously traveled by the public over the route shown by the map and field notes, with the single exception of the slight deviation at the place in controversy. In view of all the evidence, the court could properly have found that a road called the "Soldier Creek" road had been located and opened to travel by public authority, and would have been justified in accepting the map and field notes as, not only the best, but the most reliable, evidence as to where the road was officially located. It should be stat stated ***753*** that neither Mr. Curtis nor any other witness testified that the road, when located and opened, was marked or designated on the ground by stakes, the

plowing of furrows, or in any other manner. The fact that at the Patrick place the public did not travel along the section line, but along a road deviating slightly therefrom, tended, of course, to corroborate Mr. Curtis, but its effect would be overcome to some extent, if not altogether, by the consideration that, as the land was vacant and uninclosed, the route traveled may have been used by the public as a mere matter of convenience, regardless of the true line of the road as located and surveyed, especially in view of the showing made by the road record.

It appears that in October, 1907, the county surveyor of Sheridan county made a written report to the county board, at the request of a member thereof, concerning the question whether Mr. Patrick had built a fence (the one in question) across the county road, and in that report it was stated that the road then being used was on the section line; that according to the map and field notes of the road it was not located south of such line, and therefore it had not been obstructed. Thus it appears that the record was regarded by the county surveyor as showing the true location of the road. The testimony of Mr. Curtis that the road was originally located along the course taken by the public travel, and not on the section line, disagrees with the only record evidence in the case, and is unsupported by the record of any official act in that regard. What he says, therefore, with reference to the original laying out of the road must be disregarded in ascertaining the extent, if any, to which the traveled road was officially recognized or controlled. He is the only witness who testifies to any work upon the road 10 years or more before it was obstructed by the defendant in error.

In other respects than that mentioned in the former opinion, we regard the testimony of Mr. Curtis as insufficient to show any recognition or control by any board of county commissioners of the road as traveled through the Patrick ranch at the time he claims to have worked upon it, viz., in 1885 or 1886. In the first place his work at that time was confined to putting in a culvert at the northeast end and grading the road down on each side of the culvert. The northeast end was where this traveled road connected with the section line, or the road as surveyed according to the map and field notes, and it is not clear that any of the work referred to was south of the section line, or upon the road inclosed by the fence of defendant in error. Again it is left quite uncertain whether the road supervisor under whom he was working at the time gave any directions with special reference to that portion of the road running through the Patrick land. The witness was asked, when speaking of his work in 1885, if he was referring to the old Soldier Creek road running through the Patrick place, which he answered in the affirmative, and, then being asked under whose direction he worked upon it, he said: "Working for the road supervisors of Sheridan county." That was followed by this question and answer: "Q. Were you paid for this work that you did? A. I put in culverts and graded it whenever it was necessary." That is all of his testimony relating to his authority for working on the road.

In 1882 the statute provided for the division of each county into road districts, and the appointment by the county board of a road overseer in each district, who was given charge of all roads in his district, under the direction of the board of county commissioners. Laws 1882, c. 89. The act of 1886 provided for a road supervisor, with

authority to open, or cause to be opened, all roads that may have been, or shall be, laid out and established according to law, in any part of his district, and to keep the same in good repair. Laws 1886, c. 99. If it may be assumed that the overseer or supervisor, in regard to the work performed by Mr. Curtis, was engaged in carrying out the directions of the county board, we fail to find anything in the evidence as to the work done in 1885 or 1886 showing official recognition or knowledge of any part of the Soldier Creek road that deviated from the line defined upon the map by the field notes of that road. It was the duty of the county to show by satisfactory evidence some recognition or control by the proper county authorities of the traveled road in controversy covering a period of at least 10 years before the obstruction of the road, in order to establish a right in the public by prescription. This, in our opinion, it failed to do, even if the testimony of Mr. Curtis should be understood as stating that he was working, at the time mentioned, for the road supervisor of Johnson instead of Sheridan county. We need not therefore, reconsider whether it is proper to construe his testimony in that particular literally.
The application for rehearing will be denied.

BEARD and SCOTT, JJ., concur.

Appendix 15

15. Roads and Highways, ch. 26, 1869 Wyo. Sess. Laws 330.

GENERAL LAWS, 31

MEMORIALS AND RESOLUTIONS

OF THE

TERRITORY OF WYOMING,

PASSED AT THE FIRST SESSION

OF THE

LEGISLATIVE ASSEMBLY,

CONVENED AT

Cheyenne, October 12th, 1869,

AND ADJOURNED SINE DIE, DECEMBER 11TH, 1869,
TO WHICH ARE PREFIXED

DECLARATION OF INDEPENDENCE, CONSTITUTION OF THE UNITED STATES, AND THE ACT ORGANIZING THE TERRITORY,

TOGETHER WITH

EXECUTIVE PROCLAMATIONS.

PUBLISHED BY AUTHORITY.

CHEYENNE, W. T.
S. ALLAN BRISTOL, PUBLIC PRINTER, TRIBUNE OFFICE.
1870.

or officers having charge of such money or funds, who, but for this act, would be required to pay the same into the territorial treasury of Dakota.

This act to be a defense.

SEC. 2. This act shall be a full and complete defense to all such officers in any court in this territory, in which said officers, or any of them, shall be prosecuted for the non-payment of such money into the treasury of said Dakota territory.

SEC. 3. This act shall take effect and be in force from and after its passage.

Approved, December 9, 1869.

ROADS AND HIGHWAYS.

CHAPTER 26.

AN ACT CONCERNING ROADS AND HIGHWAYS.

Be it enacted by the Council and House of Representatives of the Territory of Wyoming:

What roads public highways

SEC. 1. All roads within this territory shall be considered public highways, which have been, or may hereafter be declared territorial roads by act of the legislative assembly, or which have been or may be declared public roads by the board of county commissioners of any county, within such county, or which have been, or shall hereafter be used and traveled by the public, so that the same would, according to the course of the common law, be deemed public highways.

Petition for changing road.

SEC. 2. Any person or persons desiring to have any territorial road changed, shall petition the board of county commissioners, which petition shall state the change asked to be made, and said petition shall be signed by at least two-thirds of all the house-holders residing within one mile of that portion of the road which it is desired to change.

Notices.

SEC. 3. It shall be the duty of the commissioners of any county in this territory, through which any territorial

road is, or may be located, in ten days after receiving any petitions as required in the preceding section, to post notices in three conspicuous places along the line of said road; said notices shall state the time and place, when and where they will meet, and such notices shall be posted at least ten days before said meeting.

County commissioners to view road.

SEC. 4. It shall be the duty of the county commissioners, or of a majority of them, to meet at the time and place specified in said notices, and proceed to view said road according to the prayer of said petitioners, and to hear such allegations as may be made for or against the change prayed for; and thereupon the board of commissioners may, in their discretion, by an order to be entered of record, particularly describing the changes made therein, re-locate such territorial road within their county, and such road or part thereof, upon payment of all damages occasioned by the opening of the same, as hereinafter mentioned, shall be, and stand in lieu of so much of such road as said commissioners shall declare vacated; *Provided*, That the line and direction of such road, shall in no county be changed further than necessary to straighten or locate the same upon better ground, or by a shorter or nearer route; nor shall the line of any such road of any county, be so changed that the same may not connect directly with the continuation of such road in any adjoining county or counties.

Proviso.

Petitioners to bear expense of viewing.

SEC. 5. Whenever a petition, signed by not less than fifteen house-holders of such county, shall be presented to the board of commissioners of any county praying for a public road to be laid out within such county, designating the termini and general course of such road, the petitioners shall deposit with the county clerk a sum sufficient to defray the expense of viewing the proposed road, to be fixed by the board of county commissioners, such board shall appoint a day for the hearing of such petition, and shall forthwith direct that some one of the petitioners, at his own expense, serve a written notice upon every person residing upon any of the lands across which it is proposed to lay out said road, setting out the substance of such petition, and the time

Persons on line of road to be served with notice.

appointed for hearing the same, and that the clerk post the like notice upon the door of his office not less than ten days before the hearing of such petition. Upon the day set for the hearing of such petition, if it appear that such notices have been given, as above required, the commissioners shall proceed to hear the allegations and objections of the petitioners, and of all persons objecting, and if it shall appear to them that such road is necessary, or that it is expedient to locate the same, they shall proceed to appoint three disinterested house-holders of the county as viewers, to view and locate such road, and to make, or cause to be made a survey and plat thereof, to determine the probable expense of opening the same, so that such road may be traveled, and to assess and equalize the damages and benefits which may accrue to any and all owners of lands over which such road is to be located. The county commissioners shall also at the time of the appointment of such road viewers, fix and publicly announce a day and place for the meeting of such viewers, not less than ten days subsequent to the day of such appointment.

Duties of commissioners.

Warrant of county clerk to be served by sheriff or deputy.

SEC. 6. Immediately after such appointment, the county clerk shall issue a warant directed to the viewers appointed, setting forth their appointment, and requiring them to meet on the day and at the place named by the board of county commissioners, and to proceed thence to view and locate such road, and survey or cause the same to be surveyed and platted, and return the said plat with their assessment of the damages and benefits, in each case accruing or resulting to the owners of any lands over which said road may pass, by reason of the location thereof, and the probable cost of opening such road to travel, into the office of the county clerk on the first day of the next regular meeting of the board of county commissioners. Such warrant shall be delivered to the sheriff, or to any of his deputies to be served, and the sheriff or his deputy as the case may be, shall serve the same by delivering a copy thereof to each of the persons named or indicated therein as viewers of such contemplated road; the original of such warrant shall be returned to the

county clerk with the endorsement of service thereon. Any person appointed a road viewer as provided in this act, who shall wilfully neglect or refuse to act, shall forfeit the sum of fifty dollars to the county, to be recovered by action of debt in the name of the county before any justice of the peace.

Refusal to . . .

SEC. 7. In case any person appointed a road viewer as provided in this act, shall refuse or be disqualified to act, or cannot be found, the board of county commissioners may appoint some other person to act in his stead.

Failure to make return.

SEC. 8. If the viewers appointed fail or omit to make their return on or before the day named in the warrant, for the return thereof, the same shall be deemed to be continued to such day as the county commissioners may designate, or until the next regular meeting of the board, if no day be designated.

Road, how designated.

SEC. 9. The viewers appointed shall designate and mark out such road as located by them, either by stakes or by turning a furrow upon both sides of the proposed road on prairie, meadow lands or plains, and by blazing trees, or by other appropriate and easily discernable land marks, in wooded lands or in mountainous regions.

Commissioners to decide whether or not located.

SEC. 10. Upon the return of such plat and assessment, the board of county commissioners shall proceed to consider the same, and all objections which may be made thereto, and they shall determine whether such road shall be opened and located or not; and if in their judgment it may appear beneficial or necessary, they may refer the matter of such viewing and assessment to the same or other viewers, with directions to report in like manner.

Damages.

SEC. 11. Whenever in any case, the damages accruing to any person by reason of the opening of such road, shall exceed the benefits to him, according to the report of the viewers, the excess shall be paid by the county, and the commissioners shall issue scrip therefor.

Road or highway, when damages are paid.

SEC. 12. Upon the payment of all such damages or the excess thereof, over the benefits, to the owners of any lands taken for the opening of any such road, such road shall,

upon the order of the county commissioners to that effect, be and become a public highway.

Where unlawful to locate.

SEC. 13. In locating or laying out any road under the provisions of this act, it shall not be lawful to locate the same through any dwelling house nor within thirty rods thereof, nor through any barn, stable, office, mill or other building, nor through any garden, orchard or stable-yard, appurtenant to any dwelling house, without consent of the owner of such premises.

Width of roads.

SEC. 14. All territorial and other public highways hereafter located and laid out under direction of the legislative assembly or county commissioners of any county shall not be less than sixty nor more than eighty feet in width.

Fords.

SEC. 15. When any public road heretofore laid out, or traveled as such, or hereafter to be laid out or traveled as a public road, crosses any stream of water, and such stream is at any time during the year, fordable where such road crosses, or shall cross the same, the said ford and the banks of the stream adjacent thereto, and the roadway or track usually traveled leading to and from such highway to and from such ford, shall be deemed and taken to be a part, portion and continuation of such public road and highway. Any person who shall obstruct any such ford, or the road leading thereto, or shall dig down the banks of such ford, or who shall erect any dam, embankment or other obstruction in such stream, or any wing dam, or other obstruction, upon the banks or edge of such stream, for the purpose of raising the water of such stream upon said ford, so as to render the said ford impassable or more difficult of passage than heretofore, or who shall maintain any such dam, wingdam, embankment or obstruction heretofore erected, after being required by the road overseer or other authorized person, of the district wherein the same is situated, to remove or abate the same, shall be liable to the same penalties as for obstructing a public highway.

Obstructions.

No toll bridge.

SEC. 16. No person or persons, company or corporation, shall, upon any pretense or authority, be permitted to erect

a toll bridge over any stream at road crossing, or so near there embankments, piers of such bri impassable the said ford or the r

SEC. 17. When any bridge public highway, the estimated fifty dollars, the work shall be constructed by contract; and th cause notices of such contract three consecutive weeks, in any the county, or if no newspape they shall cause written or pri to be let, to be posted in two such county, and one such no house, or of the building used thirty days before the letting contracts shall be awarded b the lowest responsible bidder hereby authorized to contract ments upon the public roa manner as provided in the ca when any bridge is to be buil as provided in this section, award such contract in such just and equitable for the co

SEC. 18. If any person cause to be erected or plac or public road, any obstruct encroach upon any public hi stones therein, or by erec structure therein, or if any destroy, or in any way m bridge upon any public hi shall pay a fine of not le more than three hundred d fine of twenty dollars for shall be suffered to rema have been given for the

a toll bridge over any stream at or upon any public ford or road crossing, or so near thereto as, by the abutments, embankments, piers of such bridge, to obstruct or render impassable the said ford or the roadway leading thereto.

Bridge when built by contract.

SEC. 17. When any bridge is to be built upon any public highway, the estimated cost of which shall exceed fifty dollars, the work shall be given out, and such bridge constructed by contract; and the county commissioners shall cause notices of such contract to be let to be published for three consecutive weeks, in any newspaper published within the county, or if no newspaper be published in the county they shall cause written or printed notices of such contract to be let, to be posted in two of the most public places in such county, and one such notice on the door of the court house, or of the building used as court house in such county, thirty days before the letting of such contract, and all such contracts shall be awarded by the county commissioners to the lowest responsible bidder; and the commissioners are hereby authorized to contract for other necessary improvements upon the public roads and highways in the same manner as provided in the case of bridges; *Provided*, That when any bridge is to be built or other improvement made, as provided in this section, the county commissioners may award such contract in such manner as to them shall appear just and equitable for the county.

Notices.

Proviso.

Obstructions.

SEC. 18. If any person shall wilfully erect, or place or cause to be erected or placed, within or upon any highway or public road, any obstruction, or shall wilfully obstruct or encroach upon any public highway, by felling trees or placing stones therein, or by erecting any fence, house or other structure therein, or if any person shall tear down, burn or destroy, or in any way maliciously or wilfully injure any bridge upon any public highway, every person so offending shall pay a fine of not less than one hundred dollars nor more than three hundred dollars for such obstruction, and a fine of twenty dollars for each day that such obstruction shall be suffered to remain in such road after notice shall have been given for the removal thereof; and for wilful or

malicious injury to any bridge as provided in this section,

Penalties. the penalty shall be four fold the cost, or estimated cost of repairing such damage, or imprisonmet therefor at the rate of one day's confinement for each two dollars of such damage.

Nor person to damage by water

SEC. 19. No person or persons, company or corporation, shall, by virtue of any franchise, charter or law granted, or made for any mining ditch, milling, irrigating or other purpose whatsoever, be permitted or allowed to dam the water of any stream in this territory, so that the water or waters raised by such damming shall flow back to a higher point or mark on the margin of such stream than high water mark, or so that the water thus dammed shall overflow any public road or highway running or being situated on the side or banks of such stream, or so as to cause the water so dammed to undermine, weaken or damage any bridges, walls or embankments of such road.

Penalties.

SEC. 20. Any person or persons, company or corporation violating the provisions of section nineteen of this act, shall be liable to a fine of not less than ten dollars, nor more than five hundred dollars, and shall also be liable to the party injured for any damages resulting therefrom.

Ditches to be bridged.

SEC. 21. Whenever the owner or owners of any ditch, race or drain for mining, milling, manufacturing or other purposes, shall fail, neglect or refuse to construct a bridge over such ditch or canal, whenever the same crosses a public highway, within thirty days after this act shall have been promulgated, by means of print in pamphlet or book form, or in any official newspaper, every such person or owner, and every officer and trustee of any company or corporation owning such ditch, shall be liable to a fine of fifty dollars, and a fine

Fine. of five dollars for every day that such ditch shall remain unbridged after the time specified in this section.

Tax.

SEC. 22. The board of county commissioners of each county shall levy such a tax for the purposes of this act as is provided and authorized by the law providing for a territorial and county revenue.

Fines, how recoverable.

SEC. 23. All fines, penalties and forfeitures provided by this act, when not otherwise specified, shall be recoverable

by action of debt in the name of the people of Wyoming territory, or by indictment before any court of competent jurisdiction. All such fines, penalties and forfeitures, shall be paid into the county treasury, and shall become a part of the fund for the construction and repair of roads and bridges.

SEC. 24. This act to be in force and take effect from and after the time specified in section twenty-one.

Approved 9th December, 1869.

GAMING.

CHAPTER 27.

AN ACT TO RESTRICT GAMING.

Be it enacted by the Council and House of Representatives of the Territory of Wyoming, as follows:

Misdemeanor, who guilty.

SEC. 1. Each and every person who shall deal, play, carry on, open or cause to be opened, or who shall conduct, either as owner or employe, whether for hire or not except under a license as herein after provided: Any game of faro, monte, roulette, lansquenette, rondo, vingtun, commonly known as twenty-one, keno, props, or any banking game played with cards, dice, or any other device, whether the same be played for money, checks, credits, or any other representatives of value, shall be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than three hundred, nor more than one thousand dollars, or by imprisonment not less than three months nor more than one year, or by both such fine and imprisonment.

Punishment.

Licenses.

SEC. 2. Any person may procure a license for carrying on any one of the games mentioned in section *one* of this act except as hereinafter provided, in any one room or apartment upon payment to the sheriff of the county in which the same is situated, the amount of license money fixed in section four of this act, and upon giving to said sheriff a definite description of the room in which he designs

Appendix 16

16. Roads and Highways, ch. 99, 1886 Wyo. Sess. Laws 375, 375.

SESSION LAWS

OF

WYOMING TERRITORY,

PASSED BY THE

Ninth Legislative Assembly,

CONVENED AT CHEYENNE,

ON THE

TWELFTH DAY OF JANUARY, 1886.

PUBLISHED BY AUTHORITY.

CHEYENNE, WYOMING
VAUGHAN & MONTGOMERY, PRINTERS AND BINDERS,
DEMOCRATIC LEADER OFFICE.

ing jurisdiction over such water district, by the person or persons, company or corporation, to whom the same is issued, within thirty days after the same is given by the surveyor, and such certificate, before the same is delivered, shall be verified by the surveyor or deputy making such measurements, and in such verification shall be stated and shown the average width of the ditch thus measured, on its top and bottom, slope of its banks and its grade, and giving in cubic inches its carrying capacity, and such certificate, thus verified, shall be received by the courts of this Territory as prima facie evidence of the carrying capacity of such ditch.

Compensation.

SEC. 4. The surveyor and his deputies shall receive such compensation for making said measurements as may be allowed by the district court, upon a showing made by the surveyor or his deputy, of the time occupied and expense incurred by him in making such measurement, and said court shall have authority and it shall be its duty, to apportion said expenses between the several owners of ditches within such water district.

In force.

SEC. 5. This act shall take effect and be in force from and after its passage.

Approved March 12, 1886.

CHAPTER 99.

Roads and Highways.

AN ACT concerning roads and highways.

Be it enacted by the Council and House of Representatives of the Territory of Wyoming:

County roads under supervision of commissioners.

SECTION 1. That all county roads shall be under the supervision of the board of county commissioners of the county wherein said road is located, and no county road shall be hereafter established, nor shall any such road be altered or vacated in any county in this Territory except by authority of the county commissioners of the proper county.

Road petitions.

SEC. 2. All applications for laying out, altering or locating county roads shall be by petition to the county commissioners of the proper county, signed by at least twelve householders of the county residing in the vicinity where said road is to be laid out, altered or located, which petition shall specify the place of beginning, the intermediate points, if any, and the terminus of said road.

Notice of petition

SEC. 3. When any petition shall be presented for the action of the county commissioners for the laying out, altering or vacating of any county road, it shall be accompanied by satisfactory proof that notice has been given, notifying all persons concerned that application will be made to the county commissioners at their regular session, for laying out, altering or vacating such road, as the case may be.

Viewers.

SEC. 4. Upon the presentation of such petition, and proof that notice has been given, as provided in the last section, the county commissioners shall, in their discretion, appoint three disinterested householders of the county as viewers of said road, and the county surveyor to survey the same, if the county commissioners deem it necessary to have a survey made of the same, and shall issue an order directing said viewers and surveyors, if appointed, on a day to be named in said order, or on their failing to meet on said day, within five days thereafter, to view survey if so ordered, and lay out or alter said road.

Duties of viewers

SEC. 5. That it shall be the duty of the viewers and surveyor appointed as aforesaid, after receiving at least five days previous notice by one of the petitioners, to meet at the time and place specified in the order of the county commissioners aforesaid, or within five days thereafter, and after taking an oath or affirmation, faithfully and impartially to discharge the duties of their appointments, shall proceed to view, survey if necessary, and lay out or alter said road as prayed for in the petition, as near as in their opinion a good road can be made at a reasonable expense, taking into consideration the utility, convenience, and inconvenience and expense which will result to individuals as well as to the public if such road shall be established and opened or altered. The county surveyer if appointed, shall survey under the direction of the viewers, and shall make out and deliver to one of the viewers a certified return of the survey of

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said road, and a plat of the same, and the viewers, or a majority of them, shall make and sign a report in writing, stating their opinion in favor of or against the establishment or altering of such road, and set forth the reasons of the same, which report, together with the plat and survey of said road or alteration, if made, shall be delivered to the county clerk by one of the viewers on or before the first of the session of the board of county commissioners next insuing; and it shall be the duty of the county commissioners on receiving the report of the viewers aforesaid, to cause the same to be publicly read on each day of the same meeting, and if notice shall have first been personally given of such reading, and the day on which the same shall be read at least ten days before such reading, to all persons owning the property through which said road is proposed to be laid out or altered, and if such notice cannot be personally given on any such person or persons, by reason of his or their absence from the Territory, then by publication as is now provided by law for constructive service in cases against non-residents; the notice herein above required shall be a written notice signed by the chairman of the board of county commissioners and attested by the clerk of said county and the seal thereof, directed to such person, advising of said petition to open or alter, as the case may be, a road, describing the same; that said change will affect the interests of such person in and to certain of his real estate, describing it as near as may be, and the time and place when the report of said viewers will be presented and received, and that he can if he so desires be present and object thereto, and if no remonstrance or petition for damages be filed, and the county commissioners being satisfied that such road will be of public utility, will order the report of the viewers' survey and plat to be recorded, and the commissioners shall issue an order directing said road to be opened; upon receiving said order the supervisor of the district in which said road may be located, shall proceed to open said road, and when said road is opened and in condition to be travelled, the county commissioners shall receive the same, after which time said road will be declared a public highway.

Duty of county commissioners.

SEC. 6. That in all cases where any oath or affirmation is required to be taken by any person under the provisions of this article, the same may be administered by

Oath administered by viewers.

one of the viewers who has been previously sworn; *Provided*, That it shall not be necessary to survey any county road, new road, or alteration in roads, if the county commissioners so direct.

Complaints.

SEC. 7. If any person through whose lands any county road may be viewed or marked out shall feel that he or she would be injured by the opening of the same, such person may make complaint thereof in writing to the county commissioners at the time the report of the viewers appointed to view said road is received, and if such complaint be made the county commissioners shall appoint three disinterested householders of the county, who shall meet at such time as may be designated by the commissioners, or at such time as may be agreed upon by such householders, and after having been duly sworn or affirmed to discharge their duty faithfully and impartially, shall proceed and view said proposed road the whole distance through the premises of the complainant, and assess and determine how much less valuable such premises of the complainant would be rendered by the opening of said road, and they shall report the same in writing to the county commissioners at their next regular session.

Payment of damages.

SEC. 8. If the county commissioners are satisfied that the amount of damages so assessed is just and equitable, and that the proposed road will be of sufficient importance to the public to cause the damages so assessed and determined to be paid by the county, the commissioners shall order the same to be paid to the complainant out of the county road fund; but if in the opinion of the county commissioners such proposed road is not of sufficient importance to the public to cause damages to be paid by the county, they shall refuse to establish the same as a public highway, unless the expenses or damages, or such part thereof as they may think proper, shall be paid by the petitioners.

Appeal to district court.

SEC. 9. Any complainant who may conceive himself aggrieved by the assessment of damages, as prescribed by the last two sections, may within thirty days after such report is adopted by the county commissioners, appeal therefrom to the district court of the proper county. Such appeal shall be taken to the district court in the same manner as appeals from justices of the peace, and if the appellant shall fail to recover a judgment for fifty dollars more than the amount appealed from, he shall pay all costs of appeal.

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Width of roads.

SEC. 10. All county roads shall be not less than sixty nor more than one hundred feet in width, unless the commissioners shall, upon the prayer of the petitioners for the same, determine on a less number of feet in point of width; *Provided*, That in the counties of Laramie and Crook all county roads shall be not less than sixty feet, nor more than five hundred feet in width as may be authorized by the board of county commissioners of such county; and *Provided further*, That in the county of Albany there may be one road leading to the Union Pacific railroad, of not exceeding five hundred feet in width as may be determined by the board of the county commissioners of such county.

Petition to change.

SEC. 11. If any person or persons through whose lands any public highway is or may be established shall be desirous of changing such road through any part of his or their lands, such person or persons may, by petition, apply to the county commissioners of the proper county to permit him or them to turn such road through any other part of his or their lands, on as good ground and without materially increasing the distance, without injury to the public, and on receipt of such petition, accompanied by a sufficient bond to pay the costs and expenses to be incurred thereby, the county commissioners may appoint three disinterested householders as viewers, and the county surveyor, if necessary, who, or a majority of such viewers, shall proceed to review the ground over which the road is proposed to be changed, and ascertain the distance such road will be increased by the proposed alteration and make out a report in writing, stating their opinions as to the utility of making such alterations, and if the viewers or a majority of them shall report to the county commissioners that the prayer of the petitioner or petitioners is reasonable, and upon receiving satisfactory evidence that the proposed new road has been opened a legal width, and in all respects made equal to the old road for the convenience of travelers, the commissioners shall declare such new road a public highway and make record thereof, and at the same time vacate so much of the old road as is not embraced in the new, and the person or persons petitioning for the alteration shall pay all costs and expense of view, survey if ordered, and return of such alteration.

Viewers—penalty for neglect of duty.

SEC. 12. If any viewer or viewers shall refuse or neglect to perform the duties required by this article

without making satisfactory excuse for such refusal or neglect, he shall be fined in any sum not exceeding ten dollars, to be recovered by an action before a justice of the peace of the proper county, which fine when collected shall be paid over without delay into the county treasury for the benefit of the road fund.

Private roads

SEC. 13. Any person whose land shall be so situated that it has no connection with any public road, may make application in writing to the county commissioners of his county at a regular session, for a private road leading from his premises to some convenient public road, and thereupon the said commissionere shall appoint three disinterested householders of the county as viewers, and cause an order to be issued directing them to meet on a day named in such order to view and locate a private road according to the application, and to assess the damages to be sustained thereby, and after being duly sworn or affirmed, faithfully and impartially to discharge the duties of their appointments, and after at least three days' notice given to all persons through whose lands such private road is to be located, such viewers shall proceed to locate and mark out a private road thirty feet in width, from certain point on the premises of the applicant to some certain point on the public road, so as to do the least possible damage to the lands through which such private road is located, and they shall also at the same time assess the damages sustained by the person and persons owning such land.

Gates.

SEC. 14. The viewers appointed in accordance with the provisions of the preceding sections of this article shall have power to determine in all cases whether or no gates shall be placed at proper points on said road, and assess damages in accordance with such determination.

Private roads, reports of viewers.

SEC. 15. The viewers so appointed, or a majority of them, shall make a report to the county commissioners at the next regular session of the private road so located by them, and also the amount of damages, if any, assessed by them, and the person or persons entitled to such damages, and if the commissioners are satisfied that such report is just, and after payment by the applicant of all costs of locating such road, and the damages assessed by the viewers, the commissioners shall order such report to be confirmed and declare such road to be a private road, and the same shall be recorded as such; and any person

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Road districts.

SEC. 16. The county commissioners shall, at their next regular meeting in May, divide their respective counties into road districts, and shall cause a brief description of each road district to be entered on the county records.

Road supervisor.

SEC. 17. There shall be in each organized county a road supervisor, who shall hold his office for two years, and until his successor is elected or appointed and qualified according to law, and such road supervisor shall be elected or appointed as by law provided in the case of county and precinct officers.

Qualification of road supervisor.

SEC. 18. Each supervisor shall hold his office for two years, unless sooner removed, and shall take an oath to faithfully discharge the duties of his office, and shall enter into an undertaking to the county with one or more sureties, to be approved by the county commissioners, in any sum specified by them, not to exceed one thousand dollars, to the effect that he shall faithfully account for all moneys collected by him, and perform the duties of his office according to law. The commissioners shall have power at any time to remove from office any supervisor who shall fail, neglect or refuse to perform the duties of his office.

Road tax.

SEC. 19. There shall be levied and collected on all taxable property in the county the sum of not less than one mill nor more than three mills on the dollar for road purposes. Also a special road tax of three dollars on each able-bodied man between the ages of twenty-one and fifty years, residing in the district; *Provided*, That any person liable to pay a special road tax, may work out such tax under the directions of the supervisor of the district where such person resides, and shall be allowed for such work the sum of three dollars per day. The several county treasurers are hereby authorized and empowered to collect all road tax, both special and ad valorem, levied in each year, as required by law for the collection of revenue; *Provided*, That any person producing the supervisor's certificate for labor done and performed, or for material furnished, on any road or bridge by or for the supervisor, shall be allowed the same on his special road tax; *Provided, also*, That no special road tax shall be required from any member of any organized fire company of any village or city.

Road labor.

SEC. 20. The supervisor must notify every person within his road district, subject to road labor as aforesaid, to perform one day's work in each year upon the public roads, and if any person subject to road labor as aforesaid shall, after three days notice either personally or by writing left at his usual place of abode by the supervisor or any other person under his direction, neglect or refuse to attend by himself, or suitable substitute, at the time and place designated by the supervisor, or shall pass his time in idleness or inattention to the labor or duties assigned to him, every such delinquent shall thereby become liable for the amount of his road tax in money, and if such person has no real or personal property assessed in his name, it shall be the duty of the supervisor to make complaint before the nearest justice of the peace, setting forth the facts of such notice and refusal to perform the labor or to pay the money, when, if such charge be sustained after a hearing, the delinquent shall be deemed guilty of a misdemeanor, and shall be fined twice the amount due from him for road tax, together with all costs. Such fine to be collected as in ordinary criminal actions, and be paid to the supervisor for the use of the road fund in his district.

Road labor, teams.

SEC. 21. Every person notified to labor on the public roads, under the provisions of this act, shall be required to appear at the place appointed by the supervisor, at the hour of eight o'clock in the forenoon, with such necessary tools and implements as said supervisor may direct; *Provided*, Such person is the owner of such tools and implements, and work industriously and diligently, doing at least eight hours faithful labor in each day at such work and in such manner as shall be directed by the supervisor, and such supervisor may, if he deem it necessary, order any resident of his district, from whom road work or tax is due and owing, to furnish a team of horses, mules or oxen, and wagon, cart, scraper or plow, to be employed or used on the roads under the direction of the supervisor, and shall allow such person a reasonable compensation for the use of such team, wagon, cart, scraper or plow, which shall be allowed by the board of county commissioners, on such order of the supervisor, out of the general road fund of the county, less the special road tax due from such person.

Condition of roads.

SEC. 22. The supervisor of roads shall open, or cause to be opened, all public roads which may have been, or

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may hereafter be, laid out and established according to law, in any part of his road district, and shall keep the same in good repair; and if the labor in his district is not sufficient for that purpose, the supervisors shall have power and authority to call out all persons liable to road tax for one or more days labor, and if such labor is not sufficient, the board of commissioners are hereby authorized, at their discretion, to appropriate from the general road fund any amount they see fit for the use and benefit of such road district.

Drains.

SEC. 23. The road supervisor shall have authority to cut, open or construct such drains or ditches as he shall deem necessary for the making and preserving of such roads, doing as little injury as may be to the lands, and any person stopping or obstructing the drains or ditches so made, shall forfeit the sum of twenty dollars, to be recovered by the supervisor in a civil action, as before provided. If any person shall feel aggrieved by the act of any supervisor, cutting or carrying away any timber or stone, as aforesaid, he may make complaint in writing to the county commissioners, who shall allow any damages they may see fit, and pay the same out of the road fund. The county commissioners may authorize the supervisors to purchase any plows, scrapers, or other implements that they may think proper for the use of any road district, and pay for the same out of the general road fund.

Obstructions.

SEC. 24. If at any time during the year any public road shall become obstructed by snow, or from any other cause, or any bridge shall need repairing or become dangerous for the passage of teams or travelers, the supervisor of the road, upon being notified thereof, shall forthwith cause such obstruction to be removed or bridge repaired, for which purpose he shall immediately order out such number of inhabitants of his district as he may deem necessary to remove such obstruction, or to repair such bridge, and all persons so ordered out shall, after having received one day's notice, be subject to the same restrictions as if ordered out under the provisions of section twenty of this act.

Certificate of extra labor.

SEC. 25. In all cases under the preceding section, where any person has performed labor on the public roads in removing obstructions, or repairing bridges, the supervisor shall give such person a certificate specifying the amount of extra labor so performed, which certificate may be transferred and received in discharge of the labor

of any other person within the same district to the amount of labor specified in such certificate, or may be received from the holder in satisfaction of labor on the roads in such district on any subsequent year for the amount of labor specified therein.

Compensation of supervisors of roads.

SEC. 26. Every supervisor of roads shall receive for each day necessarily employed in the performance of any of the duties required by this act, the sum of five dollars, to be paid out of the general road fund, and it shall be the duty of the supervisor to report to the board of county commissioners at their regular meeting in December in each year, a sworn statement of all moneys collected by them; they shall also present a sworn statement of the number of days' work done in their district each year, and by whom performed.

Presumptions in actions to recover delinquent road taxes.

SEC. 27. In an action by the supervisor to recover delinquent road tax, herein provided, the presumption shall be that the defendant was duly notified to work the road, and failed and neglected so to do, and that he had no real or personal property listed to him during the current year. No property is exempt from execution and sale for a delinquent road tax.

Fines against supervisor of roads.

SEC. 28. Any supervisor of roads who shall neglect or refuse to perform the several duties enjoined upon him by the provisions of this act, or who shall under any pretense whatever give or sign any receipt or certificate for money received or labor performed unless the money shall have been received or the labor performed prior to the giving or signing of such receipt or certificate, shall forfeit for each offense not less than five nor more than twenty dollars, to be recovered before any court having jurisdiction, and it shall be the duty of the county commissioners to sue for the same in the name of the county.

Compensation of surveyor.

SEC. 29. The county surveyor while employed under the provisions of this act shall receive as compensation the sum of eight dollars per day, and each viewer the the sum of five dollars per day for each day necessarily employed in such labor, surveying or laying out roads under the supervision of the county commissioners.

Parallel roads; water roads timber roads.

SEC. 30. County roads running parallel shall not be nearer than one mile, and upon the presentation of a petition signed by at least five freeholders of any neighborhood praying for passage to the various water courses for stock purposes, the commissioners may at

their discretion establish such passageway as provided for in section fifteen of this act. This section shall also apply to the opening and establishment of neighborhood roads running to timber.

Guide boards.

SEC. 31. Every supervisor shall erect, or cause to be erected, and keep up at the forks of every highway and every crossing of public roads within his district, a guide or finger board containing an inscription in legible letters, directing the way and specifying the distance to the next town or public place situated on each road respectively, subject to the board of county commissioners.

Ford.

SEC. 32. When any public road, heretofore laid out or traveled as such, or hereafter to be laid out or traveled as a public road, crosses any stream of water, and such stream is at any time during the year fordable where such road crosses or shall cross the same, the said ford and the banks of the stream adjacent thereto, and the roadway or track usually traveled leading to and from such highway, to and from such ford, shall be deemed and taken to be a part, portion and continuation of such public road and highway. Any person who shall obstruct any such ford, or the road leading thereto, or shall dig down the banks of such ford, or who shall erect any dam, embankment or other obstruction in such stream, or any wing dam or other obstruction upon the banks or edge of such stream, for the purpose of raising the water of such stream upon said ford so as to render the said ford impassable or more difficult of passage than heretofore, or who shall maintain any such dam, wing dam, embankment or obstruction heretofore erected, after being requested by the road supervisor, or other authorized person of the district wherein the same is situated, to remove or abate the same, shall be liable to the same penalties as for obstructing a public highway.

Toll bridges.

SEC. 33. No person or persons, company or corporation, shall, upon any pretense or authority, be permitted to erect a toll bridge over any stream at or upon any public ford or road crossing, or so near thereto as by the abutments, embankments or piers of such bridge, to obstruct or render impassable the said ford, or the road leading thereto.

Bridges.

SEC. 34. When any bridge is to be built upon any public highway, the estimated cost of which shall exceed fifty dollars, the work shall be given out, and such bridge

constructed by contract, and the county commissioners shall cause notices of such contract to be let to be published for three consecutive weeks in any newspaper published within the county, or if no newspaper be published in the county they shall cause written or printed notices of such contract to be let, to be posted in two of the most public places in such county, and one such notice on the door of the court house, or of the building used as court house in such county, thirty days before the letting of such contract, and all such contracts shall be awarded by the county commissioners to the lowest responsible bidder, and the commissioners are hereby authorized to contract for other necessary improvements upon the public roads and highways in the same manner as provided in the case of bridges; *Provided*, That when any bridge is to be built or other improvement made as provided in this section, the county commissioners may award such contract in such manner as to them shall appear just and equitable for the county.

Obstructions.

SEC. 35. If any person shall wilfully erect or cause to be erected or placed within or upon any highway or public road any obstruction, or shall wilfully obstruct or encroach upon any public highway by felling trees or placing stones therein, or by erecting any fence, house or other structure therein, and if any person shall tear down, burn or destroy, or in any way maliciously or wilfully injure any bridge upon any public highway, every person so offending shall pay a fine of not less than twenty-five dollars nor more than one hundred dollars for any obstruction, and a fine of ten dollars for each day that such obstruction shall be suffered to remain in such road after notice shall have been given for the removal thereof; and for wilful or malicious injury to any bridge as provided in this section, the penalty shall be four-fold the cost or estimated cost of repairing such damage, or imprisonment therefor at the rate of one day's confinement for each two dollars of such damage.

Overflowing roads.

SEC. 36. No person or persons, company or corporation, shall, by virtue of any franchise, charter or law granted or made for any mining, ditch, milling, irrigating or other purpose whatsoever, be permitted or allowed to dam the water or waters of any stream in this Territory so that the water or waters raised by such damming shall flow back to a higher point or mark on the margin of such stream than high water-mark, or so that the

water thus dammed shall overflow any public road or highway, or undermine, weaken or damage any bridge, walls or embankments of such road, nor shall any person, company or corporation, owning or controlling any ditch, allow any waste water from the same to flow upon or across any established road or highway.

Fines. SEC. 37. Any person or persons, company or corporation, violating the provisions of section thirty-six of this act, shall be liable to a fine not to exceed one hundred dollars, and shall also be liable to the party injured for any damages resulting therefrom.

Tax levy. SEC. 38. The board of county commissioners of each county shall levy a tax for the purposes of this act as is provided and authorized by law, providing for a territorial and county revenue.

Recovery of fines, etc. SEC. 39. All fines, penalties and forfeitures provided by this act, when not otherwise specified, shall be recoverable by action of debt in the name of the people of Wyoming Territory, or by indictment before any court of competent jurisdiction. All such fines, penalties and and forfeitures shall be paid into the county treasury, and shall become a part of the fund for the construction and repair of roads and bridges.

Repeal. SEC. 40. That chapter one hundred and two, of the compiled laws of Wyoming, being "An act concerning roads and highways," approved December ninth, eighteen hundred and sixty-nine; and also an act entitled "An act to amend an act concerning roads and highways," of the session laws of Wyoming, approved December twelfth, eighteen hundred and seventy-seven, be and the same are hereby repealed; *Provided, however*, That nothing herein contained shall be construed to affect the validity of any act done or right accrued under and by virtue of the law hereby repealed. Construction.

In force. SEC. 41. This act shall take effect and be in force from and after its passage.

Approved March 12, 1886.

Appendix 17

17. Rev. Stat. of Wyo., tit. 44, § 3859-3899 (1887).

BY AUTHORITY OF THE LEGISLATIVE ASSEMBLY.

REVISED STATUTES

OF

WYOMING.

IN FORCE JANUARY 1, 1887.

INCLUDING

THE DECLARATION OF INDEPENDENCE, THE ARTICLES OF CONFEDERATION, THE CONSTITUTION OF THE UNITED STATES, THE ORGANIC ACT OF WYOMING,

AND ALL

LAWS OF CONGRESS AFFECTING THE TERRITORIAL GOVERNMENT.

PREPARED AND EDITED BY

JOHN W. BLAKE, WILLIS VAN DEVANTER,

AND

ISAAC P. CALDWELL,

COMMISSIONERS.

CHEYENNE, WYOMING:
THE DAILY SUN STEAM PRINTING HOUSE.
1887.

TITLE 44. ROADS AND HIGHWAYS.

CHAPTER 1.

ROADS AND BRIDGES.

County commissioners to control roads.

SEC. 3859. All county roads shall be under the supervision of the board of county commissioners of the county wherein said road is located, and no county road shall be hereafter established, nor shall any such road be altered or vacated in any county in this territory except by authority of the county commissioners of the proper county. [S. L. 1886, ch. 99, § 1.]

Requisites of road petition.

SEC. 3860. All applications for laying out, altering or locating county roads shall be by petition to the county commissioners of the proper county, signed by at least twelve householders of the county residing in the vicinity where said road is to be laid out, altered or located, which petition shall specify the place of beginning, the intermediate points, if any, and the terminus of said road. [S. L. 1886, ch. 99, § 2.]

Notice of presenting petition.

SEC. 3861. When any petition shall be presented for the action of the county commissioners for the laying out, altering or vacating of any county road, it shall be accompanied by satisfactory proof that notice has been given, notifying all persons concerned that application will be made to the county commissioners at their regular session, for laying out, altering or vacating such road, as the case may be. [S. L. 1886, ch. 99, § 3.]

Appointment of viewers—Surety.

SEC. 3862. Upon the presentation of such petition, and proof that notice has been given, as provided in the last section, the county commissioners shall, in their discretion, appoint three disinterested householders of the county as

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viewers of said road, and the county surveyor to survey the same, if the county commissioners deem it necessary to have a survey made of the same, and shall issue an order directing said viewers and surveyors, if appointed, on a day to be named in said order, or on their failing to meet on said day, within five days thereafter, to view survey if so ordered, and lay out or alter said road. [S. L. 1886, ch. 99, § 4.]

Duties, oath and report of viewers—Proceedings by commissioners.

SEC. 3863. It shall be the duty of the viewers and surveyor appointed as aforesaid, after receiving at least five days previous notice by one of the petitioners, to meet at the time and place specified in the order of the county commissioners aforesaid, or within five days thereafter, and after taking an oath or affirmation, faithfully and impartially to discharge the duties of their appointments, shall proceed to view, survey if necessary, and lay out or alter said road as prayed for in the petition, as near as in their opinion a good road can be made at a reasonable expense, taking into consideration the utility, convenience, and inconvenience and expense which will result to individuals as well as to the public if such road shall be established and opened or altered. The county surveyor if appointed, shall survey under the direction of the viewers, and shall make out and deliver to one of the viewers a certified return of the survey of said road, and a plat of the same, and the viewers, or a majority of them, shall make and sign a report in writing, stating their opinion in favor of or against the establishment or altering of such road, and set forth the reasons of the same, which report, together with the plat and survey of said road or alteration, if made, shall be delivered to the county clerk by one of the viewers on or before the first of the session of the board of county commissioners next ensuing; and it shall be the duty of the county commissioners on receiving the report of the viewers aforesaid, to cause the same to be publicly read on each day of the same meeting, and if notice shall have first been personally given of such reading, and the day on which the same shall be read at least ten days before such reading, to all persons owning the property through which said road is proposed to be laid out or altered, and if such notice cannot be personally given on any such person or persons, by reason of his or their absence from the territory, then by publication as is now provided by law for constructive service in cases against non-residents; the notice herein above required shall be a written notice signed by the chairman of the board of county commissioners and attested by the clerk of said county and the seal thereof, directed to such person, advising of said petition to open or alter, as the case may be, a road, describing the same; that said change will affect the interests of such person in and to certain of his real estate, describing it as near as may be, and the time and place when the report of said viewers will be presented and received, and that he can if he so desires be present and object thereto, and if no remonstrance or petition for damages be filed, and the county commissioners being satisfied that such road will be of public utility, will order the report of the viewers' survey and plat to be recorded, and the commissioners shall issue an order directing said road to be opened; upon receiving said order the supervisor of the district in which said road may be located, shall proceed to open said road, and when said road is opened and in condition to be traveled, the county commissioners shall receive the same, after which time said road will be declared a public highway. [S. L. 1886, ch. 99, § 5.]

Viewers may administer oaths.

SEC. 3864. In all cases where any oath or affirmation is required to be taken by any person under the provisions of this chapter, the same may be administered by one of the viewers who has been previously sworn: *Provided*, That it shall not be necessary to survey any county road, new road, or alteration in roads, if the county commissioners so direct. [S. L. 1886, ch. 99, § 6.]

Complaint for damages—Appraisers.

SEC. 3865. If any person through whose lands any county road may be viewed or marked out shall feel that he or she would be injured by the opening of the same, such person may make complaint thereof in writing to the county commissioners at the time the report of the viewers appointed to view said road is received, and if such complaint be made the county commissioners shall appoint three disinterested householders of the county, who shall meet at such time as may be designated by the commissioners, or at such time as may be agreed upon by such householders, and after having been duly sworn or affirmed to discharge their duty faithfully and impartially, shall proceed and view said proposed road the whole distance through the premises of the complainant, and assess and determine how much less valuable such premises of the complainant would be rendered by the opening of said road, and they shall report the same in writing to the county commissioners at their next regular session. [S. L. 1886, ch. 99, § 7.]

When damages assessed to be paid by county.

SEC. 3866. If the county commissioners are satisfied that the amount of damages so assessed is just and equitable, and that the proposed road will be of sufficient importance to the public to cause the damages so assessed and determined to be paid by the county, the commissioners shall order the same to be paid to the complainant out of the county road fund; but if in the opinion of the county commissioners such proposed road is not of sufficient importance to the public to cause damages to be paid by the county, they shall refuse to establish the same as a public highway, unless the expenses or damages, or such part thereof as they may think proper, shall be paid by the petitioners. [S. L. 1886, ch. 99, § 8.]

Appeal to district court—Costs.

SEC. 3867. Any complainant who may conceive himself aggrieved by the assessment of damages, as prescribed by the last two sections, may within thirty days after such report is adopted by the county commissioners, appeal therefrom to the district court of the proper county. Such appeal shall be taken to the district court in the same manner as appeals from justices of the peace, and if the appellant shall fail to recover a judgment for fifty dollars more than the amount appealed from, he shall pay all costs of appeal. [S. L. 1886, ch. 99, § 9.]

Width of roads.

SEC. 3868. All county roads shall shall be not less than sixty nor more than one hundred feet in width, unless the commissioners shall, upon the prayer of the petitioners for the same, determine on a less number of feet in point of width; *Provided*, That in the Counties of Laramie and Crook all county roads shall be not less than sixty feet, nor more than five hundred feet in width as may be authorized by the board of county commissioners of such county; *And provided further*, That in the County of Albany there may be one road leading to the Union Pacific railroad, of not exceeding five hundred feet in width as may be determined by the board of the county commissioners of such county. [S. L. 1886, ch. 99, § 10.]

Petition to change road and proceedings thereon.

SEC. 3869. If any person or persons through whose lands any public highway is or may be established shall be desirous of changing such road through any part of his or their lands, such person or persons may, by petition, apply to the county commissioners of the proper county to permit him or them to turn such road through any other part of his or their lands, on as good ground and without materially increasing the distance, without injury to the public, and on receipt of such petition, accompanied by a sufficient bond to pay the costs and expenses to be incurred thereby, the county commissioners may

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appoint three disinterested householders as viewers, and the county surveyor, if necessary, who, or a majority of such viewers, shall proceed to review the ground over which the road is proposed to be changed, and ascertain the distance such road will be increased by the proposed alteration and make out a report in writing, stating their opinions as to the utility of making such alterations, and if the viewers, or a majority of them, shall report to the county commissioners that the prayer of the petitioner or petitioners is reasonable, and upon receiving satisfactory evidence that the proposed new road has been opened a legal width, and in all respects made equal to the old road for the convenience of travelers, the commissioners shall declare such new road a public highway and make record thereof, and at the same time vacate so much of the old road as is not embraced in the new, and the person or persons petitioning for the alteration shall pay all costs and expense of view, survey if ordered, and return of such alteration. [S. L. 1886, ch. 99, § 11.]

Neglect of duty by viewer—Penalty.

SEC. 3870. If any viewer or viewers shall refuse or neglect to perform the duties required by this chapter without making satisfactory excuse for such refusal or neglect, he shall be fined in any sum not exceeding ten dollars, to be recovered by an action before a justice of the peace of the proper county, which fine when collected shall be paid over without delay into the county treasury for the benefit of the road fund. [S. L. 1886, ch. 99, § 12.]

Petition for private road and proceedings thereon.

SEC. 3871. Any person whose land shall be so situated that it has no connection with any public road, may make application in writing to the county commissioners of his county at a regular session, for a private road leading from his premises to some convenient public road, and thereupon the said commissioners shall appoint three disinterested householders of the county as viewers, and cause an order to be issued directing them to meet on a day named in such order to view and locate a private road according to the application, and to assess the damages to be sustained thereby, and after being duly sworn or affirmed, faithfully and impartially to discharge the duties of their appointments, and after at least three days notice given to all persons through whose lands such private road is to be located, such viewers shall proceed to locate and mark out a private road thirty feet in width, from certain point on the premises of the applicant to some certain point on the public road, so as to do the least possible damage to the lands through which such private road is located, and they shall also at the same time assess the damages sustained by the person and persons owning such land. [S. L. 1886, ch. 99, § 13.]

Gates on private roads.

SEC. 3872. The viewers appointed in accordance with the provisions of the preceding section shall have power to determine in all cases whether or no gates shall be placed at proper points on said road, and assess damages in accordance with such determination. [S. L. 1886, ch. 99, § 14.]

Report of viewers on private road—Confirmation by commissioners.

SEC. 3873. The viewers so appointed, or a majority of them, shall make a report to the county commissioners at the next regular session of the private road so located by them, and also the amount of damages, if any, assessed by them, and the person or persons entitled to such damages, and if the commissioners are satisfied that such report is just, and after payment by the applicant of all costs of locating such road, and the damages assessed by the viewers, the commissioners shall order such report to be confirmed and declare such road to be a private road, and the same shall be recorded as such; and any person aggrieved by the assessment of damages may appeal, within thirty days, to the district court. [S. L. 1886, ch. 99, § 15.]

Counties to be divided into districts.

SEC. 3874. The county commissioners shall, at their next regular meeting in May, divide their respective counties into road districts, and shall cause a brief description of each road district to be entered on the county records. [S. L. 1886, ch. 99, § 16.]

Road supervisor—Election and term of office.

SEC. 3875. There shall be in each organized county a road supervisor, who shall hold his office for two years, and until his successor is elected or appointed and qualified according to law, and such road supervisor shall be elected or appointed as by law provided in the case of county and precinct officers. [S. L. 1886, ch. 99, § 17.]

Oath and bond of supervisor.

SEC. 3876. Each supervisor shall hold his office for two years, unless sooner removed, and shall take an oath to faithfully discharge the duties of his office, and shall enter into an undertaking to the county with one or more sureties, to be approved by the county commissioners, in any sum specified by them, not to exceed one thousand dollars, to the effect that he shall faithfully account for all moneys collected by him, and perform the duties of his office according to law. The commissioners shall have power at any time to remove from office any supervisor who shall fail, neglect or refuse to perform the duties of his office. [S. L. 1886, ch. 99, § 18.]

Tax levy for road purposes - Special road tax.

SEC. 3877. There shall be levied and collected on all taxable property in the county the sum of not less than one mill nor more than three mills on the dollar for road purposes. Also a special road tax of three dollars on each able-bodied man between the ages of twenty-one and fifty years, residing in the district; *Provided*, That any person liable to pay a special road tax, may work out such tax under the directions of the supervisor of the district where such person resides, and shall be allowed for such work the sum of three dollars per day. The several county treasurers are hereby authorized and empowered to collect all road tax, both special and *ad valorem*, levied in each year as required by law for the collection of revenue; *Provided*, That any person producing the supervisor's certificate for labor done and performed, or for material furnished on any road or bridge by order of the supervisor, shall be allowed the same on his special road tax; *Provided also*, That no special road tax shall be required from any member of any organized fire company of any village or city. [S. L. 1886, ch. 99, § 19.]

Refusal to work out special road tax -Penalty.

SEC. 3878. The supervisor must notify every person within his road district, subject to road labor as aforesaid, to perform one day's work in each year upon the public roads, and if any person subject to road labor as aforesaid shall, after three days notice, either personally or by writing left at his usual place of abode by the supervisor or any other person under his direction, neglect or refuse to attend by himself or suitable substitute, at the time and place designated by the supervisor, or shall pass his time in idleness or inattention to the labor or duties assigned to him, every such delinquent shall thereby become liable for the amount of his road tax in money, and if such person has no real or personal property assessed in his name, it shall be the duty of the supervisor to make complaint before the nearest justice of the peace, setting forth the facts of such notice and refusal to perform the labor or to pay the money, when, if such charge be sustained after a hearing, the delinquent shall be deemed guilty of a misdemeanor, and shall be fined twice the amount due from him for road tax, together with all costs. Such fine to be collected as in ordinary criminal actions, and be paid to the supervisor for the use of the road fund in his district. [S. L. 1886, ch. 99, § 20.]

Supervisor to control labor on roads.

SEC. 3879. Every person notified to labor on the public roads, under the provisions of this chapter, shall be required to appear at the place appointed by the supervisor, at the hour of eight o'clock in the forenoon, with such necessary tools and implements as said supervisor may direct; *Provided*, Such person is the owner of such tools and implements, and work industriously and diligently, doing at least eight hours faithful labor in each day at such work and in such manner as shall be directed by the supervisor, and such supervisor may, if he deem it necessary, order any resident of his district, from whom road work or tax is due and owing, to furnish a team of horses, mules or oxen, and wagon, cart, scraper or plow, to be employed or used on the roads under the direction of the supervisor, and shall allow such person a reasonable compensation for the use of such team, wagon, cart, scraper or plow, which shall be allowed by the board of county commissioners, on such order of the supervisor, out of the general road fund of the county, less the special road tax due from such person. [S. L. 1886, ch. 99, § 21.]

Supervisor to keep roads in repair.

SEC. 3880. The supervisor of roads shall open, or cause to be opened, all public roads which may have been, or may hereafter be, laid out and established according to law, in any part of his road district, and shall keep the same in good repair; and if the labor in his district is not sufficient for that purpose, the supervisor shall have power and authority to call out all persons liable to road tax for one or more days labor, and if such labor is not sufficient, the board of commissioners are hereby authorized, at their discretion, to appropriate from the general road fund any amount they see fit for the use and benefit of such road district. [S. L. 1886, ch. 99, § 22.]

Road ditches- Implements and materials for road work.

SEC. 3881. The road supervisor shall have authority to cut, open or construct such drains or ditches as he shall deem necessary for the making and preserving of such roads, doing as little injury as may be to the lands, and any person stopping or obstructing the drains or ditches so made, shall forfeit the sum of twenty dollars, to be recovered by the supervisor in a civil action, as before provided. If any person shall feel aggrieved by the act of any supervisor, cutting or carrying away any timber or stone, as aforesaid, he may make complaint in writing to the county commissioners, who shall allow any damages they may see fit, and pay the same out of the road fund. The county commissioners may authorize the supervisors to purchase any plows, scrapers, or other implements that they may think proper for the use of any road district, and pay for the same out of the general road fund. [S. L. 1886, ch. 99, § 23.]

Supervisor to remove obstructions.

SEC. 3882. If at any time during the year any public road shall become obstructed by snow, or from any other cause, or any bridge shall need repairing or become dangerous for the passage of teams or travelers, the supervisor of the road, upon being notified thereof, shall forthwith cause such obstruction to be removed or bridge repaired, for which purpose he shall immediately order out such number of inhabitants of his district as he may deem necessary to remove such obstruction, or to repair such bridge, and all persons so ordered out shall, after having received one days notice, be subject to the same restrictions as if ordered out under the provisions of section thirty-eight hundred and seventy-eight. [S. L. 1886, ch. 99, § 24.]

Certificate for extra labor performed.

SEC. 3883. In all cases under the preceding section, where any person has performed labor on the public roads in removing obstructions, or repairing bridges, the supervisor shall give such person a certificate specifying the

amount of extra labor so performed, which certificate may be transferred and received in discharge of the labor of any other person within the same district to the amount of labor specified in such certificate, or may be received from the holder in satisfaction of labor on the roads in such district on any subsequent year for the amount of labor specified therein. [S. L. 1886, ch. 99, § 25.]

Compensation and report of supervisors.

SEC. 3884. Every supervisor of roads shall receive for each day necessarily employed in the performance of any of the duties required by this chapter, the sum of five dollars, to be paid out of the general road fund, and it shall be the duty of the supervisor to report to the board of county commissioners at their regular meeting in December in each year, a sworn statement of all moneys collected by them; they shall also present a sworn statement of the number of days work done in their district each year, and by whom performed. [S. L. 1886, ch. 99, § 26.]

Presumptions in action to recover road tax.

SEC. 3885. In an action by the supervisor to recover delinquent road tax, herein provided, the presumption shall be that the defendant was duly notified to work the road, and failed and neglected so to do, and that he had no real or personal property listed to him during the current year. No property is exempt from execution and sale for a delinquent road tax. [S. L. 1886, ch. 99, § 27.]

Malfeasance of supervisor—Penalty.

SEC. 3886. Any supervisor of roads who shall neglect or refuse to perform the several duties enjoined upon him by the provisions of this chapter, or who shall under any pretense whatever give or sign any receipt or certificate for money received or labor performed, unless the money shall have been received or the labor performed prior to the giving or signing of such receipt or certificate, shall forfeit for each offense not less than five nor more than twenty dollars, to be recovered before any court having jurisdiction, and it shall be the duty of the county commissioners to sue for the same in the name of the county. [S. L. 1886, ch. 99, § 28.]

Compensation of surveyor.

SEC. 3887. The county surveyor, while employed under the provisions of this chapter, shall receive as compensation the sum of eight dollars per day, and each viewer the sum of five dollars per day for each day necessarily employed in such labor, surveying or laying out roads, under the supervision of the county commissioners. [S. L. 1886, ch. 99, § 29.]

Parallel roads—Water roads—Timber roads.

SEC. 3888. County roads running parallel shall not be nearer than one mile, and upon the presentation of a petition signed by at least five freeholders of any neighborhood praying for passage to the various water courses for stock purposes, the commissioners may, at their discretion, establish such passageway as provided for in section thirty-eight hundred and seventy-three. This section shall also apply to the opening and establishment of neighborhood roads running to timber. [S. L. 1886, ch. 99, § 30.]

Guide boards to be erected by supervisor.

SEC. 3889. Every supervisor shall erect or cause to be erected and keep up at the forks of every highway and every crossing of public roads within his district, a guide or finger board containing an inscription in legible letters directing the way and specifying the distance to the next town or public place situated on each road respectively, subject to the board of county commissioners. [S. L. 1886, ch. 99, § 31.]

Fords—Penalty for obstructing same.

SEC. 3890. When any public road heretofore laid out or traveled as such or hereafter to be laid out or traveled as a public road, crosses any stream of

water, and such stream is at any time during the year fordable where such road crosses or shall cross the same, the said ford and the banks of the stream adjacent thereto, and the roadway or track usually traveled leading to and from such highway, to and from such ford, shall be deemed and taken to be a part, portion and continuation of such public road and highway. Any person who shall obstruct any such ford or the road leading thereto, or shall dig down the banks of such ford, or who shall erect any dam, embankment or other obstruction in such stream, or any wing dam or other obstruction upon the banks or edge of such stream, for the purpose of raising the water of such stream upon said ford so as to render the said ford impassable or more difficult of passage than heretofore, or who shall maintain any such dam, wing dam, embankment or obstruction heretofore erected, after being requested by the road supervisor or other authorized person of the district wherein the same is situated, to remove or abate the same, shall be liable to the same penalties as for obstructing a public highway. [S. L. 1886, ch. 99, § 32.]

Toll bridges not to obstruct fords.

SEC. 3891. No person or persons, company or corporation, shall, upon any pretense or authority, be permitted to erect a toll bridge over any stream at or upon any public ford or road crossing, or so near thereto as by the abutments, embankments or piers of such bridge, to obstruct or render impassable the said ford, or the road leading thereto. [S. L. 1886, ch. 99, § 33.]

Limitation upon contracting for bridge work.

SEC. 3892. When any bridge is to be built upon any public highway, the estimated cost of which shall exceed fifty dollars, the work shall be given out, and such bridge constructed by contract, and the county commissioners shall cause notices of such contract to be let to be published for three consecutive weeks in any newspaper published within the county, or if no newspaper be published in the county they shall cause written or printed notices of such contract to be let, to be posted in two of the most public places in such county, and one such notice on the door of the court house, or of the building used as court house in such county, thirty days before the letting of such contract, and all such contracts shall be awarded by the county commissioners to the lowest responsible bidder, and the commissioners are hereby authorized to contract for other necessary improvements upon the public roads and highways in the same manner as provided in the case of bridges; *Provided*, That when any bridge is to be built or other improvement made as provided in this section, the county commissioners may award such contract in such manner as to them shall appear just and equitable for the county. [S. L. 1886, ch. 99, § 34.]

Obstructing roads or injuring bridge—Penalty.

SEC. 3893. If any person shall wilfully erect or cause to be erected or placed within or upon any highway or public road any obstruction, or shall wilfully obstruct or encroach upon any public highway by felling trees or placing stones therein, or by erecting any fence, house or other structure therein, and if any person shall tear down, burn or destroy, or in any way maliciously or wilfully injure any bridge upon any public highway, every person so offending shall pay a fine of not less than twenty-five dollars nor more than one hundred dollars for any obstruction, and a fine of ten dollars for each day that such obstruction shall be suffered to remain in such road after notice shall have been given for the removal thereof; and for wilful or malicious injury to any bridge as provided in this section, the penalty shall be four-fold the cost or estimated cost of repairing such damage, or imprisonment therefor at the rate of one days confinement for each two dollars of such damage. [S. L. 1886, ch. 99, § 35.]

Restrictions upon damming water in streams.

SEC. 3894. No person or persons, company or corporation, shall, by virtue of any franchise, charter or law granted or made for any mining, ditch,

milling, irrigating or other purpose whatsoever, be permitted or allowed to dam the water or waters of any stream in this territory so that the water or waters raised by such damming shall flow back to a higher point or mark on the margin of such stream than high water-mark, or so that the water thus dammed shall overflow any public road or highway, or undermine, weaken or damage any bridge, walls or embankments of such road, nor shall any person, company or corporation, owning or controlling any ditch, allow any waste water from the same to flow upon or across any established road or highway. [S. L. 1886, ch. 99, § 36.]

Penalty for violating last section.

SEC. 3895. Any person or persons, company or corporation, violating the provisions of the last preceding section, shall be liable to a fine not to exceed one hundred dollars, and shall also be liable to the party injured for any damages resulting therefrom. [S. L. 1886, ch. 99, § 37.]

Tax levy.

SEC. 3896. The board of county commissioners of each county shall levy a tax for the purposes of this chapter as is provided and authorized by law, providing for a territorial and county revenue. [S. L. 1886, ch. 99, § 38.]

How fines recovered, etc.

SEC. 3897. All fines, penalties and forfeitures provided by this chapter, when not otherwise specified, shall be recoverable by action of debt in the name of the people of Wyoming Territory, or by indictment before any court of competent jurisdiction. All such fines, penalties and forfeitures shall be paid into the county treasury, and shall become a part of the fund for the construction and repair of roads and bridges. [S. L. 1886, ch. 99. § 39.]

Albany County may build roads outside of county.

SEC. 3898. The board of county commissioners of Albany County are hereby authorized and empowered to expend annually, as in their judgment they may deem necessary for the public good, a sum or sums of money, not exceeding fifteen hundred dollars in any one year, upon repairs of existing roads and bridges, and upon making new roads and bridges, at places outside of the boundaries of said Albany County, and of the Territory of Wyoming; *Provided*, That said sums so expended shall be taken only from any surplus that may be left unexpended in the road and bridge fund of said county, after providing for the necessary expenditures on roads and bridges within said county; *Provided also*, That said sums shall only be expended along roads that form a continuous line from some legally laid out, open and traveled road within and to the boundaries of said county. [S. L. 1884, ch. 4, § 1.]

To be paid from road fund.

SEC. 3899. The sums expended, as provided in the preceding section, shall be paid by warrants issued by said board of county commissioners, the same as for other indebtedness, which shall be drawn against the road and bridge fund of said county. [S. L. 1884, ch. 4, § 2.]

CHAPTER 2

OBSTRUCTING WATER COURSES.

Restrictions upon constructing dams and booms.

SEC 3900. No dam or boom shall hereafter be constructed or permitted on any river of sufficient size for floating or driving logs, timber or lumber, and which may be used for that purpose, unless said dam or boom shall have

connected therewith a sluice-way, lock, or other fixture sufficient and so arranged as to permit logs, cross-ties, wood, telegraph poles, timber and lumber to pass around, through, or over said dam or boom, without unreasonable delay or hindrance. [C. L. 1876, ch. 78, §§ 1 and 2.]

Certain booms declared unlawful.

SEC. 3901. Any boom or weir now in or over any river as aforesaid, that is so constructed as to prevent the free passage of logs or lumber, is hereby declared a public nuisance, which shall be abated unless a suitable sluice-way, lock or passage as above provided, be made thereon as aforesaid, within thirty days after written notice given by any person interested, and any person or persons so owning, holding or occupying said boom or weir shall be liable to pay five dollars for every day the same shall be suffered to remain in or over said river, after having had thirty days notice to remove said nuisance, (which may be recovered before any justice of the peace having jurisdiction in the case, and the amount so recovered shall be collected by said justice and paid into the county treasury of the county where such offense was committed, for the use of common schools therein,) and shall furthermore be liable for any damages sustained by individuals by reason of said nuisance. [C. L. 1876, ch. 78, § 3.]

Ditch owner to maintain head-gate.

SEC. 3902. Any person or persons, corporation or corporations, using water through any ditch or canal now constructed, or which may be hereafter constructed, under the laws of Wyoming Territory; or any person or persons, corporation or corporations using water through any natural ditch or slough from any creek or river in this territory which is of sufficient size for floating or driving logs, lumber, timber railroad ties, poles, rails, posts or firewood, and which may be used for that purpose, shall erect and maintain in good order, a head-gate across said ditch, canal or slough at or near the bank of the creek or river where such ditch, canal or slough opens out therefrom, sufficient to prevent logs, lumber, timber, railroad ties, poles, rails, posts or firewood from floating into any such ditch, canal or slough; *Provided*, That the foregoing shall not apply to natural sloughs that water will run through without being dammed or flumed. [S. L. 1882, ch. 67, § 1.]

Liability for failure to maintain head-gate.

SEC. 3903. If any person or persons, corporation or corporations, shall fail or neglect to erect and maintain a sufficient head-gate as required by the provisions of the preceding section, such person or persons, corporation or corporations, shall be held liable for any and all damages sustained by any person or persons, corporation or corporations through such failure or neglect; said damage to be recovered in any court having competent jurisdiction. [S. L. 1882, ch. 67, § 2.]

Water courses declared public highways.

SEC. 3904. All creeks and rivers within the Territory of Wyoming of sufficient size for floating or driving logs, timber or lumber, and which may be used for that purpose, are hereby declared to be public highways, so far as to prevent obstructions to the free passage of logs, cross ties, wood, telegraph poles, timber or lumber down said stream, or either of them. [C. L. 1876, ch. 78, § 1.]

Appendix 18

18. Highways and Bridges, ch. 69, § 1-67, 1895 Wyo. Sess. Laws 126, 126-44.

SESSION LAWS of the

State of Wyoming,

ENACTED BY THE

Third State Legislature,

Convened at Cheyenne on Jan'y 8, 1895;

Also
Joint Resolutions and Memorials,
Rules of the Supreme Court
And List of State Officers.

PUBLISHED BY AUTHORITY.

The Daily Sun Publishing House.

CHAPTER 69.

HIGHWAYS AND BRIDGES.

An Act to revise, amend and consolidate the Statutes relating to Highways and Bridges.

Be it enacted by the Legislature of the State of Wyoming:

PUBLIC ROADS DEFINED.

Section 1. All roads within this state shall be public highways which have been or may be declared by law to be national, state, territorial or county roads. All roads that have been designated or marked as highways on government maps or plats in the record of any land office of the United States within this state, and which have been publicly used as traveled highways, and which have not been closed or vacated by order of the Board of the County Commissioners of the county wherein the same are located, are declared to be public highways until the same are closed or vacated by order of the Board of County Commissioners of the county wherein the same are located, and the board or officer charged by law with such duty shall keep the same open and in repair the same as in the case of roads regularly laid out and opened by order of the Board of the County Commissioners.

COUNTY COMMISSIONERS TO CONTROL ROADS.

Sec. 2. All county roads shall be under the supervision, management and control of the Board of the County Commissioners of the county wherein such roads are located, and no county road shall hereafter be established, altered or vacated in any county in this state, except by the authority of the Board of the County Commissioners of the county wherein such road is located, except as is in this Act provided.

WIDTH OF ROADS.

Sec. 3. All county roads shall be not less than sixty nor more than one hundred feet in width, unless the Board of the County Commissioners upon the prayer of the peitioners for the same, determine that a county road be established with a less width; Provided, That for the purpose of providing drive ways for live stock, and for other purposes of public convenience, the Board of the County Commissioners may open a county road to a width not exceeding five hundred feet.

PETITION FOR OPENING, CLOSING OR ALTERING ROAD.

Sec. 4. Any person desiring the establishment, vacation or alteration of a public road, shall file in the office of the

county clerk of the proper county, a petition signed by ten or more electors of the county residing within fifteen miles of the road proposed to be established, altered, or vacated, in substance as follows:

To the Board of the County Commissioners of ..... County. The undersigned ask that a public road, commencing at ..... and running thence ..... and terminating at ..... be established (altered or vacated as the case may be).

COUNTY BOARD MAY REQUIRE DEPOSIT.

Sec. 5. The Board of the County Commissioners may require, in their discretion, that the petitioners for the establishment, alteration or vacation of a public road, shall deposit with the county clerk, a sufficient sum of money to defray the expenses of laying out, vacating or altering such road, and such expense, when so incurred, shall be paid out of such deposit. If the road is finally established, altered or vacated, the money so deposited shall be returned to the person who deposited the same.

APPOINTMENT OF VIEWER.

Sec. 6. Upon the filing of such petition the Board of the County Commissioners at a regular or special meeting, or the chairman of said board, if in his judgment an emergency exists, shall appoint a suitable and disinterested elector of the county, who may be a member of the board of County Commissioners, to examine into the expediency of the proposed road, alteration or vacation thereof, and to report immediately.

VIEWER'S OATH.

Sec. 7. The person so appointed shall be termed a viewer, and he shall be sworn by some person or officer authorized by law to administer oaths, before entering upon his duties, to faithfully and impartially discharge his duties, and he shall file his oath in the office of the county clerk. He shall not be confined to the precise matter of the petition, but may inquire or determine whether that, or any road, in the vicinity of the proposed or altered road, answering the same purpose is required.

CONVENIENCE AND EXPENSE OF ROAD TO BE CONSIDERED.

Sec. 8. In forming his judgment the viewer shall take into consideration both the public and private convenience, and also the expense of the proposed road.

VIEWER'S REPORT.

Sec. 9. The said viewer shall report in writing to the Board of the County Commissioners, whether or not, in his judgment, said proposed road is practicable, and ought or ought not to be established, altered or vacated, as the case

may be, stating the probable expense of the same, including damages to the property owners along the line thereof, the benefits thereto, and such other matters therein as shall enable the said board to act understandingly in the premises.

COMPENSATION.

Sec. 10. The Board of the County Commissioners shall allow the said viewer such reasonable compensation for his services as they shall determine and fix upon.

SURVEY AND RECORD OF ROAD.

Sec. 11. 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.

DAMAGES—WHEN FILED.

Sec. 12. If the Board of the County Commissioners shall determine to establish, lay out or alter any road, they shall appoint a day, not less than thirty days after such determination, on or before which day all objections to the establishment, alteration or vacation of the proposed road, and claims for damages by reason thereof, shall be filed with the county clerk.

NOTICE OF LOCATION OF ROAD TO BE PUBLISHED.

Sec. 13. Notice shall be published of the proposed location or alteration of any road for three successive weeks in three successive issues of some weekly newspaper published in the county, if any such there be, and if no newspaper be published therein, such notice shall be posted in at least three public places along the line of said proposed or altered road, which notice may be in the following form:

To all whom it may concern: The Board of the County Commissioners have decided to locate (or alter, as the case may be) a road commencing at .....in..... county, Wyoming, running thence (here describe in general terms the points and courses thereof), and terminating at .....

All objections thereto or claims for damages by reason thereof must be filed in writing with the county clerk of said county, before noon of the ..... day of ..... A. D. ....., or such road will be established (or altered) without reference to such objections or claims for damages.

..... County Clerk.

Dated ..... A. D.....

The publication or posting of such notice shall be a legal and sufficient notice to all persons owning lands or claiming any interest in any lands over or across which said road is proposed to be located or altered, and to all persons interested in any manner, in the location or alteration thereof and to make their objections thereto, or to file their claims for damages by reason thereof.

CLAIMS FOR DAMAGES WHEN BARRED.

Sec. 14. No objections or claims for damages shall be filed or made after the noon of the day fixed for filing the same, and if no objections or claims for damages are filed, on or before noon of the day fixed for filing the same, they shall be disregarded, and not considered, and shall be deemed to have been waived and barred.

CONTINUANCE OF HEARING.

Sec. 15. If objections to the establishment, altering or vacating of the road, or if any claims for damages shall be filed, the further hearing of the application may be continued by the board until the matter can be properly disposed of.

APPOINTMENT OF APPRAISERS.

Sec. 16. When claims for damages are filed, at the next regular meeting or special meeting of the Board of the County Commissioners, or so soon thereafter as may be praticable and convenient, the said board shall appoint three suitable and disinterested electors of the county as appraisers, to view the ground, on a day fixed by said board, and they shall report their doings in the matter and file their report in writing with the county clerk within thirty days after the date of their appointment, fixing the amount of the damages sustained by the claimants.

APPRAISERS TO BE NOTIFIED OF APPOINTMENT.

Sec. 17. The county clerk shall cause each of the said appraisers to be notified in writing, of his appointment, stating in said notice, (first) the names of all appraisers, (second) the names of all claimants for damages, on account of the location or alteration of the said road, with the amount of damages asked by each claimant, (third) stating when their report must be filed, and (fourth) the law relating to their duty as found in Section eighteen of this Act. The county clerk shall also prepare suitable blanks, for such notice, for the oath of the appraisers and for the report, a proper number of which shall be forwarded by him to them.

DUTIES OF APPRAISERS.

Sec. 18. The said appraisers shall, within ten days after receiving notice of their appointment, meet at some convenient

place, on the line of said proposed or altered road, and take and administer to each other, an oath or affirmation to faithfully and impartially discharge their duties. They shall then view the ground, so far as they shall deem it necessary, and fix the amount of damages sustained by each claimant, after allowing for all benefits that may accrue to each claimant, by reason of the location or alteration of the said proposed road. They, or a majority of them, shall as soon as practicable, after performing their said duties, make a report in writing to the county clerk of their doings, stating that they were so sworn or affirmed as aforesaid, before performing their duties and fixing the amount of damages, if any, sustained by each claimant, after allowing and deducting for benefits and where they have disallowed claims for damages, they shall so state in their report and they shall immediately transmit their report, when made, to the county clerk. They shall, whenever they can conveniently do so, notify the claimants or their agents, of the place of their meeting and may hear such evidence as they may deem necessary in determining the amount of damages fixed by them. They are hereby authorized to administer oaths to each other and to such witnesses as they may hear. If any one of them shall fail or refuse to perform his duty, the other two appraisers shall serve and shall appoint a suitable and disinterested elector in his place, who shall be within easy access, and he shall be sworn or affirmed in like manner as the other two appraisers, and the facts of such appointment and qualification shall be stated in said report to the county clerk. The said appraisers shall each receive for their compensation such reasonable sum as the Board of County Commissioners shall allow.

DUTIES OF COUNTY BOARD.

Sec. 19. At the next meeting of the County Commissioners after the report of the appraisers has been filed, or as soon thereafter as may be practicable, the said board may hear testimony and consider petitions for and remonstrances against the etsablishment or alteration, as the case may be, of any road, or may establish or alter any road or may refuse so to do, as in the judgment of the said board, the public good may require, but in case there shall be no claim for damages filed, they shall act as speedily as possible in the matter. Said board may increase or diminish the damages allowed by the appraisers, and may make such establishment or alteration of any road, dependent or conditioned upon the payment, in whole or in part, of the damages awarded or expenses incurred in relation thereto by the petitioners for such road or such alteration of any road. If, upon considering and acting upon the report of the viewers or otherwise, the Board of County Commissioners shall decide to lay out or alter any road, they shall cause the county surveyor to make an accurate sur-

vey thereof, if such survey is necessary, and to plat the same in books to be provided by the county for such purpose, and the county clerk shall record in the same books opposite or near to such plat so that the same may be easily ascertained to be concerning the platted road, the proceeding of the said board in relation to the location, establishment or alteration of said road, in order to keep in a separate book a record of all the county roads of that county.

EFFECT OF LOCATION ON PREVIOUS ROAD.

Sec. 20. The establishment of a new road on the route of a road already established according to law, shall not vacate any road previously established, unless such vacation shall be ordered by the Board of the County Commissioners.

REMOVAL OF FENCES.

Sec. 21. Whenever a public road is ordered to be established or altered according to the provisions of this Act, which shall pass through, or on enclosed lands, the road overseer, or other proper officer, shall give the owner, agent or occupant of such lands, notice in writing to remove the fences thereon, and if such owner, agent or occupant shall not move his fence, within thirty days thereafter, the same may be removed by the proper officer and the road opened and worked; and such owner shall forfeit and pay twenty dollars for each day he shall permit his fence to remain after said thirty days, and shall pay all necessary cost of removal, to be collected by the proper officer, in any court of competent jurisdiction for the use and benefit of the general county road fund.

STREETS IN VILLAGES NOT INCORPORATED ARE PUBLIC ROADS.

Sec. 22. All public streets of towns or villages, not incorporated are a part of the public roads, and all road overseers, or persons having charge of the same, in their respective districts or counties, shall work the same as provided by law or ordered by the Board of the County Commissioners of the proper county.

ROADS ESTABLISHED BY CONSENT.

Sec. 23. Public roads shall be established without the appointment of a viewer, or without any other proceeding, than the order of the Board of County Commissioners: Provided, That the written consent of all the owners of the land to be used for that purpose, be first filed in the office of the county clerk, and when it is shown to the satisfaction of the said board that the proposed road is of sufficient importance to be opened and traveled, they shall make an order establishing the same. The Board of the County Commissioners, when in their judgment such action shall be in the interests of economy

or the public good, may purchase or receive donations of rights of way for a public road, or any alteration thereof, or any part thereof, from any and all persons along the route thereof, and declare the same opened, whenever the consent of the owners of the land, through which said proposed road or alteration shall run, has been obtained, either by the donations of land or when an amicable adjustment of the amount to be paid therefor has been made between such land owners and said board; and all roads or parts of roads or alteration of roads heretofore opened or made, by consent or adjustment of damages, without recourse to other proceedings, are hereby declared to be public roads, the same as if such roads had been legally opened, or said alterations legally made.

APPEALS FROM COUNTY BOARDS.

Sec. 24. Any applicant for damges claimed, or caused by the establishment or alteration of any road, may appeal from the final decision of the Board of the County Commissioners to the district court of the county, in which the land lies, for the taking of which for a public road, damages are asked; but notice of such appeal must be made to the county clerk, within thirty days after such decision has been made by the said board, or such claim shall be deemed to have been abandoned. No appeal shall be allowed, unless a good and sufficient bond be given by the party appealing, in a sum not less than fifty dollars to cover costs. Said bond to be approved by the clerk of the district court.

DUTIES OF COUNTY CLERKS ON APPEAL.

Sec. 25. The county clerk shall, within ten days after the notice of an appeal as provided for in the preceding Sections, is filed in his office, make out and file in the office of the clerk of the district court, in his county, a transcript of the papers on file in his office, and the proceedings of the board in relation to such damages.

APPEALS TO DISTRICT COURTS—COSTS.

Sec. 26. The amount of damages to which the claimant shall be entitled on such appeal shall be ascertained in the same manner as in a civil action, and the amount so ascertained, if any, shall be entered of record, but no judgment shall be entered therefor. The amount thus ascertained shall be certified by the clerk of the court to the county clerk who shall thereafter proceed as if such amount had been allowed by the Board of the County Commisioners to the claimant as damages. If the appellant shall fail to recover an amount exceeding fifty dollars above the amount allowed to him by the Board of the County Commissioners, he shall pay all costs of the appeal.

NEGLECT OF VIEWER OR APPRAISER—PENALTY.

Sec 27. If any viewer or appraiser shall refuse or neglect to perform any of the duties required by this Act or shall fail to act after his appointment, without a satisfactory excuse for such refusal or neglect, he shall be fined in any sum not exceeding fifty dollars, upon his conviction thereof in any court of competent jurisdiction, and such fine when collected shall be paid into the county treasury for the benefit of the road fund.

PETITION FOR PRIVATE ROAD AND PROCEEDINGS THEREON.

Sec. 28. Any person whose land shall be so situated that it has no outlet to nor connection with a public road, may make application in writing to the Board of County Commissioners of his county at a regular session for a private road leading from his premises to some convenient public road, and thereupon the said board shall appoint three disinterested householders of the county as viewers and appraisers, and shall cause an order to be issued directing them to meet on a day named in such order and view and locate a private road according to the application, and to assess damages to be sustained thereby, and after being duly sworn or affirmed faithfully and impartially to discharge their duties under their appointment, and after three days notice given by the petitioner and applicant for the road to all persons through whose lands such private road is to be located, or to their resident agents, such viewers and appraisers shall proceed to locate and mark out a private road, not to exceed thirty feet in width from a certain point on the premises of the applicant to some certain point on the public road, so as to do the least possible damage to the lands through which such private roads is located, and they shall also at the same time assess the damages sustained by the person or persons owning such land.

GATES ON PRIVATE ROADS.

Sec. 29. The viewers and appraisers appointed in accordance with the provisions of the preceding Section shall have power to determine in all cases whether or not gates shall be placed at proper points on said road, and assess damages in accordance with such determination.

REPORT OF VIEWERS AND APPRAISERS ON PRIVATE ROAD—CONFIRMATION.

Sec. 30. The viewers and appraisers so appointed, or a majority of them, shall make a report to the county commissioners at the next regular session of the private road so located by them, and also the amount of damages, if any, assessed by them, and the person or persons entitled to such damages, and if the commissioners are satisfied that such report is just, and after payment by the applicant of all costs of locating such road, and the damages assessed by the viewers,

the commissioners shall order such report to be confirmed and declare such road to be a private road, and the same shall be recorded as such; and any person aggrieved by the assessment of damages may appeal, within thirty days, to the district court.

WATER ROADS—TIMBER ROADS.

Sec. 31. Upon the presentation of a petition signed by at least five freeholders of any neighborhood, praying for passage to any water course for the purpose of watering live stock, or for the convenient access to timber, the Board of County Commissioners may, in their discretion, establish such water or timber way as provided in the last three preceding Sections relating to the opening of private roads.

COUNTY MAY BE DIVIDED INTO ROAD DISTRICTS.

Sec. 32. The Board of the County Commissioners of any county may, in their discretion, divide their county into road districts of as compact form and convenient size as is practicable, and embracing the territory within an election district if possible, and may change or alter said road districts from time to time as the public convenience may require, or abolish them altogether, or such board may in their discretion provide for the election of a road supervisor for the entire county, and may not divide their county into road districts.

ELECTION OR APPOINTMENT OF DISTRICT ROAD SUPERVISORS—WHEN REQUIRED.

Sec. 33. When the county is divided into road districts as provided in the preceding Section, there shall be elected at each general election for county officers by the qualified electors thereof, a district road supervisor for each district who shall hold his office for two years and until his successor is elected or appointed and qualified, and his term of office shall begin on the first Monday of January succeeding his election.

After the passage of this Act, and whenever any vacancy occurs from whatever cause in the office of district road supervisor, the Board of the County Commissioners shall fill such vacancy by appointment until the qualification of such officer elected at the next general county election.

ELECTION OF COUNTY ROAD SUPERVISOR WHEN REQUIRED.

Sec. 34. Unless the county be divided into road districts, there shall be elected at the general election for county officers in each county a road supervisor, who shall hold his office for the term of two years from the first Monday in January succeeding his election, and until his successor is elected or appointed and qualified.

COUNTY BOARD HAS POWER OF REMOVAL OF EITHER COUNTY OR DISTRICT ROAD SUPERVISOR.

Sec. 35. The Board of County Commissioners shall have power to remove either a county or a district road supervisor from his office who shall fail or neglect or refuse to perform the duties of his office with fidelity or in any manner.

OATH AND BOND OF SUPERVISOR OF ROADS.

Sec. 36. Each road supervisor, whether county or district, shall hold his office for the term of two years beginning with the first Monday in January next succeeding his election and until his successor is duly elected or appointed and qualified according to law, unless sooner removed, and he shall take and subscribe the oath required by the contstitution of this state and shall enter into an undertaking or bond to the county with one or more sufficient sureties, to be approved by the Board of County Commissioners, in the sum of five hundred dollars, in case he is a road district supervisor, and in the sum of one thousand dollars, in case he be a county road supervisor, of the effect and conditioned that he will faithfully discharge all the duties of his office, according to law and under the directions of the said Board of County Commissioners, and that he will faithfully collect, pay over and account for all moneys coming into his hands by virtue of his office.

ROAD SUPERVISOR UNDER CONTROL OF COUNTY BOARD.

Sec. 37. Each road supervisor whether district or county shall be at all times under the direction, supervision and control of the Board of the County Commissioners of his county, who shall see that all provisions of law and the orders of the board relating to roads and highways, concerning the duties of such supervisor are faithfully and promptly executed. When five or more resident tax payers shall petition the county commissioners, setting forth that any road in such county is out of and needs immediate repair, it shall be the duty of the county commissioners to investigate or cause to be investigated by the supervisor of roads, the condition of such road and if the same be found to be out of and in need of repair, such commissioners shall require such road to be immediately placed in good and passable repair in the manner hereinbefore provided, and the provisions of this Section shall apply as well to any bridge or culvert in said county as to any road therein.

ROAD TAX.

Sec. 38. The Board of County Commissioners shall at the time of levying taxes for county purposes levy on all taxable property in the county, a tax for roads and bridges of not less than one-half nor more than three mills on the dollar for bridge and road purposes, which shall be levied and collected at the same time and in the same manner as other county taxes.

POLL OR SPECIAL ROAD TAX PERMITTED.

Sec. 39. The Board of County Commissioners of any county may also at the time of making the levy of taxes for county purposes, in their discretion, when in their judgment public interests so require, levy upon each able bodied man in the county, between the ages of twenty-one and fifty years, a poll or special road tax of two dollars, but such poll or special road tax shall not be levied unless the county is divided into road districts, and any person liable to pay such poll or road tax, may work out the said tax under the direction of the supervisor of the district or other proper officer in an incorporated town or city, where such person resides, and he shall be allowed for such work the sum of two dollars for each day's work of eight hours. Any person producing the certificate for labor done or performed, or for material furnished on any road or bridge, by order of the supervisor of the district or other proper officer shall be allowed the same on his special road poll tax. Provided, however, That no special road tax or poll tax as provided for in this Section shall be required from any member of any organized fire company of any incorporated town or city.

REFUSAL TO WORK OUT SPECIAL ROAD TAX—PENALTY.

Sec. 40. The district road supervisor must notify every person within his road district, subject to road labor as aforesaid, to perform one day's work in each year upon the public roads, and if any person subject to road labor as aforesaid shall, after three day's notice, either personally or by writing left at his usual place of abode by the supervisor or any other person under his direction, neglect or refuse to attend by himself or suitable substitute, at the time and place designated by the supervisor, or shall pass his time in idleness or inattention to the labor or duties assigned to him, every such delinquent shall thereby become liable for the amount of his road poll tax, in money, and if such person has no real or personal property assessed in his name, it shall be the duty of the supervisor to make complaint before the nearest justice of the peace, setting forth the facts of such notice and refusal to perform the labor or to pay the money, when, if such charge be sustained after a hearing, the delinquent shall be deemed guilty of a misdemeanor, and shall be fined twice the amount due from him for road tax, together with all costs. Such fine to be collected as in ordinary criminal actions, and be paid to the supervisor for the use of the road fund in his districts.

SUPERVISOR TO CONTROL LABOR ON ROADS.

Sec. 41. Every person notified to labor on the public roads, under the provisions of this Act, shall be required to appear at the place appointed by the supervisor, at the hour of eight o'clock in the forenoon, with such necessary tools and

implements as said supervisor may direct: Provided, Such person is the owner of such tools and implements, and work industriously and diligently, doing at least eight hours faithful labor in each day at such work and in such manner as shall be directed by the supervisor, and such supervisor may, if he deem it necessary, order any resident of his district from whom road work or tax is due and owing, to furnish a team of horses, mules or oxen, and wagon, cart, scraper or plow, to be employed or used on the roads, under the direction of the supervisor, and shall allow such person a reasonable compensation for the use of such team, wagon, cart, scraper or plow, which shall be allowed by the Board of County Commissioners, on such order of the supervisor, out of the general road fund of the county, less the special road tax due from such person.

SUPERVISOR TO KEEP ROADS IN REPAIR.

Sec. 42. The district supervisor of roads shall open, or cause to be opened, all public roads which may have been, or may hereafter be, laid out and established according to law, in any part of his road district, and shall keep the same in good repair; and if the labor in his district is not sufficient for that purpose, the supervisor shall have power and authority to call out all persons liable to road tax for one or more days' labor, and if such labor is not sufficient the Board of County Commissioners are hereby authorized, at their discretion, to appropriate from the general road fund any amount they see fit for the use and benefit of such road district.

ROAD DITCHES—IMPLEMENTS AND MATERIALS FOR ROAD WORK.

Sec. 43. The district road supervisor shall have authority to cut, open or construct such drains or ditches as he shall deem necessary for the making and preserving of such roads, doing as little injury as may be to the lands, and any person stopping or obstructing the drains or ditches so made, shall forfeit the sum of twenty dollars, to be recovered by the supervisor in a civil action, as before provided. If any person shall feel aggrieved by the act of any supervisor, cutting or carrying away any timber or stone, as aforesaid, he may make complaint in writing to the county commissioners, who shall allow any damages they may see fit, and pay the same out of the road fund. The county commissioners may authorize the supervisors to purchase any plows, scrapers or other implements that they may think proper for the use of of any road district, and pay for the same out of the general road fund.

SUPERVISOR TO REMOVE OBSTRUCTIONS.

Sec. 44. If at any time during the year any public road shall become obstructed by snow, or from any other cause, or any bridge shall need repairing or become dangerous for the

passage of teams or travelers, the county or district supervisor of the road, upon being notified thereof, shall forthwith cause such obstruction to be removed or bridge repaired, for which purpose he shall immediately order out such number of inhabitants of his district as he may deem necessary to remove such obstruction, or to repair such bridge, and all persons so ordered out shall, after having received one day's notice, be subject to the same restrictions as if ordered out under the provisions of Section 40 of this Act.

CERTIFICATE FOR EXTRA LABOR PERFORMED.

Sec. 45. In all cases under the preceding Section, where any person has performed labor on the public road in removing obstructions, or repairing bridges, the district supervisor shall give such person a certificate specifying the amount of extra labor so performed, which certificate may be transferred and received in discharge of the labor of any other person within the same district to the amount of labor specified in such certificate, or may be received from the holder in satisfaction of labor on the roads in such district on any subsequent year for the amount of labor specified therein.

PRESUMPTIONS IN ACTION TO RECOVER ROAD TAX.

Sec. 46. In an action by the district supervisor to recover delinquent road tax, herein provided, the presumption shall be that the defendant was duly notified to work the road, and failed and neglected so to do, and that he had no real or personal property listed to him during the current year. No property is exempt from execution and sale for a delinquent road tax.

MALFEASANCE OF SUPERVISOR—PENALTY.

Sec. 47. Any district supervisor of roads who shall neglect or refuse to perform the several duties enjoined upon him by the provisions of this Chapter, or who shall under any pretense whatever give or sign any receipt or certificate for money received or labor performed, unless the money shall have been received or the labor performed prior to the giving or signing of such receipt or certificate, shall forfeit for each offense not less than five nor more than twenty dollars, to be recovered before any court having jurisdiction, and it shall be the duty of the Board of County Commissioners to sue for the same in the name of the county.

COMPENSATION AND REPORT OF DISTRICT ROAD SUPERVISOR.

Sec. 48. Every road district supervisor shall receive for each day by him necessarily employed in the performance of any of the duties required of him by this Act, and only when his office is created as in this Act provided, the sum of three dollars, to be paid out of the general road fund of the county.

It shall be his duty and that of a like officer of an incorporated city or town to report to the Board of County Commissioners of his county a sworn statement of all moneys collected by him and of the number of days work done in his road district for the year and by whom performed and also a sworn statement of such matters as may be required of him by the Board of County Commissioners; and said board may require a like report under the oath of said officer at any time.

DISTRICT SUPERVISOR TO FURNISH LIST OF TAX PAYERS IN HIS DISTRICT.

Sec. 49. The supervisor of each road district when a county is laid out and divided into road districts, shall, on or before the first day of April in each year, furnish to the county clerk of his county a list of all resident tax payers in his road district liable for a road tax on property.

COUNTY CLERK TO FURNISH TO DISTRICT SUPERVISORS PROPERTY TAX.

Sec. 50. The county clerk, on receiving such list furnished to him by the district road supervisor, as provided for in the preceding Section, shall file the same in his office, and shall, within thirty days thereafter, or as soon thereafter as he shall be able to ascertain the same from the county assessment roll, when duly equalized, furnish to the district road supervisor a list of said tax payers in the road district, and the amount of the road tax on property of each resident tax payer in the road district.

DISTRICT SUPERVISOR TO NOTIFY TAX PAYERS IN WRITING WHEN TO WORK OUT PROPERTY TAX.

Sec. 51. The district supervisor shall, upon receiving said list from the county clerk, notify each resident tax payer in his district in writing at his residence of the amount of his road tax, and when and where said tax payer shall be required to perform work, labor or service, or to furnish material for the construction or repair of any public road in the district in the payment of said tax, if the said tax payer so chooses and elects, under the direction of the road supervisor of the district, and said work shall be performed and said materials shall be furnished on or before the 30th day of November in the current year.

COMPENSATION FOR WORK AND MATERIALS.

Sec. 52. The district supervisor of roads, after the performance of said work, labor and services and materials furnished, shall give his receipt to the tax payer for the amount of labor so performed at the rate of two dollars per day for each man employed, and at the rate of three dollars and fifty cents per day for each two-horse team with driver, and a reason-

able amount for materials furnished, and said receipt shall be received by the county treasurer in payment or part payment, as the case may require, of said property road tax.

PROVISIONS OF LAST 14 SECTIONS TO APPLY ONLY WHERE ROAD DISTRICTS ARE ESTABLISHED.

Sec. 53. The provisions of last fourteen preceding Sections of this Act, that is to say from Section thirty-nine to Section fifty-two inclusive, shall apply only where the county has been laid out in road districts, and not when the Board of County Commissioners have not yet divided their county into road districts.

COUNTY ROAD SUPERVISORS—DUTIES AND COMPENSATION.

Sec. 54. Where the Board of County Commissioners have not divided their county into road districts, or where they have abolished road districts in their county, a road supervisor for the county shall be elected as herein provided, and he shall qualify by taking the oath prescribed by the constitution, and by filing his bond, as is in this Act provided. He shall be liable to be removed from office for good cause, shown in the failure, refusal or neglect to perform the duties required of him by law or by order of the Board of County Commissioners. The said board shall have power to fill a vacancy occurring in said office until the qualification of a successor elected as herein provided. The county road supervisor shall at all times be under the direction, supervision and control of the Board of County Commissioners of his county, and shall perform such duties as shall be required of him by said board, and shall receive such compensation as said board shall allow, not exceeding the sum of three dollars per day for each day necessarily employed by him in the discharge of his duties. The office of county road supervisor shall exist only where the office of district road supervisor does not exist and where the county has not been divided into road districts or where the same have been abolished.

Sec. 55. Any person, company, corporation or association of persons, constructing, operating or maintaining in whole, or in part, either as owner, agent, occupant or appropriator any ditch, canal or water course, not being a natural stream, for irrigation or for any other and different purpose, shall put in, construct, maintain and keep in repair at his, her, its, or their expense, where the same crosses any public highway or publicly traveled road, a good substantial bridge, not less than fourteen feet in width, over such ditch, canal or water course where it crosses such road. Any violations of the provisions of this Section shall be a misdemeanor, and upon conviction thereof, the persons so offending shall pay a fine in any sum not exceeding one hundred dollars for each day such ditch, canal or water-

course shall be unbridged, insufficiently bridged, or permitted to remain out of repair.

GUIDE BOARD TO BE ERECTED BY ROAD SUPERVISOR.

Sec. 56. Every county or district road supervisor shall, when the Board of County Commissioners of his county so require erect or cause to be erected and keep up at the forks of every public highway and every crossing of public roads within his county or district, a guide or finger board, containing an inscription in legible letters directing the way and specifying the distance to the next town or public place situated on each road respectively.

FORDS—PENALTY FOR OBSTRUCTING SAME.

Sec. 57. When any public road heretofore laid out or traveled as such or hereafter to be laid out or traveled as a public road, crosses any stream of water, and such stream is at any time during the year fordable where such road crosses or shall cross the same, the said ford and the banks of the stream adjacent thereto, and the roadway or track usually traveled leading to or from such highway, to and from such ford, shall be deemed and taken to be a part, portion and continuation of such public road and highway. Any person who shall obstruct any such ford or the road leading thereto, or shall dig down the banks of such ford, or who shall erect any dam, embankment or other obstruction in such stream, or any wing dam or other obstruction upon the banks or edge of such stream, for the purpose of raising the water of such stream upon said ford so as to render the said ford impassable or more difficult of passage than heretofore, or who shall maintain any such dam, wing dam, embankment or obstruction heretofore erected, after being requested by the road supervisor or other authorized person of the district wherein the same is situated, to remove or abate the same, shall be liable to the same penalties for obstructing a public highway.

TOLL BRIDGES NOT TO OBSTRUCT FORDS.

Sec. 58. No person or persons, company or corporation, shall, upon any pretense or authority, be permitted to erect a toll bridge over any stream or upon any public ford or road crossing, or so near thereto as by the abutments, embankments or piers of such bridge, to obstruct or render impassable the said ford, or the road leading thereto.

LIMITATION UPON CONTRACTING FOR BRIDGE WORK.

Sec. 59. When any bridge is to be built upon any public highway, the estimated cost of which shall exceed one hundred dollars, the work shall be given out, and such bridge constructed by contract, and the county commissioners shall cause notices of such contract to be let, to be published for three

consecutive weeks in any newspaper published within the county, or if no newspaper be published in the county they shall cause written or printed notices of such contract to be let, to be posted in two of the most public places in such county, and one such notice on the door of the court house, or of the building used as court house in such county, thirty days before the letting of such contract, and all such contracts shall be awarded by the county commissioners to the lowest responsible bidder, and the commissioners are hereby authorized to contract for other necessary improvements upon the public roads and highways in the same manner as provided in the case of bridges: Provided, That when any bridge is to be built or other improvement made as provided in this Section, the county commissioners may award such contract in such manner as to them shall appear just and equitable for the county.

OBSTRUCTING ROADS OR INJURING BRIDGE—PENALTY.

Sec. 60. If any person shall wilfully erect or cause to be erected or placed within or upon any highway or public road any obstruction, or shall wilfully obstruct or encroach upon any public highway by felling trees or placing stones therein, or by erecting any fence, house or other structure therein, and if any person shall tear down, burn or destroy, or in any way maliciously or wilfully injure any bridge upon any public highway, every person so offending shall pay a fine of not less than twenty-five dollars nor more than one hundred dollars for any obstruction, and a fine of ten dollars for each day that such obstruction shall be suffered to remain in such road after notice shall have been given for the removal thereof; and for wilful or malicious injury to any bridge as provided in this Section, the penalty shall be four fold the cost or estimated cost of repairing such damage, or imprisonment therefor, at the rate of one day's confinement for each two dollars of such damage.

RESTRICTION UPON DAMMING WATER IN STREAMS.

Sec. 61. No person or persons, company or corporation or association of persons shall be permitted or allowed to dam the water or waters of any stream or irrigating or mining ditch or any water way so that the water thus dammed or any part thereof shall over flow any public road or highway, or undermine, weaken, or damage any bridge, or any walls or embankment of any road, nor shall any person, association of persons, company or corporation, owning or controlling any ditch, allow any waste water from the same to flow across or upon any public road or highway.

PENALTY FOR VIOLATING LAST SECTION.

Sec. 62. Any person or persons, company or corporation, violating the provisions of the last preceding Section, shall be liable to a fine not to exceed one hundred dollars, and shall

also be liable to the party injured for any damages resulting therefrom.

HOW FINES RECOVERED AND INTO WHAT FUND PAID.

Sec. 63. All fines, penalties and forfeitures provided by this Act when not otherwise provided therein, shall be recoverable by a civil action in the name of the State of Wyoming or by indictment or information before any court of competent jurisdiction, and all such fines, penalties and forfeitures shall be paid into the county treasury, and shall become part of the fund for the construction and repair of roads and bridges.

REPEAL OF EXISTING LAWS COVERED BY THIS ACT AND LAWS IN CONFLICT.

Sec. 64. Chapter one (1) of Title forty-four (44) of the Revised Statutes of Wyoming, relating to roads and highways, and also an Act entitled "An Act to amend Chapter one (1) Title forty-four (44) of the Revised Statues of Wyoming, relating to roads and highways," approved March 6, 1888, the same being Chapter 38 of the session laws of 1888, and also an Act entitled "An Act concerning roads and highways," approved March 14, 1890, the same being Chapter 86 of the Session laws of 1890, and also Chapter ninety-seven (97) of the session laws of 1890-91, entitled "Public Highways," approved January 20, 1891, and Section thirteen hundred and twenty-five of the Revised Statutes of Wyoming, and also all Acts and parts of Acts inconsistent with any of the provisions of this Act, are hereby repealed; but any and all proceedings heretofore instituted prior to the taking effect of this Act, under statutes hereby repealed, shall be continued and completed the same as if this Act had not been passed, and any and all rights obtained by, secured to, or vested in the public or any person, corporation or association of persons under laws existing at the time of the taking effect of this Act, are hereby preserved and continued in force the same as if this Act had not been passed.

NO PROVISIONS OF LAW RELATING TO RAILROAD CROSSING REPEALED.

Sec. 65. None of the provisions of Chapter fifty-six (56) of the session laws of 1888, an Act entitled "An Act providing for the exercise of the right of eminent domain by railroad companies, and for other purposes," approved March 8, 1888, nor any of the provisions of Sections 34, 35, or 36 of said Act, relating to the crossing of public highways by railroad companies or corporations, the care of public highways while constructing crossings, and the crossing for owners of land on both sides of a railroad track, are hereby amended, modified or repealed, but the same shall be continued in force, except where amended or modified by statutes other than this Act.

THIS ACT TAKES IMMEDIATE EFFECT.

Sec. 66. All Acts and parts of Acts inconsistent with this Act are hereby repealed.

Sec. 67. This Act shall take effect and be in force from and after its passage.

Approved February 16, A. D. 1895.

CHAPTER 70.

BOUNTIES.

An Act to encourage the destruction of predatory wild animals and to provide bounties for the killing thereof; and making an appropriation for the payment of such bounties; and for the repeal of Chapter 21 of the Session Laws of Wyoming for 1890, entitled "An Act to encourage the destruction of predatory wild animals, and for other purposes" approved March 1, 1890, and for the repeal of Chapter 6, of the Session Laws of Wyoming for 1893, entitled "An Act to amend and re-enact Section 1, of an Act entitled "An Act to encourage the destruction of predatory wild animals and for other purposes," approved March 1, 1890, approved February 10th, 1893.

Be it enacted by the Legislature of the State of Wyoming:

Paid by state.

Section 1. For the purpose of encouraging the destruction of coyotes and gray and black wolves, the following bounties shall hereafter be paid by the state of Wyoming, in the manner hereinafter provided, viz: For each coyote so destroyed, one dollar; for each gray or black wolf so destroyed, three dollars; Provided, That the Board of the County Commissioners of any county in this state may, in their discretion, by resolution or order entered of record in the proceedings of the board, offer a county bounty to be paid out of the county funds, in addition to the state bounty provided for in this Act, for the destruction of such predatory wild animals for which a state bounty shall be paid, and such order or resolution of the county board shall designate the amount of county bounty to be paid in addition to the state bounty, which shall in no case exceed the state bounty herein provided for the destruction of any predatory wild animal.

Proviso.

Entire skin.

Sec. 2. Any person who shall desire to obtain the bounty provided for in Section 1 of this Act, shall present to the county clerk of the county in which said animals were killed, the entire