I. PUBLIC ROAD CREATION AND USE

A. Special Circumstances Surrounding Public Roads on Record

1. In 1919 (as subsequently amended in 1921), the Wyoming legislature "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." Boykin v. Carbon County Bd. of Comm'rs, 124 P.3d 677, 681 (Wyo. 2005). Under this statute, "all roads not recognized by the respective boards of county commissioners per the requirements of the 1919 statute were effectively vacated." Yeager v. Forbes, 78 P.3d 241, 254 (Wyo. 2003).
2. After 1924, public use alone was insufficient to establish a public road. See Yeager, 78 P.3d at 254, 256. The result is that a public road established through public use prior to 1924 is no longer a public road unless and until a board of county commissioners took official action. Yeager, 78 P.3d at 253. "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." Id. (quoting Nixon v. Edwards, 264 P.2d 287, 293-94 (Wyo. 1953)).
3. In 1955, the legislature amended the statute to allow a public road to be created by prescription. See Boykin, 124 P.3d at 681; W.S. § 24-1-101(a). However, in order for the road to be a county road, the board of county commissioners still had to follow the procedures for the establishment of a county road. See W.S § 24-1-101(a).
4. The importance of the board of county commissioners taking formal action to establish a road is most significant in terms of

R.S. 2477, which allowed for the creation of public roads across unreserved federal lands. See 43 U.S.C. § 932 (repealed 1976). In order for a road to qualify as a R.S. 2477 right-of-way in Wyoming, the road must have been established by a board of county commissioners. See Yeager v. Forbes, 78 P.3d at 254. The road must also predate the reservation of the National Forest if it is on Forest Service land or must predate September, 1976 if it is on Bureau of Land Management lands. Schultz v. Department of the Army, 10 F.3d 649 (9th Cir. 1993); Southern Utah Wilderness Alliance v. BLM, 425 F.3d 735 (10th Cir. 2006).

5. The procedures that need to be followed in order to establish a county road or a public road by prescription or adverse possession are outlined in Sections I.E.5 and I.E.2. respectively.

B. Off Record: Is it Legitimately a Public Road?

1. County Road

   a. After January 1, 1924, any road which the county had not declared to be a public road was vacated (in other words, it was neither a public road nor a county road). See Yeager, 78 P.3d at 254.

   b. In 1955, the legislature amended the statute to allow a public road to be created by prescription. See Boykin, 124 P.3d at 681; W.S. § 24-1-101(a).

   c. If a board of county commissioners has not established and recorded a road, it cannot be a county road. See Yeager, 78 P.3d at 255. However, the public may still be able to claim a public prescriptive easement. See generally id. If a board of county commissioners subsequently accepts and records a public road created by prescription, it will then be a county road. See generally Boykin, 124 P.3d 677.

d. Likewise, a board of county commissioners cannot purport to abandon or vacate a county or public road that it has accepted and established unless it follows the proper procedures. See Bd. of County Comm'rs v. White, 547 P.2d 1195, 1198 (Wyo. 1976). Thus, if a county attempted at some point in the past to vacate or abandon a public road but did not follow the proper procedure, that road would still be a public road. See id. at 1198-1200.

e. Where a board of county commissioners fails to follow the legal requirements for establishing a public road, the actions of the board in creating the road are a nullity. See Ruby v. Schuett, 360 P.2d 170, 174 (Wyo. 1961). Although not every procedural irregularity will invalidate the actions of the board in establishing a road, "[g]enerally speaking, provisions only which are enacted for the special benefit of interested parties should, in a proceeding of this kind, be construed as mandatory and jurisdictional." North Laramie Land Co. v. Hoffman, 219 P. 561, 563-64 (cited in Ruby, 360 P.2d at 174, as explaining the difference between irregularities and jurisdictional defects). For example, the failure of a board to provide an accurate survey or to publish notice as required deprives a board of jurisdiction to establish a road. Ruby, 360 P.2d at 174.

f. Where a board of county commissioners initiates proceedings, but then fails to officially establish or record the road, a county road is not established. See Bd. of County Comm'rs v. White, 547 P.2d at 1197. There is a policy that roads should be shown on the records. See Ruby, 360 P.2d at 174.

2. Public Road by Prescription or Adverse Possession

a. With regard to public prescriptive easements, the Wyoming statutes provide that "[o]nly 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." W.S. § 24-1-101(c).

b. Once a road is determined to be a public road by adverse possession or prescription, it has to be surveyed, platted and notice published in the local newspaper for three successive weeks. The County Commissioners also have to notify impacted landowners. W.S. § 24-1-101(a), (b).

C. What Influences the Scope of the Road Right of Way

1. Width

a. A county highway established by prescription cannot exceed 66 feet in width and is limited to the portion of the road that "was 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." W.S. 24-1-101(d).

b. County roads established under chapter 24, title 1, "shall not be less than sixty (60) nor more than one hundred (100) feet in width, unless the board of county commissioners determines that a county road be established with a less width; provided, that for the purpose of providing

driveways for livestock, the board of county commissioners may open a road to a width not exceeding five hundred (500) feet. Provided, however, that state highways may be established not to exceed three hundred (300) feet in width unless a greater width is necessary for parking facilities, maintenance, excavations, embankments, the deposit of waste materials, or driveways for livestock." W.S. § 24-1-105.

c. Livestock crossings "shall be constructed of such material that livestock will readily cross over the same and shall not be less than sixty (60) feet in length and the full width of the highway." W.S. § 24-1-125.

d. "Lands acquired for rights-of-way for [state] highways may be up to three hundred (300) feet wide and greater where extra width is necessary for: (A) Deposits of road building materials; (B) Deposits of waste materials; (C) Embankments; (D) Excavations; (E) Maintenance; (F) Parking facilities; (G) Roadside rest areas; and (H) Scenic roadside areas." W.S. § 24-2-102.

e. No more property rights shall be taken than those reasonably necessary for public use, but taking will be sustained where need within exception to 300-foot limitation shown. Woolley v. State Hwy. Comm'n, 387 P.2d 667, 674 (Wyo. 1963). The term "maintenance" should be given a broad meaning to include weighing facilities. Id. at 675.

2. Use

a. The easement holder's rights are determined by the purpose and character of the easement. Wyoming v. Homar, 798 P.2d 824, 826 (Wyo. 1990).

b. A public road, whether established by the government's actions or through prescription, means "any passageway . . . to which a governing body has acquired unrestricted legal right for the public to use the passageway." Boykin, 124 P.3d at 686 (quoting W.S. § 24-1-133(b)). Unlike a private easement, a public road, however acquired, "is open to all members of the public for *any* uses consistent with the dimensions, type of surface, and location of the roadway." Id. (quoting Lovvorn v. Salisbury, 701 P.2d 142, 144 (Colo. App. 1985)). The use of a public highway, whether acquired by prescription or otherwise, is not limited to historical uses. Id. at 685-86.

D. Legal Rights of Property Owners vs. Cities/Counties

1. City/County Rights

a. A city/county is not bound by the historic use of the road, and the public may use the road for "any use consistent with the dimensions, type of surface, and location of the roadway." See Boykin, 124 P.3d at 686.

b. "The grant of a public road easement embraces every reasonable method of travel over, under and along the right-of-way. Thus, the running of power and telephone lines above the ground and pipelines underneath do not increase the burden on the servient estate and are permissible uses . . . The operation of a public mass transit system is also within the realm of permissible uses of a road easement . . . The construction and operation of a bus

turnout on the right-of-way is a legitimate use of the road easement held by the state" Homar, 798 P.2d at 826 (internal citations omitted).

c. "[P]ublic road easements, unless otherwise restricted, include the secondary rights described herein [watermains, gas pipes, telephone and telegraph lines, etc.]." Box L Corp. v. Teton County, 92 P.3d 811, 818-19 (Wyo. 2004).

d. "[T]he right to use a public road easement . . . is transferable and divisible, so long as the transfer or division is in the public interest, and so long as the burden on the servient estate is not thereby increased." Id. at 819.

e. The legislature gave the board of county commissioners "very general powers to manage and control county roads." Bd. of County Comm'rs v. White, 547 P.2d at 1198.

2. Landowner Rights

a "The establishment of a roadway, in the absence of consent, constitutes the taking of property by the county or city for which a party may make a claim for compensation according to statute necessarily adopted to satisfy constitutional requirements." Kern v. Deerwood Ranch, 528 P.2d 910, 912 (Wyo. 1974).

b. "[A]ll persons including parties whose land is to be taken, are entitled to be informed of the land which the road is to occupy, and the description in the plat should be so definite and certain that a competent surveyor could, based upon the description, determine the road's location." Id. (citing Ruby, 360 P.2d at 174). Before a county can take the necessary land to establish a roadway, "it must identify it

specifically so that the party owning the land may assert his claim for just compensation." Id.

c. No more property rights shall be taken than those reasonably necessary for public use. Woolley, 387 P.2d 667 (allowing land in excess of 300 foot right of way to be taken for weigh station).

d. The Wyoming Eminent Domain Act and the Wyoming road establishment statutes give landowners additional rights. See infra at Section I.E.

e. After vacation:

"Since the legislature provided that all title and interest to the vacated portion of a county road reverts to the adjacent landowner subject to only a few designated exceptions, any other special rights-of-way, licenses, or privileges which a county has granted to individuals would be extinguished upon vacation of the road and relinquishment of the public's interest in the road." Schott v. Miller, 943 P.2d 1174, 1177 (Wyo. 1997) (citing W.S. § 24-3-126(c), 101(c)) (finding that plaintiff's right-of-way for water well and pipelines was extinguished when county vacated road and relinquished its interest in the property to defendants without preserving right-of-way).

E. Eminent Domain and Easements for Public Roads

1. Express Easements

a. An easement is "an interest in land which entitles the easement holder to a limited use or enjoyment over another person's property." Hasvold v. Park County Sch. Dist. No. 6, 45 P.3d 635, 638 (Wyo. 2002).

b. According to Wyoming's easement statute, easements recorded after May 20, 1981, "which do not specifically describe the location of the easement are null and void and of no force and effect." W.S. § 34-1-141(a). "Specifically described" means "sufficient to locate the easement and is not limited to a survey." W.S. § 34-1-141(d).

2. Prescriptive Easements/Adverse Possession

a. Requirements for establishment of a prescriptive easement are the same for either a public easement or a private easement. The requirements are adverse or hostile use that is continuous for ten years and puts the owner of the servient estate on notice. Lincoln County Comm'rs v. Cook, 39 P.3d 1076, 1086 (Wyo. 2002); W.S. § 24-1-101(c).

b. Although the courts generally use the terms adverse possession and prescription interchangeably when referring to prescriptive easements, there is a fundamental difference:

1. "Adverse possession denotes title acquired by the manner of possession, while a prescriptive easement is a nonexclusive right acquired by the manner of use. 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 prescribe 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." Koontz v. Town of Superior, 746 P.2d 1264, 1267 (Wyo. 1987).

2. Other than the nature of the use, the elements of adverse possession and prescription are the same.

c. The standards which must be shown are use by the public and maintenance by the county. Lincoln County Comm'rs, 39 P.3d at 1087; Steplock v. Board of County Comm'rs for Johnson County, 894 P.2d 599 (Wyo. 1995).

d. Use cannot be permissive. Lincoln County Comm'rs, 39 P.3d at 1086. Prescriptive easements are not favored, thus use is presumed to be permissive. Id. at 1089.

e. Prescriptive use is not enough to establish a public road, the road must be established by legal authority. Board of County Comm'rs v. White, 547 P.2d at 1197. If the county fails to follow the statutory procedure, the failure precludes establishing a county road. Ruby, 360 P.2d at 174.

f. W.S. § 24-1-101 established the procedure for establishment of a county road by prescription or adverse possession.

i. To create a public highway by adverse possession or prescription, the board of county commissioners must: (1) file a plat and accurate survey in accordance with W.S. § 24-3-109; (2) make publication for three weeks in an official newspaper published in the county; and (3) send notice to all landowners owning land over which the road is proposed. W.S. § 24-1-101(a)-(b).

ii. W.S. § 24-3-109 sets forth the requirements for plat and survey: "[the board of county commissioners] shall cause the county surveyor to make an accurate survey thereof . . . 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."

iii. The road must be described specifically and the survey and plat establish for all time where the road is located and establish ownership in the county. Kern v. Deerwood Ranch, 528 P.2d 910 (Wyo. 1974).

g. A municipality may also acquire a roadway through prescription or adverse possession. Koontz, 746 P.2d at 1266.

h. The party claiming the prescriptive easement has the burden of proof. Lincoln County Comm'rs, 39 P.3d at 1086.

i. A prescriptive easement cannot be established across federal lands. Bunyard v. USDA, 301 F. Supp. 2d 1052, 1054 (D. Ariz. 2004).

3. Eminent Domain

a. A public road can be established either under the Eminent Domain Act or the Wyoming road establishment statutes. Thunderbasin Land, Livestock & Inv. Co. v. Bd. of County Comm'rs, 5 P.3d 774, 780 (Wyo. 2000); L.U. Sheep Co. v. Board of County Comm'rs, 790 P.2d 663, 674-75 (Wyo. 1990). However, in reviewing an eminent domain case, the

court will "look at the broad area of eminent domain proceedings in Wyoming because . . . the road establishment statutes are simply a method of exercising the power of eminent domain." Thunderbasin Land, Livestock & Inv. Co., 5 P.3d at 780.

b. "Eminent domain is the State's right and power to appropriate private property to promote the general welfare." Wyoming Resources Corp. v. T-Chair Land Co., 49 P.3d 999, 1001 (Wyo. 2002). Condemnation is the process of taking private property for public use through power of eminent domain. See, W.S. § 1-26-502(a)(ii).

c. In Kelo v. New London, the United States Supreme Court held that the city's taking of private property and transferring it to another private party for economic development, where the condemnation serves a public purpose, satisfies the "public use" requirement of the Fifth Amendment's Takings Clause and is a constitutional use of a city's power of eminent domain. 125 S. Ct. 24 (2005). Neither the Wyoming Constitution nor Wyoming case law specifically addresses whether a state or local government's use of its condemnation power for similar purposes would violate the Wyoming Constitution. In addition to allowing private property to be taken for public use, the Wyoming Constitution provides that private property may be taken for private use for "private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, milling, domestic or sanitary purposes, nor in any case without due compensation." Wyo. Const. art. I, § 32; see also Wyo.

Const. art. I, § 33. "[U]nder the constitutional provisions aforesaid there is no difference between a public use and a private use. A private use for any of the purposes mentioned in section 32 is given the same force and effect as a public use, and no greater." Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co., 131 P. 43, 57 (Wyo. 1913). While economic development is not one of the enumerated "private uses," Grover suggests that the court may give a broad interpretation to what constitutes a "public use." "[Eminent domain] embraces all cases where, by authority of the state and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use, either by the state itself or by a corporation, public or private, or by a private citizen." Id. at 53 (quoting I Lewis on Em. Domain (3d Ed.) § 1). There was a bill introduced in the 2006 Wyoming Legislative budget session that would define "public use" to prohibit the taking of private property from one person for the benefit of economic development. Although the bill did not pass, I know it will be filed again next year.

d. Eminent Domain Act (W.S. §§ 1-26-501 through 1-26-817)

i. The Eminent Domain Act does not require that eminent domain be used 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." W.S. § 1-26-503. W.S. § 1-26-801 gives states, counties,

and municipal corporations authority for condemnation. W.S. §§ 1-26-802 through 814 grant water companies, railroads, utility companies (public and private), petroleum companies and pipeline companies condemnation authority for limited purposes. Other persons, associations, companies, and corporation authorized to conduct business in Wyoming have condemnation authority for ways of necessity. W.S. § 1-26-815.

ii. Requirements to exercise eminent domain:

a). "Except as otherwise provided by law, the power of eminent domain may be exercised to acquire property for a proposed use only if all of the following are established:
(i) The public interest and necessity require the project or the use of eminent domain is authorized by the Wyoming Constitution;
(ii) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and
(iii) The property sought to be acquired is necessary for the project." W.S. § 1-26-504.

b). Necessity means "reasonably convenient or useful to the public." "A showing that the project will increase the public safety is sufficient." Board of County Comm'rs v. Atter, 734 P.2d 549 (Wyo. 1987).

c). Condemnor has the burden of proof on necessity, then the burden shifts to condemnee to show bad faith or abuse of discretion as an affirmative defense. Id.

d). Prior access agreement does not preclude condemnation action. Wyoming Resources Corp. v. T-Chair Land Co., 49 P.3d 999 (Wyo. 2002) (citing W.S. § 1-26-503).

iii. Entry prior to condemnation.

a). Condemnor can enter the land prior to condemnation action to make sure land is suitable:

"A condemnor and its agents and employees may enter upon real property and make surveys, examinations, photographs, tests, soundings, borings and samplings, or engage in other activities for the purpose of appraising the property or determining whether it is suitable and within the power of the condemnor to condemn if the entry is:
(i) Preceded by prior notice to and written authorization from the owner or his agent;
(ii) Undertaken during reasonable hours, normally during daylight;
(iii) Accomplished peaceably and without inflicting substantial injury." W.S. § 1-26-506.

b). If efforts to accomplish a lawful entry fail, the condemnor can apply for a court order

for entry. The court can require a deposit to be held in case of damage. W.S. § 1-26-507.

c). Damages for entry:

" A condemnor is liable for physical injury to, and for substantial interference with possession or use of, property caused by his entry and activities upon the property." W.S. § 1-26-508.

d). Unreasonable inspections may subject a government employee to personal liability. See Mimics, Inc. v. Village of Angel Fire, 394 F.3d 836 (10th Cir. 2005) (holding that building inspector was not entitled to qualified immunity when he made warrantless searches of commercial premises after hours and allegedly for the purpose of harassing the plaintiff).

iv. Condemnor must make **good faith effort to purchase** prior to commencement of condemnation action. W.S. § 1-26-510.

a). Negotiations:

"(a) A condemnor shall make reasonable and diligent efforts to acquire property by good faith negotiation.

(b) In attempting to acquire the property by purchase under W.S. § 1-26-510, the condemnor acting within the scope of its powers and to the extent not otherwise

forbidden by law, may negotiate and contract with respect to:

(i) Any element of valuation or damages recognized by law as relevant to the amount of just compensation payable for the property;

(ii) The extent or nature of the property interest to be acquired;

(iii) The quantity, location or boundary of the property;

(iv) The acquisition, removal, relocation or disposition of improvements upon the property and of personal property not sought to be taken;

(v) The date of proposed entry and physical dispossession;

(vi) The time and method of payment of agreed compensation or other amounts authorized by law; and

(vii) Any other terms or conditions deemed appropriate by either of the parties." W.S. § 1-26-509.

b). Exceptions to W.S. § 1-26-509 and W.S. § 1-26-510:

"(i) Compliance is waived by written agreement between the property owner and the condemnor;

(ii) One (1) or more of the owners of the property is unknown, cannot with

reasonable diligence be contacted, is incapable of contracting and has no legal representative, or owns an interest which cannot be acquired by contract; or
(iii) Due to conditions not caused by or under the control of the condemnor, there is a compelling need to avoid the delay in commencing the action which compliance would require." W.S. § 1-26-511.

v. The public entity condemning the property must make a **written resolution.**

a). "A public entity may not commence a condemnation action until it has first adopted a written resolution in substantial conformity with this section, authorizing commencement and prosecution of the action. The authorization may be amended or rescinded at any time before or after commencement of the condemnation action but if rescinded the public entity shall pay the litigation expenses of the condemnee." W.S. § 1-26-512(a).

b). The written authorization shall include:
"(i) A general statement of the proposed public use for which the property is to be taken and a reference to the specific statute that authorizes the taking of the property by the condemnor;

(ii) A description of the general location and extent of the property to be taken, with sufficient detail for reasonable identification; and

(iii) A declaration that a taking of the described property is necessary and appropriate for the proposed public use." W.S. § 1-26-512(b).

vi. Compensation

a). Condemnor must make deposit with court at commencement of eminent domain action of "an amount equal to the condemnor's last offer of settlement prior to the action." The court can order additional deposit or can waive deposit for a public entity. If no deposit is made, the public entity can not enter the property prior to judgment. W.S. § 1-26-513(a).

b). If amount of compensation is in dispute and "is less than twenty thousand dollars ($20,000.00), excluding interest and costs, or the difference between the latest offer of the condemnor and the latest demand by the condemnee is less than five thousand dollars ($5,000.00)", a party can request the court hold an informal hearing to determine compensation. W.S. §§ 1-26-601, 602, 603. If a party is not happy with the court's judgment, "[e]ither party, within thirty (30)

days after entry of the judgment, may reject the judgment and file a written demand for trial. The action shall be restored to the docket of the court as though proceedings under this article had not occurred." W.S. § 1-26-604.

c). The "right to compensation accrues upon the date of possession by condemnor." W.S. § 1-26-701.

d). The measure of compensation is the "fair market value determined under W.S. § 1-26-704 as of the date of valuation." W.S. § 1-26-702(a). "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." W.S. § 1-26-702(b); L.U. Sheep Co. v. Board of County Comm'rs, 790 P.2d 663 (Wyo. 1990).

e). "The date of valuation is the date upon which the condemnation action was commenced." W.S. §§ 1-26-701, 703.

f). Fair Market Value:

"(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.

(b) The fair market value of property owned by an entity organized and operated upon a nonprofit basis is deemed to be not less than the reasonable cost of functional replacement if the following conditions exist:

(i) The property is devoted to and is needed by the owner in order to continue in good faith its actual use to perform a public function, or to render nonprofit educational, religious, charitable or eleemosynary services; and

(ii) The facilities or services are available to the general public.

(c) The cost of functional replacement under subsection (d) of this section includes:

(i) The cost of a functionally equivalent site;

(ii) The cost of relocating and rehabilitating improvements taken, or if relocation and

rehabilitation is impracticable, the cost of providing improvements of substantially comparable character and of the same or equal utility; and

(iii) The cost of betterments and enlargement required by lay or by current construction and utilization standards for similar facilities." W.S. § 1-26-704.

g). Effect of condemnation action on value: "The fair market value of the property taken, or of the entire property if there is a partial taking, does not include an increase or decrease in value before the date of valuation that is caused by:

(i) The proposed improvement or project for which the property is taken;

(ii) The reasonable likelihood that the property would be acquired for that improvement or project; or

(iii) The condemnation action in which the property is taken." W.S. § 1-26-705.

h). Effect of condemnation action on value in partial taking:

i). "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 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." W.S. § 1-26-706.

ii). In a case involving condemnation of a private road for public use, the court indicated that W.S. § 1-26-706 "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." L.U. Sheep Co. v. Board of County Comm'rs, 790 P.2d 663 (Wyo. 1990).

i). Compensation for crops and improvements:

i) According to Wyoming Statute:

"(i) The compensation for crops growing on the property on the date of valuation is the higher of the

current fair market value of the crops in place, assuming the right to bring them to maturity and to harvest them, or the amount by which the existence of the crops enhances the fair market value of the property.

(ii) 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.

(iii) If improvements are destroyed, removed or damaged by the condemnee after the date of valuation, the amount of compensation shall be adjusted to reflect the extent to which the fair market valued of the property has thereby been reduced.

(iv) Crops or improvements that are first placed upon the property after the date of valuation shall be excluded from consideration in determining the amount of the award, except that the award shall be

adjusted to include the reasonable and necessary cost of providing improvements required by law and improvements necessary to protect life or property as authorized by the court." W.S. § 1-26-709.

ii). A private road is an improvement under W.S. § 1-26-709(b), and thus, "evidence of road construction costs may well be relevant as to its market value." L.U. Sheep Co. v. Board of County Comm'rs, 790 P.2d 663 (Wyo. 1990).

j). Divided interest:

If the property to be taken is under divided interests, the fair market value is still based on the value of the property as a whole. W.S. § 1-26-710.

k). 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 purpose 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." W.S. § 1-26-711.

l). Compensation for loss of goodwill:

"(a) In addition to fair market value determined under W.S. § 1-26-704, the owner of a business conducted on the property taken, or on the remainder if there is a partial taking, shall be compensated for

loss of goodwill only if the owner proves that the loss:

(i) Is caused by the taking of the property or the injury to the remainder;

(ii) Cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill;

(iii) Will not be included in relocation payments . . .; and

(iv) Will not be duplicated in the compensation awarded the owner.

(b) Within the meaning of this section, 'goodwill' consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality and any other circumstances resulting in probable retention of old or acquisition of new patronage." W.S. § 1-26-713.

e. Landowner rights under Eminent Domain Act

i. Inverse condemnation:

"When a person possessing the power of condemnation takes possession of or damages land in which he has no interest, or substantially diminishes the use or value of land, due to activities on adjoining land without the authorization of the owner of the land or before filing an action of

condemnation, the owner of the land may file an action in district court seeking damages for the taking or damage and shall be granted litigation expenses if damages are awarded to the owner." W.S. § 1-26-516. The two year statute of limitations for filing claims established in the Wyoming Governmental Claims Act applies to inverse condemnation actions against the government under this section. See Waid v. Wyoming, 996 P.2d 18, 24-25 (Wyo. 2000).

ii. Use of property sought to be condemned: "(a) Unless the court otherwise directs, the condemnee may use the property sought to be taken for any lawful purpose before the date on which the condemnor is authorized to take possession. (b) Thereafter, the condemnee may use the property only for any purpose or use which is not inconsistent with the estate taken by the condemnor. The uses authorized by subsection (a) of this section include any normal work on the property and the planting, cultivation and removal of crops.

iii. The compensation awarded the condemnee shall include an amount sufficient to compensate for loss caused by any temporary restriction or limitation imposed by the court upon his right to use the property under subsection (a) of this section." W.S. § 1-26-708.

5. Wyoming Road Establishment Statutes (W.S. §§ 24-3-101 through 24-3-127)

a. Initiation

i. Can be initiated by a board of county commissioners:

"The board of county commissioners of any county, may, on its own motion by resolution duly adopted, where it deems the public interest so requires, initiate the procedure for the establishment, vacation or alteration of a county highway, as the case may be, by setting forth in such resolution the point of commencement, 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 [chapter 24]." W.S. § 24-3-101(a).

ii. Or can be initiated by the public:

"Any person desiring the establishment, vacation, or alteration of a county highway shall file in the office of the county clerk of the proper county, a petition signed by five (5) or more electors of the county residing within twenty-five (25) miles of the road proposed to be established, altered, or vacated." W.S. § 24-3-101(b).

iii. Note that if it is initiated by the public, "[t]he board of 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 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." W.S. § 24-3-102.

iv. Additionally this statute allows the board of county commissioners to change the status of any road to a private road. W.S. § 24-3-101(c).

b. Procedure

i. Case contested by landowner.

a). Board of county commissioners appoints a "viewer." The chairman of the board alone can appoint a viewer in an emergency situation. A viewer is a "suitable and disinterested person, who may be a member of the board of county commissioners, to examine into the expediency of the purposes of the proposed road, alteration or vacation thereof, and to report immediately." W.S. § 24-3-103.

b), The viewer can determine whether another road in the vicinity of the proposed road would meet the same purpose. W.S. § 24-3-104.

c). The viewer must take into consideration both public and private convenience and the expense of the proposed road. W.S. § 24-3-105.

d). Viewers decision: "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 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." W.S. § 24-3-106.

ii. Additionally, roads can be established by consent of landowners: "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 said 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 or 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 landowners and said board . . . ." W.S. § 24-3-108.

c. Landowner rights under the road establishment statutes:

i. "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." Appeal must be made within 30 days. The proceedings are governed by the Wyoming Administrative Procedures Act. If appeal is upheld, appellant can be reimbursed "for all reasonable costs of asserting his claim." W.S. § 24-1-101(b).

ii. "Any applicant for damages 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 (30) days after such decision has been made by the said board, or such claim shall be deemed to have been abandoned." The applicant must also post a bond to cover costs. W.S. § 24-3-119.

iii. Damages are determined "in the same manner as in a civil action." W.S. 24-3-121. A landowner is entitled to a trial de novo. Thunderbasin Land,

Livestock & Inv. Co. v. County of Laramie, 5 P.3d 774 (Wyo. 2000).

iv. ". . . Ranchmen, farmers and livestock raisers and producers may file with the board of county commissioners of their county a request for livestock crossings, and the various boards of county commissioners shall recommend from time to time to the department of transportation such crossings as they believe will best suit the necessities and convenience of ranchmen, farmers and livestock raisers and producers in their county." W.S. § 24-1-124.

6. Differences Between Proceedings Under Eminent Domain Act and Road Establishment Statutes

a. The Eminent Domain Act applies more generally to government and non-government entities condemning property, whereas the road establishment statutes provide specific procedures to establish county roads only.

b. Under the Eminent Domain Act, condemnation proceedings are initiated in a court, whereas under the road establishment statutes, the court only becomes involved if a landowner appeals the board's decision. W.S. § 1-26-513; W.S. § 24-3-119.

i. In cases where any objections and claims for damages are likely to be settled at a hearing before the board, the road establishment statutes may be more efficient.

ii. In cases where there is likely to be a large amount of dispute, condemnation proceedings under the

Eminent Domain Act may be more efficient because, if a landowner appeals a board's determination of damages under the road establishment statutes, the court will hold a trial de novo. See Thunderbasin Land, Livestock & Investment Co., 5 P.3d 774.

c. The road establishment statutes provide for more public involvement.

i. The public can petition the board to establish a public road. W.S. § 24-3-101(b)(i). The board is the one that must initiate the proceedings under the Eminent Domain Act.

ii. The public has the opportunity to voice its objections and to claim damages at a hearing before the board. W.S. § 1-26-118.

d. The board may defray the expenses of establishing a county road under the road establishment statutes by requiring the petitioners to deposit a sufficient sum with the county clerk. W.S. § 24-3-102.

III. ABANDONMENT AND VACATION CONSIDERATIONS

A. Vacation of a Public Road

1. When a Statutory Vacation Should be Initiated

   a. If the board considers a highway impractical or without benefit to the public, section 24-3-101 is clear authority for alteration or vacation. Board of County Comm'rs v. State ex rel. Miller, 369 P.2d 537, 542 (Wyo. 1962). W.S. § 24-3-101: "The board of county commissioners of any county, may, on its own motion by resolution duly adopted, where it deems the public interest so requires, initiate the procedure for the establishment, vacation or alteration of a county highway . . . Any person desiring the establishment, vacation, or alteration of a county highway shall file in the office of the county clerk of the proper county, a petition . . . ."

   b. Additionally § 24-1-104 gives authority to vacate a public road:

   "No county road shall hereafter be established, altered or vacated in any county in this state, except by authority of the board of the county commissioners of the county wherein such road is located." W.S. § 24-1-104.

   c. Agreements by board of county commissioners to vacate an established county road by methods other than those by statute provided are null and void. Board of County Comm'rs v. White, 547 P.2d 1195, 1200 (Wyo. 1976).

2. Abandoned Road Bed: Who Owns It? Who Can Use It?

   a. When the Wyoming Transportation Commission abandons a portion of a state highway, "all title and interest, except as herein provided, to the highway right-of-way shall pass

to and vest in the present adjacent landowner according to the portion contributed by adjacent landowner or his predecessor in interest." Wyo. St. § 24-3-126(c)(i).

b. Although the statute only refers to state highways, this rule applies equally to other county roads. See Schott v. Miller, 943 P.2d 1174, 1177 (Wyo. 1997). "If the public has an easement on the land occupied by a highway, the title reverts to the fee owners upon vacation of the highway, and exclusive possession of the land is restored to the owners." Id.

c. The legislature has statutorily mandated that certain rights are not extinguished by abandonment, such as the right of a corporation to "operate or maintain facilities associated with public utilities" and the right of counties to reserve access rights for landowners. Id. (citing W.S. § 24-3-126(c), 101(c)).

d. "Since the legislature provided that all title and interest to the vacated portion of a county road reverts to the adjacent landowner subject to only a few designated exceptions, any other special rights-of-way, licenses, or privileges which a county has granted to individuals would be extinguished upon vacation of the road and relinquishment of the public's interest in the road." Id. (citing W.S. 24-3-126(c), 101(c)).

B. Termination of Private Easements

1. Common Law Abandonment

a. An easement holder may abandon an easement under certain circumstances. "Abandonment of an easement requires an intentional relinquishment indicated by conduct

which discloses the intention to surrender the right to use the land authorized by the easement." Hasvold v. Park County Sch. Dist. No. 6, 45 P.3d 635, 641 (Wyo. 2002).

b. "[T]he determination of whether or not an easement has been abandoned turns largely on the intention of the dominant estate owner. The servient estate owner must prove that the dominant estate owner intended to abandon the easement and such intention may be inferred only from strong and convincing evidence." Abandonment cannot be shown by mere nonuse. Id.

c. "Upon abandonment, nonuse for a period of ten (10) years, or transfer or attempted transfer to a use where the transferee could not have condemned for the new use, or where the new use is not identical to the original use and new damages to the landowner whose property was condemned for the original use will occur, any easement authorized under this act [1-26-501 through 1-26-817] terminates." W.S. § 1-26-515.

2. What Must Be in Place for Adverse Possession and Use to Occur

a. "To terminate an easement by adverse possession, the owner of the servient estate must take an action that would be permitted only if the easement did not exist. An easement is extinguished by a use of the servient tenement by the possessor of it which would be privileged if, and only if, the easement did not exist, provided (a) the use is adverse as to the owner of the easement and (b) the adverse use is, for the period of prescription, continuous and uninterrupted." Mueller v. Hoblyn, 887 P.2d 500, 506-07 (Wyo. 1994).

b. The difference between adverse possession of land and adverse possession of an easement is that, since the "owner of the servient estate claiming adverse possession of an easement already has the right to possess and use the land so long as that use is not inconsistent with the easement, the owner of a servient estate must prove the use of the servient estate made during the period of adverse possession is sufficiently hostile and inconsistent with the use permitted by the easement." Id. at 507.

c. The elements required to terminate an easement by adverse possession are "visible, notorious, and continuous adverse and hostile use of said land which is inconsistent with the use made and rights held by the easement holder, not merely possession which is inconsistent with another's claim of title." Id.

d. In Mueller, the court held that the owner of the servient estate did not terminate an undeveloped private easement by the cultivation of crops and drilling of a water well on the easement because that use was "not adverse to the holders of the unused easement." Id. at 509.

VI. COMMON ROAD AND ACCESS PROBLEMS AND SOLUTIONS

A. Disputes Between Private Landowners

1. Misuse/Obstruction of an easement

   a. "Both owners possess rights and each must as far as possible respect the other's use." Bard Ranch Co. v. Weber, 557 P.2d 722, 730 (Wyo. 1976).

      i. The owner of an easement has all rights incident or necessary to the enjoyment of the easement. Id. (quoting 25 AM. JUR. 2D EASEMENTS AND LICENSES § 72). "The rights of any person having an easement in the land of another are measured and defined by the purpose and character of the easement. A principle which underlies the use of all easements is that the owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden." Id. at 731 (quoting AM. JUR).

      ii. If an easement owner exceeds "his rights either in the manner or in the extent of [the use of the easement], he becomes a trespasser to the extent of the unauthorized use." Id. at 730 (quoting AM. JUR.).

      iii. The owner of the servient estate retains all rights to the property and "may make any use of his land that does not interfere substantially with the created easement." Id. 730 (quoting Edwards v. Julian, 159 A.2d 547, 549 (Pa. Super. 1960).

      iv. What constitutes an unreasonable use of an easement or an unreasonable use of the servient

estate is a question of fact. See id. at 732; White v. Allen, 65 P.3d 395, 399-401 (Wyo. 2003).

v. Gates/Cattleguards

a). In the absence of express language in a grant, "the servient owner may maintain a gate across the way if necessary for the use of the servient estate and if the gate does not unreasonably interfere with the right of passage." White v. Allen, 65 P.3d at 399 (Wyo. 2003) (citation omitted).

b). The owner of the servient estate has the burden of establishing that the gate is reasonable. Id. at 400. Once the servient owner meets this burden, the dominant owner must establish that the gate poses an unreasonable interference with the easement. Id.

c). Whether the owner of the dominant estate may substitute cattleguards for a gate without unreasonably burdening the servient estate is a question of fact. White v. Allen, 115 P.3d 8, 11 (Wyo. 2005).

d). Factors that the court has considered in determining the reasonableness of a gate include the language of the grant, the circumstances under which the grant of the easement was made, whether the grant was gratuitous, and the uses of the servient estate both before and after the creation of the

easement. See White v. Allen, 65 P.3d at 400-01.

b. Solutions for solving disputes between landowners

i. Suit for Damages: "The owner of the servient estate may recover damages if those using the easement exceed their rights under the easement." Curutchet v. Bordmarrampe, 726 P.2d 500, 506 (Wyo. 1986). The owner of the dominant estate may also maintain an action for damages for interference with an easement. Id. at 507.

ii. Obtain an Injunction: The owner of the dominant or servient estate may obtain an injunction against the unreasonable use of an easement or interference with an easement. See, e.g., Bard Ranch Co. v. Weber, 557 P.2d 722 (Wyo. 1976). Contempt may be an available remedy in certain circumstances if a party continues to obstruct or misuse an easement after the court has prohibited the conduct. See id.

iii. Obtain a Declaratory Judgment: "Courts of record within their respective jurisdictions may declare rights, status and other legal relations whether or not further relief is or could be claimed." W.S. § 1-37-102.

a) The owner of the dominant or servient estate may bring a declaratory judgment action to enforce the parties' respective rights in an easement. See White v. Allen, 115 P.3d 8.

b) A declaratory judgment is not the appropriate remedy to declare a public

prescriptive easement since the legislature has established specific procedures pursuant to statute to establish public prescriptive easements. Ten Broek v. County of Washakie, 82 P.3d 269 (Wyo. 2003).

iv. Bring a Quiet Title Action: "An action may be brought by a person in possession of real property against any person who claims an estate or interest therein adverse to him, for the purpose of determining the adverse estate or interest." W.S. § 1-32-201.

v. Self Help: Some jurisdictions have held that, "[t]he easement owner has a right to remove obstructions unreasonably interfering with use of the easement, so long as there is no breach of the peace." Carson v. Elliott, 728 P.2d 778, 780 (Idaho 1986). Wyoming has not addressed whether self help is an appropriate option, although in some instances the easement holder did remove an obstruction, which was the cause of the servient landowner filing suit.

vi. If the road in question is a public road, and a landowner obstructs the road, a member of the traveling public may bring an action for a public nuisance if he suffers some special injury (i.e. injury to property or health) different from that of the general public. See Cottman v. Lochner, 278 P. 71 (Wyo. 1929) (allowing a livestock owner to bring a suit for damages where the defendant had built a fence across a public highway that blocked

the livestock owner's access between his land and the public rangeland).

2. Location/Relocation of an easement

   a. Where the location of an easement is disputed, the court may determine the location of an easement. See R.C.R., Inc. v. Rainbow Canyon, Inc., 978 P.2d 581, 589 (Wyo. 1999).

   b. The general rule is that "unilateral relocation of an easement is not permitted, absent an express provision in the granting instrument." R.C.R., Inc. v. Rainbow Canyon, Inc., 978 P.2d 581, 588 (Wyo. 1999).

   c. "An easement holder and the servient estate owner may relocate the easement by mutual consent." Id. (quoting Ericsson v. Braukman, 824 P.2d 1174, 1177 (Or. App. 1992).

3. Issues with easements and multiple landowners

   a. "Unless the terms of the servitudes . . . provide otherwise, holders of separate servitudes creating rights to use the same property must exercise their rights so that they do not unreasonably interfere with each other. In the event of irreconcilable conflicts in use, priority of use rights is determined by priority in time, except as a later-created servitude takes free of another under the applicable recording act." Rest. (3rd) Prop-Serv § 4.12.

   b. Although there is no Wyoming case law directly on point, the rule stated in the Restatements is consistent with the principles in Wyoming law that the owners of the dominant and servient estates must respect each others' rights and that the owner of the servient estate may make "any use of

his land that does not substantially interfere with the created easement." Bard Ranch Co., 557 P.2d at 730. It is also consistent with the principle that "[i]n construing an easement, [the court will] seek to determine the intent of the parties to the easement." Hasvold v. Park County Sch. Dist. No. 6, 45 P.3d 635, 638 (Wyo. 2002). This rule has been applied in other jurisdictions, as illustrated below.

i. In a case where a servient landowner granted to both plaintiff landowners and defendant landowners the right to use a roadway for ingress and egress, and defendant landowners laid a gas line underneath the roadway that did not interfere with the plaintiffs' rights of ingress and egress, the court held that the plaintiffs were not entitled to an injunction ordering the removal of the gas line. See Rippetoe v. O'Dell, 276 S.E.2d 793 (W. Va. 1981). The court stated, "An owner of a servient estate may legally grant successive easements for purposes of travel in and over a certain road or way in favor of various property owners having need for such travel easements, to be used jointly by them; and a person having such an easement right may not be permitted to object to any use or change in the character of such road or way by the owner of the servient estate or by any other owner of such an easement right or way so long as the rights of the one complaining are not thereby impaired or interfered with in an undue or unreasonable manner or degree. Id. at 796.

ii. In a case where a land developer granted a homeowner's association the right to charge a reasonable access fee over a private roadway, and subsequently granted an access right over the same roadway to a tennis club, the court held that the tennis club was subject to the access fee. Howorka v. Harbor Island Owners' Ass'n, 356 S.E.2d 433 (S.C. Ct. App. 1987). "The grantor of an easement retains dominion and use of the servient land only to the extent his actions do not interfere with the grantee's reasonable enjoyment of the easement. Thus, any easement subsequently granted is subordinate, and the subsequent grantee acquires only the right to use the servient land in a manner consistent with the terms of the easement." Id. at 436 (internal citations omitted).

B. Impact of Road and Access Disputes on Title

1. An easement owner may need to pursue a quiet title or declaratory judgment action in order to assure a prospective purchaser of appurtenant land that the purchaser's access needs will be served. See JAMES H. BACKMAN & DAVID A. THOMAS, A PRACTICAL GUIDE TO DISPUTES BETWEEN ADJOINING LANDOWNERS–EASEMENTS §§ 1.07(2)(e), 2.05(2)(a)(ii) (Lexis 2002). In this manner, an easement holder can establish the precise dimensions of the right-of-way and may be able to satisfy a "purchaser or a lending institution serving the purchaser and relying on the secured value of the appurtenant land together with its beneficial easements." Id. at § 1.07(2)(e).

2. If a burdened property owner wishes to be able to "satisfy the marketability obligation arising under an agreement promising to convey an unencumbered fee simple title," the property owner may need to initiate a quiet title action. See id. at § 1.07(3)(e); see also id. at § 5.05(1)(v). While encumbered property may be conveyed, the seller must disclose the nature and extent of the encumbrance. Id. at § 1.07(4)(b)(ii).

C. Landlord/Owner Liability for Third Party or Public Use Easements

1. Conditions on the right-of-way

a. The general rule is that "[a] possessor of land over which there is a public highway or private right-of-way is not subject to liability for physical harm caused to travelers upon the highway or persons lawfully using the way by his failure to exercise reasonable care (a) to maintain the highway or way in safe condition for their use, or (b) to warn them of dangerous conditions in the way which, although not created by him, are known to him and which they neither know nor are likely to discover." RESTATEMENT (SECOND) OF TORTS § 349.

i. The reason for this rule is that normally either the government (in the case of a public road) or the person using the easement (in the case of a private road) has the duty to maintain the road. Id. at Cmt. b.

ii. Although there are no Wyoming cases on point, several other jurisdictions have adopted this rule. Thus, for example, in Lacey v. Bekaert Steel Wire Corp., the Eighth Circuit Court of Appeals held that, where the plaintiff had failed to show that the

landowner had "created or maintained any structure or artificial condition" on a public road or that "any such structure or artificial condition existed for [the landowner's] sole benefit, the landowner "had no duty to install safety devices on the public road which ran across its property." 799 F.2d 434, 437 (8th Cir. 1986).

b. The Restatements note an exception to the general rule: "A possessor of land over which there is a public highway is subject to liability for physical harm caused to travelers thereon by a failure to exercise reasonable care in creating or maintaining in reasonably safe condition any structure or other artificial condition created or maintained in the highway by him or for his sole benefit subsequent to its dedication." RESTATEMENT (SECOND) OF TORTS § 350.

c. Although there are no Wyoming cases on point, the Colorado Court of Appeals adopted this exception to the general rule in Swickowski v. City of Fort Collins, 923 P.2d 208 (Colo. App. Div. V 1996), aff'd 934 P.2d 1380 (Colo. 1997). In that case, the court held that a landowner that conveyed a right-of-way over a portion of his land to a city for a roadway and then subsequently designed and built the roadway under an agreement with the city owed a duty of care to a bicyclist who was allegedly injured by the landowner's negligent design and construction of the modifications and improvements to the roadway. Id. at 213. The court found that the "general rule that an abutting owner is not liable for conditions existing upon the public way because he does not own, possess, or control it" was

not applicable in this case because the landowner had created the alleged defect. Id.

2. Liability for conditions on the adjoining land

   a. "A possessor of land who creates or permits to remain thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidently brought into contact with such condition while traveling with reasonable care upon the highway, is subject to liability for physical harm thereby caused to persons who (a) are traveling on the highway, or (b) foreseeably deviate from it in the ordinary course of travel." RESTATEMENT (SECOND) OF TORTS § 368.

   b. "A possessor of land abutting upon a public highway is subject to liability for physical harm caused to children by an artificial condition maintained by him on the land so close to the highway that it involves an unreasonable risk to children because of their tendency to deviate from the highway." Id. at § 369.

   c. The rules listed above are simply applications of the general rules regarding premises liability.

3. Liability issues relating to livestock

   a. Wyoming rejected the English common law rule that the owner of livestock is strictly liable for damages caused by trespassing livestock in favor of an open-range or fence-out rule. Anderson v. Two Dot Ranch, Inc., 49 P.3d 1011, 1014 (Wyo. 2002). Thus, in Wyoming, the common law rule is that "an owner of domestic animals is under no legal obligation to restrain them from being loose or unattended

on a highway," absent a statute to the contrary. Id. at 1017-18.

i. Open range can be defined as "an area where there is no stock law or ordinance prohibiting an owner from allowing his domestic animals to roam at large" or "an area in which livestock are kept at large, unrestrained and unattended." Id. at 1014 n.3 (internal quotations omitted).

ii. While livestock owners owe a general duty of care, "that duty does not require a livestock owner to prevent livestock from wandering onto public highways in posted open range." Id. at 1024.

b. The Wyoming legislature has modified the common law rule by the passage of three statutes: the Fence Out Statute (W.S. § 11-28-108), the Strays on Fenced Highways Statute (W.S. § 11-24-108), and the Livestock District Statutes (W.S. §§ 11-33-101 to 109). Id. at 1020 n.15.

i. The Fence Out Statute provides, "Any person owning or having in his possession or charge any livestock or domesticated buffalo which breaches into any lawful enclosure belonging to someone other than the owner of the animal, is liable to the party sustaining the injury for all damages sustained by reason of such breaching." W.S. § 11-28-108(a).

a). "The following are lawful fences in this state:

(i) A fence made of steel, concrete or sound wooden posts and three (3) spans of barbed wire not more than fifteen (15 inches) or

less than ten (10) inches apart, or two (2) spans of barbed wire with a wooden rail on top. Wooden posts shall be at least four (4) inches in diameter. Posts shall be set firmly in the ground at least twenty (20) inches deep, at no greater distance apart than twenty-two (22) feet between the posts or thirty-three (33) feet with at least two (2) iron or wooden stays between the posts. Stays shall be placed equal distance apart from themselves and the post on either side.
(ii) A post and board fence made of sound posts not less than four (4) inches in diameter set substantially in the ground not more than ten (10 feet) apart, with three (3) boards sold as one (1) inch lumber eight (8) inches wide, and not more than ten (10) inches apart, or four (4) boards sold as one (1) inch lumber six (6) inches wide, not more than eight (8) inches apart, securely fastened with nails or otherwise;
(iii) A four (4) pole fence with round poles not less than two (2) inches in diameter at the small end, with either upright or leaning posts not more than sixteen (16) feet apart, and securely fastened with nails, wires or otherwise." W.S. § 11-28-101(a). "All other fences made and constructed of boards, rails, poles, stones, hedge plants or

other material which upon evidence is declared to be as strong and well calculated to protect enclosures and is as effective for resisting breaching stock as those described in subsection (a) shall be considered a lawful fence." Id. at 11-28-101(b).

b). A board of county commissioners "may authorize the erection of a lawful fence upon the right-of-way of any public road." W.S. § 11-28-105.

c). Although no Wyoming cases have used this statute to impose liability on an owner whose livestock breached a lawful fence and caused damage to a user of a private right-of-way, the Wyoming Supreme Court recently stated that the "Fence Out Statute established the full liability of livestock owners for all damages caused by livestock breaching a 'lawful fence,' not just for damages to property." Anderson, 49 P.3d at 1016.

ii. The Strays on Fenced Highways statute provides, "No owner or person having custody or charge of livestock shall permit the livestock to run at large in any fenced public highway in Wyoming." W.S. § 11-24-108(a). "Any person or corporation violating this section shall be fined . . . and in addition shall pay all damage done by the livestock. The provisions of this section do not apply to livestock

drifting into lanes or fenced roads in going to or returning from their accustomed ranges." Id. at 11-24-108(b).

a). The statutes define a public highway as "the entire width between the boundary lines of every way publicly maintained or if not publicly maintained, dedicated to public use when any part is open to the use of the public for purposes of vehicular travel." W.S. § 31-1-101(a)(viii).

b). To impose civil liability, the owner must have been at least negligent in allowing the livestock onto the highway. Nylen v. Dayton, 770 P.2d 1112, 1116 (Wyo. 1989). The mere presence of livestock on the highway without any evidence of negligence on the part of the owner does not establish a violation of the statute. Id. at 1116-17.

c). The Wyoming Supreme Court has not distinguished a situation in which the landowner is the one that fenced the public highway versus a situation in which the county or the Wyoming Department of Transportation fenced the highway. Wyoming statues provide, "In the event that fences paralleling state highways, or built on the highway right-of-way need repair or reconstruction to meet legal fence requirements, . . . the actual work of repair

and reconstruction of the fence, including all corresponding labor costs, shall be performed by the department of transportation." W.S. § 24-1-112. However, in Gilliland v. Steinhoefel, the court found that, where the defendant may not have made a careful inspection of the fence prior to leaving his cattle in the field for the night and where the defendant may have been "negligent in the choice of the field in which he placed the cows and could reasonably foresee that they would escape therefrom onto the highway," there was a genuine issue of material fact sufficient to preclude summary judgment in favor of the defendant in an action for damages caused when the plaintiff's vehicle struck the defendant's cow on a fenced public highway. 521 P.2d 1350, 1351-52 (Wyo. 1974). This suggests that which party erects or maintains the fence is not dispositive to the issue of negligence.

iii. Under the Livestock District Statutes, the "board of county commissioners of each county in the state may create livestock districts within any irrigation district." W.S. § 11-33-101. "The owner of livestock within a livestock district established pursuant to Wyoming laws who allows the livestock to run at large "is liable to any person who suffers

damage from the depredations or trespasses of the animals, without regard to the condition of his fence." W.S. § 11-33-108. "The Livestock District Statutes, like the Fence Out Statute, made any violation a misdemeanor and imposed liability on a livestock owner for all damages occasioned by such a violation." Anderson, 49 P.3d at 1019.

a). A livestock district can only be created or vacated by the petition of 75 percent of the landowners owning at least 75 percent of the land in an irrigation district. W.S. §§ 11-33-102, 104.

b). If a landowner is unsure as to whether his/her land is within a livestock district, the landowner can call the board of county commissioners.

D. Overweight Vehicle Permits

1. Wyoming statutes define the maximum width, height, length, and weight of all vehicles operating on state highways. See W.S. § 31-18-802. "A board of county commissioners may by resolution adopt any or all of the provisions of this act to apply to county roads under their jurisdiction." Id. at § 31-18-802(a)(x).

2. Congress has also established vehicle weight limits applicable to the interstate and national defense highway system with which a state must comply in order to be eligible to receive federal highway funds. See 23 U.S.C. § 127(a)(1).

   a. In general, a vehicle may not exceed 80,000 pounds gross weight, and other limitations are placed on the gross weight that can be carried per axle. Id. at § 127(a)(2).

b. Although the federal government does not issue overweight vehicle permits, a state may issue special permits for vehicles that exceed the federal limitations for:

i. vehicles and loads which cannot be easily dismantled or divided;

ii. divisible loads where the maximum weight of the vehicle does not exceed the maximum weight allowed by state laws or regulations in effect on July 1, 1956 (state grandfathered rights); or

iii. the vehicle falls within one of the enumerate exceptions for specific states. Id.

3. "Restrictions, requirements for lighter loads, alternate routes or other conditions may be imposed by the Highway Patrol Office of Overweight Loads [an office within the Highway Patrol Division of the Department of Transportation which processes permits for overweight loads] in order to insure the structural integrity of the highway system and to minimize the inconvenience to the other highway users." Wyo. Admin. Code Transp. Motor Carriers Ch. 5, § 17(c), § 3(cc).

4. The Department of Transportation may issue permits for overweight or oversize vehicles. W.S. § 31-18-804.

a. Administrative regulations provide for different classes of overweight vehicle permit, require the permittee to follow certain safety regulations, and provide that the permittee will be liable for any damage that should occur to any highway property during the move. See Wyo. Admin. Code Transp. Motor Carriers Ch. 5.

b. Special exemptions to certain statutory requirements apply to the "towing of disabled vehicles, implements and

produce of husbandry, forest products, gravel and agricultural products that cannot be weighed at a point of loading, and permits for multi-piece loads in excess of 117,000 lbs." Id. at § 6.

c. A person who fails to obtain a permit before transporting an overweight load if required by statute, rule, or regulation, is guilty of a misdemeanor and will be fined. W.S. § 31-18-805(a). The fine for exceeding weight limits is assessed according to the excess weight. Id. at § 31-18-805(e).

5. To facilitate interstate transportation, Wyoming enacted the Multistate Highway Transportation Agreement, which established a cooperating committee, of which Wyoming is a voting member, with the objective of, *inter alia*, providing uniform standards for the operation of overweight vehicles on state highways within the participating states. W.S. §§ 31-18-901 to 903.