

# Highways 101

*"A way may be a road that is neither a public highway nor a private road or way, under our statutes."* Territory v. Richardson, 8 Ariz. 336 (1904).

*Huh?*

# Topics

- How County Highways Were Created (in the past)
- How to Establish a County Highway (now)
- How County Roads Were Created (in the past)
- How to Establish a County Road (now)
- Classes of County Roads
- Authority, Duties, Liabilities (depending on class)
- How to Get Rid of a County Road (or ROW)
- Special Road Issues
  - Roads with no ROW
  - RS 2477
  - State Lands
  - HURF

# Kinds of County Roads

- County Highways
- County Roads—Maintained
- County Roads—Primitive (maintained, sort of)
- County Roads—Not maintained
- County Rights of Way (not roads, just on paper)
- Private Roads

# A Little County Road History

- Territorial roads
- Federal land/State Trust Land
- Counties and roads
- A Kind, Gentle State Land Dept. (“free leases!!”)
- A Less Kind, Gentle State Land Dept. (“your money or your life”)
- Subdivisions gone wild
- Subdivisions tamed
- So many roads, so little time and (HURF) money
- Roads less traveled (and expensive to maintain)

# How County Highways *Were* Created

- Wagon ho!
- Legitimizing roads in the county as highways
  - Early statehood: BOS declares all roads as highways
  - Right of way? (Nah, that's for sissies)
  - RS2477 (roads on fed lands)
- 1960: legislature says “defects are cured”!
  - If county built it and already used for 10 years
  - ARS § 28-7041.C

# How County Highways *Are* Created

- Petition (10 taxpayers) to BOS
  - Hint: County employees pay taxes
  - New! Or on County Engineer's Recommendation
- Survey (County Engineer)
- Hearing
- BOS: public necessity?
- Declare!
- ROW: donation, purchase or condemnation
- ARS § 28-6701 et seq

# County Highways Authority/Duties

- Can spend \$\$ to maintain AND improve
  - County Road standards?
- Signs and Signals
- Counties set standards for maintain & improve
- Duty: reasonably safe for travel
- Not all County highways are maintained
  - (and not all roads in maintenance system are highways)

# County Roads (in Maintenance): How they *were* created

- (Roads that are not declared Highways)
- Laid out, constructed and opened before 1990
  - i.e., not a “paper road”
- Or have been designated as primitive roads
- Might have ROW, might not
- Like highways, many sources (territorial, old subdivisions, wildcat, etc.)

# County Roads: How they *are* created

- ROW dedicated to public, and
- Built with no cost to county, and
- Road is in an approved subdivision plat, and
- Built to county standards

# County Highways/Roads

## How they are NOT created

- Prescriptive easements?
  - Nope, no such thing for public roads
  - Must acquire ROW (eventually)
    - Donation
    - Agreement
    - Condemnation
  - But the County has roads on private and State land, with no ROW...how about these?

# County Roads in Maintenance: Authority/Duties

- Can maintain
  - But not improve
- Signs, Signals
- Weight Limits





# What is Maintenance?

- It ain't cement – that's an improvement
- Chip seal maintenance is ok
  - But can't chip seal a gravel/dirt road
- Rock, gravel (AB) is okay
- Blading

# County Maintained Roads: Primitive Roads

- Board designates “primitive roads”
  - Constructed and opened before June 13, 1990
  - Not built to county standards
- Must have signs saying:
  - “Primitive road, caution, use at your own risk. This surface is not regularly maintained”
- Liability Limitation (gross negligence or intent)
- Authorities/Duties—same as for regular maintained roads

PRIMITIVE ROAD  
CAUTION  
USE AT YOUR OWN RISK  
THIS SURFACE IS NOT  
REGULARLY MAINTAINED

35  
MPH



04/24/2009

# County Roads: Unmaintained

- Why have roads if they're not maintained?
  - Like there is a choice!
    - Old subdivisions.....
- Some look like roads
- Some are just on paper as public ROWs
- Authority/Duties—no authority to maintain
  - If no authority, not much duty
  - Warn of known hazards (and possibly fix extreme hazards)

# A NonMaintained County Road

## A hazard?







EARTH  
FISSURES  
POSSIBLE

35  
MPH

50' wide Public Easement



# Liability--Standards

- County Highways (safe for travel)
- County Roads—Maintained (ditto)
- County Roads—Primitive (intentional or gross negligence)
  - Always fix hazards
- County Roads—Not maintained (duty to warn, fix hazards)
- County Rights of Way (Weeds and other hazards??)
- Private Roads—none, unless county has been maintaining it (even though it should not)

# Liability

## Critters and Fences

- Open Range Law
  - Cows first, humans second
  - Govt responsibility?
    - Warn? Fence?
- Ferae Naturae (Wild Animals)
  - Humans first, elk/deer second
  - *State v. Booth (2004)*—don't need to animal-proof highways, but 168 elk/deer collisions in 11 mile stretch in 7 years is too much!!
    - Breach of duty to keep highways safe for travel





# Immunities

- Absolute Immunity for “fundamental governmental policy” that “involves the exercise of discretion” (ARS § 12-821.01)
- This includes (but is not limited to):
  - Purchase of equipment
  - Construction/maintenance of facilities
  - Hiring decisions
  - Providing governmental services
- Absolute Immunity for determining how to spend resources

# Immunity

## *Galati v. Lake Havasu*

- Absence of legislative act (no conscience choice)
  - Is NOT an exercise of policy/legislation
- Rollover at road dip/curve--alleged bad design
- Defense: legislative act not to fund reconstruction
- Problem: no evidence City considered funding one way or the other
- Note: Highway Dept Road Plans—priorities—reviewed with BOS

# Immunity

## *Kohl v. City of Phoenix*

- Bicyclist killed at intersection—*no* traffic signal
- Why no signal?
  - Resources not unlimited—must prioritize
  - Computer program analyzes 200 intersections
  - Criteria: vehicle volume, pedestrian volume, accidents, etc. (using USDOT Manual)
  - Winnow to 20; engineers pick 8-10
- Immune: traffic planning program is fundamental policy
- Distinguish *implementation* of policy (eg., bad data)

# Immunity

## *Armendariz v. Mohave County*

- Two vehicle collision at intersection of county road and private road.
- No county stop sign, no warning signage.
- County had done a study of county road intersections and recommended signage at some, not others.
- Determined signage not warranted at intersection of private road in question (and not sure HURF money could be used).
- Held: immune as determination of government policy.

# Immunities

- Affirmative Defense (not absolute immunity)
  - Highways, roads and bridges
  - Immunity for design if.....
    - Design conforms to generally accepted engineering/design standards
    - In effect at time of design
    - But must warn of reasonably dangerous hazard

# Affirmative Defense

## *Glazer v. Arizona*

- Motorist tries to avoid a truck moving into her lane, crosses median into oncoming traffic, resulting in a head on collision.
- Plaintiff: State should have installed a median barrier to prevent this
- State: standards at the time the highway was built in 1967, no median was necessary.
- Plaintiff: circumstances changed by 2007 when accident occurred, eg., heavier traffic volume, which made this unreasonably dangerous.
- Held: ruling for the State, held that standards at the time of design/construction apply.

# Affirmative Defense

## *Glazer v. Arizona*

- BUT, State should have warned of danger, which it did not, and thus was liable.
- What kind of warning could have prevented accident?
- Takeaway: Although in theory this affirmative defense protects a govt entity when it doesn't update/improve a road when its design becomes outdated, if the road is dangerous, govt will likely be held liable.

# Getting Rid of County Roads

## Abandonment of Highway

- Why abandon a County Highway?
  - To make it a primitive road
    - Liability
- So it's abandoned as a “highway”, but not as a County road
  - Same process as establishing a highway
    - Petition by 10 taxpayers (or engineer's recommendation)
    - BOS hearing—public necessity?

# Getting Rid of County Roads

## Abandonment of Right of Way

- Abandon ROW (a “paper only” road)
- New! Statute requires notice to abutting owners....
  - A majority must approve
- Can’t “landlock” parcels (must have legal access)
- Who gets the land?
  - Abutting landowners
- Must they pay for it?
  - Generally, yes, “commensurate with value”
    - Fragmentation, marketability, etc.
    - But not for abandoning a paper easement

# Special ROW Issues: Roads on State Land

- Counties leased ROW from State Land for *free*
  - Lots of it!!!
- *Lassen v. Arizona*, 385 U.S. 458 (1967)
  - State Lands holds lands in trust for schools
  - Thus: State Lands can't give property away
  - Thus: Counties must pay FMV

# Special ROW Issues

## Roads on State Land

- Is *Lassen* prospective? Or must counties pay FMV since ROW was leased?
  - \$\$\$\$\$\$\$\$\$!!!!!!!!!
- *Mayer Unified School Dist. v. Winkelman*, 219 Ariz. 562 (2009)
  - Statute of limitations began to run when *Lassen* decided
  - Continued road use NOT a continuing violation
  - State Lands blew the statute of limitations
  - In effect, *Lassen* is prospective

# Special ROW Issues: Roads on State Land (no ROW)

- What about county roads across State Lands for which there is *no lease??*
- *Lassen + Mayer = no \$\$\$*
- But can State Lands block roads since County has no ROW?
  - Make my day....

# Special ROW Issues:

## Roads on Private Land (no ROW)

- Can private owner block access?
- If County improves (chip seal), must County pay for ROW?
- My opinion: **No** and **No**
- *State ex. rel. Miller v. Dawson*, 175 Ariz. 610 (1993)
  - ARS § 28-7041.C, curing defects in pre-1960 roads, doesn't pass title
  - Using road on private land is a takings
- But apply *Mayr*: statute of limitations

# Special ROW Issues

## Roads in Defunct Subdivisions

- Subdivider dedicates road to County
- Subdivision goes belly up, never develops
- Road leads to a ranch (or a few houses)
- Rancher gates the road
- Other owners holler: County, tear down that gate!
- Can't everyone just get along?
- Criminal laws against blocking public roads

# HURF

- Highway User Revenue Fund
- Revenues split among counties, state
- May only be used for “highway and street purposes”
- County use of HURF audited every year
- If funds misspent, counties must reimburse the fund from general funds monies
- (Distributions of HURF to counties declining)

# RS 2477

- “Sec. 8. *And be it further enacted*, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”
- Part of the Mining Act of 1866
- Highway status, width determined by reference to state law
- No documentation required; use establishes right of way
- Arizona-New Mexico Enabling Act placed federal lands in trust for benefit of public schools, constituted a “reserved public use” under the law
- Repealed by the Federal Land Protection and Management Act of 1976

# Special ROW Issues

## Subdivisions – Dedication?

- Plat approval by Board does NOT constitute acceptance of subdivision roads.
- However, when the developer builds them to County standards, the County must accept them.

# Roads and Utilities

- Franchise: lay utility lines in county ROW
- Move/expand the road
  - Who pays for moving utility lines?
- Utilities pay. *Sanitary Dist. No. 1 v. State, 1 Ariz. App. 45, 49, 399 P.2d 179, 183 (1965)*
- Watch out for utilities' drafts of franchise agreements!!