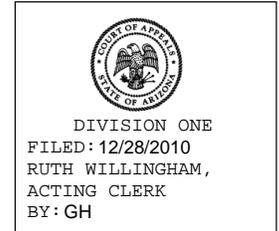


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



CHINO GRANDE, LLC, a Missouri)
limited liability company, and) No. 1 CA-CV 10-0157
MERWYN C. DAVIS, Trustee under)
the Merwyn C. Davis Trust dated) DEPARTMENT E
July 27, 1981,)
)
) **MEMORANDUM DECISION**
Plaintiffs/Appellees,) (Not for Publication -
) Rule 28, Arizona Rules of
v.) Civil Appellate Procedure)
)
)
JOHN I. KIECKHEFER; ROBERT C.)
SPINNEY and SUSAN L. SPINNEY,)
)
)
Defendants/Appellants,)

)
JOHN I. KIECKHEFER,)
)
)
Counterclaimant/Appellant,)
)
v.)
)
)
CHINO GRANDE, LLC, a Missouri)
limited liability company, and)
MERWYN C. DAVIS, Trustee under)
the Merwyn C. Davis Trust dated)
July 27, 1981,)
)
)

 Counterdefendants/Appellees.)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CV20050809

The Honorable Howard D. Hinson, Jr.
The Honorable Kenton D. Jones, Judge

AFFIRMED

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T I M M E R, Chief Judge

¶1 This is an appeal from a summary judgment declaring that a 1911 resolution established Big Chino Road as a county highway. Finding no genuine dispute of material fact or error of law, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 The important facts are not disputed. Big Chino Road traverses Chino Valley and runs generally from the southeast to the northwest along the Big Chino Wash.¹ As of 1913, Big Chino Road served as the main route from Prescott to Seligman and Ash

¹ The portion of the road found by the superior court to be at issue in this action runs from "Section 24, Township 18 North, Range 3 West to the entrance of the CV Ranch at the northern border of Section 19, Township 19 North, Range 3 West." During the 1990s, Yavapai County acquired rights-of-way for the portion of Big Chino Road that runs from State Route 89 to Section 13. The parties agree that this segment of Big Chino Road is a county highway.

Fork and was used by the traveling public at least since that time.

¶13 On June 6, 1911, when Arizona was still a territory, the Yavapai County Board of Supervisors (the "Board") passed a resolution (the "Resolution") declaring Big Chino Road to be a "Public Highway, and for the use of the public." The Board was acting on a petition submitted by Yavapai County residents.

¶14 In subsequent years, official Yavapai County Highway maps identified Big Chino Road as a "Main County Highway" and a "County Road - Graded." The maps from 1934, 1942, and 1952 consistently depict Big Chino Road as the only county road in the relevant area.

¶15 Yavapai County spent decades investing in Big Chino Road and otherwise treating it as a county highway that the county is charged to maintain. In 1975, Big Chino Road was listed as a public, county road. In 1995, Yavapai County passed Resolution No. 978 in an attempt to reclassify Big Chino Road from a county highway to a "primitive road," apparently to avoid maintenance costs. That effort failed but demonstrated the County's belief that Big Chino Road was a county highway.

¶16 On or about September 26, 2004, Merwyn Davis observed a gate installation in progress on Big Chino Road at the point where the road crosses the northern boundary of Section 4, Township 18 North. The gate was on Howard S.

Charney's property and obstructed access to property owned by Davis and Chino Grande L.L.C.'s ("Chino Grande") predecessor-in-interest, BMW Ranches, Inc. ("BMW"). According to Davis, Charney equipped the gate with a lock and unilaterally determined who would have the gate code. Charney refused to remove the gate despite repeated requests.

¶17 On August 29, 2005, BMW and Davis, on behalf of the Merwyn C. Davis Trust Dated July 27, 1981, filed a special action in the superior court seeking the gate's removal along with other relief, including a declaration that Big Chino Road was a public road.² The respondents included Yavapai County and all owners of property crossed by Big Chino Road from the end of the admitted County owned right-of-way in Section 13, Township 18 North, Range 3 West, to the entrance to Chino Grande and Davis' property in Section 18, Township 19 North, Range 3 West. Ten affected property owners stipulated to entry of judgment declaring Big Chino Road a public road. Another defaulted. The case then proceeded against the remaining owners: Arizona State Land Department ("SLD"), Charney, Edward B. Hitchcock, John I. Kieckhefer, and Robert C. Spinney and Susan L. Spinney (collectively the "Land Owners").

¶18 Kieckhefer currently owns three parcels intersected by Big Chino Road: Sections 3, 4 and 10, Township 18 North, Range

² Chino Grande later substituted for BMW in the special action.

3 West, in Yavapai County. This appellant took title by a warranty deed dated December 21, 1982, subject to "rights of way . . . of record or which may be observed upon an inspection of the property" including "[t]he rights of the Santa Fe Pacific Railroad Company" as reserved in the "1921 Santa Fe Deed."³ In turn, the 1921 Santa Fe Deed reserved and excepted from the grant "such portions of said real property as may have been appropriated or dedicated or otherwise acquired for public roads and highways, or other public uses."

¶9 The Spinneys assumed ownership of their property on June 25, 1998. Big Chino Road provides the sole access to their property from State Route 89 and, before reaching Spinney's property, it crosses property owned by others in Sections 3, 4, 10, 11, 13, 14, and 24, Township 18 North, Range 3 West, and Sections 19, 20, 28, 29, and 33, Township 19 North, Range 3 West.

¶10 Chino Grande and Davis moved for partial summary judgment declaring Big Chino Road a public highway as established by the Resolution, or a public road under a dedication theory. Yavapai County and the Land Owners filed responses, and Charney, Hitchcock, and Yavapai County cross-

³ "Deed recorded February 10, 1921, in Book 124 of Deeds, Page 137 (Affects Sections 3, 5, 7, 19, 29, Township 18 North, Range 3 West)."

moved for summary judgment. The SLD eventually settled with Davis and Chino Grande.

¶11 In its summary judgment briefing, Yavapai County argued it had no interest in Big Chino Road, apart from the initial 5.3 miles starting at Route 89, and therefore could not force Charney to remove his gate. According to the County, the Resolution failed to create a public highway because at one point, not including the property blockaded by the gate, Big Chino Road cut across reserved land.

¶12 After a hearing, the superior court rejected this "all or nothing" approach and declared that Big Chino Road qualified as a county highway as a matter of law. The court granted Davis' and Chino Grande's motion for summary judgment and denied the cross-motions for summary judgment. The court expressly declined to reach the issue whether Big Chino Road also qualified as a public road under the dedication theory. The court entered a Rule 54(b) judgment on January 7, 2010.

¶13 Yavapai County subsequently entered a settlement agreement providing it would not appeal from the judgment and recognizing that Big Chino Road is a county highway. Charney and Hitchcock filed a notice of appeal, and Kieckhefer and the Spinneys filed a separate notice. Charney and Hitchcock then settled with Davis and Chino Grande, and dismissed their appeal.

DISCUSSION

I. As a matter of law, the Board established Big Chino Road as a public highway.

¶14 We review the grant of summary judgment de novo, viewing the evidence in the light most favorable to Kieckhefer and the Spinneys as the non-prevailing parties. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). The superior court properly entered summary judgment for Chino Grande and Davis if no genuine issues of material fact exist and they are entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990).

¶15 Kieckhefer and the Spinneys contend that Big Chino Road (1) does not qualify as a public highway because the Board failed to comply with Section 3617 of the 1901 Code, and (2) is not a public road because it does not satisfy the requirements for a dedication. We address each contention in turn.

A. As a matter of law, the Resolution satisfied Section 3617's requirements

¶16 Section 3617 of the 1901 Arizona Code provided the procedure for establishing a public highway:

The board of supervisors, on presentation of a petition, signed by ten or more persons, residents of the county, and paying road taxes therein, praying for a public road to be laid out or changed within the county . . . , and designating the location of the road to be established as prayed for, shall cause

notice to be given by posting notices, for at least twenty days, in three of the most public places in the district or township where the road is situated, describing the proposed location or change, and stating the time when they will act upon the subject of the petition; and, if they consider a road necessary, they shall appoint three viewers, the county surveyor to act as one, who shall view out and locate said road and appraise all legitimate damages arising from such location or change, and, upon the return of the certificate of the viewers, together with the location, if satisfied with the same, they shall cause the location to be recorded in the county recorder's office, and declare the same to be a public highway, and cause a notice of their action to be served upon the road overseer of the district in which said road is located.

The Board held a meeting and approved the petition on June 6, 1911. The Board's Resolution describes the road as:

Commencing at the end of the present county road near Del Rio and running thence in a general North-westerly direction to Puntenney's in Big Chino; thence along the east and south sides of Big Chino to a place called "The Old Clearwater Place;" thence following what is known as "The Old Deputy Short Line" to Butcher Knife Canyon and there connecting with the present County Road running to Ash Fork and known as the "Patterson Road."

¶17 The Resolution itself contains evidence of the Board's compliance with Section 3617. It provides that June 6, 1911, is the date fixed to consider the Yavapai County residents' petition for laying out a county road. The Resolution further states that notice had been given as required by law, and more

than twenty days had elapsed with no objections having been received. The Resolution then declares the road described to be "a Public Highway, and for the use of the public."

¶18 Kieckhefer and the Spinneys argue that there is no evidence that Section 3617's other requirements were met. They complain that no records expressly state that the viewers performed their duties or that the Board served a notice of their action on the road overseer in accordance with the statutorily required procedures. In the absence of such evidence, they argue, no county highway can exist. These arguments miss the mark.

¶19 It is fundamental that legislative acts are "cloaked with a presumption of validity." *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 187 Ariz. 479, 482, 930 P.2d 993, 996 (1997). Therefore, "when a [legislative act's] factual basis is called into question, the existence of facts to sustain [it] are assumed." *State v. Also*, 11 Ariz. App. 227, 229, 463 P.2d 122, 124 (1969); see *Consol. Motors v. Skousen*, 56 Ariz. 481, 486, 109 P.2d 41, 43 (1941) ("[W]here a public officer is required as a condition precedent to the performance of an official act to do a certain thing, the presumption is that he has done it."). This presumption applies "in the absence of clear and convincing evidence to the contrary." *Sandblom v. Corbin*, 125 Ariz. 178, 185, 608 P.2d 317, 324 (App. 1980).

Kieckhefer and the Spinneys produced no evidence, let alone clear and convincing evidence, to rebut the presumption of compliance.

¶20 Kieckhefer and the Spinneys also mistakenly assume that the 1901 Code itself required the Board to memorialize its compliance with all of Section 3617's requirements. They draw negative inferences from the Resolution's silence on the requirements for appointment of viewers and service of notice on the overseer. But the statute does not require documentation of such actions. Accordingly, we reject the argument and must hold that no evidence rebuts the presumption that the Resolution satisfied Section 3617's requirements. *See Consol. Motors*, 56 Ariz. at 486, 109 P.2d at 43 (holding that, absent evidence to the contrary, the court presumes that a notice required to be mailed to a property owner was properly sent).

¶21 Nor can we agree that *Cochise County v. Pioneer National Title Insurance Company* requires a different result. 115 Ariz. 381, 565 P.2d 887 (App. 1977). In *Cochise County*, we found that no county highway was established in 1911, and the curative statutes of 1927 could not divest private land rights established in 1915. *Id.* at 384, 565 P.2d at 890. The board of supervisors' only step toward establishing a county highway was approval of a map submitted by the county surveyor. *Id.* at 382, 565 P.2d at 888. Importantly, the county conceded that the

board of supervisors had failed to take the steps necessary to fully comply with Arizona law. *Id.* at 384, 565 P.2d at 890. Chino Grande and Davis make no such concession.

B. Federal authorities are irrelevant

¶122 To bolster their argument for reversal, Kieckhefer and the Spinneys rely on cases analyzing whether federal lands converted to public roads by public use. *See, e.g., S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 768-69 (10th Cir. 2005) (holding that, in accordance with federal law and federal interests, the burden of proof is on the parties "seeking to enforce rights-of-way against the federal government"). Kieckhefer and the Spinneys fail to explain why they, as private citizens with title to private land, should be allowed to claim the same evidentiary presumptions and rights as the federal government, and we are unaware of such authority.

¶123 The federal decisions are also factually distinguishable. In *Southern Utah Wilderness*, for example, no attempt was made to create a public road under state law; rather, the party asserted a right-of-way on federal land based upon mere use. *Id.* at 788. *Southern Utah Wilderness* supplies no basis for reversing the grant of summary judgment.

C. The "all or nothing" approach to reserved land is unsupported by fact and law

¶24 The Spinneys and Kieckhefer also attack the Resolution as void based upon Big Chino Road's alleged passage through reserved state and federal land. They contend that the existence of any such land in the road's path on June 6, 1911, precluded the road from attaining county highway status. Because Arizona was not yet a state in 1911, there was no state reserved land.⁴ We therefore consider whether federal reserved land precluded establishment of a public highway.

¶25 "The act of Congress of 1866, section 2477, Rev.St., now known as 43 U.S.C. s 932, declared that a right-of-way be granted for the construction of highways over public lands not reserved for public uses." *Cochise Cnty.*, 115 Ariz. at 384, 565 P.2d at 890. Courts have refrained from construing the section as granting rights-of-way and establishing rights "contrary to the laws of the state or territory in which the affected lands are located." *Id.* (citations omitted).

¶26 As a threshold matter, Yavapai County expert Mark Cheney testified that he found no evidence that the sections at issue in this case contained any federal "reserved" lands as of June 6, 1911, except for a portion of Section 4, Township 18

⁴ In any event, the SLD did not acquire title to its land from the federal government until 1914 - three years after the Resolution - and subject to any rights-of-way.

North, Range 3 West, and, with respect to that section, Cheney could not testify that Big Chino Road crossed the reserved portion.⁵ Indeed, the undisputed facts in this record indicate that all land at issue was unreserved federal land in 1911.

¶127 In any event, the “all or nothing” theory that a county highway is invalid because another portion of that highway crosses reserved land is unsupported by case law, including *Cochise County*. As we have noted, *Cochise County* concerned a road established with no substantial attempt to comply with the statutory procedure. Two maps were created in connection with the effort: one showing a road within the Fort Huachuca Military Reservation boundary, and the other showing a road outside the boundary. *Cochise Cnty.*, 115 Ariz. at 382, 565 P.2d at 888. The *Cochise County* court held that “a road within Fort Huachuca lies on federal property reserved for public uses and therefore falls outside the scope of R.S. s 2477.” *Id.* at 384, 565 P.2d at 890. We fail to see how this case supports the “all or nothing” approach. Kieckhefer’s and the Spinneys’ other authorities stand for the proposition that a right-of-way under

⁵ The County also introduced a map reflecting “reserved” and “unreserved” land as of 1911 that showed a railroad right-of-way through sections of land at issue in this case. The map, however, was produced at the time of litigation by overlaying a purported map of the railroad right-of-way on a map purporting to show the location of the current alignment of Big Chino Road. It is neither a contemporaneous map nor one prepared by an expert witness.

R.S. 2477 may not be established upon non-public land, and therefore also fail to support the argument. See *S. Utah Wilderness*, 425 F.3d at 784; *Humboldt Cnty. v. U.S.*, 684 F.2d 1276, 1281 (9th Cir. 1982); *Galli v. Idaho Cnty.*, 191 P.3d 233, 237 (Idaho 2008).

D. The migration evidence fails to create a genuine dispute of material fact

¶128 Kieckhefer and the Spinneys further contend that the “migration” of Big Chino Road negates the Resolution’s effect and creates a genuine dispute of material fact as to the road’s location. Their primary authority is *Adams v. U.S.*, 3 F.3d 1254 (9th Cir. 1993). In that case, the court determined that Clark Canyon Road, an 1881 road traversing federal forest land, was not continuously used and became non-existent. *Id.* at 1256, 1258. A new road bearing its name was built in the 1960s. *Id.* at 1258. Consequently, the court held that the Adamses were not entitled to an easement over the road pursuant to R.S. 2477. *Id.* *Adams* does not address gradual variations in the path of an existing road.

¶129 This case is different. An expert established, without contradiction, Big Chino Road’s location in reference to three landmarks cited in the Resolution. It is undisputed that Big Chino Road has not ceased to exist and has been used

continuously by the public since at least 1913. No new dedication was required.

¶30 After nearly a hundred years' time, it would not be surprising that a road could realign via a force of nature or new technology. Many highways would be invalidated based upon gradual deviations if such migrations were determinative. That is not the law. See *Sheridan Cnty. v. Spiro*, 697 P.2d 290, 298-99 (Wyo. 1985) (holding that a road statutorily established in 1910 did not lose its public status due to variances in its course when used by the public and maintained by the county for more than seventy years); see also *Cent. Pac. Ry. Co. v. Alameda Cnty.*, 284 U.S. 463, 467 (1932). Nor is it remarkable or dispositive that different maps from different sources might depict Big Chino Road's location differently. See *Garrison v. Lincoln Cnty.*, 77 P.3d 163, 167, ¶ 21 (Mont. 2003) (agreeing with the district court that "[d]iscrepancies in the description or location of the road are not sufficient to turn this county road into private property"). As one expert explained, any such discrepancies are a matter of scaling. None of this evidence creates a genuine dispute of material fact, and there is no factual dispute in this record that since 1911 Big Chino Road has traversed the land now held by Kieckhefer and the Spinneys.

¶31 In sum, we affirm the superior court's holding that Big Chino Road was established in accordance with the statutory

requirements for a county highway. Our resolution of these issues obviates the need to consider whether a statute cured defects in the proceedings to establish a county highway. Likewise, we do not address the easement, equitable estoppel, and laches arguments.

CONCLUSION

¶32 For the foregoing reasons, we affirm the superior court's grant of summary judgment in all respects.

/s/
Ann A. Scott Timmer, Chief Judge

CONCURRING:

/s/
Philip Hall, Presiding Judge

/s/
Sheldon H. Weisberg, Judge