No. D080942

**IN THE COURT OF APPEAL OF THE**

**STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT, DIVISION ONE**

**MARVIN DONIUS and RINCON MUSHROOM CORPORATION OF AMERICA, INC.**,

*Plaintiffs-Appellants*,

v.

**COUNTY OF SAN DIEGO and NORTH COUNTY TRANSIT DISTRICT**

*Defendants-Respondents.*

On Appeal from the Superior Court
for the County of San Diego
Honorable Joel R. Wohfeil
Case No. 37-2020-00015528-CU-PO-CTL

# COUNTY OF SAN DIEGO'S RESPONDING BRIEF

Katie A. Richardson (Bar No. 238260)
Joshua M. Heinlein (Bar. No. 239236)
Office of County Counsel, County of San Diego
1600 Pacific Highway, Room 355
San Diego, California 92101
Telephone: (619) 531-4860
Facsimile: (619) 531-6005

**Counsel for Defendant-Respondent**
**COUNTY OF SAN DIEGO**

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## INTRODUCTION

Following an eight-day jury trial in this private land use case involving once-tribal land, the jury returned a unanimous verdict in favor of Defendants County of San Diego (the County) and North County Transit District (NCTD) on plaintiffs' trespass and private nuisance causes of action. That verdict, which plaintiffs Marvin Donius and Rincon Mushroom Corporation of America, Inc. (RMCA) challenge on appeal, was supported by substantial evidence and resulted from legally accurate and, as relevant here, mutually agreed-upon jury instructions.

Though both plaintiffs purport to challenge the verdict and the rulings on their post-trial motions for judgment notwithstanding the verdict and new trial, the jury expressly found that Marvin Donius alone owned and occupied the subject property—a five-acre parcel of land originally referred to as Tract 137—and that RMCA did not. On appeal, plaintiffs do not challenge the jury's determination that RMCA had no ownership or possessory interest in the property—a prerequisite to both trespass and private nuisance claims. Therefore, the judgment as to RMCA must stand. So too must the judgment against Donius ("Donius" or "Plaintiff") because it was supported by substantial evidence that in 1935 the United States Department of the Interior, through the Bureau of Indian Affairs (BIA), granted to the County a valid right-of-way across Tract 137, and that thereafter in 2001 and 2003, respectively, the County lawfully approved two permit applications—the Rincon San Luiseño Band of Mission Indian's ("Rincon Tribe") application for a permit to construct road improvements and NCTD's application for an encroachment permit—

authorizing installation of the traffic light and bus stop of which Donius complains.

In reaching its findings, the jury was properly instructed regarding the Secretary of the Interior's ("Secretary") authority to grant rights-of-way across allotted Indian land held in trust by the BIA. And Plaintiff's attempt to distinguish the Secretary's authority to "approve easements" from the authority to "convey easements" is a hypertechnical statutory construction that finds no support in law. What is more, in challenging the legal accuracy of Special Jury Instructions 10 and 16, Plaintiff attempts to avoid the doctrine of invited error based on the fact that the two instructions were proposed by Defendants and that plaintiffs thus had no role in inducing the trial court to so instruct the jury. In fact, plaintiffs' counsel expressly agreed to the accuracy of both instructions. Thus, they may not now claim on appeal that the judgment should be reversed based on alleged instructional error.

This Court should affirm the judgment.

## STATEMENT OF THE CASE

### A. The Subject Property was Originally Tribal Land Allotted in Trust to Matthew Calac of the Rincon Tribe in 1929

The property at issue in this case involves a five-acre parcel of non-Indian fee land that lies within, but is not part of, the Rincon Tribe reservation. (1 CT 20; 6 RT 1178:4-14.) A 1935 Road Survey Map on record with the BIA, specifically identified as Road Survey No. 604, depicts the subject property as "Tract 137." ("the Property"). (Ex. 237.)[1]

[1] In the interest of consistency with Appellants' Opening Brief, and for clarity of the Court, all citations to trial exhibits throughout this responding brief refer to the exhibit's original number and page

In 1929, the BIA allotted Tract 137 to Matthew Calac, an Indian minor.[2] (4 RT 665:26–666:13; Ex. 380.) As authorized by law, the BIA held the land in trust for Calac until it conveyed the land to him in fee simple in 1962. (Exs. 380, 381.)

### B. The Secretary of the Interior Approved a Road Right-of-Way Across the Property in 1935

During the period that Calac was a restricted-fee owner of the Property held in trust by the federal government, the Secretary of the Interior in 1913 granted the County a permit to build a roadway through the Rincon Tribe's reservation and across several individual allotments, including Tract 137. (Ex. 242-26 [referring to "blue print copy" of "map of definite location"]; Exs. 231-237 [sections of blue road survey map].) Thereafter, in 1935, the County applied for and obtained from the BIA a road right-of-way, which involved agreement by the Rincon Tribe and the affected allottees, compensation to same, and approval of the application by the Secretary. (Exs. 242-3–242-4, 243-1–243-2.) The Secretary approved the right-of-way, while still holding the Property in trust for Calac, and the Secretary's approval was noted both in a 1937 County Board of Supervisors Resolution on file with the BIA, and by endorsement of the 1935 Road Survey Map depicting the right-of-way's definite location. (10 RT 1976:6–1983:14; Exs. 239,[3] 240, 241, 243-2, 244-2.) A 1959 version of Road Survey No. 604 reflects the

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therein, rather than the page number affixed to the transmittal of trial exhibits filed by Appellants.

[2] See *Calhoon v. Sell* (D.S.D. 1998) 71 F.Supp.2d 990, 992 ["The United States, the Department of the Interior . . . and the Secretary of the Interior . . . generally act, as to Indian affairs, through the Bureau of Indian Affairs."]

[3] A more legible copy of this exhibit can be found at 7 CT 1819.

Secretary's approval of the right-of-way by notation "Easement permit approved September 10, 1935." (10 RT 1973:15–1976:5; Exs. 228-7, 237.)

### C. The Easement was Recorded with the County Surveyor and with the Bureau of Indian Affairs

The 1959 Road Survey Map was recorded with the San Diego County Surveyor's Office, and is publicly available on the County Surveyor's website. (7 RT 1365:1-17.) Additionally, as Defendants' expert surveyor's research revealed, the 1935 Road Survey Map is on record with the BIA and publicly available, and the same right-of-way—a portion of which runs across Tract 137—is depicted in both maps. (10 RT 1973:1-8, 1976:2-5, 1977:18–1979:2, 2063:14-24; Exs. 230, 240, 241, 376.) Indeed, Plaintiff's expert surveyor, Dale Greene, noted in his 2020 survey of the Property that there was a right-of-way "as indicated on Road Survey (RS) No. 604." The BIA's records also include a 1937 County Board of Supervisors Resolution acknowledging the Secretary's approval of the County's application regarding the right-of-way. (10 RT 1979:3–1983:14; Exs. 243, 244.)

### D. RMCA Bought the Property in 1982 and Sold it to Donius in 1999

Approximately twenty years after the federal government conveyed the Property to Calac in fee simple, RMCA bought the Property in 1982. (8 RT 1638:6–1639:13.) RMCA operated a mushroom farm on the land, but as the price of mushrooms declined and RMCA considered exiting the mushroom business, Donius, an employee of RMCA, assumed farming operations. (8 RT 1639:7–1640:2.) In 1999, RMCA sold the Property to Donius, who paid a

portion of the purchase price through an exchange of his stock in the company, and then gave RMCA a promissory note for the approximately $430,000 balance. (6 RT 1181:13–1182:17; Exs. 65, 66.) At that point, Donius became the owner of the Property, and RMCA was merely a mortgagee.[4] Indeed, RMCA's president testified that "we were like the -- like the mortgage company or a bank," and "once [Donius] made all the payments, then he would own the property free and clear." (8 RT 1640:16-24.) For this reason, the jury predictably found that only Donius owned the Property.[5] (6 CT 1536, 1547.)

### E. The County Issued Permits to the Rincon Tribe in 2001 and the NCTD in 2003 to Install a Traffic Light and a Bus Stop Along the Right-of-Way

In 2001 and 2002, the Rincon Tribe built a Harrah's casino directly across the street from the Property. (6 RT 1175:15–1176:2, 1201:18–1202:1; Exs. 1, 89.) As part of a cooperative agreement with the County, the Rincon Tribe agreed to conduct certain road improvements along the County-owned Valley Center Road, which was the subject of the 1935 Road Survey Map. (Exs. 1, 15.) Among those

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[4] A "mortgagee" is defined as "a bank or other financial organization that lends money in the form of mortgages." (Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/mortgagee, last visited 5.10.23).

[5] Appellants statement in their opening brief that the property sale between RMCA and Donius was "previously deemed by a federal court to give RMCA possessory or asserted ownership interest in the Property" (AOB 19), is misleading. Based on either sustained objections or wholly stricken testimony, *no such evidence was before the jury*. (8 RT 1642:20–1643:9, 1643:13–1644:28.) Indeed, the trial court issued a limiting instruction regarding the use of evidence of the prior federal case to determine only when the plaintiffs first discovered the traffic light and bus stop on the Property. (6 CT 1434.)

improvements was the installation of a traffic signal to control anticipated high traffic at the casino's entrance. (Ex. 1-2, 15-1–15-2.) The Rincon Tribe had to obtain a construction permit from the County to install the traffic signal and related equipment, some of which was installed in the subject right-of-way. (7 RT 1392:4–1393:16, 1399:13-21, 1400:18–1401:6; Exs. 17, 20.) The County issued that permit to the Rincon Tribe on February 21, 2001. (7 RT 1402:23–1403:9; Ex. 16.) In March of 2003, two years after the traffic light was installed, the County issued an encroachment permit to the NCTD to install a bus stop in the subject right-of-way. (Ex. 421; see Ex. 22.)

### F. Plaintiff was Aware at the Time of Installation that the Traffic Light and Bus Stop Were on His Property

Donius lived on the Property at the time of the traffic light's installation in 2001/2002 as well as the bus stop's installation in 2004, and he testified that the construction work for the traffic light installation was open and obvious. (6 RT 1202:2-13, 1291:4–1292:17, 1295:18–1296:2.) Prior to the installation of those items, San Diego Gas & Electric (SDG&E) installed power poles on the Property—within the right-of-way that crosses Tract 137—pursuant to a utility easement it obtained in 1969. (Exs. 271, 327, 383-5.) Donius admitted that he knew SDG&E had a utility easement on his property because he could see the power poles. (6 RT 1289:17-25.) And those power poles are situated farther west than the traffic light, bus stop, and related equipment. (Exs. 22, 271, 277, 280.)

Additionally, in order to install the traffic light, a portion of a chain link fence that runs across the Property had to be relocated. (10 RT 1990:16–1992:25; Exs. 17, 20.) The fence's relocation was set forth

in the road improvement plans and is visually apparent from viewing the fence itself. (10 RT 1997:7–1998:28; Exs. 17, 20, 296, 327.) This too happened during the 2001/2002 period when Donius lived on the Property.

### G. Plaintiff Sued the County and NCTD in 2020 for Trespass and Nuisance

Eighteen years after becoming aware of the traffic light's 2001/2002 installation on his Property, and sixteen years after becoming aware of the bus stop's 2004 installation, Donius and RMCA sued the County and NCTD for trespass, private nuisance, and inverse condemnation. (1 CT 17–49.) They later dismissed their inverse condemnation cause of action and proceeded to trial on their trespass and nuisance causes of action. (1 CT 186; 3 RT 309:25-26; 4 RT 615:5-18, 618:1-7.) The critical issue at trial was whether the County and NCTD had the right to place the traffic light, bus stop, and related equipment on the Property. (See 4 RT 655:5-8.)

### H. Plaintiff Expressly Agreed to the Challenged Instructions

The trial court held a jury instructions conference on the sixth day of trial. (9 RT 1804:1–1871:18.) During that conference, the court inquired of plaintiffs' counsel's position regarding Special Jury Instructions 10 and 16, both of which were proposed by Defendants. (5 CT 1307, 1310 [proposed with authority]; 9 RT 1860:19–1861:7, 1861:21–1863:3.) Counsel for plaintiffs neither objected nor proposed modifications to either instruction. To the contrary, he expressly agreed to the accuracy of the instructions. (9 RT 1861:3-5, 1862:26–1863:3.) Specifically, with respect to Special Instruction 10, plaintiffs' counsel advised the court "[t]hat's fine . . . Yeah, he summarized what's

in the code." (9 RT 1861:26 –1863:3.) And with respect to Special Instruction 16, he stated: "Sure. That's the law."[6] (9 RT 1861:3-5.) Based on those representations from plaintiffs' counsel, the trial court agreed to give both instructions. (9 RT 1861:6-7, 1863:2-3; 6 CT 1461–1462 [given instructions].)

## I. The Jury Reached a Unanimous Verdict in Favor of Defendants

After eight days of trial, the jury returned a unanimous verdict in favor of Defendants. (6 CT 1508–1528 [special verdict forms]; 12 RT 2408:8–2413:10 [post-verdict jury poll].) In reaching that verdict, the jury found that only Donius—*not* RMCA—owned, occupied, or controlled the Property. (6 CT 1508, 1519.) RMCA does not challenge the jury's finding on appeal, stating only that RMCA's president "believed" that RMCA was a co-owner of the Property.[7] (AOB 18–19.)

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[6] For clarity, Manuel Corrales—the attorney who made these affirmations—served as counsel below for both plaintiffs Marvin Donius and RMCA. RMCA also was represented below by separate counsel.

[7] Because an ownership or possessory interest in property is an essential element of both trespass and private nuisance claims (see 6 CT 1441, 1445 [instructions]), and because RMCA does not challenge the jury's finding on this element of its prima facie case, the argument is waived and the judgment as to RMCA must stand. (*Katelaris v. Cnty. of Orange* (2001) 92 Cal.App.4th 1211, 1216, fn. 4 [declining to consider arguments not raised in opening brief based on rule that "an issue is waived when not raised in appellant's opening brief"]; *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 864, fn. 12 [issue waived where argument raised only in appellant's reply brief, and not in their opening brief].) That is true even as to the challenged jury instructions, which do not relate to either plaintiff's ownership, occupancy, or control of the Property. For that reason, the County asserts its responsive arguments in this brief as to Donius only. Should

Because the jury found that RMCA did not have an ownership or possessory interest in the Property, it answered "N/A" with respect to RMCA as to all other questions in the special verdict forms that it did answer. (6 CT 1509–1510, 1520–1521.) Moreover, because the jury found against Donius on essential elements of his trespass and private nuisance causes of action, it did not make findings on any of Defendants' affirmative defenses. (6 CT 1509–1510, 1514–1517, 1520–1521, 1525–1528.)

### J. The Trial Court Denied Plaintiffs' Motions for Judgment Notwithstanding the Verdict and for New Trial

After the jury returned its unanimous verdict for Defendants, the plaintiffs moved for judgment notwithstanding the verdict and for new trial. (6 CT 1599–1616, 1557–1576.) Following extensive briefing and argument on the motions, the trial court denied both. (6 CT 1557–1716; 7 CT 1718–1756, 1761–1918, 1921–1935; 13 RT 3105:24 –3141:3; 7 CT 1947, 1950.) Judgment was entered on June 9, 2022. (6 CT 1529–1556.) This appeal followed.

## STANDARDS OF REVIEW

When reviewing the denial of a motion for judgment notwithstanding the verdict, this Court "review[s] whether substantial evidence supports the verdict, viewing the evidence in the light most favorable to the party obtaining the verdict." (*Nissan Motor Acceptance Corp. v. Superior Auto. Grp., LLC* (2021) 63 Cal.App.5th 793, 823 (*Nissan*).) The Court "must accept as true the evidence supporting the verdict, disregard conflicting evidence, and draw every legitimate

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the Court decide differently on the issue of waiver, the County's arguments apply equally to RMCA.

inference in favor of the verdict." (*Ibid.*) The Court may not weigh the evidence or judge witness credibility. (*Ibid.*) "The substantial evidence standard of review is generally considered the most difficult standard of review to meet, as it should be, because it is not the function of the reviewing court to determine the facts." (*In re Michael G.* (2012) 203 Cal.App.4th 580, 589.)

On review of an order denying a motion for new trial, appellate courts generally review for an abuse of discretion and will not set aside the order unless an abuse of discretion resulted in prejudicial error. (*Crouch v. Trinity Christian Ctr. of Santa Ana, Inc.* (2019) 39 Cal.App.5th 995, 1018.) In determining prejudicial error, this Court independently reviews the entire record. (*Ibid.*) Where a new trial is sought based on a claim of instructional error, the Court reviews the claimed error de novo. (*Strouse v. Webcor Constr., L.P.* (2019) 34 Cal.App.5th 703, 713.) Even if instructional error is held, the jury verdict must be affirmed "despite instructional error if the error was harmless." (Cal. Const., art. VI, § 13; *People v. Hendrix* (2022) 13 Cal.5th 933, 941.)

## ARGUMENT

### I. Substantial Evidence Supports the Jury's Determination That the County Had a Permissive Right-of-Way Over the Property Based on Both Recordation and Donius's Notice of the Easement

The jury's finding that the County did not "cause another person to enter the [P]roperty without the permission of [Donius] or [his] predecessor" (6 CT 1509) was substantially supported by evidence of the 1935 easement's recordation in the County Surveyor's Office as well as Donius's constructive notice of the easement. That the easement

was not recorded in the County Recorder's Office—as Plaintiff's expert surveyor testified constitutes the "official" record (7 RT 1354:21-23, 1359:21-24)—does not itself render the easement invalid.

Notably, Plaintiff offers no legal authority supporting the conclusion that to be valid an easement must be recorded with the County Recorder's Office—or at all. (see AOB 25.) And Dale Greene, Plaintiff's expert surveyor, testified that he could not opine as to the validity of an easement that had not been recorded with the County Recorder. (7 RT 1364:3-27; see also 7 RT 1350:6-9, 1351:2-10.) Indeed, "[a]n unrecorded instrument is valid as between the parties thereto and those who have notice thereof." (Civ. Code, § 1217; see Civ. Code § 1215 ["The term 'conveyance,' as used in Sections 1213 and 1214"—which are part of the same statutory scheme as section 1217—"embraces every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged, *or incumbered*"] (emphasis added); cf. *Evans v. Faught* (1965) 231 Cal.App.2d 698, 705 [construing Civil Code section 1214, which expressly voids conveyances "unless the conveyance shall have been duly recorded," and upholding the trial court's determination that, as to County of Sonoma's lease on the plaintiff's property, the "plaintiff had notice of the unrecorded lease" and the lease was therefore "valid and binding upon him"].)

But the right-of-way at issue in this case *was* recorded, albeit with the County Surveyor's Office by way of a 1959 Road Survey Map (referred to throughout trial as Road Survey 604), and Greene acknowledged as much at trial. (7 RT 1360:25–1361:24, 1365:1-7; Ex. 228.) He also acknowledged that the 1959 Road Survey Map was publicly available on the internet, which is where he obtained it. (7 RT

1365:8-17; see 7 RT 1365:22–1366:7.) What is more, Greene's 2020 survey of the Property refers to the "EASTERLY EDGE OF [THE] RIGHT-OF-WAY AS INDICATED ON ROAD SURVEY (RS) NO. 604." (Ex. 78; see 10 RT 1969:7-11.) And his survey depicts the traffic light, bus stop, and related improvements within that right-of-way. (Ex. 78; 10 RT 1969:11–1970:11.) In fact, the portion of Road Survey 604 that encompasses Tract 137 also refers to an "Easement Permit Approved, Sept. 10, 1935," that Greene did not bother to investigate simply because the title report—on which he exclusively relied—did not list an easement on the Property. (Ex. 228-7; 7 RT 1365:1-2, 1366:8–1367:14; see Ex. 8-1 [3/12/20 Ltr. from Greene to Donius stating that Survey 604 "indicates a right of way line encumbering your property"; cf. 10 RT 1971:10–1972:12 [Defendants' expert surveyor Matthew Webb testifying as to the need for investigation "beyond just noting what's in the title report"].)

In addition to its recordation in the County Surveyor's Office, the right-of-way is referenced in documents on file with the BIA, including the San Diego County Board of Supervisors' official records. Specifically, the 1935 Road Survey Map is recorded with the BIA, which Defendants' expert surveyor confirmed depicts the same right-of-way (though more fully) as is depicted in the 1959 Road Survey Map. (10 RT 1963:7-16, 1973:1-8, 1976:2-5; Ex. 230; see 10 RT 2063:14-24.) The 1935 Road Survey Map evinces approval of the survey by the Department of the Interior on September 10, 1935. (10 RT 1976:16–1977:16; Exs. 230, 237, 239.)[8] That is the same easement permit

[8] Copies of these trial exhibits submitted by Appellants are not entirely legible. For clarity, the County also refers the Court to versions of

approval date referenced on the 1959 Road Survey Map, and which is recorded in the BIA's right-of-way index. (10 RT 1973:15–1974:9, 1977:18–1979:2; Exs. 228-7, 240, 241, 376.) Also on file with the BIA is the 1937 San Diego County Board of Supervisors' Resolution approving the right-of-way for Road Survey 604 as a public highway—based in part on obtaining the Secretary of the Interior's approval of the County's application regarding the right-of-way. (10 RT 1979:3–1983:14; Ex. 243, 244.)

That evidence contradicts Plaintiff's contention that "neither the 1937 County Board of Supervisors' Resolution nor the 1936 Superintendent's Letter referenced in the resolution memorialized that the Department of the Interior had approved an application for an easement granted across Tract 137." (AOB 27.) The 1937 Board of Supervisors' Resolution expressly states that "there was filed in this office, on September 28, 1936, a copy of the letter from John W. Dady, Superintendent, Mission Indian Agency . . . addressed to the County Surveyor, *advising of the approval by the Department of the Interior, of the County's application, and that the right of way was granted . . . .*" (Ex. 243-2, emphasis added.) The application mentioned in the Resolution logically refers to the "Application for Public Highway Form No. 5-104" discussed in the County Surveyor's 1935 letter to the County Board of Supervisors, which addresses the necessary requirements and payments to the Rincon Tribe *and* the four allottees noted—including Matthew Calac—to lawfully secure the right-of-way across Tract 137.

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these exhibits in the clerk's transcript that are more readily discernable. (7 CT 1779, ¶¶ 3-4; *id.* at pp. 1811, 1818, 1819.)

(Compare Ex. 243-2 with 242-3–242-4[9]; *King v. U.S. Bank Nat'l Assoc.* (2020) 53 Cal.App.5th 675, 700 (*King*) ["substantial evidence may consist of inferences," so long as "such inferences [are] 'a product of logic and reason'"].)

Beyond all this, Donius was on notice of the right-of-way based on SDG&E's placement of power poles on the Property. Donius admitted that he knew SDG&E had a utility easement on his property because he could see the power poles. (6 RT 1289:17-25.) And those power poles are farther west (closer to the street) than the traffic light and bus stop at issue in this case. (Exs. 22, 271, 277, 280.) Thus, if Donius knew that the SDG&E power poles were within his property line, the logical inference is that he knew the traffic light, bus stop, and related improvements installed *east* of the poles also were on his property. (*King, supra*, 53 Cal.App.5th at p. 700 [substantial evidence may consist of inferences that are logical and reasonable].)

Moreover, in order to accommodate installation of the traffic light, a portion of a chain link fence that runs across the Property was relocated. (10 RT 1989:16–1990:7, 1990:16–1992:25, 1997:7–1998:28,

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[9] It is worth noting that the County Surveyor's letter at times refers to the singular and plural of "application" interchangeably. (See Ex. 242-4 ["Also it is respectfully requested that the Auditor be authorized to draw warrant in favor of the different Alottees named, in the amounts as shown on their *application*, after which if you will return the *applications*, blueprints and petitions to this office, the same will be forwarded to the Superintendent of Mission Agency at Riverside, who in turn will forward the *application* to Washington for approval."]) (emphasis added). Thus, it cannot reasonably be said that reference in the Board of Supervisors' Resolution to "approval by the Department of the Interior, of the County's application" refers to one—but not all—of the applications referenced in the County Surveyor's letter. (Cf. AOB 27.)

2063:25–2064:9; Exs. 17, 20, 296, 327.) Although Donius claimed he was unaware that the fence was moved, he testified that he lived on the Property at the time of the traffic light's installation—which included the fence relocation—and that the traffic light construction work was open and obvious. (6 RT 1202:2-13, 1291:4 –1292:17.) He also lived on the Property at the time the bus stop was installed in 2004. (6 RT 1295:18–1296:2.) Thus, he was constructively aware of the road improvements on the Property *eighteen and sixteen years, respectively, before* bringing this suit.

Further undermining Plaintiff's contention that there was insubstantial evidence of the County's road easement over the Property is evidence concerning a different SDG&E utility easement. A 1969 SDG&E easement was reflected in the title report on which Plaintiff's expert surveyor relied in preparing his survey—the same title report the he claimed would (and should) have included all documents recorded with the County Recorder. (7 RT 1368:10 –1370:24; Ex. 383-5.) Yet that title report did *not* include reference to a 1979 right-of-way recorded in the "official" records of the County Recorder's Office for the benefit of SDG&E across Tract 137. (7 RT 1371:18–1374:20; compare Ex. 383 [title report] with Ex. 384 [1979 recorded utility easement for SDG&E].)

Thus, regardless of whether the easement required recordation with the County Recorder (it did not), substantial evidence supports the jury's determination that the County had a permissive right-of-way across the Property because Donius had constructive notice of it by way of it being (1) recorded with the BIA, (2) reflected in County Board of Supervisors' official records (also on file with the BIA), (3) recorded

with the County Surveyor's Office, and (4) visually apparent given Donius's knowledge of the SDG&E utility easement. It was Plaintiff's burden to prove that he lacked actual or constructive notice of the easement, and he failed in that regard. (See *Vasquez v. LBS Fin. Credit Union* (2020) 52 Cal.App.5th 97, 107 [articulating general burden of proof rule regarding notice]; *IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 639–640 ["Substantial evidence may be contradicted or uncontradicted." It is "'evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value.'"].) The judgment should therefore be affirmed on this basis.

## II. Substantial Evidence Supports a Finding that the Secretary of the Interior Approved the Right-of-Way Depicted in the 1935 Road Survey Map

Keeping in mind that the substantial evidence standard looks to the *evidence* admitted at trial—which may consist of any logical and reasonable inferences drawn therefrom—and not to law that may have been cited for the first time in post-trial motions, Plaintiff's contention that the Secretary's stamp of approval on the back of a 1935 Road Survey Map is insufficient to support the jury's finding that the depicted right-of-way constituted the easement itself, lacks merit. (Cf. AOB 29.) Indeed, the argument fails for several reasons.

First, the jury was presented with evidence supporting the grant of a right-of-way by both the Secretary of the Interior and, as discussed more fully below in Section III, by Donius himself through implied dedication. The jury verdict does not specify which basis (or both) the jury relied on in reaching its determination that Donius or a predecessor owner granted Defendants permission to enter the Property. Thus, Plaintiff's suggestion that the jury relied exclusively or impermissibly

on the 1935 Road Survey Map in reaching its finding that Defendants had a valid, permissive right-of-way across the Property fails to establish a lack of substantial evidence.

Second, Plaintiff's suggestion that Defendants' relied on the "inapposite" case of *United States v. Oklahoma Gas & Elec. Co.* (10th Cir. 1942) 127 F.2d 349 (*Oklahoma*), is misleading. (Cf. AOB 29.) Defendants' discussion of that case was in the context of challenging *plaintiffs*' reliance on it in their motion for judgment notwithstanding the verdict. (Compare 6 CT 1608, with 7 CT 1767:18-19, 1769:9–1770:6.) And, as Defendants explained, the case buttresses the jury's finding of a permissive right-of-way.

In *Oklahoma*, the land in question was allotted individually to a Kickapoo Indian and was held in trust by the Secretary of the Interior. (*Oklahoma, supra,* 127 F.2d at p. 351.) The state of Oklahoma applied to the Secretary of the Interior to open a public highway across the land and paid the Secretary $1,275 to compensate the individual for the use of their land. (*Ibid.*) Relying on 25 U.S.C. section 311, the Assistant Secretary of the Interior "approved the application ***by*** endorsing on the map of definite location the following: 'Approved subject to the provisions of the Act of March 3, 1901 (31 Stat.L., 1058-1084), Department regulations thereunder; and subject also to any prior valid existing right or adverse claim.'" (*Ibid*, emphasis added.) The highway was then opened and established. (*Ibid.*)

That the case does not "indicat[e] whether the allottee consented or was a minor" does not render it "inapposite," as Plaintiff contends. (AOB 29.) It is not known either way whether the individual allottee was a minor. What is known is that—as here—the title to the land was

held in trust by the Secretary of the Interior. (*Oklahoma, supra,* 127 F.2d at p. 351.) And an endorsement stamp on the "map of definite location" nearly identical in language to that on the 1935 Road Survey Map in this case was deemed sufficient to approve the State of Oklahoma's application for a right-of-way. (Compare *ibid.*, with 7 CT 1819.)

Finally, and even moreso here, there is evidence that the County's application for a public highway—which included the presumed consent of the Rincon Tribe and the four affected allottees (see Exs. 242-3–242-4; Section I, *supra*, at pp. 19–20)—was approved not only by way of the Secretary's stamp of approval on the 1935 Road Survey Map, but also by way of the County Board of Supervisors' Resolution (on file with the BIA) confirming receipt "of the approval by the Department of the Interior, of the County's application, and that the right of way was granted." (Ex. 243-2.) That resolution, coupled with the County Surveyor's 1935 letter to the Board of Supervisors, also evidences that Matthew Calac was paid fifty dollars as compensation for the right-of-way's impact on Tract 137. (*Ibid.*; Ex. 242-4.) That there was no direct evidence from Calac consenting to a right-of-way that Plaintiff contends he could not legally provide in any event because he was a minor,[10] does not undermine the otherwise substantial evidence demonstrating that all of the necessary requirements to lawfully establish the subject right-of-way were satisfied. (See Evid. Code § 664 ["It is presumed that official duty has been regularly performed."]; *U.S. v. Chem. Found.* (1926) 272 U.S. 1, 14–15 (*Chem. Found.*) ["In the

[10] AOB 10, 11, 28.

absence of clear evidence to the contrary," public officials are presumed to "have properly discharged their official duties."].)

Indeed, the General Allotment Act in effect in 1935, as it pertained to rights-of-way across individually allotted land held in trust by the federal government, did not expressly require an individual allottee's consent. (See 25 U.S.C. § 311.) However, the later-enacted Indian Right-of-Way Act of 1948 did expressly so require (with certain exceptions), and in 2015 federal regulations were adopted formalizing the procedure to obtain rights-of-way across Indian tribal or allotted land. (25 U.S.C. §§ 323, 324; 25 C.F.R. §§ 169.1, et seq.) In *Nebraska Public Power District v. 100.95 Acres of Land* (8th Cir. 1983) 719 F.2d 956, 958–59, the circuit court described the General Allotment Act as "an amalgam of special purpose access statutes," and explained that, prior to 1948, "[w]hen a right-of-way was not authorized under one of the existing statutes"—of which rights-of-way for public highways under 25 U.S.C. section 311 was one—"it became necessary to obtain easement deeds, approved by the Secretary of the Interior, from each of the Indian owners." Thus, it cannot be said with certainty that an individual allottee's consent—minor or not—was required to grant a right-of-way across individual Indian land held in trust prior to 1948. But even if statutory and decisional law could be construed to require individual Indian consent of trust land in 1935, the substantial evidence discussed above, coupled with the public official presumption, support the conclusion that the Secretary lawfully approved the right-of-way depicted on the 1935 Road Survey Map.

## III. The Jury's Determination of a Permissive Right-of-Way Is Further Supported by Substantial Evidence that Donius Impliedly Dedicated His Property to Defendants

During trial the jury was instructed on dedications, and substantial evidence supports the jury's finding of a permissive right-of-way on that basis, independent of any findings regarding the BIA-approved easement. As the jury was instructed, a "[d]edication is an offer of private property for public use" that, once made, precludes the owner "from asserting an exclusive right over the land now used for public purposes." (6 CT 1458; 5 CT 1303 [relying on *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 820–821 (*Friends of the Trails*) as source authority].) "A common law dedication may be express or implied," and "[a]n implied dedication occurs when the public uses the property and the owner's acts imply consent or acquiescence to the use." (6 CT 1458.) Finally, "[a] dedication is implied by law when the public use is adverse and is for longer than five years." (*Ibid.*; see *Friends of the Trails*, at p. 821.) Plaintiff does not challenge this instruction.

Donius impliedly dedicated his property to the County for public use when he saw the traffic light and related equipment being installed in 2001/2002 (followed two years later by installation of the bus stop) and did not object, despite knowing—based at least on the SDG&E utility easement—that the items were on his property, and despite the fence on his property being moved to accommodate the installation. (10 RT 1989:16–1990:7, 1990:16–1993:7, 1997:7–1998:28; Exs. 17, 20, 296, 327; see 10 RT 2063:25–2064:9.) Though it is unclear from the special verdict form whether the jury found that the BIA-approved right-of-way created the permissive easement, that Donius impliedly dedicated

his property for public use, or both, "[i]f there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict," a motion for judgment notwithstanding the verdict is properly denied. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110 (en banc) ["If the evidence is conflicting, or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied."].)

Here, substantial evidence and reasonable inferences drawn therefrom support a finding that Donius impliedly dedicated his property to Defendants.

## IV. The Judgment Cannot be Reversed in Favor of Plaintiff Because the Jury Did Not Reach Defendants' Affirmative Defenses

Notwithstanding the substantial evidence supporting the jury's verdict in favor of Defendants, the judgment cannot be reversed for another reason: the jury never reached findings on any of Defendants' affirmative defenses because it determined that Plaintiff had not proven essential elements of his prima facie case. (6 CT 1508–1510, 1514–1518, 1519–1521, 1525–1528.)

As a general rule, the plaintiff has the burden of proving each element of each cause of action alleged,[11] and the defendant has the burden of proving each element of each affirmative defense alleged.[12] In this case, the jury was directed to "stop" and "answer no further questions" after determining that both plaintiffs had failed to prove one or more essential elements of their trespass and private nuisance

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[11] *Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.* (2011) 51 Cal.4th 421, 436.

[12] *Waller v. Truck Ins. Exch., Inc.* (1985) 11 Cal.4th 1, 33.

causes of action. (6 CT 1510, 1521.) Thus, it did not make findings on any of the five affirmative defenses included in the special verdict forms—namely, statute of limitations, prescriptive easement, permit immunity, design immunity, and laches. (6 CT 1514–1518, 1525–1528.)

Had the jury made different findings regarding Plaintiff's burdens of proof, it may nevertheless have reached the same verdict on Plaintiff's causes of action if it was satisfied that Defendants had proven one or more of their affirmative defenses—which also were supported by substantial evidence. (See 9 RT 1772:8–1779:7; 1793:6–1794:18 [summary of affirmative defense evidence in County's motion for nonsuit]; 11 RT 2261:21–2265:11 [same in County's closing].) That being so, and because in reviewing for substantial evidence this Court must indulge every reasonable conclusion and legitimate inference which may be drawn from the evidence in favor of the party that obtained the verdict, the judgment should be affirmed for this reason as well.

## V. The Trial Court Properly Instructed the Jury Regarding the Secretary of the Interior's Authority to Grant Road Rights-of-Way on Allotted Indian Land

### A. Special Jury Instructions 10 and 16 Are Accurate Statements of Law

Contrary to Plaintiff's contentions, Special Jury Instructions 10 and 16 accurately state the law regarding the federal government's authority to hold a parcel of tribal land allotted to an individual Indian in trust for twenty-five years or longer, and the Secretary of the Interior's authority to grant road rights-of-way across such land during the period it is held in trust. Plaintiff's challenges to these instructions

find no support in law and misrepresent the authority on which one of those instructions was based.

Special Instruction 10, predicated principally on 25 U.S.C. section 311, paraphrased the statute as follows:

> In the 1930s, the United States Secretary of the Interior was authorized to grant road rights of way through any Indian reservation or through any lands that had been allotted to any individual Indian while the United States government held the property in trust for the individual Indian.

(Compare 5 CT 1307 [proposed] and 6 CT 1462 [given], with 25 U.S.C. § 311.) Section 311 is the first provision within Chapter 8 of Title 25, entitled "Rights-of-Way Through Indian Lands." Thereafter, in Chapter 9—entitled "Allotment of Indian Lands"—section 341, on which Special Instruction 10 also was based, provides that:

> Nothing in this act shall be so construed as to affect the right and power of Congress ***to grant the right of way through any lands granted to an Indian or a tribe of Indians,*** for railroads ***or other highways,*** or telegraph lines, ***for the public use,*** or to condemn such lands to public uses, upon making just compensation.

(25 U.S.C. § 341, emphasis added; see 5 CT 1307 [citing section 341].)

Though Plaintiff argues that section 341 authorizes "Congress" to grant the right of way, and that the Secretary of the Interior is not a member of Congress, therefore section 341 is somehow inapplicable,[13] the argument fails to consider the reality evinced by Sections 311 and 341—that Congress exercised its power by authorizing the Secretary of the Interior to grant "local authorities" like the County permission to establish road easements through Indian lands held in trust by the

[13] AOB 38.

United States. (See *Oklahoma, supra,* 127 F.2d at pp. 352–353 [analyzing the Secretary's authority to permit rights-of-way to generate and distribute power, and noting "Congress authorized the Secretary of the Interior to permit the use of rights-o[f]-way upon public lands" and subsequently "reservations of the United States"].) Congress can—and often does—vest members of the executive branch with authority to act. (E.g., *Bowen v. Georgetown Univ. Hosp.* (1988) 488 U.S. 204, 205–206 [Congress authorized Secretary of Health and Human Services "to promulgate regulations setting limits on the levels of Medicare costs that will be reimbursed"]; *City & Cnty. of S.F. v. U.S. Citizenship & Immigration Servs.* (9th Cir. 2019) 944 F.3d 773, 792 ["When Congress created DHS, Congress vested the Secretary of Homeland Security" with administrative and enforcement authority of all immigration and naturalization laws, "and authorized the Secretary to 'establish such regulations . . . as he deems necessary.'"]; *Racine v. U.S.* (9th Cir. 1988) 858 F.2d 506, 507 [Congress authorized Secretary of Agriculture "to acquire 'scenic easements'" from private landowners for specific purpose]; *Hardman v. U.S.* (1987) 827 F.2d 1409, 1411, fn. 1 [Congress authorized Secretary of the Treasury "to prescribe regulations setting forth the factors to be considered in determining whether an advance is debt or equity"].)

Moreover, sections 311 and 341—*not* section 314—were the *only* provisions cited by Defendants in support of Special Instruction 10. (Compare AOB 34 with 5 CT 1307.)[14] And, as discussed, Special

[14] Though Defendants did reference 25 U.S.C. § 314 in their joint opposition to the plaintiffs' motion for judgment notwithstanding the verdict and during the hearing on post-trial motions, that provision was not relied on in support of either Special Instruction 10 or 16 prior to or

Instruction 10 is an accurate statement of law when these two statutes are read together. It does not state that the Secretary of the Interior was authorized to grant (or "convey") road rights-of-way through Indian land without the consent of the Indian nations or individual Indian allottees, as Plaintiff suggests. (See AOB 33–34.) Nor did County counsel argue that to the jury when relying on the instruction in his closing argument. (11 RT 2245:9-16.) Rather, Plaintiff's argument erroneously conflates the language of Special Instructions 10 and 16.

Special Instruction 16, which also is legally accurate, provided that:

> The General Allotment Act of 1887 empowered the President of the United States to allot most tribal lands nationwide ***without the consent of the Indian nations involved.*** When the United States allotted a parcel to an individual Indian, the United States would hold the parcel in trust for the individual Indian for a period of 25 years or longer. While holding the allotted property in trust, the United States government had the right to grant road right of way through the property.

(6 CT 1461, emphasis added.) The first two sentences of this statement of law are taken directly from *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation* (1992) 502 U.S. 251, 254 (*County of Yakima*). And the third sentence derives from 25 U.S.C. section 341. (Compare 25 U.S.C. § 341, with 5 CT 1310.) The instruction does not say anything about consent (with or without) as it relates to individual allottees, nor does it state that the federal government has the right to grant rights-of-way through tribal lands without the consent of the

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at the time of instruction. (See 5 CT 1307, 1310; 9 RT 1860:19–1861:7, 1861:21–1863:3.) Thus, it was not a basis on which the trial court instructed the jury.

Indian nations. It states that the General Allotment Act empowered the government to *allot* tribal lands without the consent of the Indian nations involved. And that is an accurate statement of law reflected in both current decisional and then-effective statutory law. (See *County of Yakima*, 502 U.S. at p. 254 [recognizing that 25 U.S.C. section 331 "empowered the President to allot most tribal lands nationwide without the consent of the Indian nations involved"]; former 25 U.S.C. § 331 [authorizing the President "to cause allotment to each Indian located [on a reservation] to be made in such areas as in his opinion may be for their best interest"], repealed by Pub.L. 106-462, Title I, § 106(a)(1), Nov. 7, 2000, 114 Stat. 2007.)

Plaintiff focuses intently on the word "permission" in section 311 in arguing that the instructions somehow erroneously state or misleadingly suggest that the Secretary of the Interior has authority to unilaterally convey road easements across tribal reservations or allotted Indian land. (AOB at 34–38.) But the fact that the Secretary is "authorized to grant permission" to State or local authorities to establish road rights-of-way, subject to certain "requirements" being met, is not meaningfully or legally distinct from the Secretary's ultimate authority to grant or approve the right-of-way so long as the necessary requirements have been met. And Plaintiff does not cite to any authority suggesting otherwise. That is especially true in light of section 341, which does *not* use the word "permission" but expressly states that Congress has "the right and power . . . to grant the right of way through" individual Indian or tribal lands for "railroads or other highways." (25 U.S.C. § 341.) It is a "fundamental canon of statutory construction that the words of a statute must be read in their context

and with a view to their place in the overall statutory scheme." (*Davis v. Mich. Dept. of the Treasury* (1989) 489 U.S. 803, 809.)

Here, Plaintiff's hypertechnical reading of section 311 fails to demonstrate any instructional error. Indeed, substantial evidence of all of the criteria that Plaintiff contends are required in order for the Secretary to ultimately grant or approve a road right-of-way application across Indian lands was introduced in this case. (See Ex. 243-2 [application for permission to build road]; Ex. 242-26 [permit issued by Secretary to build road]; Ex. 242-3 [consent from Rincon Tribe's membership and agreements by individual allottees, including for Tract 137]; Ex. 242-4 [consideration paid for each easement]; and Exs. 239, 243-2 [approval by Secretary through application process]; AOB 34–35.) Thus, Plaintiff's cited authority regarding the federal government's fiduciary obligations toward Indian allottees is of no moment.

Because neither Special Instruction 10 nor 16 states that the Secretary of the Interior or the BIA has authority grant rights-of-way across tribal land without the consent of the tribe or individual allottee, and because the instructions are accurate statements of statutory and decisional law, the trial court did not commit instructional error in giving them to the jury.

### B. Plaintiff is Barred by the Invited Error Doctrine from Challenging the Instructions on Appeal

Even if the giving of Special Instructions 10 or 16 could be construed as instructional error, Plaintiff cannot now claim to benefit from an error that he invited. As an initial matter, Plaintiff, who did not object to the challenged instructions, does not raise—and therefore

waives—any argument regarding the "excepted to" provision of Code of Civil Procedure section 647. Rather, he erroneously contends that despite not objecting to the instructions, he may still raise instructional error simply because Defendants proposed the challenged instructions. (AOB 39.) Yet Plaintiff conveniently ignores the fact that he expressly agreed with the propriety of the instructions, and thereby *did* induce or invite the instructional error of which he now complains.

It is well settled that parties in a civil case have a duty to "propose complete and comprehensive instructions" consistent with their theory of the case. (*Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 468 (*Little*) [citing *Downing v. Barrett Mobile Home Transport, Inc.* (1974) 38 Cal.App.3d 519, 523].) If the parties fail to do so, the trial court is not obligated to instruct on its own motion. (*Little*, 67 Cal.App.3d at p.468.) Moreover, "[u]nder the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error." (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1000.) At least one appellate court has described the doctrine as "an application of the estoppel principle: Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal on appeal. [Citation] . . . At bottom, the doctrine rests on the purpose of the principle, which is to prevent a party from misleading the trial court and then profiting therefrom in the appellate court. [Citations]" (*Ibid.*)

With respect to Special Instructions 10 and 16, Plaintiff's counsel did not object to the instructions or propose any modifications or alternatives. To the contrary, Plaintiff's counsel expressly agreed that

the instructions accurately stated or summarized the law. (9 RT 1861:3-5, 1862:24–1863:1.) When given an opportunity to argue Special Instruction 10 at the jury instructions conference, and after counsel for the County read through the entirety of 25 U.S.C. section 311 verbatim, Plaintiff's counsel advised the court "[t]hat's fine. . . Yeah, he summarized what's in the code." (9 RT 1861:21–1863:1.) And when arguing Special Instruction 16, Plaintiff's counsel represented to the court: "Sure. That's the law." (9 RT 1860:19–1861:5.) Based on those representations from Plaintiff's counsel, the trial court agreed to give both instructions. (9 RT 1861:6-7, 1863:2-3; 6 CT 1461–1462.)

By agreeing to Special Instructions 10 and 16, Plaintiff induced the trial court to charge the jury with them, on the understanding that the parties agreed that the instructions fully addressed the material issues. In so doing, Plaintiff denied the trial court the opportunity to evaluate and cure, if necessary, the instructions Plaintiff now complains of. The doctrine of invited error thus bars him from challenging the instructions on appeal. (*People v. Davis* (2005) 36 Cal.4th 510, 539 ["Because defendant *expressly agreed* to this instruction, he is barred from challenging it on appeal under the doctrine of invited error."]) (emphasis in original).

### C. Any Instructional Error that May Have Occurred Was Harmless

Because Special Jury Instructions 10 and 16 accurately stated the law, and because Plaintiff invited any error of which he now complains, the trial court's giving of these "key" instructions neither was prejudicial nor resulted in a miscarriage of justice. (Cf. AOB 32,

40.) Rather, if any error occurred in giving the instructions, it was harmless, as substantial evidence supported the verdict in any event.

"There is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case unless . . . after an examination of the entire cause, including the evidence, the court is of the opinion that the error complained of has resulted in a miscarriage of justice." (*Soule v. Gen. Motors Corp.* (1994) 8 Cal.4th 548, 549 (*Soule*); see Cal. Const., art. VI, § 13.) As the Supreme Court explained in *Soule*, instructional error in a civil case is prejudicial only "'where it seems probable' that the error 'prejudicially affected the verdict.'" (*Soule*, at p. 580; *Mendoza v. Western Med. Ctr. Santa Ana* (2014) 222 Cal.App.4th 1334, 1342 [instructional error prejudicial where there is a "reasonable probability" the error prejudicially affected the verdict].) "Of course, that determination depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury. [¶] But the analysis cannot stop there. Actual prejudice must be assessed in the context of the individual trial record." (*Soule,* at p. 580.)

The "reasonable probability" test "asks the [reviewing] court to imagine what the jury would have done in the counterfactual world in which it received correct instructions. While the court should undertake that task in light of the 'entire cause, including the evidence' [citation], the reviewing court should focus solely on whether 'the error affected the outcome' [citation], not whether the court personally believes that the outcome was correct." (*People v. Hendrix* (2022) 13

Cal.5th 933, 948.) "In assessing prejudice from an erroneous instruction," courts consider: (1) the degree of conflict in the evidence on critical issues; (2) whether respondent's argument to the jury may have contributed to the instruction's misleading effect; (3) whether the jury requested a rereading of the of the erroneous instruction or related evidence; (4) whether the verdict was close; and (5) the effect of other instructions in remedying the error. (*Soule, supra*, 8 Cal.4th at pp. 570–571.) The balance of these factors—if not all of them—weighs against there being a "reasonable probability" that any error prejudicially affected the verdict. Thus, any instructional error was harmless and the judgment must be upheld.

Taking the factors in turn, there was conflicting evidence on the issue of permission—i.e., whether documents on file with the BIA demonstrated the Secretary of the Interior's authority to grant permission to the County for the right-of-way across Tract 137 while holding the land in trust for Matthew Calac, or whether separate, express consent by Calac was required in order for the Secretary to grant a valid right-of-way. The jury could have found either that the Secretary was so authorized or that he was not in reaching its determination that Defendants had permission to enter the Property. But, as discussed above, it also could have reached the finding it did based on evidence that Donius impliedly dedicated to the County the portion of the Property across which the easement runs. Thus the degree of conflict on this critical issue did not necessarily affect the outcome of the case, even had Special Jury Instructions 10 and 16 not contained Plaintiff's purported errors. For the same reason, any

arguments by Defendants in closing that relied on Special Instructions 10 and 16 would not have necessarily affected the verdict.

As for the third factor, the jury did not request a rereading of either the challenged instructions or related evidence. Nor was the verdict close—it was unanimous in Defendants' favor. (12 RT 2408:8–2413:10 [post-verdict jury poll]; cf. *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 664–665 ["A close verdict is a key indication that the jury was misled by an instructional error."].) Finally, with respect to consent as a condition of the Secretary's authority to grant road rights-of-way, Plaintiff's evidence and argument at trial presented that requirement to the jury. (See 6 CT 1569:4-9 [plaintiffs' new trial motion acknowledging evidence demonstrating their "separate consent requirement" theory].) Plaintiff also requested and received Special Jury Instruction 29 concerning the inability of a minor to "make a contract relating to real property, or any interest therein." (6 CT 1460.) Thus, Plaintiff was able to "place his full case before the jury." (*Soule, supra,* 8 Cal.4th at p. 580.)

Indeed, the evidence presented at trial—including those exhibits on which Plaintiff bases his consent requirement—was sufficient to conclude that the Secretary, holding the property in trust for Calac, properly obtained whatever consent was necessary, because "[i]n the absence of clear evidence to the contrary," public officials are presumed to "have properly discharged their official duties." (*Chem. Found., supra,* 272 U.S. at pp. 14–15; accord, *Banks v. Dretke* (2004) 540 U.S. 668, 696; *People v. Gonzalez* (2021) 12 Cal.5th 367, 394; see Evid. Code § 664.) And Plaintiff failed to present any evidence or argument to the contrary.

For these reasons, the record adequately reflects that any error in giving Special Instructions 10 and 16 was harmless and does not require reversal, as there is no "reasonable probability" that the purported error prejudicially affected the verdict.

## CONCLUSION

In light of the foregoing, the jury verdict and resulting judgment in Defendants' favor should be affirmed. Substantial evidence supports the jury's findings and no instructional error occurred that Plaintiff did not invite, or that was not otherwise harmless.

Dated: May 23, 2023

Respectfully submitted,

OFFICE OF COUNTY COUNSEL,
COUNTY OF SAN DIEGO

By: *s/ Katie A. Richardson*
Katie A. Richardson

Attorneys for Defendant-Respondent
COUNTY OF SAN DIEGO

## CERTIFICATE OF WORD COUNT

As required by California Rules of Court, rule 8.204(c), I certify that this Responding Brief was produced on a computer in 13-point Century Schoolbook font. The word count, including footnotes but excluding matters that may be omitted under Rule 8.204(c), is 9,173 words as calculated by the word processing program used to generate the brief.

Dated: May 23, 2023

Respectfully submitted,

OFFICE OF COUNTY COUNSEL,
COUNTY OF SAN DIEGO

By: *s/ Katie A. Richardson*
Katie A. Richardson

Attorneys for Defendant-Respondent
COUNTY OF SAN DIEGO and NORTH
COUNTY TRANSIT DISTRICT

## CERTIFICATE OF SERVICE

I, Chelsea Ferreira, declare that I am employed in the County of San Diego, California, am over the age of eighteen years, and am not a party to the case. My business address is 1600 Pacific Highway, Room 355, San Diego, California, 92101. On May 23, 2023, I electronically filed the County Of San Diego's Responding Brief with the Clerk of the Court of Appeal, Fourth Appellate District, by using the Court's electronic filing system, TrueFiling. I certify that all participants in the case are registered users of the TrueFiling portal and will be served by that system.

I further certify that, on March 23, 2023, I caused a copy of the County Of San Diego's Responding Brief to be served on the trial court by first-class mail at the following address:

San Diego County Superior Court
Hon. Joel R. Wohlfeil
Department C-73
1100 Union Street
San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed May 23, 2023, at San Diego, California.

*s/ Chelsea Ferreira*
Chelsea Ferreira