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 and Appellants,
v.
COUNTY OF SAN DIEGO and NORTH COUNTY TRANSIT DISTRICT,
Defendants and Respondents.

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

APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED PARTIES

This Certificate is submitted on behalf of plaintiffs and appellants MARVIN DONIUS, an individual, and RINCON MUSHROOM CORPORATION OF AMERICA, INC.. Other than the parties to the underlying action, appellants do not know of any interested entities or persons who either have an ownership interest of ten percent or more in one of the parties or a financial or other interest in the outcome of this proceeding to be listed in this certificate under California Rules of Court, Rule 8.208(e)(1).

Dated: March 24, 2023

Respectfully Submitted,

MANUEL CORRALES, JR.

By: /s/ *Manuel Corrales*
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I. INTRODUCTION

This appeal arises from an erroneous jury verdict for defendants County of San Diego (the County) and North County Transit District (NCTD) even though their conduct violated plaintiffs' fundamental property rights. This Court should reverse judgment against plaintiffs on their claims for trespass and nuisance because the verdict is contrary to substantial evidence and two key jury instructions misstated applicable law.

Plaintiffs are non-Indians owners of a five-acre parcel (the Property) within the outer boundaries of a tribal reservation home to the Rincon Band of Luiseño Indians. It is undisputed that the Property is privately owned in fee simple, and not a part of the surrounding reservation. It is also undisputed that, in 1935, the County obtained a valid easement from the Rincon Tribe to build a road through the reservation, which road now separates the Property from a tribal casino built around 2000. What is disputed, however, is whether a County-operated traffic light and an NCTD-operated bus stop, built near the road to manage casino-related traffic and extending across a portion of the Property, are encompassed by the County's century-old road easement or constitute a trespass and a private nuisance.

Evidence showed that, when the County road was built, it did not just run through the tribal reservation, but also through parcels allotted to individual Indians by the Department of Interior's Bureau of Indian Affairs (the BIA). This included Tract 137, as the Property was identified back in 1935, which the BIA had allotted to an Indian minor at the time. Under applicable

law, and admissions by the County Surveyor in documents on file with the County Recorder's Office, the County was therefore required to obtain consent for its road easement from both the tribe's members (for the road to run through the reservation) **and** the individual allotees (for the road to run through their allotted parcels). But the minor to whom Tract 137 was allotted could not give legal consent to any road easement, and there was no evidence that a guardian ad litem had been appointed to give consent for the minor. As a result, defendants urged the jury to find that the minor's consent was unnecessary because the BIA, which used to hold allotted land in trust for 25 years after the allotment, had granted the County a road easement across Tract 137 on the minor's behalf. But as plaintiffs established, this defense was contrary to substantial evidence and the law.

First, defendants never produced an easement across Tract 137, either by the minor or the BIA, that was recorded with the County Recorder's Office or in the BIA's recording system. Instead, the County relied on the depiction of the ***planned*** road across Tract 137 in a 1935 Road Survey Map marked "approved" by the Secretary of the Interior (the Secretary), who oversaw the BIA. However, as plaintiffs established through their expert surveyor and as a matter of law, the BIA's approval of a survey map depicting a planned road does not itself constitute a recorded road easement deemed to validly encumber private property. Moreover, the 1935 Road Survey Map on which the County relied **predated** correspondence from the County Recorder, purporting to enclose written consents for the road easement from the tribe

and the individual allottees, including the minor to whom Tract 137 was allotted. As a result, the survey map of the planned road could not itself be the grant of the road easement. A later County resolution, noting that the Secretary had approved the tribe's grant of the road easement, further established that the survey map itself could not be the grant of any road easement.

Second, even if the depiction of a planned road across Tract 137 on a survey map could itself constitute a valid easement, the jury was erroneously instructed that the Secretary had authority to convey easements through allotted Indian land without the allottee's consent because the BIA held allotments in trust for 25 years. To the contrary, the law authorized the Secretary to merely ***approve*** easements on allotted Indian land held in trust by the BIA if the easement were conveyed by the allottee, but not to actually convey the easement without such consent. Otherwise, the allotment from the BIA would be meaningless. But, as noted, the minor could not provide valid consent for a road easement across Tract 137 without a guardian ad litem, meaning there was no valid easement for the Secretary to approve while the BIA held the tract in trust for the minor. And absent a valid, recorded easement, the traffic light and the bus stop built on portions of Tract 137 several decades later, when plaintiffs had come to buy the Property, constituted a trespass and a private nuisance.

Accordingly, this Court should reverse the judgment, and remand with instruction for the trial court to enter judgment for plaintiffs notwithstanding the verdict or grant a new trial.

II. STATEMENT OF APPEALABILITY

Notice of entry of the final judgment in the underlying action, which is appealable under Code of Civil Procedure, § 904.1, subdivision (a)(1), was served June 10, 2022. (6 CT 1529.) Plaintiffs' timely notice of intention to move for new trial, filed June 13, 2022, extended their time to appeal from the judgment until thirty days after the denial of the new trial motion. (6 CT 1556–1557; Rules of Court, rule 8.108, subd. (b).) Plaintiffs then timely filed their notice of appeal on August 10, 2022, within 30 days of the July 15, 2022 order denying their motion for new trial. (7 CT 1952–1954; 7 CT 1949–1951.)

III. STATEMENT OF ISSUES PRESENTED

1. Does substantial evidence support the jury's finding that the County did not need plaintiffs' permission to allow a traffic light and a bus stop to be built across a portion of the Property because, in 1935, the County obtained a road right-of-way easement even though no such easement was ever recorded?

2. Does substantial evidence support the jury's finding that the depiction of a ***planned*** road across a portion of the Property on a 1935 Road Survey Map in the BIA's records with an "approved" stamp by the Secretary of the Interior somehow constituted the Secretary's valid grant of a road easement without consent from the allottee who then owned the parcel?

3. Did the trial court erroneously instruct the jury that the Secretary had the authority to convey road easements on Indian land allotted to individual owners without their consent

while holding the allotments in trust, instead of merely having the power to approve such easements with the allottees' consent?

IV. STATEMENT OF THE CASE

A. The Parties to this Case are Private Fee Simple Landowners and Two Public Entities

The plaintiffs to the underlying dispute are a corporation and an individual—Rincon Mushroom Corporation of America, Inc. (RMCA), a non-Indian corporation previously engaged in the mushroom farming business, and Marvin Donius (Donius), who operated RMCA's business in San Diego. (Ex. 65;[1] 6 RT 1182; 8 RT 1639–1640.) Defendants are two public entities—the County of San Diego (the County) and the North County Transit District (the NCTD). (1 CT 18.) At issue in the action is plaintiffs' five-acre parcel of non-Indian fee land, which sits within but is not a part of the tribal reservation of the Rincon Band of Luiseño Indians, located at 3377 Valley Center Road, Valley Center, California (the Property). (1 CT 20; 6 RT 1178.)

B. The Subject Property Sits on a Tribal Reservation and Was Allotted to an India Minor in 1929

A 1935 Road Survey Map in the records of the Department of the Interior's Bureau of Indian Affairs (BIA) depicts the Property at issue as "Tract 137." (Ex. 237.) In 1929, the BIA allotted Tract 137 to an Indian minor named Matthew Calac. (6 RT 1228–1229; Ex. 380.) Consistent with the practice governing land allotted to Indian individuals at the time, the BIA was to

[1] All referenced exhibits were admitted at trial; are attached to concurrently-filed "Appellant's Notice of Transmittal of Trial Exhibits"; and are cited by their existing exhibit and page number, instead of the page number stamped on the transmittal.

hold the Tract 137 in trust for Calac for his sole use and benefit for at least 25 years before conveying it to him in fee simple. (Ex. 380; 6 RT 1162.) Ultimately, the BIA held Tract 137 in trust for Calac for approximately 33 years, conveying it to him in a fee simple "patent" in 1962. (Ex. 381.) This patent does not list any road right-of-way easement encumbering Tract 137 before the conveyance to Calac. (*Ibid.*)

C. The County Received Approval of an Easement from the Tribe to Build a Road Through the Reservation

In 1913, the BIA's chair, the U.S. Secretary of the Interior (the Secretary), granted the County a "permit" to build a roadway across the Rincon Tribe's reservation, including some allotted parcels of Indian land. (Ex. 242-26.) However, before the road could be constructed, the County needed to obtain a road-right-of-way, also known as an easement,[2] from two sets of parties—one from the Rincon Tribe's membership for the road to run across the reservation itself, and a second from the individual Indian allottees for the road to run across their respective allotted tracts. (Ex. 242-3.) In a June 28, 1935 letter to the County Board of Supervisors, the County Surveyor acknowledged the "law" requiring separate written consents from the Rincon Tribe's membership and the individual Indian allottees for the easement:

[2] A road right-of-way is an easement (7 RT 1487) "where improvements can be constructed for public benefit" (8 RT 1564:1–4) or "that allows for travel upon it by the public" (8 RT 1600:11–1; see also 8 RT 1634; *Darr v. Lone Star Indus., Inc.* (1979) 94 Cal.App.3d 895, 900–901 [right-of-way is an easement to use property].)

> In connection with securing an easement across the Indian Reservation certain procedure[s] in conformance with Government law must be complied with. There ***must be a written consent*** from a majority of the Indians enrolled upon the reservation ***before the approval of the Government can be obtained*** across tribal land. ***Also, in the case of where allotments have been made to individual Indians, a separate agreement must be made with the individual Indian owning the allotment***.

(*Ibid.*, emphases added.) The County Surveyor went on to state that the County had, in fact, obtained signatures or agreements for the easement from the Rincon Tribe and each of the four allottees, including Tract 137's individual owner:

> We have secured the signatures of a majority of the Indians enrolled at Rincon and the same is attached hereto for your inspection. Also, we have secured an agreement from four Allottees across the following Allotments located in the Rincon Reservation: Numbers **137**, 155, 156 and 157.

(*Ibid.*, emphasis added.) Indeed, the County Surveyor attached "duly executed" applications titled "Form 5-104B" from each allottee, showing the damages or consideration to be paid to each for the road to run through their allotted parcel:

> [T]here is also attached hereto ***four applications in duplicate in Form 5-104B, each form being duly executed by the Allottee*** and showing thereon the amount of damages to be paid. For your information they are tabulated as follows:
>
> Mary Barker Calac, owner of Alottment No. 157, amount of damages-$50.
> Natalia Calac Siva, owner of Alottment No. 156, amount of damages-$200.

> Agnes Calac, owner of Alottment No. 155, amount of damages-$200.
> ***Matthew Calac, a minor,*** owner of Alottment No. 137, amount of damages-$50.

(Ex. 242-4, emphases added.) Notably, while County Surveyor acknowledged that Tract 137's owner, Calac, ***was a minor*** (*ibid.*), he said nothing about a guardian ad litem being appointed for the minor to effectuate his consent to any agreement conveying an easement across his tract.

According to the County Surveyor, all that was left was to pay the damages or consideration to the allottees for the easement, and to send the completed easement applications to Washington for the BIA or Secretary's "approval":

> Also, it is respectfully requested that the Auditor be authorized to draw warrant[s] ***in favor of the different Allotees named***, in the amounts as shown on their applications, after which if you will return the applications, blueprints and petitions to this office, the same will be forwarded to the Superintendent of Mission Indian Agency at Riverside, who in turn will forward the application to Washington ***for approval***.

(*Ibid.*, emphases added.) Importantly, sending the easement applications to Washington for "approval" was not described anywhere in the 1935 County Surveyor's Letter as authorizing the BIA or the Secretary to grant a right-of-way easement on behalf of the Rincon Tribe's membership or the individual allottees without their consent. (See generally Ex. 242.)

D. There Was No Recorded Road Right-of-Way Easement Across Tract 137, the Property at Issue

Though referenced in the 1935 County Surveyor's Letter, no agreement by Calac to convey a right-of-way easement to the County over his allotted Tract 137 was ever produced. Instead, the County asserted at trial that the Secretary agreed to convey the easement on Calac's behalf and did not need his consent because the BIA held Tract 137 in trust for him at the time. (9 RT 1855–1856; 10 RT 1984–1985, 2028.) But whereas a 1937 County Board of Supervisors' Resolution reflects the Secretary's approval of the right-of-way granted by the Rincon Tribe for the road to run across the reservation (Ex. 243-2), it does not reflect the Secretary's grant or approval of any easement across Tract 137. (Ex. 243-2–4; see also 10 RT 1979–1980.)

Indeed, the 1937 County Board of Supervisors' Resolution noted receipt of a letter dated September 28, 1936 from the BIA Superintendent in California, "advising of the approval by the Department of the Interior, of the County's application" for an easement granted by the Rincon Tribe for a road "extending across Indian Lands, (Rincon Mission Indian Reservation." (Ex. 243-2.) Even though the 1935 County Surveyor's Letter referenced two sets of applications for approval, one from the tribe and another from the individual allottees, the 1937 Board of Supervisors' Resolution did ***not*** state that the Department of the Interior had approved (or granted) an application based on an easement across over Tract 137. (Ex. 243.) Given this omission, the County asserted that the 1935 Road Survey Map on which the planned road was drawn through, among others, Tract 137,

with a Department of Interior "approval" stamp on it constituted the Secretary's grant of an easement on Tract 137 while the BIA held it in trust for Calac. (Exs. 237, 239; 9 RT 176–1757; 10 RT 1979–1980, 1985.)

E. Plaintiff RMCA Bought the Property in Fee Simple in 1982 and Sold it to Plaintiff Donius in 1999

Some fifty years later, through a series of transactions, plaintiff RMCA purchased Tract 137 in fee simple in 1982. (8 RT 1638–1639.) In 1999, RMCA sold the Property to plaintiff Donius, an RMCA stockholder who had been operating the mushroom farming business, for a portion of the purchase price. (Ex. 65;[3] 6 RT 1182; 8 RT 1639–1640.) Donius then gave RMCA a promissory note for the balance of the purchase price, $425,000, secured by a deed of trust on the Property. (6 RT 1182; 8 RT 1640; Ex. 66.) The deed made no mention of any right-of-way easement encumbering on any part of the Property. (Ex. 65.)

While Donius owned the business used revenues to pay RMCA the promissory note, RMCA owned the land underneath, meaning plaintiffs had a shared or combined interest in the Property and RMCA could tell Donius what to do or not do on the Property. (8 RT 1640–1641, 1659–1660.) Whereas defendants asserted that RMCA was only the mortgagor, like a bank, RMCA's president believed RMCA was the Property's co-owner

[3] All referenced exhibits were admitted at trial; are listed in the concurrently-filed "Appellant's Notice of Transmittal of Trial Exhibits;" and are being lodged electronically with this Court. They are cited by the original page number stamped upon admission (on the lower right hand), not the page number added to the transmittal page (in the center on the bottom of the page).

until Donius paid off the deed of trust. (8 RT 1638, 1640,1665–1666.) Though the jury found only Donius owned the Property, the above transaction was previously deemed by a federal court to give RMCA possessory or asserted ownership interest in the Property. (Compare 6 CT 1508 with 8 RT 1643–1644.)

F. The Tribe Built a Casino Across the Property in the 2000s, Leading to a Traffic Light and Bus Stop on the Adjacent County Road on a portion of the Property

For many years after RMCA and then Donius purchased the Property, Donius operated a business on the Property that bought, sold, and transported specialty mushrooms and other produce; stored RVs and other vehicles for outside clients; and grew succulents in greenhouses. (6 RT 1174–1175.) Around 2001 or 2002, the Rincon Tribe built a gambling casino called Harrah's directly across the Property, separated by the County Road for which the County had a valid easement from the Rincon Tribe going back to 1935. (6 RT 1175–1176, 1201–1202; Exs. 8, 78, 89.) As a condition of approving the casino's construction, the County required the Rincon Tribe to build a traffic light-controlled intersection along the County's Road at the casino's entrance and issued a permit for such construction to mitigate anticipated high traffic volume. (Exs. 1, 15, 16.) Around 2004, a few years after the traffic light was installed for the County to operate, the County gave NCTD an encroachment permit[4] to add a bus stop shelter

[4] An encroachment is "permission from someone to another person to do something on their property." (8 RT 1634:7–15.)

and related equipment along, among others, the County Road. (Exs. 22, 51, 402, 404–410, 421.)

G. Plaintiffs Discovered the Traffic Signal and Bus Stop Encroachment on their Property from a 2020 Survey

Around the time of these developments, plaintiffs had become involved in a dispute with the Rincon Tribe over the tribe's alleged right to regulate activities on plaintiffs' Property that has continued to the present day. *(*2 CT 526–537; 6 RT 1183–1187; 8 RT 1685–1686; Ex. 74.) As a result, not much business is able to be conducted on the Property, and Donius has not been able to pay off the promissory note to RMCA. (8 RT 1640.) When the Rincon Tribe put cement blocks at the entrance to plaintiffs' Property across the County Road in 2019 (6 RT 1191–1196), plaintiffs filed suit against the County for assisting the Tribe's efforts to block access to their Property, which action was removed to federal court. (6 RT 1196.)

At the federal magistrate judge's recommendation, plaintiffs conducted a boundary survey in February 2020 to determine whether the cement blocks were placed on their side of the County Road. (6 RT 1196–1198.) But when the survey results came out in March 2020, plaintiffs discovered the true boundaries of the Property for the first time, and learned that the County-operated traffic light and the NCTD-operated bus stop were installed across portions of the Property. (See 6 RT 1191, 1196–1199; see also Ex. 8.)[5]

[5] Contrary to defendants' arguments, Donius testified he was never aware of the Property's true boundaries or that the traffic light or bus stop encroached on it until the 2020 Survey, and that

H. Plaintiffs Filed the Underlying Trespass and Nuisance Suit Against the County and NCTD in 2020

Within months of this discovery, in May 2020, plaintiffs sued the County and NCTD for trespass, private nuisance, and inverse condemnation. (1 CT 17–49.) Plaintiffs later dismissed their inverse condemnation claim and proceeded to trial on their trespass and private nuisance claims, alleging that defendants had encroached or unlawfully occupied a portion of their Property. (1 CT 186; 3 RT 309; 4 RT 615, 618.) The "core issue" at trial was whether the traffic light pole, bus stop, and related structures were improperly placed on the Property without plaintiffs' permission. (4 RT 655.)

I. The County Argued That the Traffic Light and Bus Stop Were Placed on Its 1935 Right-of-Way Easement

At trial, the County raised the defense that it did not need plaintiffs' permission to install the traffic light on a portion of the Property because it had obtained an easement across Tract 137 in 1935, when the County Road was being built across the reservation, before plaintiffs took ownership of the Property. (2 CT 407, 409–410; 6 CT 1617, 1625.) Defendant NCTD argued that, because it had obtained an encroachment permit from the County to build the bus stop, it was just a "passenger" in the suit whose liability stood or fell on the validity of the County's claimed easement. (4 RT 618–619; 6 RT 1172; 8 RT 1594, 1634.)

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he did not get such notice by a portion of a surrounding chain link fence being moved for the traffic light and related structures to be placed. (6 RT 1199, 1200–1203.)

J. Evidence Failed to Show any Recorded Easement to the County Across Tract 137, that is, the Property

During his title search, plaintiffs' surveyor found no recorded right-of-way road easement encumbering the portion of the Property on which the traffic light and the bus stop were placed. (6 RT 1318, 1323). The only right-of-way easements were found on the Rincon Tribe's side of the County Road, including those dedicated by the Tribe related to the casino's construction. (Ex. 8.) Though plaintiffs' surveyor acknowledged that there was a reference to or depiction of a right-of-way line encumbering the Property in the 1935 Road Survey Map (Ex. 8, 230), it depicted the general road across the reservation, not across Tract 137. (6 RT 1326–1328; Ex. 237.) Thus, there was no easement recorded with the County Recorder's Office or the BIA encumbering plaintiffs' Property that would be captured by a title report. (6 RT 1323, 1327; Exs. 8, 383.)

Nevertheless, the County relied on the 1935 Road Survey Map depicting the right-of-way and marked "approved" as itself a valid easement granted by the Secretary across Tract 137 while the BIA held that parcel in trust for Calac. (Ex. 239; 9 RT 1856–1858; 10 RT 1984–1986; 11 RT 2244–2246 ["the BIA stepped in to approve it on behalf of Calac"].) By contrast, plaintiffs relied on the law that the Secretary could only approve easements granted by tribes or individual allottees, not grant them without the owner's consent, and evidence that the 1935 Road Survey Map was prepared to show ***where*** the road easements needed to be conveyed instead of being the equivalent of a recorded road easement itself. (6 RT 1326–1327; Ex. 242-2–3.)

K. The Trial Court Gave the Jury Two Key Erroneous Instructions, Misstating Applicable Law

The County proposed and obtained two special jury instructions (Nos. 10 and 16) stating that the Secretary had the authority to make allotments of Indian land to individuals without the tribal nation's consent, hold the allotted land in trust for 25 years, and convey or grant easements on such land without the allottee's consent. (5 CT 1307, 1310.) But these instructions were erroneous as a matter of law because the Secretary's authority was limited to ***approving*** easements made with the individual Indian allottees' consent, not granting easements on allotted land with the allottees' consent. (28 U.S.C. §§ 311, 314.)

L. The Jury Erroneously Rendered a Defense Verdict, Which the Trial Court Refused to Set Aside

Not surprisingly, the jury rendered a defense verdict, first finding that only plaintiff Donius, and not RMCA, owned, occupied or controlled the Property and then finding that the County did not cause another person to enter the Property "without the permission of Plaintiff or Plaintiff's predecessor." (6 CT 1354, 1375.) In other words, the jury agreed with the County that the Secretary both the power to and had exercised such power to grant the County an easement across Tract 137 while the BIA held the parcel in trust for him without the need for Calac's consent (which he was incapable of providing as a minor).

Plaintiffs timely moved for judgment notwithstanding the verdict and for a new trial, raising the above grounds in detail, among other errors. (5 CT 1599–7 CT 1924.) The trial court denied both motions without analysis or reasoning, stating only

that it confirmed its tentative ruling that it "agrees with the arguments set forth in Defendants' opposition." (7 CT 1947–1950). This timely appeal followed. (7 CT 1952.)

V. STANDARDS OF REVIEW

A. The Jury's Findings are Reviewed for Substantial Evidence

On appeal from judgment following the denial of a motion for judgment notwithstanding the verdict, this Court reviews the record de novo to determine whether substantial evidence supports the jury's findings. (*Hirst v. City of Oceanside* (2015) 236 Cal.App.4th 774, 782.) In doing so, this Court accepts as true any evidence and legitimate inferences supporting the verdict and disregards conflicting evidence. (*Begnal v. Canfield & Assoc., Inc.* (2000) 78 Cal.App.4th 66, 72.)

B. Denial of a New Trial is Reviewed for an Abuse of Discretion But Instructional Error is Reviewed De Novo

On appeal from judgment following the denial of a motion for new trial, this Court reviews the record independently to determine whether there were prejudicial errors in the conduct of the trial. (*Wilkinson v. S. Pac. Co.* (1964) 224 Cal.App.2d 478, 483.) Though an order denying a new trial is itself not appealable, it may be reviewed on appeal from the judgment. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871–872 (*City of Los Angeles*).) The ruling on a new trial motion is reviewed for an abuse of discretion (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1176), but the deference to an order granting a new trial does not apply to one denying a new trial. (*City of Los Angeles*, 18 Cal.3d at pp. 871–872.)

Where, as here, a new trial is denied despite jury instructions that misstate the law, this Court reviews the propriety of giving instructions de novo. (*Zannini v. Liker* (2022) 74 Cal.App.5th 610, 624, citing *People v. Posey* (2004) 32 Cal.4th 193, 218.) To be reversible, instructional error must be prejudicial, that is, it must be reasonably possible that appellant would have obtained a more favorable result absent the error. (*Soule v. Gen. Motors Corp*. (1994) 8 Cal.4th 548, 577.)

VI. LEGAL DISCUSSION

A. The Finding that the County Had Permission to Enter the Property Because It Purportedly Secured a Right-of-Way Easement Across the Property in 1935 is Contrary to the Evidence that There Was No Such Recorded Easement

Defendants' primary defense to plaintiffs' claims rested on the County's acquisition of a purported road right-of-way easement in 1935 across Tract 137, as the subject Property was then identified. According to defendants, this easement assertedly gave the County permission to have the Rincon Tribe install the traffic light and the NCTD install the bus stop across the edge of what became plaintiffs' Property. But substantial evidence does not support the jury's endorsement of this defense.

To be valid, an easement must be recorded, among other things. Otherwise, as plaintiffs' expert surveyor testified, it can be drawn by anyone and even made to look official:

> [A]nyone can draw up a piece of paper from Neighbor A to Neighbor B and get someone to sign it. Maybe even notarize it. But to not record it, in my experience, it is not considered a valid easement.

(7 RT 1353.) Indeed, a defendant was convicted for doing exactly that by offering to record a deed purporting to convey an easement across land in which she had no legally cognizable interest. (*Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 681.) Yet it is undisputed that defendants failed to produce any official "deed" or recording reflecting the purported easement by or on behalf of Calac as the individual allottee who owned the Property (or Tract 137) at the relevant time. (See 7 RT 1338 [plaintiffs' expert surveyor testifying that no **recorded** easement was found encumbering the Property during his 2020 land survey and title search].)

Importantly, in his 1935 Letter to the County Board of Supervisors, the County Surveyor had acknowledged the need for written easements from both the tribe's membership and the individual allottees "in conformance" with governing law. (Ex. 242-2.) The 1935 County Surveyor's Letter even purported to enclose the attempted conveyances of right-of-way easements to the County from ***both*** the Rincon Tribe's membership across the reservation and four individual allottees their across tracts, including Tract 137, to be forwarded to the Secretary for approval. (Ex. 242-3.) But neither any approval of the individual allottees' agreement to grant the easements nor an actual recorded easement across Tract 137 or other allotted land was produced or found in a title search or land survey. (See Ex. 383 [title report]; see also Ex. 8-01 [survey report stating that "there is no reference to a recorded easement supporting th[e] right of

way line"].) By contrast, a ***recorded*** easement to San Diego Gas & Electric did show up on the title report. (Ex. 383-5.)

Moreover, 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. (Ex. 243-2.) Yet the 1937 County Board of Supervisors' Resolution did reflect the Secretary's approval of the easement granted by the Rincon Tribe for the County Road to run across the reservation. (Ex. 243-2; 10 RT 1979–1980.) Notably, had the Secretary approved the easement across Tract 137 referenced in the 1935 County Surveyor's Letter, it would have had to be recorded in the BIA's recording system, which was in existence well before 1935 and established Titles and Records Offices throughout the United States. (See 25 U.S.C. § 5 [enacted 1892 to require the BIA "to make and keep a record of every deed executed by any Indian" and to return "the deed so approved [by the Secretary] . . .to said [BIA] office"]; 25 C.F.R. § 150.2(j) [discussing BIA offices "charged with the Federal responsibility to record, provide custody, and maintain records that affect titles to Indian lands"]; see also *In re Emerald Outdoor Advertising, LLC* (9th Cir. 2006) 444 F.3d 1077, 1082 [discussing parallel recording systems for conveyances of Indian land maintained by tribes themselves].)

The omission of any approval of an easement across Tract 137 in both the 1937 County Board of Supervisor's Resolution and the 1936 Superintendent's Letter, combined with the absence

of a recorded easement across Tract 137 could only lead to one logical inference—that the attempted easement across Tract 137 was rejected given Calac's incapacity as a minor without an appointed guardian ad litem to consent to any easement as a matter of law. (See, e.g., *Lee v. Hibernia Sav. & Loan Soc.* (1918) 177 Cal. 656, 658 ["Section 33 of the Civil Code provides that 'a minor cannot give a delegation of power, nor under the age of eighteen, make a contract relating to real property, or any interest therein"];[6] *Lomax v. Pickering* (1899) 173 U.S. 26, 29–30 [deed may be void by reason of grantor's infancy]; *Truskett v. Closser* (1915) 236 U.S. 223, 225 [holding that Indian minor cannot lease allotted property without guardian ad litem and the Secretary of Interior's approval]; *Jefferson v. Winkler* (1910) 26 Okl. 653, 756 [finding void female Indian minor's conveyance to third person because it was done without approval from a guardian ad litem and the Secretary of the Interior]; accord *Ridley v. Young* (1944) 64 Cal.App.2d 503, 510 [noting that minors cannot make enforceable contracts for real property, only for personal property in their immediate possession.)

Instead of drawing this logical inference, however, the jury erroneously credited defendants' argument that the lack of a recorded easement across Tract 137 and Calac's inability to give consent were irrelevant because the Secretary granted the

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[6] Civil Code §§ 33 to 37 were repealed in 1993 (Stats. 1993, c. 219 (A.B.1500), § 2.) But a minor's inability to give legal consent is codified elsewhere. (E.g., Fam. Code, § 6701 ["A minor cannot do any of the following: (a) Give a delegation of power. (b) Make a contract relating to real property or any interest therein."].)

easement across 137 for Calac while the BIA held it in trust for him. (11 RT 2244–2246.) But this too was contrary to substantial evidence because, even assuming the Secretary was authorized to grant easements across allotted Indian land held in trust without the beneficiary's consent, defendants also failed to produce any recorded easement across Calac's allotted land by the Secretary or someone else in the Department of the Interior.

B. Substantial Evidence Does Not Support the Jury's Finding that the Secretary of the Interior's Stamp of Approval on a 1935 Road Survey Map Depicting a Right-of-Way Line on the Property Constituted the Easement Itself

To excuse the lack of a recorded easement, defendants relied on the 1935 Road Survey Map depicting the planned roadway through the reservation and across a portion of Tract 137. (Ex. 239.) According to defendants, the mere depiction of the planned roadway across the reservation constituted the actual right-of-way easement across Tract 137 because the 1935 Road Survey Map was annotated on the back as part of the BIA's records and was stamped approved by the Secretary. (7 RT 1480, 1770; 10 RT 1979-1980, 2061–2062; 11 RT 2243; Exs. 240–241.) But defendants cited no applicable law in support of the proposition that a survey map could constitute a valid, recorded easement itself. Instead, defendants cited an inapposite case in which a permit granted by the Secretary to the State of Oklahoma to build a highway across a reservation included a permit over allotted land, but there was no indication whether the allottee consented or was a minor. (*United States v. Oklahoma Gas & Elec. Co.* (10th Cir. 1942) 127 F.2d 349, 353.)

The jury was also shown a notarized easement to San Diego Gas & Electric across Tract 137, recorded in the San Diego County Recorder's Office, further undermining its conclusion that the 1935 Road Survey Map could itself be an easement. (Ex. 384.) Also introduced into evidence was the correspondence file regarding the County Road between the County Surveyor and the County Board of Supervisors, noting the easements from some of the original property owners being "on record" at a specified page. (Ex. 242-16.) By contrast, plaintiffs' expert surveyor testified that the 1935 Road Survey Map did not create an easement because it was not recorded in the "official records of the County of San Diego." (7 RT 1359; see also 7 RT 1354 [explaining that, while the 1935 "Road Survey 604 was recorded within the county engineer and county surveyor's office," it was not recorded "in the official records. . . . where you record documents and possibly marriage licenses and trust deeds."]; 7 RT 1355 [testifying that failure to record the 1935 Road Survey Map in the official record meant that it has no recording number, no "book and page" to be looked up as an encumbrance during a title search].)

Because it was not accompanied by any language that the Secretary was approving an easement over any individual Indian allotments, the stamp of approval on the 1935 Road Survey Map merely indicated approval of the map and the location of the road itself, not the grant of an easement. This is consistent with the law that survey maps depicting a "definite" location of the easement are a necessary but separate step from the grant of the easement itself. (See, e.g., *Midwestern Devs., Inc. v. City of Tulsa,*

Okla. (N.D. OK 1966) 259 F.Supp.554, 557–558 [noting that the grant of a railroad right-of-way does not become effective until maps of definite location are filed and approved, thereby indicating that survey maps do not themselves constitute grants of easement]; see also *United States v. S. Pac. Transp. Co.* (9th Cir. 1976) 543 F.2d 676, 689–690 [rejecting railroad's argument that the Department of the Interior has always considered the Secretary's approval of maps in 1881 as conferring a valid right-of-way under the 1875 Act and finding that approval of a survey map cannot alter or extinguish an reservation's boundaries in favor a railroad right-of-way sought]; 25 U.S.C. § 314 [stating that approval of a survey map is one condition for a valid railroad right-of-way over Indian land, not the grant of the right-of-way itself, and allowing for condemnation proceedings against an Indian allottee who fails to give reasonable consent to a right-of-way over allotted land].)

Defendants made a similar argument regarding a 1959 Road Survey Map with markings on it with the phrase "permit for additional width approved" for an easement running up to the south edge of, but not through, Tract 137. (Ex. 228, p. 7; 6 CT 1680 [showing highlighted portion of additional, approved width running up to but not into Tract 137].) But, for the reasons discussed, a survey map with the depiction of an easement does not substitute for or itself constitute a valid easement recorded with either the County Recorder's Office or the BIA's recording system. Moreover, there was no evidence that Calac ever conveyed any right-of-way easements to the County in 1959, or at

any other later time, meaning the 1959 Road Survey Map could also not have been the easement itself.

For the jury to nevertheless accept the 1935 Road Survey Map as a right-of-way easement itself was also contrary to the 1935 County Surveyor's Letter enclosing Calac's and the three other allottees' written consent to the easements across their allotments and the need for the Secretary's subsequent approval of those and the Rincon Tribe's easement. (Ex. 242-4). Moreover, the Superintendent referenced the County's application of the Rincon Tribe's conveyance of a right-of-way across the reservation in a 1936 letter while the County Board of Supervisors noted its approval in a 1937 resolution, both long ***after*** the Secretary approved the 1935 Road Survey Map. This was further evidence that the 1935 Road Survey Map could not have been the Secretary's grant or approval of an easement, which attempted (if invalid) easement by Calac across Tract 137 would not come to be submitted for such approval for over a year.

C. The Trial Court Erroneously Instructed the Jury that the Secretary of the Interior Was Authorized to Convey Right-of-Way Easements on Allotted Indian Land Without the Allottee's Consent, Instead of to Merely Approve Easements Granted by the Allottee

The jury also rendered a verdict contrary to substantial evidence and the law because it was also misled by two key jury instructions, Special Instruction Nos. 10 and 16, regarding the BIA's purported authority to grant road rights-of-way over Indian reservations and allotments. The trial court gave these special instructions based on defendants' representation that they were accurate statements of the law, as paraphrased. (E.g., 9 RT 1860–

1861.) As discussed however, these instructions misstated the law, meaning they are preserved for review notwithstanding plaintiffs' failure to object, and are prejudicial because they allowed the jury to endorse defendants' primary defense.

Special Jury Instruction 10, titled "Authority of the Secretary of the Interior re Highways Across Indian Lands," stated 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 individual Indians.

(5 CT 1307, emphasis added; citing 25 U.S.C. §§ 311, 314.) The trial court also gave Special Jury Instruction No. 16, titled "The General Allotment Act of 1887," which stated as follows:

> 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 rights of way through the property***.

(5 CT 1310; emphasis added; citing *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992) and 25 U.S.C. § 341.)

Contrary to these instructions, however, the law did not authorize the Secretary of the Interior to ***convey rights-of-way***

through Indian land and individual Indian allotments without the consent of the Indian nations or the individual allottees. Rather, 25 U.S.C. § 311, cited as one of the sources for Special Instruction 10, provides that the Secretary is only authorized to grant ***permission*** for public entities, like the County, to establish roads and highways through tribal reservations or land allotted to Indian allottees:

> The Secretary of the Interior is ***authorized to grant permission . . . to the proper State or local authorities*** for the opening and establishment of public highways . . through any Indian reservation or through any lands which have been allotted in severality to any individual Indian.

(25 U.S.C. § 311.) Moreover, 25 U.S.C. § 314, cited as another source for Special Instruction 10 requires the Secretary's approval of a survey map "before" the grant of a right of way for a ***railroad*** easement, not a road easement, "shall become effective" through Indian land. It also requires compensation for damage to adjacent lands to be paid to the Secretary for the tribe and directly to allottees, and discusses condemnation proceedings against individual allottees who withhold reasonable consent. Notably, neither § 311 nor § 314 state that the Secretary has authority to unilaterally convey road easements across tribal reservations or allotted Indian land.

Rather, consistent with the evidence introduced at trial, after obtaining a permit from the Secretary to build a road through the Rincon Tribe's reservation (Ex. 242-26), the County was required "in conformance" with governing law to obtain easements via ***written consent*** from the Rincon Tribe's

membership for the road to run through the reservation itself and via agreements by individual Indian allotees, including Calac, for the road to run through the allotted land (Ex. 242-3).

Once the easements were granted by the Tribe's membership and the individual allottees, the County was required to pay consideration for each easement and get them approved by the Secretary through an application process. (Trial Ex. 242-4.) This is consistent with the recognition that the Secretary's approval of the transaction while the allotment was held in trust was meant to discharge his fiduciary responsibility to protect Indian allottees in connection with the alienation of Indian land, and to ensure that the allottee was not defrauded out of the land. (See, e.g. Cohen's Handbook of Federal Indian Law (2012 Edition) pp. 1086–1087, §16.03[4][f]]; accord *Cnty. of Yakima*, 502 U.S. at p. 254 [explaining that United States held allotted land in trust for 25 years or longer before issuing a fee patent to the Indian allottee to avoid the allotted parcel from being lost in an unfair or fraudulent transaction]; *United States v. Mason* (1973) 412 U.S. 391, 348 [noting that the United States, when acting as trustee for the property of its Indian wards, is held to the most exacting fiduciary standards]; *Coast Indian Comm. v. United States* (Ct. Cl. 1977) 550 F.2d 639, 649 [finding that BIA office breached its and the federal government's fiduciary duty to the tribe by making a right-of-way conveyance across the reservation to the County without the tribe's consent].)

Thus, the County could not obtain a road right-of-way in 1935 from any allottee with the allottee's consent alone because

the Secretary needed to approve the grant of an easement by the Tribe or the individual allottee. But this did not mean, as the jury was instructed, that the Secretary alone could convey a right-of-way easement on an individual Indian's allotment without the allottee's consent. This is no different than the Secretary having to approve contracts tribes enter into with third parties—the Secretary doesn't enter into the contract for the tribe; rather, the Secretary provides approval, without which the contract is void. (25 U.S.C. § 81(b) [providing that no contract with tribe that encumbers Indian lands for seven or more years is valid unless approved by the Secretary of the Interior or a designee].)

Moreover, contrary to both Special Instructions 16 and 10, the BIA had no authority to convey either tribal land or allotted land to anyone without the consent of the tribe's or individual allotees. (See *United States v. Creek Nation* (1935) 295 U.S. 103, 110 [holding that BIA's appropriation of Indian land for its own purposes without the tribe's consent constituted a taking for which compensation was required].) Further, the need to obtain written consent from individual allotees for a right-of-way over their land ***in 1935*** was confirmed by the subsequent passage of the Indian Right-of-Way Act of ***1948*** (the 1948 Act), which did go on to provide that rights-of-way over allotted land held by individual Indians could be granted without their written consent under specified conditions. (E.g., 25 U.S.C. § 324.) But even the conditions allowing the conveyance without each individual allottee's consent are instructive, for example, where the majority of owners of land allotted to more than one person consented;

where the owner's whereabouts were unknown; or where the heirs a deceased owner were unknown.

Moreover, cases recognized that ***prior to the passage of the 1948 Act***, written consent for easements from individual Indian allotees was required in most cases:

> [T]he 1948 Act was a response to quite the opposite problems; the limited nature of rights-of-way authorized by statute, and the difficulty of obtaining easement deeds from all the various owners. Conditioning rights-of-way in certain cases upon consent of only the Secretary [in the 1948 Act] was intended to make the law more lenient in situations where consent of all the owners previously had to be obtained.

(*Nebraska Public Power Dist. v. 100.95 Acres of Land in Thurston County, Hiram Grant* (8th Cir. 1983) 719 F.2d 956, 959 (*Nebraska Public Power*) ["easement deeds" from each individual Indian allotment owner to third parties must be approved by the Secretary of Interior].) The fact that the 1948 Act changed things to allow the Secretary to provide certain easements is confirmed in a letter to Congress the Under Secretary of the Interior encouraging passage of the 1948 Act to facilitate rights-of-ways through Indian land. (6 CT 1630–1633 [in the case of allotted land, "application for right-of-way over Indian land" required the execution of "***easement deeds executed by the Indian owners*** [of allotted land] and approved by the Secretary].)

Likewise, the Senate Committee's "Explanation of the Bill" confirmed that the procedure before 1948 was that "easement deeds" ***executed by the individual Indian allottees*** were required to grant right-of-way easements over allotted land:

> The ***present procedure*** *whereby an* ***easement deed must be executed*** by the owner of the land on which a right-of-way is desired creates an excessive amount of work …. and retards the processing of applications for right-of-way" (Emphasis added).

(6 CT 1631.) Thus, contrary to the defendants' assertions, there was never a procedure in place prior to 1948 allowing the Secretary of the Interior alone to convey easement deeds over allotted land without the individual Indian allottee's consent.

Further, 25 U.S.C. § 341, which defendants cited as further authority to support Special Jury Instructions 10 and 16, is inapplicable because it references the power of the ***Congress***, not the Secretary of the Interior, to grant rights of way through Indian lands: "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." Obviously, the Secretary of the Interior is not a part of the Legislative branch, but a part of the Executive branch and a member of the United States Cabinet (5 U.S.C. § 5312.) Nor can Special Instructions 10 and 16 be salvaged on defendants' mistaken reliance on cases involving condemnation proceedings against individual Indian allotments, for which no consent or approval from the Secretary was required prior to the 1948 Indian Right-of-Way Act. (See, e.g., *Nebraska Public Power*, 19 F.2d at p. 959–960 [recognizing that, prior to the 1948 Act, 25 U.S.C. § 357 authorized condemnation of Indian allotted land pursuant to state law without Secretarial consent]; *Nicodemus v. Washington Water Power Co.* (9th Cir. 1959) 264 F.2d 614, 616–617 [condemnation proceedings against allottee did not require

the Secretary's approval because allotted land "is no longer part of the reservation, nor is it tribal land" and "virtual fee is in the allottee"].)

Because Special Instructions 10 and 16 were a misstatement of the law for the reasons discussed, plaintiffs can raise instructional error notwithstanding their failure to object to them when defendants proposed them:

> [W]hen a trial court gives a jury instruction which is prejudicially erroneous as given, i.e., which is an incorrect statement of the law, the party harmed by that instruction need not have objected to the instruction or proposed a correct instruction of his own in order to preserve the right to complain of the erroneous instruction on appeal.

(*Suman v. BMW of N. Am., Inc.* (1994) 23 Cal.App.4th 1, 9; accord Code Civ. Proc. § 647 ["All of the following are deemed excepted to: . . . giving an instruction, refusing to give an instruction, or modifying an instruction requested"]; *Mock v. Michigan Millers Mut. Ins. Co.* (1992) 4 Cal.App.4th 306, 333–334 [holding that, under § 647, a party is not precluded from asserting error in jury instructions the trial court gives that misstate the law].) Nor does the doctrine of "invited error" preclude this Court's review of instructional error, as defendants argued (7 CT 1879–1880), because it only precludes a party from asserting as a ground for reversal an error that he or she induced the trial court to commit. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 (*Norgart*).) But here, the undisputed evidence shows that Special Instructions 10 and 16 were, in fact, proposed by defendants alone, meaning that plaintiffs did not induce or invite the instructional error at issue. (See 7 CT 1890; *Norgart*, 21 Cal.4th

at p. 403 ["At bottom, the doctrine . . . prevents a party from misleading the trial court and then profiting therefrom in the appellate court."]; *Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 530 (*Maureen K.*) [finding the doctrine of invited error inapplicable "because appellant did nothing to convince the trial court to give an incorrect jury instruction"].)

Moreover, where they have led do a miscarriage of justice, the giving of erroneous jury instruction is prejudicial, and thus, reversible error. (*Soule v. Gen. Motors Corp*. (1994) 8 Cal.4th 548, 577.) Here, Special Instructions 10 and 16 were prejudicial because they misstated the law on defendants' primary defense to claims of trespass and nuisance involving placement of the traffic light and bus stop on the Property without plaintiffs' permission. So important where these instructions that defendants expressly argued them to the jury in their closing argument, using them to support their primary defense. (E.g., 11 RT 2244–2246.)

As discussed, plaintiffs established that, as a minor, Calac lacked the ability to consent to a road right-of-way easement over Tract 137. Moreover, plaintiffs' expert testified that an easement had to be recorded to be valid, as supported by other recorded easements found in the County Recorder's Office, yet the County failed to produce a recorded easement over Tract 137 by either Calac or the Secretary. However, with the benefit of Special Instructions 10 and 16, defendants argued that neither Calac's consent nor a recorded easement was necessary because the Secretary could and did convey a road easement across Tract 137 by approving a survey map depicting where the road would be

built. This allowed the jury to be misled into concluding, both in disregard of substantial evidence and the law, that the County did not need plaintiffs' permission to place the traffic light and bus stop on their Property, and defendants committed no trespass or encroachment. Thus, the erroneous instructions require reversal. (*Maureen K.*, 215 Cal.App.4th at p. 531 [reversing where state of the evidence supported appellant's theory of the case but erroneous instructions on establishing discrimination due to physical disability misled the jury].)

VII. CONCLUSION

For the reasons discussed, the jury verdict and resulting judgment in defendants' favor should be reversed, with instructions to the trial court to enter judgment notwithstanding the verdict in plaintiffs' favor or to grant plaintiffs a new trial.

Dated: March 24, 2023

Respectfully Submitted,

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CERTIFICATE OF LENGTH

Under rules 8.486(a)(6) and 8.204(c) of the California Rules of Court, we certify that this Opening Brief was produced on a computer in 13-point Century Schoolbook font. The word count, including footnotes but exclusive of matters that may be omitted under the rules, is 9,430 words as calculated by the word processing program used to generate the brief.

Dated: March 24, 2023

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CERTIFICATE OF SERVICE

I, Rupa G. Singh, am employed in San Diego County, California, am over the age of 18 years, and am not a party to this matter. My business address is 225 Broadway, 21st Floor, San Diego, CA 92101. On March 24, 2023, I electronically filed the (1) Appellant's Opening Brief and (2) Appellant's Notice of Transmittal of Exhibits, Volumes 1 and 2, with the Clerk of the Court of Appeal, Fourth Appellate District, Division One by using the appellate Electronic Filing System (EFS). I certify that all participants in the case, including counsel for defendants and respondents, are registered users of the EFS TrueFiling Portal and will be served by the appellate EFS system.

I further certify that, on March 24, 2023, I caused a copy of only the Opening 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 the foregoing is true and correct. Executed March 24, 2023 at San Diego, California.

s/ Rupa G. Singh
Rupa G. Singh