D060610

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

PATRICIA DONATO

Defendant and Appellant

v.

SERGEY PEREYMA

Plaintiff and Respondent

APPEAL FROM JUDGMENT AFTER COURT TRIAL
OF THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

Honorable Joel R. Wohlfeil, Presiding
Superior Court Case No. 37-2009-00070768-CU-OR-EC

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The trial court heard and decided a matter over which it had no jurisdiction. The policy against courts acting in excess of their power is so strong that lack of subject matter jurisdiction can be raised for the first time on appeal. *Ash v. Hertz Corp.* (1997) 53 Cal.App.4th 1107, 1112.

The two (2) Grant Deeds (AA[1] p. 027 - 035) conclusively establish that Rancho Ballena Road is Indian trust land. Respondent does not dispute this fact, but instead, represents to this Court that the ownership of Rancho Ballena Road is not relevant. It will be demonstrated below that the standard for barring state jurisdiction is whether the action may affect or concern Indian trust land.

Moreover, the state courts of California have no power to regulate the use or governance of Indian trust land in the absence of an effective waiver or consent by Congress or the Tribe. See, *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council* (1985) 170 Cal.App.3d 489, 494-495; *Long v. Chemehuevi Indian Reservation* (1981) 115 Cal.App.3d 853, 857-858.

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[1] Cites to "AA"refers to Appellant's Appendix.

In this case, there is nothing in the record tantamount to of any such waiver or consent by Congress.

There is no evidence or finding that Respondent, Sergey Pereyma ("Pereyma"), had any authorization or consent from the Mesa Grande Band of Mission Indians (the "Tribe") to perform any work (whether maintenance or repair) to Rancho Ballena Road.

Further, in the trial below there is no evidence or finding that Pereyma owned an easement over the Indian trust land. Yet, the trial court found that Pereyma carried his burden of proof under Civil Code Section 845 on his second cause of action for a contribution for his work of repair or maintenance to an easement. The trial court merely found that Pereyma, defendants, and the tribe "use" Rancho Ballena Road to access their respective parcels. (AA p. 056, par. 38; p. 054, par. 23, 26 & 28; p. 055, par. 30 & 32).

It is demonstrated below that the state court can enforce no encumbrance, such as an easement, of any real property belonging to an Indian tribe that is held in trust by the United States. Assuming, *arguendo,* that a state court statute such as Civil Code Section 845 may be enforced with respect to Indian trust land, absent any proof

that Pereyma "owns" a valid easement over the Indian trust land, he has no standing under Section 845 to seek contribution.

Pereyma is not deprived of a remedy. He is still free to seek recourse and adjudicate the matter in tribal court for his claims involving his use, repair and maintenance against defendants and/or the Tribe.

II. LEGAL ARGUMENT

A. In Determining Jurisdiction, the Threshold Question is Whether the Subject Property May be Indian Trust Land.

The issue of whether subject matter jurisdiction exists in a case involving Indian trust land is de novo review. In *Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, the California Supreme Court held that the state court had no subject matter jurisdiction in a case involving an easement over Indian trust land, stating: "[S]ection 1360(b) precludes states from asserting jurisdiction over disputes concerning Indian land . . . the threshold question must be whether one possible outcome of the litigation is the determination that the disputed property is, in fact, Indian trust land. If that outcome is possible, then a state court is barred from assuming jurisdiction of the case. *Id.*, at pg. 1152. (Emphasis added). Further, if " . . . one

possible outcome of the case may be a finding that the property in dispute is Indian trust land, the court may dismiss the case for want of subject matter jurisdiction." *Id.*, at pg. 1156.

Respondent contends that ownership of Rancho Ballena Road is not relevant to the trial court's finding of contribution under Civil Code Section 845. Notwithstanding that there is no evidence or finding that Respondent owns an easement over the subject Indian trust land, Respondent cannot escape the fact that the property in issue is Indian trust land. The standard is whether the dispute over the road may affect or concern Indian trust land. If it does, the state court is barred from asserting jurisdiction over the case.

The present case involves a dispute about property that is Indian trust land. This fact is undisputed by Respondent. In his complaint, Pereyma seeks contribution for money he spent on repairing or maintaining Rancho Ballena Road. A fair reading of Pereyma's complaint shows that the dispute involves Rancho Ballena Road, which is Indian trust land and the singular subject matter of the case. (AA p. 001-008). It is undisputed by Pereyma that the instant action "is or may be" a dispute concerning Indian trust land. Pereyma

seeks contribution from defendants under Civil Code Section 845 based only upon his purported interest in Rancho Ballena Road.

Since there is no evidence that Pereyma has any interest in the subject Indian trust land, he has no standing under Civil Code Section 845 to seek contribution, assuming, *arguendo*, that Section 845 applies to Indian lands. Moreover, since the instant action "involves" or "concerns" Indian trust land, the trial court had no subject matter jurisdiction.

B. Pereyma Cannot, as a Matter of Law, Own an Valid Easement Encumbering Rancho Ballena Road; and There Is No Evidence In the Record That He Owns Such an Easement.

In the trial court, there was no evidence or finding that Pereyma owns an easement over the Indian trust land known as Rancho Ballena Road. The Grant Deed conveying the road into trust contains no reference to any easement or other encumbrance. (AA p. 031-034). An examination of title reveals no such encumbrance. There is no evidence in the record that the Secretary of the Interior notified the Tribe of any existing encumbrances, such as an easement, when accepting the land into trust, as required by 25 C.F.R. Section 151.12. Further, a review of the formal acceptance of the land into trust which

is attached to the deed (AA p. 035) references no encumbrance of any kind as required by 25 C.F.R. Section 151.13.

Respondent's assertion that he is entitled to contribution under Civil Code Section 845 is predicated on the existence of an easement which he owns. Notwithstanding that Section 845 cannot apply to Indian land, Respondent has no right to contribution with establishment of a valid easement.

C. Public Law 280 Precludes a State or Private Encumbrance of Indian Trust Land.

Nothing in Public Law 280 shall authorize the encumbrance of any real property belonging to any Indian tribe that is held intrust by the United States. 18 U.S.C. Section 1162(b); 28 U.S.C. Section 1360(b). Previously, one could argue that 28 U.S.C. Section 1360(a) allows states to assume civil jurisdiction in Indian country to the same extent that such state has jurisdiction over non-Indian civil causes of action. However, in *Bryan v. Itasca County* (1976) 426 U.S. 373, in an unanimous decision, the Supreme Court found nothing in Section 1360(a) "remotely resembling an intention by Congress to confer general state regulatory control" over Indian land. *Id.*, at 386. The Court held that Section 1360(a) did nothing more than authorize

Indians to resolve their disputes in state court - *should they elect to do so*. *Id.*, at 390. The non-Indian's only option in a dispute involving Indian land is to file suit in a tribal court. *Id.*, at 390-391.

It is now well settled that a Public Law 280 state, such as California, has no more right to impose its state laws over Indian land than a non-Public Law 280 state. A Public Law 280 state, for example, may not zone Indian trust land or determine ownership or possession of Indian trust land, including interests of non-Indians in Indian trust land. *Santa Rosa Band of Indians v. Kings County* (1975) 532 F.2d 655 (9th Cir.), *cert. denied*, 429 U.S. 1038 (1977).; *Ollestead v. Native Village of Tyonek*, 560 P.2d 31 (Alaska), *cert. denied* 434 U.S. 938 (1977); *In re Humboldt Fir, Inc.* 426 F.Supp. 292 (N.D. Cal. 1977). Now, the only difference between a Public Law 280 state and a non-Public Law 280 state is that courts of a Public Law 280 state (such as California) are permitted to resolve disputes between Indians if the all the Indians involved elect to do so.

Public Law 280 expressly excepts from its authorization any jurisdiction that would "affect" Indian trust land. 28 U.S.C. Section 1360(b); 18 U.S.C. Section 1162(b). Broad application of such exceptions is consistent with Congress's evident intent to maintain an

exclusive tribal-federal relationship with regard to Indian trust land. *Boisclair v. Superior Court* (1990) 51 Cal.3d 1140.

One important proviso of Public Law 280 precludes application of state laws, such as Civil Code Section 845, over Indian trust land that would allow for any encumbrance of Indian trust land. 18 U.S.C. Section 1162(b); 25 U.S.C. Sections 1321(b), 1322(b); 28 U.S.C. Section 1360(b). These exceptions deny state court jurisdiction to adjudicate the "ownership or right to possession of Indian trust property or any interest therein." (Emphasis added). 18 U.S.C. Section 1162(b); 25 U.S.C. Sections 1321(b), 1322(b); 28 U.S.C. Section 1360(b).

When interests in Indian trust land are acknowledged to be the basis for the lawsuit, as here, the proviso clearly operates to bar state jurisdiction. Thus, state jurisdiction under Public Law 280 does not encompass unlawful retainer actions, evictions (even of non-Indians), quiet title or ejectment actions, or suits to establish the existence of a state easement where Indian trust land is involved. *Heffe v. State*, 633 P.2d 264 (Alaska 1981).

In *Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, the fact that one possible outcome of the lawsuit was a finding that the land

was trust land, and hence, no easement could have been created, was sufficient to defeat state jurisdiction. *Id.*, at 1152. The court must "look beyond the face of the complaint . . . to determine from the totality of the pleadings whether the case before it is a dispute over the ownership or right to possession of Indian land or any interest therein.'" (emphasis added.) *Id.*, at 1156.

Likewise, the exceptions are to be applied to deny state jurisdiction even when the effect of state litigation on Indian trust land is indirect rather than direct. In *Hoopa Valley Tribe v. Blue Lake Forest Products, Inc.* 143 B.R. 563, 568 (N.D. Cal. 1992), *affirmed* 30 F.3d 1138 (9th Cir. 1994), the federal court held that Public Law 280's trust property proviso prevented application of state law, even though technically, the non-Indian creditor's claim was against the non-Indian bankrupt's sale proceeds from logs cut from Indian trust property. The court stated that "it is at least arguable that enforcing a state law lien so as to give the creditor-Bank priority over the Tribe in proceeds from logs as to title, under federal law, never left the United States in trust for the Tribe (and where the logs no longer exist), is 'effective' alienation of tribal trust property."

For Pereyma to overcome the Indian trust proviso, he must establish that he owns an interest (a valid easement) in Rancho Ballena Road conferred upon his by Congress or by way of treaty with the Tribe. Even then, Civil Code Section 845 is not applicable under Public Law 280. All forms of encumbrances, including easements, which may have pre-existed the Tribe's ownership of Rancho Ballena Road, are extinguished.

In *United States v. Southern Pacific Transportation Company*, 543 F.2d 676 (9th Cir. 1976), the federal court invalidated a pre-existing right-of-way through an Indian reservation because the easement was invalid under the statute prohibiting any conveyance of land from any Indian Tribe unless made by treaty or convention. *Id.*, at 684-685. There is no evidence of any act of Congress or any treaty which conferred an easement or other interest in Rancho Ballena Road onto Pereyma. There is no evidence that the Tribe voluntarily accepted any pre-existing use or easement affecting Rancho Ballena Road.

Nor is there any evidence that the Tribe entered into any agreement with Pereyma for him to perform repair or maintenance work to Rancho Ballena Road in which the Tribe agreed to waive its

sovereign immunity. In fact, the trial court found that Pereyma did not have the consent or agreement of any of the parties to perform the work and there is no evidence of any agreement, consent or authorization for the work by the Tribe. (AA p. 053, par. 16-17; p. 056, par. 39).

In *Zachary v. Wilk* (1985) 173Cal.App.3d 754, the Fourth District Court of Appeal, in a pre-*Boisclair* ruling, held that municipal rent control laws may not be enforced by a non-Indian tenants against a non-Indian landlord who leased property held in trust by the United States for reservation Indians. The land was leased for the operation of a mobile home park by the non-Indian landlord. None of the parties to the action were Indians. The court held that the ordinance would otherwise preclude the Tribe from imposing its own rent control laws and refused to subject any of the tribe's leased property to rent controls of any kind. The court explained that such a situation would not be one of dual sovereignty, but one on which the reservation would be nothing more a property subject to regulation by local government as well as the state, which is impermissible. The court found the law unenforceable. *Id.*, at 764-765.

Likewise, Civil Code Section 845 should not be enforced over Indian trust law because it would preclude the Tribe (or Congress) from imposing its own scheme for contribution for road use repair and maintenance (assuming a valid easement over Indian trust land in the first instance).

Respondent can point to nothing in the record to show that he had a right to use Rancho Ballena Road or that he owns a valid easement encumbering the road. Respondent does not dispute that the road is Indian trust land. Pereyma's only response is to oppose the motion for judicial notice of the two Grant Deeds in order to avoid having the judgment voided.

Nor does it matter that none of the parties to the instant action were Indians or the United States. It was sufficient to bar jurisdiction on a showing that the dispute could possibly involve Indian trust property. *Inland Casino Corporation v. Superior Court* (1992) 8 Cal.App.4th 770, 778.

Here, Pereyma, a non-Indian, erroneously contends that Rancho Ballena Road being Indian trust property is not relevant to the trial court's determination because liability under Civil Code Section 845 is not dependent upon the ownership of the road over which non-

Indians purportedly enjoy an easement. Yet, in stark contradiction, Pereyma sued under Civil Code Section 845 claiming to have an "interest" in Rancho Ballena Road, which interest is an easement. However, as discussed above, Pereyma is precluded from bringing his case to state court because the Indian trust proviso under Public Law 280 precludes the application of Civil Code Section 845. Pereyma cannot assert an "interest" in Rancho Ballena Road and, therefore, cannot invoke Civil Code Section 845 as a basis for contribution against the other non-Indian users of Rancho Ballena Road.

Clearly, it is undisputed that the instant action involves a dispute concerning Indian trust land and the superior court has no subject matter jurisdiction over the dispute, regardless of whether the Tribe is not a party to the action. Although the trial court found that the Tribe is not a necessary and indispensible party to the action, it probably is both.[2] (AA p. 055, par. 31).

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[2] Code of Civil Procedure Section 389, subd. (a) and (b); Federal Rules of Civil procedure , Rule 19, subd. (a) and (b); *Sherman v. United States*, 982 F.2d 1312, 1317-1319 (9th Cir. 1992); *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990).

III. CONCLUSION

Pereyma is precluded from bringing any case to state court which may involve, concern or affect Indian trust land. The state of California is not authorized to impose Civil Code Section 845 over Indian trust land; and the state court has no jurisdiction over the instant action because it "involved" or "concerned" Indian trust land.

According, the trial court judgment is void.

Dated: April 16, 2012

Patricia Donato

Patricia Donato, Appellant *in pro per*

CERTIFICATION OF COMPLIANCE
California Rules of Court, Rules 8.204(b)(4) & (c)(1)

I, the undersigned, do hereby certify, pursuant to California Rules of Court, Rule 8.204(b)(4) & (c)(1), that Appellant's Reply Brief to which this certification is attached is proportionately spaced, has a typeface of 13 points or more and contains 2676 words, exclusive of cover, tables, signature lines, indices, titles, footnotes, and headings; but inclusive of all text,.

April 16, 2012

Patricia Donato

PROOF OF SERVICE BY MAIL

PEREYMA VS. DONATO
Appeal Case No.: D060610
Superior Court Case No.: 37-2009-00070768-CU-OR-EC

I reside in Ramona, County of San Diego, State of California. I am over the age of 18 years old. I am not a party to the action. I am not a registered process server. My address is 26702 Rancho Ballena Lane, Ramona, CA 92065.

On April 16, 2012, I deposited in the U.S. Mail at the U.S. Post Office in Ramona, California, an envelope containing a true and correct copy of the below described documents with First Class Postage affixed thereon:

APPELLANT'S REPLY BRIEF

Upon the following persons:

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I declare under penalty of perjury that the above is true and correct.

Executed on April 16, 2012, at Ramona, California.

James Wayne Johnson