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Daina A. Vitolins  
Circuit Court Judge

Annette C. Hillman  
Presiding Judge

Michael R. McLane  
Circuit Court Judge

## Twenty-Second Judicial District

May 27, 2020

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RE: Three Rivers Landowners Association, a nonprofit corporation v. Jefferson County, a political subdivision of the State of Oregon, Ralph DeMonte, Trustee of the DeMonte Family Trust, and Allen Trust Company, trustee of the Herbert H. Anderson and Barbara B. Anderson Revocable Trust  
Jefferson County Circuit Court Case No. 16CV26227

Dear Counsel:

This matter came before the Court on July 29, 2019 and July 30, 2019, for Trial. Final closing briefs were received by the Court on November 8, 2019. The Court gave thorough and thoughtful consideration of all issues raised by all parties. The Court having considered the issues, the evidence, exhibits, arguments and written submissions of the parties, makes the following findings of fact and rulings.

Summarizing the case history thus far, a Complaint was filed on August 15, 2016, by Plaintiff, Three Rivers Landowners Association, a nonprofit corporation seeking a Declaratory Judgment against all Defendants that no public road exists within the Three Rivers Recreational Area (TRRA). A Second Amended and Supplemental Complaint was filed by Plaintiff on December 21, 2017 seeking a Declaratory Judgment and among other claims seeking Quiet Title to all property located within TRRA without the burden of any public road or right-of-way. The Court granted Defendant's motions for Partial Summary Judgment heard on June 25, 2019, with respect to Plaintiff's Third Claim for Relief, count 2 (Equitable Estoppel) and count 1 (Collateral Attack on past land use decision is barred). The Court denied Defendant's Motion for Partial Summary Judgment against Plaintiff's Fourth Claim for

Relief (Quiet Title). On July 23, 2019, the Court entered a stipulated Limited Judgment of Dismissal of Defendant Allen Trust Company, Trustee of the Herbert H. Anderson and Barbara Anderson Revocable Trust, which dismissed Plaintiff's Second Claim for relief on the Second Amended and Supplemental Complaint.

On July 29, 2019, all remaining parties were present, and trial commenced. At issue at trial were Plaintiff's First Claim for Relief: Declaratory Judgment Against all Defendants – no public road exists within TRRA; Plaintiff's Third Claim for Relief: Declaratory Judgment barring County from creating a public road within TRRA, Estopping the County issuing any improvements to Sparks Road and Legalizing any public road within TRRA; and Plaintiff's Fourth Claim for Relief: Quiet Title Against all Defendants. The Court received trial memorandum, heard witness testimony and received exhibits into evidence. The Court declined an oral motion for trial view at the conclusion of trial and directed that the parties submit written closing arguments. Those were received by November 8, 2019. Plaintiff made a request for Special Findings pursuant to ORCP 62A. Those special findings are contained within this Court's opinion.

The primary issue in this case turns on whether there is a public road within TRRA. Despite the Court's ruling on the Motion for Summary Judgment on February 1, 2019 and finding that EH Sparks Road was lawfully opened in 1896 by Order of the Crook County Court<sup>1</sup> and was therefore a public county road, the same issue carried over to trial.

The Court makes the following special finding of fact that a Petition and Road Notice for EH Sparks Road was recorded on July 1, 1896<sup>2</sup> and further designated in the Jefferson County Road Register as EH Sparks Road by Order of the Crook County Court on November 7, 1896.<sup>3</sup>

Plaintiff argues primarily that EH Sparks Road passed from legal existence to non-existence. What Plaintiff is unable to dispute is that EH Sparks Road existed as a legal road on November 7, 1986. However, Plaintiff argues that the road was never constructed, nor was the road opened within four years as required by Section 4101 of Hills Second Ed (1894). Plaintiff further argues that the 1934 Heising Homestead Petition and subsequent 1942 Heising Homestead Deed did not reserve or except any public road across the federal land deeded to Heising nor did Defendants allege that EH Sparks Road was an R.S. 2477 exception to the patent. Therefore, Plaintiff argues that EH Sparks Road was vacated by operation of law.

Addressing each of Plaintiff's arguments in order raised, that the road was never constructed, nor was the road opened within four years as required by Section 4101 of Hills Second Ed (1894), Plaintiff relies upon Hislop v. County of Lincoln, 249 Or 259 (1968) for the premise that EH Sparks Road was vacated or fails to exist legally because it wasn't constructed or used within four years of dedication. A similar action to this case, plaintiff sought a declaratory judgment seeking settlement of controversy relating to the existence or nonexistence of a road across a private property. There was no dispute in Hislop about the fact that the road was never opened, it was identified in the opinion as a road on a map with a description for its establishment on file in Lincoln County. Id. at 261. Distinguishing this matter from Hislop, there is a dispute about whether the road in this case was opened. Under Hislop, the burden of proof is on the Plaintiff asserting a four-year failure to open a road to prove it. Id. at 263. The Crook County Court (the Locus in quo then being Crook County)

<sup>1</sup> Plaintiff's Ex. 6, Defendant's Ex. 101 and Defendant's Ex. 107

<sup>2</sup> Plaintiff's Ex. 6, Defendant's Ex. 101

<sup>3</sup> Defendant's Ex. 107 & 106

established E.H. Sparks Road on November 7, 1896.<sup>4</sup> EH Sparks Road had been petitioned for on July 1, 1896, and Notice provided on that day in the Court Record.<sup>5</sup> On September 9, 1896, a \$200.00 bond was filed with the Crook County Court for the location and establishment of the county road.<sup>6</sup> Viewers appointed by the Court filed their report with the Crook County Court on September 26, 1896 opining that the road as petitioned be established as a great convenience not only to the settlers in the immediate vicinity but to the traveling public.<sup>7</sup> A surveyor's report is included in the record with a description of the EH Sparks Road.<sup>8</sup> The Court record reflects that on November 7, 1896, the court reviewed the petition, viewer's report, surveyor's report and the court granted the road petition declaring said road a public highway and county road entering the road in full on the Record of Roads and directing the Supervisor of Roads immediately open the same to the use of the public.<sup>9</sup>

There is no evidence before the Court as to how a road was "constructed" during the time period of 1868 and 1900, it may be no more than a dirt path or similarly the road to the ranch or service road as described by Maurine Corbett-Heising.<sup>10</sup> Even if we adopt the argument that the county is required to open or construct a road within four years this Court cannot make a finding as alleged by Plaintiff that the county failed to open the EH Sparks Road. The Crook County Court ordering that the EH Sparks Road be immediately opened to the use of the public seems to intimate that the road was already in existence likely having been used by the original petitioners who resided in the vicinity. Defendant's Jefferson County and DeMonte rely upon a ruling subsequent to Hislop, Rendler v. Lincoln County et. al, 76 Or App 339 (1986). The Court of Appeals held that the order issued by the county court in 1890 was sufficient to establish the road as a public highway, and no further orders by the county was required. Factually similar to this case, Benton County Court issued the following order "It is so ordered, that said report, survey and plat of said road be recorded, and that said road be and is hereby declared to be a public highway, and that an order issue to open said road." Id at 341. The language mirrors that of the Crook County Court Order of November 7, 1896.<sup>11</sup> Appellants argued the same argument as raised by Plaintiffs in this case that the road in Lincoln County (the Locus in quo then being Benton County) was never opened within four years as required by Section 4101 of Hills Second Ed (1894) and Hislop v. County of Lincoln, 249 Or 259 (1968). The same question was raised in the Rendler case as in this case, was the road somehow vacated or abandoned? Rendler held that the circuit court had no jurisdiction to vacate opened road under statute which provides that the county court may vacate road or unused portion of road. Rendler at 343-344. See Also, Martin v. Klamath County, 39 Or App 455, 460, rev den 287 Or 45 (1979).

The parties are well aware that the general rule is that once a public way is established, it will continue to exist unless it can be clearly proved that it has been vacated. Hence this Court's ruling in the Motion for Summary Judgment that the EH Sparks Road was lawfully opened in 1896 by order of the Crook County Circuit Court.<sup>12</sup> The trial evidence doesn't change this Court's finding that EH Sparks Road was lawfully opened in November 1896.

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<sup>4</sup> Plaintiff's Ex. 6, Defendant's Ex. 101

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Plaintiff's Ex. 3, see pages 8-10.

<sup>11</sup> Plaintiff's Ex. 6, Defendant's Ex. 101

<sup>12</sup> Opinion Letter 16CV26227 dated February 1, 2019

Evidence at trial established that TRRA is a private gated residential and recreational subdivision covering 3922 acres with 687 lots for homes and recreation sites in Jefferson County established in 1970.<sup>13</sup> The sole access to TRRA is Lakeview Drive which is gated near Graham Road. During trial, the Court heard testimony evidence from Lorne Stills, whose father was the developer of TRRA that the area was developed without a public road noted. Randy Graves who owns property in TRRA, testified that he was familiar with Forest Service Map which showed a road up to TRRA and a road on the other side of TRRA with no road noted in TRRA.<sup>14</sup> The Court heard testimony from Randy Panek, President TRRA who testified that he was unaware of any public roads and TRRA has always been a private gated community. Mr. Panek did state that he had come across maps that identify County Road 577 (CR577) prior to the establishment of TRRA.<sup>15</sup> Finally, the Court heard from Sharlotte Brant, also a resident of TRRA who testified that EH Sparks Road today would run through her bedroom. Evidence at trial suggested that EH Sparks Road was later referred to as CR577 on Jefferson County maps, but this Court is not making a specific finding that CR577 is actually EH Sparks Road for the purpose of this trial.<sup>16</sup>

The exact location of EH Sparks Road is not at issue before the Court and therefore, the Court will not make any findings as to the specific location of the road. For the purpose of trial, the parties agree that the road in question, EH Sparks Road is alleged to run through TRRA. The only consideration before the Court in this trial is whether there is currently a public road originally known as EH Sparks Road and did it cease to exist lawfully as argued by the Plaintiff.

Turning to Plaintiff's next argument that the 1934 Heising Homestead Petition and subsequent 1942 Heising Homestead Deed did not reserve or except any public road across the federal land deeded to Heising nor did Defendants allege that EH Sparks Road was an R.S. 2477 exception to the patent in their responsive pleadings barring them from raising that issue. Therefore, EH Sparks Road was vacated by operation of law. Plaintiff presented evidence of a 1934 Heising Homestead Petition arguing that the Petition was constructive notice to Jefferson County and the public that Heising was claiming the land without a public right of way or a public road.<sup>17</sup> Plaintiff further sets forth that the 1942 Heising Homestead Deed/Land<sup>18</sup> Patent is an unassailable deed absolute that did not reserve or except any public right-of-way or road across federal land that was deeded to Heising.<sup>19</sup> Plaintiff's argument that the 1942 Heising Homestead Deed is unassailable because neither Defendants nor any member of the public moved to vacate, modify or annul the Heising Deed within six years of 1942 as required under 43 USCA 2506. Therefore, Plaintiff requests that this court issue a declaration that the 1942 Heising Deed is an unassailable deed that did not reserve or except any public right-of-way or road across federal land that was deeded to Heising.

Defendants argue that EH Sparks Road qualifies as an RS 2477 Road and the federal government's grant of the land patent to Heising in 1942 was given subject to the EH Sparks Road encumbrance. Defendants argue that the land patent itself isn't being challenged rather that the land patent is subject to public highways established across public lands in accordance with the laws of the State. *See, Wallowa County v. Wade*, 43 Or 253 (1907).

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<sup>13</sup> Plaintiff's Ex. 12, 9, 32 & 35

<sup>14</sup> Plaintiff's Ex. 23

<sup>15</sup> Defendant's Ex. 102, 103, 104 & 105

<sup>16</sup> *Id.*

<sup>17</sup> Plaintiff's Ex. 1

<sup>18</sup> Both parties use the terms Heising Land Patent and Heising Homestead Deed interchangeably. The Court will use the reference Heising Deed hereafter.

<sup>19</sup> Plaintiff's Ex. 2

Plaintiff objects to Defendant's argument that EH Sparks Road qualifies as an RS 2477 Road as Defendants failed to allege such as a counterclaim or affirmative defense in their pleadings. Plaintiff argues again that Defendants bear the burden of proof that EH Sparks Road was constructed for public use prior to the issuance of the Heising Deed to qualify as an RS 2477 Road. Plaintiff raises the issue in the Second Amended Complaint within the First Claim for Relief that the 1942 Heising Deed is an unassailable deed absolute by law that did not preserve or except any public right-of-way or road across federal land that was deeded to Heising. Plaintiff's claim invites the argument as to whether EH Sparks Road is an RS 2477 Road or whether there are any exceptions or public right-of-ways across the Heising land. A general denial by Defendants in their responsive pleadings is sufficient to join the issue of whether EH Sparks Road qualifies as an RS 2477 Road barring the Court from issuing the declaration sought by Plaintiff. Respectfully, this Court is not transforming the Heising Deed, the legal question before the Court is whether Heising claimed the federal land without a public right-of-way or a public road. The argument was anticipated by Plaintiff and argued at Motion for Summary Judgment and has been thoroughly briefed by all parties as a legal argument. ORCP 23 B. Therefore, the Court will consider the legal argument over Plaintiff's objections.

Plaintiff sets forth that this Court lacks the authority to transform the 1942 Heising Deed from an unassailable deed absolute into an encumbered conveyance and grant to Defendants relief on that basis. Plaintiff reiterates the argument that EH Sparks Road was never "constructed" over unreserved federal land as required to qualify as an RS 2477 Road. Further, that the burden of proof is on the Defendants to show the existence of an RS 2477 Road that was constructed for public use prior to the issuance of the 1942 Heising Deed.

The Court agrees with the authority cited by Defendants in Wallowa v. Wade, 433 Or 253 (1903). The Court held that an RS 2477 Road may be established by either order of the court or by use, dedication or statutory process. Id at 256. A road established pre patent vested in the public an easement over the land and so long as such easement was not extinguished by the laws of this State, a subsequent owner acquired title subject thereto. Id at 257. Further in Wilkins v. Lane County, 65 Or App 494 (1983), reconsideration denied (1983), the Court held that evidence from the county's road index books noting the road was entered in 1884 was sufficient to establish existence of a county road, since it proved public use of road before patent to property owner's land was granted. The patent granted in the Wilkins case made no mention of a county road, and factually similar to this case, evidence of its present location was not clear to the court. Id at 1179. The Court of Appeals set forth that "that this court has held that an existing road can cease to exist only under statutory provisions governing the procedure for vacation and discontinuance of public roads," citing Martin v. Klamath County, 39 Or App 455 (1979). In this case the evidence reflects that EH Sparks Road is listed in the Road Register for Jefferson County<sup>20</sup> and in the Index to Road Records.<sup>21</sup> EH Sparks Road was lawfully established pre 1942 Heising patent by Order of Crook Court on November 7, 1896.<sup>22</sup> Evidence of "construction" as argued by Plaintiff is not required as proposed by Plaintiff. Evidence in this case shows that EH Sparks Road was surveyed, marked<sup>23</sup> and viewed prior to the Crook Court Order.<sup>24</sup> The map evidence in this case is inconsistent yet in 1936, 1966, 1977, 1983 there are maps<sup>25</sup> which reflect a road in the vicinity of EH Sparks Road that cannot be overlooked but again this Court is not making a

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<sup>20</sup> Defendant's Ex. 107

<sup>21</sup> Defendant's Ex. 106

<sup>22</sup> Plaintiff's Ex. 6, Defendant's Ex. 101

<sup>23</sup> Plaintiff's Ex 7, Plaintiff's Ex. 9, Defendant's Ex. 101

<sup>24</sup> Plaintiff's Ex. 6, Defendant's Ex. 101

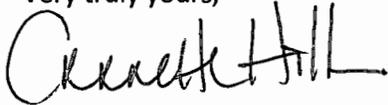
<sup>25</sup> Plaintiff's Ex. 13, 21, 22, 23, Defendant's Ex. 102, 103, 104, 105

determination as to the location of EH Sparks Road only whether a public road identified as EH Sparks Road exists.

The 1942 Heising Deed itself doesn't extinguish or vacate EH Sparks Road, the Deed is taken subject to a public road. Nor does the fact that the Deed fails to reference EH Sparks Road extinguish or vacate the road.<sup>26</sup> The Deed is burdened by a pre-existing public road, EH Sparks Road. Plaintiff has failed to establish claims for relief requested.

Having found that EH Sparks Road was lawfully opened in 1896 by order of the Crook County Circuit Court<sup>27</sup> and not vacated by operation of law or extinguished by deed, Plaintiff's Claims for Relief are Denied. The Court is empathetic to the residents of TRRA who desire to maintain the privacy of their gated community, however, this Court does not have the authority to vacate the road, only the county has the legal authority to do so and that is a decision for Jefferson County to determine. Plaintiff's general arguments are best directed to Jefferson County in a statutory action to vacate the road under ORS 368.326 to 368.366. Therefore, Plaintiff's Claims are Dismissed and Judgment Granted for Defendants DeMonte and Jefferson County. Defendants are entitled to seek costs and disbursements as requested. The Court will retain limited jurisdiction for that purpose. Mr. Hathaway and Mr. Elliott are to prepare the Orders consistent with the Court's ruling and Mr. Elliott is to prepare the Judgment. The parties are to make arrangements to retrieve their exhibits from the Court, within 45 days of today's date.

Very truly yours,



Annette C. Hillman  
Circuit Court Judge

ACH/lb

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<sup>26</sup> Plaintiff's Ex. 2

<sup>27</sup> Opinion Letter 16CV26227 dated February 1, 2019

STATE OF OREGON            )  
  ) ss.  
County of Jefferson         )

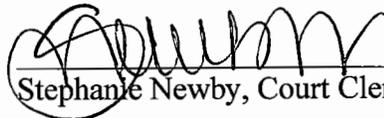
I, Stephanie Newby, Court Clerk of the Circuit Court, Madras, Oregon, hereby certify that I mailed copies of the foregoing opinion letter to the parties named below, by placing such copies in an envelope, with postage thereon fully prepaid, addressed to said parties at their respective addresses, and depositing said envelopes in the United States mail at Madras, Oregon, this 27th day of May 2020, or having placed in their courthouse pick-up box as set forth below; said parties being:

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DATED at Madras, Oregon, this 27<sup>th</sup> day of May 2020.

  
Stephanie Newby, Court Clerk