IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF JEFFERSON

THREE RIVERS LANDOWNERS ASSOCIATION, a nonprofit corporation, Plaintiff, v. JEFFERSON COUNTY, a political subdivision of the state of Oregon; Ralph DeMonte, trustee of the DEMONTE FAMILY TRUST; ALLEN TRUST COMPANY, trustee of the Herbert H. Anderson and Barbara B. Anderson Revocable Trust., Defendants.	Case No.: 16CV26227 **JEFFERSON COUNTY'S OBJECTION TO PLAINTIFF'S RULE 62 B REQUEST**

Jefferson County objects to Plaintiff's Rule 62 B Request (Amended) ("Request") as follows:

I. OBJECTION

Plaintiff's Amended Rule 62 B Request is an impermissible request for reconsideration in violation of SLR 5.045 (No Motions for Reconsideration; Exceptions). SLR 5.045 mandates that no motion for reconsideration on any pre-trial, trial or post-trial matters shall be heard, reviewed or considered by any judge sitting in the 22nd Judicial District. In fact, Plaintiff's Request begins by announcing that the Request is "made in the interests of justice and to promote judicial economy." Request, p. 1, ll. 17-18. Plaintiff's stated purpose is to allow the Court to correct its decision. In other words, to reconsider. Again, what is presented is a request for reconsideration, which, in all respects, is without merit. ORCP 62 A requires that upon request, the court shall make

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special findings of fact and shall state separately its conclusions of law thereon. The same Rule specifically provides that if an opinion or memorandum of decision is filed, "it will be sufficient if the findings of fact or conclusions of law appear therein." On May 27, 2020, after almost four years of litigation and after trial, this Court issued a thoughtful, cogent, and well-reasoned opinion containing sufficient findings of fact and conclusions of law as required by ORCP 62 A. Those findings and conclusions directly address Plaintiff's remaining claim for declaratory judgment, found in its Second Claim for Relief.[1] Now, Plaintiff asks the Court to "correct" its decision not only with respect to its ruling after trial, but also with respect to the Court's determination, twice made on separate motions for summary judgment, that EH Sparks Road was opened by the Order of the Crook County Court on November 7, 1896.[2] The fact that said Order did open the road precludes the reversal Plaintiff requests and it precludes Plaintiff's request that "...the court declare that Sparks Road ceased to exist on November 7, 1900." It is clear that with respect to Plaintiff's claim that the road ceased to exist by operation of law, this Court, as it has repeatedly done throughout these proceedings, appreciated the issue, made special findings related thereto, conclusions of law thereon, and decided that Plaintiff must not prevail. While Plaintiff describes three "cornerstones" upon which its ORCP 62 B request is made, this is the crux of Plaintiff's Request. Contrary to Plaintiff's assertions that the Court did not rely on the evidence, the language of Exhibit 101, the very order at issue, and the applicable case law repeatedly cited to the Court by all parties throughout these proceedings, the Court did not simply rely on its prior decisions on summary judgment. Its decisions on summary judgment were made with the full participation of the Plaintiff. Those rulings were necessary to determine the motions for summary judgment. This Court was not

[1] Plaintiff confirms that its action to quiet title does not apply unless it should prevail on its Second Claim for Relief for Declaratory Judgment.
[2] Plaintiff's trial Exhibit 6, Jefferson County's trial Exhibit 101.

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somehow remiss, in error, nor did it fail to thoughtfully consider all matters presented at trial. While Plaintiff throws the "kitchen sink" into its Request, the matters remain, just like at trial, narrow.

This Objection is supported by memorandum of points and authorities below.

II. POINTS AND AUTHORITIES

Plaintiff describes three "cornerstones" for its 62 B Request: 1) that it is made to seek the Court's "analysis of Oregon Road Law enacted in 1864 – the controlling law for 39 years until 1903"; 2) that there is no trial evidence Sparks Road was opened for public use and no evidence that any member of the public used Sparks Road before November 7, 1900, a date four years after establishment; and 3) the Court's misplaced reliance on its own February 1, 2019 letter opinion denying summary judgment. Request at p. 2. Plaintiff's cornerstones are addressed below.

A. Plaintiff's First and Third "Cornerstones": The decision of the Court does not lack required analysis and the Court did not misplace reliance on its summary judgment rulings.

Plaintiff's first contention is addressed at paragraph 2A of the Request under the heading "Analytical Framework." There, Plaintiff contends "the trial court did not provide its required text and context analysis of Section 4101, Hill's 2nd ed. (1892), which does require physical opening of the road under the doctrine of Abandonment by Nonuser." Plaintiff misreads the Court's decision, characterizing it as somehow wanting due to lack of analysis. According to Plaintiff, the Court has mistakenly concluded that the road was opened without evidence of construction and that such a conclusion "conflicts with the text of Section 4101." Relying once again on *Hislop v. Lincoln County*, 249 Or 259 (1968), and Hill's Code, Section 4065, ignoring other law, even that cited by the Court, Plaintiff's argument is summed up as Plaintiff feels the Court is wrong. The decision of the Court clearly addresses Section 4101 and the four-year period of limitation Plaintiff attempts to rely upon. Trial Court's Opinion, May 27, 2020 at pp. 2-3. Moreover, the

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Court's opinion clearly addresses *Hislop v. County of Lincoln*, 249 Or 259 (1968) and Plaintiff's contention that EH Sparks Road was vacated or failed to exist because it "wasn't constructed or used within four years of dedication." *Id.* The Court did not, as Plaintiff puts it, "apparently overlook [ ]...that a road which does not legally exist cannot be vacated." Request at p. 3, ll. 20-21. The Court's opinion also does not, as Plaintiff puts it, "abrogate" Hill's Code, Section 4101. Accurately, the Court's decision reads in part as follows:

> "The primary issue...is whether there is a public road within TRRA....
>
> 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 and further designated in the Jefferson County Road Register as EH Sparks Road by Order of the Crook County Court on November 7, 1896.
>
> Plaintiff argues primarily that EH Sparks Road passed for legal existence to non-existence. What Plaintiff is unable to dispute is that EH Sparks Road existed as a legal road on November 7 [1896]....Plaintiff argues that the Road was never constructed nor was the Road opened within four years as required by Section 4101 of Hill's 2nd ed (1894). Therefore, Plaintiff argues that EH Sparks Road was vacated by operation of law."

Trial Court's Opinion, pp. 2-3. As noted by the Court, this is the primary issue presented by the Plaintiff, and it was addressed by the Court. The Court did read and cite to *Hislop, supra* regarding Plaintiff's claim that said case stands for the premise the EH Sparks Road was vacated or fails to exist legally because it was "not constructed" within four years of dedication. The Court, addressing these very arguments thoroughly and thoughtfully, and addressing other caselaw cited by the parties, including *Rendler v. Lincoln County et. al*, 76 Or App 339 (1986), found that the language in this case mirrored that of the order that opened the road in *Rendler.*

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Then Court then concluded that EH Sparks Road was lawfully opened by way of the Crook County order. The Court stated:

> "Having found that EH Sparks Road was lawfully opened in 1896 by order of the Crook County Circuit Court and not vacated by operation of law or extinguished by deed, Plaintiff's Claims for Relief are Denied."

Trial Court's Opinion, p. 6. The Court found the facts and stated its conclusions of law thereon at page 5 of its opinion, citing to *Willowa County v Wade*, 433 Or 253 (1903), *Wilkins v Lane County*, 65 Or App 494 (1983), *Martin v Klamath County*, 39 Or App 455 (1979). No further analysis is required and certainly not one of 39 years of uncited Oregon Road Law. The Court has made its decision in consideration of the law cited by the parties, including *Hislop* and *Rendler* and simply concluded, correctly, that under the law an order to open the road in the manner identified in the Court's opinion, the manner at issue in this case, is sufficient to both establish and open a road. This was just like in *Rendler* where the court stated: "The order itself established and opened 804; no further order was necessary." *Rendler, supra* at 724. Plaintiff provides no reason why the Court should change that decision. It does not cite to any other evidence or any law compelling a different result. The Court should not reverse its own ruling made on February 1, 2019, upon summary judgment, again made on summary judgment on June 25, 2019, and clearly made after trial. The Court specifically stated regarding its summary judgment decision: "The trial evidence doesn't change this Court's finding that EH Sparks Road was lawfully opened in November 1896." Trial Court's Opinion, at p. 3. The Court did not adopt without consideration its finding on summary judgment.

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Rendler, as Plaintiff argued throughout these proceedings, is not in error for overruling the Supreme Court in *Hislop*. The cases are consistent. The Court's findings and conclusions dispense with Plaintiff's arguments under its Sections II and III of its Request, Statutory Interpretation, and The Road not Built, But Required to Be Built, as well as Section IV, Abandonment by Nonuser. With respect to Section V, regarding the burden of proof, Jefferson County relies on its prior trial memoranda.

Briefly, Plaintiff directs the Court to *Gentner v. Kern*, 164 Or 645 (1940). Plaintiff informs the Court that the Supreme Court concluded that the Plaintiff in *Gentner* failed to satisfy its burden of proof that a road existed in the subject location and that the Court applied Section 4101 (1887) after a county court had legally established a road. Moreover, Plaintiff describes the challenge in *Gentner* as being one where a paper road was never established for public travel, saying that in *Gentner* the use of "skid" logs was insufficient to establish the requisite use. Jefferson County takes issue with Plaintiff's description of the facts and also with the implication that the court applied Hill's Code Section 4101 (1887) to vacate a paper road for nonuse. *Gentner* was a case in which the court was unable to apprehend the facts at issue. In *Gentner*, the plaintiff sought to enjoin barricades placed upon an alleged county road. The defendants admitted the proceedings to establish the county road but said there was a conflict between the description employed in the road petition and the in the order and as such, the road was void. The Supreme Court found that this defense had not been pleaded and did not consider it. Ultimately, there was a variety of conflicting evidence as to whether or

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not a certain plank road actually traversed upon the location of an established county road and, in particular, as to whether the barricades placed on the plank road were located in any county right of way at all. In fact, there were three separate ways at issue, an alleged county road, the location of which had not been established, a skid road and a presently existing plank road. Unable to determine the facts, the Court found that the Plaintiff failed to carry the burden of proof, saying:

> "[B]ut there is no proof that the alleged county road, the skid road and the present plank road, at the places where the two barricades were erected, occupy the same location. We are satisfied that the burden of proof which the plaintiff assumed when he instituted this suit has not been discharged. We are not satisfied that at the two places were the barricades were erected a county road ever existed."

Gentner at 663. The Court did not determine that any road was vacated under Hill's Code under the doctrine of Abandonment by Nonuser. It did not, as Plaintiff puts it, hold that the part of the road use of skidding logs was insufficient to establish requisite use, thus demonstrating that in our case significant use is required. It found that there was no proof that the county road, the skid road and the existing plank road were at the same location at all. *Gentner* has been cited for the proposition that where a court cannot ascertain the facts it will not render decision. *See Shaver Forwarding Co. v. Eagle Star Ins. Co.* (Counsel have themselves to blame when they are content to allow conflicting testimony such that the court is unable to apprehend the facts.)

Finally, Plaintiff's repeated argument that if a road could be established by county order, then physically "opening" the road for public use would be a meaningless act is unavailing. A county court could establish a road as a "paper road" and require that it be physically opened, as noted by this Court. It could also establish and open the road,

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as was done in the instant case, by county order. *Wallowa County, supra.* The county court is the competent authority. The order is the manifestation of its intention to use a certain definite portion of the public land as a highway, surveying it and marking it on the ground and by other ways mentioned by the Court, including their legislative act, making it complete. *Id.* The evidence at trial clearly was that EH Sparks road was laid-out, marked on the ground. Even various markers establishing the way were located on the ground at the same locations shown in the Jefferson County Road Register. The survey, though inscribed on velum is and always has been located there, just as the evidence proved.

B. Plaintiff's Second "Cornerstone": The trial evidence does show the road was open for public use.

Plaintiff contends that the Court erred in finding that there is no trial evidence of how EH Sparks Road was actually constructed, and that the nature of the Crook County order hints at the existence of the use of the road between 1868 and 1900. The Court's conclusion is based on trial evidence as whole and is a reasonable inference to be drawn from it. Plaintiff's own pleading admits the possibility of the type of use referred to by the Court. Plaintiff's Second Amended and Supplemental Complaint, p. 8. In this instance we have an order, as noted in the Court's opinion, entered as Plaintiff's Exhibit 6 and Defendant Jefferson County's Exhibit 101, reading in part as follows:

> Therefore it is order by the Court that the prayer of the petitioners be granted and the said road as viewed, surveyed and reported be and the same is hereby declared a public highway and County road; and it is further ordered that all papers, plats and matter pertaining to this road be entered in full on the Record of Roads.
>
> And it is further ordered by the Court that the Supervisor of Roads immediately open the same to the use of the public.

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The evidence, clearly, is that the location of the road is set forth in the County Surveyor's records, in the road register and on those maps that the Court identified and which are a part of the record. The County survey is a part of the trial record. Plaintiff's own witness, Chris Brown, found and took pictures of markers which were created to locate the road, and he traced on the ground where Plaintiff alleges the road travels, by following the survey path and locating the markers. Then there is the Harry Heising Land Patent (Plaintiff's trial exhibit 2), which Plaintiff argued was a deed absolute. The evidence was that the road at issue traverses this property, it is now Three Rivers. This is coupled with the affidavit of Maurine Corbett-Heising, (Plaintiff's trial exhibit 3), his daughter who lived on the subject property, and which affidavit is referred to in the Court's decision. In her affidavit, Ms. Corbet-Heising testified to the existence of a road on the property that ran from the top of the Metolius rim to the Heising barn and house. The road served the ranch operations. *Id.* The affidavit does not explain the location of the road she talks about. Page 8 of her affidavit shows existing EH sparks Road outside of three rivers, as do other maps, and testimony, and the retracement survey offer admitted in these proceedings shows that EH Sparks Road travels in part over a portion of existing Lake Rive Drive. The survey is Plaintiff's trial exhibit 7. Without belaboring the point, the Court's finding is in all respects proper.

III. CONCLUSION

The Court's ruling is no way that EH Sparks Road was "conditionally" established by the Crook County order. It was, as the Court determined, established and opened. Now, if it is to vacated or legalized, it is for the County to decide. Plaintiff offers no reason for the Court to alter its trial decision, its findings of fact and conclusions of law.

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Jefferson County requests that Plaintiff's ORCP 62 B request for different findings and conclusions be denied.

Respectfully submitted,

DATED: August 3, 2020.

ELLIOTT, RIQUELME & WILSON, LLP

By: _____

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DECLARATION OF SERVICE

On August _3 , 2020, I, Tim Elliott, hereby served the foregoing **JEFFERSON COUNTY'S MOTION FOR ENTRY OF ORDER AFTER TRIAL** on the following parties in said action by the following method(s):

☒ by faxing a copy thereof to each party at their last-known facsimile number on the date set forth below.

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I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Executed on August 3, 2020 at Bend, Oregon.

Tim Elliott

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