

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; and Allen
Trust Company, trustee of the
Herbert H. Anderson and Barbara B.
Anderson Revocable Trust,

Defendants.

Case No. 16CV26227

**DEFENDANT DE MONTE'S
RESPONSE TO PLAINTIFF'S
ORCP 62B REQUEST**

I. INTRODUCTION.

1
2 On May 27, 2020, the Honorable Annette C. Hillman issued her
3 Opinion Letter in the above entitled matter and found that EH Sparks Road
4 was lawfully opened in 1896 by order of the Crook County Court and not

1 vacated by operation of law or extinguished by deed. Opinion Letter, p. 6.
2 Judge Hillman made Special Findings pursuant to Plaintiff's request for
3 Special Findings under ORCP 62A in support of her ruling. Opinion
4 Letter, p. 2.

5 Plaintiff filed an objection to the trial court's Special Findings
6 pursuant to ORCP 62B and requested alternate findings and conclusions of
7 law. As explained below, Defendant Ralph De Monte ("De Monte")
8 supports the Trial Court's Special Findings and Rulings and objects to
9 Plaintiff's ORCP 62B Request on the basis that Plaintiff's proposed
10 alternate findings and conclusions of law are nothing more than the
11 arguments previously presented by Plaintiff and rejected by the Trial
12 Court.

13 **II. TRIAL COURT'S SPECIAL FINDINGS AND CONCLUSIONS OF**
14 **LAW.**

15 The Trial Court's ruling that a public road exists within TRRA
16 was based on the following fundamental Special Findings:

17 1. The Crook County Court lawfully opened EH Sparks
18 Road in 1896 and Crook County was not required to do anything further to

1 open the road based on *Rendler v. Lincoln County et. al*, 76 Or App 339 (1986)
2 (“*Rendler*”). Opinion Letter, p. 3. The Trial Court noted that the Order
3 opening the road in *Rendler* “mirrored” the language of the Crook County
4 Court Order of November 7, 1896.¹ Letter Opinion, p. 3.

5 2. EH Sparks Road was not extinguished in 1900 under §
6 4101 of Hills Annotated Laws of Oregon (1892) because EH Sparks Road
7 was lawfully opened in 1896 pursuant to the Order of the Crook County
8 Court and will continue to exist unless statutorily vacated pursuant to ORS
9 368.326 to 368.366 citing *Rendler* at 343-344 and *Martin v. Klamath County*, 39
10 Or App 455, 460, rev den 287 Or 45 (1979) (“*Martin*”). Letter Opinion, p. 3,
11 6.

12 3. The EH Sparks Road qualifies as an RS 2477 Road
13 because it was established by the 1896 Crook County Court Order and
14 evidence of actual construction and use of the road is not necessary to
15 qualify EH Sparks Road as an RS 2477 Road citing *Wallowa v. Wade*, 433 Or
16 253 (1903) (“*Wallowa*”). Letter Opinion, p. 5.

¹ The Letter Opinion references the year “1986” when it’s assumed the Trial Court meant the year “1896”).

1 4. The Heising Land Patent did not extinguish or vacate EH
2 Sparks Road because the Heising Deed took subject to the EH Sparks Road
3 encumbrance as a pre-existing public road that was established in 1896
4 prior to the 1942 Heising Deed citing *Wallowa and Wilkins v. Lane County*,
5 65 Or App 494 (1983). Letter Opinion, p. 5, 6.

6 5. The Trial Court is not transforming the Heising Deed
7 because the Heising Deed took subject to the EH Sparks Road encumbrance
8 as a matter of law. Letter Opinion, p. 5, 6.

9 These Special Findings are supported by the Trial Court record
10 and the law applicable to the facts of this litigation that EH Sparks Road
11 was lawfully opened in 1896 by Order of the Crook County Court and has
12 not been vacated by operation of law or extinguished by the 1942 Heising
13 Deed.

14 **III. PLAINTIFF’S REQUEST AND PROPOSED ALTERNATE**
15 **FINDINGS AND CONCLUSIONS OF LAW LACK MERIT.**

16 Essentially, as expected, Plaintiff disagrees with the Trial
17 Court’s Special Findings and Ruling that a public road exists within TRRA
18 and is requesting the Court to reverse the Trial Court’s decision: “In this

1 complex case, the facts and law compel different and additional findings to
2 support a different conclusion of law.” Plaintiff’s Request, p. 1. As
3 explained below, Plaintiff’s Requests are without merit and do not justify
4 the Court reversing its decision.

5 **A. The Trial Court was not required to statutorily interpret**
6 **Section 4101, Hill’s 2nd ed. (1892)**

7 Plaintiff first argues that the Trial Court did not provide its
8 required statutory interpretation of Section 4101, Hill’s 2nd ed. (1892) under
9 *State v. Gaines, PGE v. Bureau of Labor and Industries, ORS 174.010 and ORS*
10 *174.020 (1)*. Plaintiff argues, as it has throughout this litigation, that EH
11 Sparks Road was never duly “opened” in 1896 and was therefore
12 extinguished as a matter of law in 1900 because there is no evidence that
13 the Road was ever constructed or used in the four-year period between
14 1896 and 1900.

15 Plaintiff has consistently ignored the legal argument advanced
16 by Jefferson County and De Monte, which was accepted by the Trial Court,
17 that the Crook County Court “opened” the EH Sparks Road in its 1896
18 Order, and nothing further was required (such as construction and use of

1 the Road) to establish it as a County Road based on the authority
2 established in *Rendler*. As a result, it was unnecessary for the Trial Court to
3 conduct a *Gaines* analysis of Section 4101, Hill's 2nd ed. (1892) since that
4 Section is inapplicable to these particular facts. Therefore, the Court
5 should reject this argument.

6 **B. *Hislop* is not the controlling precedent.**

7 Plaintiff, once again, argues that *Hislop v. Lincoln County*, 249 Or
8 259 (1968) ("*Hislop*") is precedent applicable to the facts of this litigation
9 that required the Trial Court to consider and interpret Section 4101,
10 notwithstanding that the Crook County Court duly "opened" the Road. As
11 Jefferson County and De Monte argued below, *Hislop* is not applicable to
12 the facts of this case nor the controlling precedent.

13 *Hislop* dealt with whether a road was constructed in a four-year
14 period under Section 4101 of Hill's Annotated Laws of Oregon 1892, rather
15 than whether an official act of the governing body "opened" the road as a
16 matter of law as in *Rendler*. Nowhere in the *Hislop* decision is there any
17 indication that Lincoln County issued an order to open the disputed road

1 in contrast to the Crook County Court's Order "opening" EH Sparks Road.
2 Accordingly, *Hislop's* holding would only apply in the case of roads which
3 were never "opened" under Hill's Annotated Laws of Oregon 1894, Section
4 4065 – which is not the case here.

5 Instead, the controlling and applicable appellate case relied on
6 by Jefferson County and De Monte, and accepted by the Trial Court, is
7 *Rendler*. As the Trial Court found:

8 The [*Rendler*] Court of Appeals held that the order issued by the
9 county court in 1890 was sufficient to establish the road as a
10 public highway, and no further orders by the county was
11 required. Factually similar to this case, Benton County Court
12 issued the following order "It is so ordered, that said report,
13 survey and plat of said road be recorded, and that said road be
14 and is hereby declared to be a public highway, and that an
15 order issue to open said road." *Id* at 341. The language mirrors
16 that of the Crook County Court Order of November 7, 1986
17 (sic).

18
19 Letter Opinion, p. 3.

20 As a result, Plaintiff is incorrect that *Hislop* is Supreme Court
21 precedent requiring the Trial Court to hold that *Hislop* is controlling law in
22 this case. Of course, Plaintiff desires that *Hislop* control (instead of *Rendler*)
23 since *Rendler* is clearly applicable and renders Section 4101 inapplicable in

1 this case. The reality is that Plaintiff's entire case is based on *Hislop*; and
2 because it is not controlling law, EH Sparks Road was lawfully opened and
3 not extinguished by Section 4101 as found by the Trial Court.

4 Therefore, the Court does not have to correct its Opinion by
5 applying *Hislop* or the doctrine of Abandonment by Nonuser, as requested
6 by Plaintiff. Simply stated, neither *Hislop* nor Section 4101 are applicable
7 here. If the Court agrees that *Hislop* is distinguishable from the current
8 case, and that *Rendler* controls, the Court should reject Plaintiff's proposal
9 that *Hislop* is controlling precedent in this case.

10

1 **C. Something more than the County Order directing the**
2 **supervisor of roads to open a road is not necessary under**
3 **Rendler.**

4 Once again, Plaintiff's argue (relying on *Hislop*) that the 1896
5 Crook County Court Order was insufficient to open EH Sparks Road.
6 Plaintiff argues that the road had to be constructed and used between 1896
7 and 1900. Plaintiff is wrong. Based on *Rendler*, and this Court's Special
8 Finding that the County Order in *Rendler* was similar to the 1896 Crook
9 County Order, nothing more was required to "open" the Road. In other
10 words, once duly opened, Section 4101 became inapplicable, and issues of
11 construction and use of the Road became irrelevant.

12 The Court should reject Plaintiff's argument if the Court agrees
13 that *Rendler* is the controlling precedent in this case, and nothing more was
14 required to "open" EH Sparks Road.

15

1 **D. The Trial Court’s ruling that it could not make a finding**
2 **that the County failed to open EH Sparks Road even if the**
3 **Court accepted Plaintiff’s argument that the County is**
4 **required to open or construct a road within four years is**
5 **not reversible error.**
6

7 The Trial Court stated: “Even if we adopt the argument that
8 the county is required to open or construct a road within four years this
9 Court cannot make a finding as alleged by Plaintiff that the county failed to
10 open the EH Sparks Road.” Plaintiff argues that this finding
11 fundamentally misstates Plaintiff’s argument and misunderstands the
12 “Pre-1903 Oregon Road Law”.

13 It makes no difference whether the Trial Court could or
14 could not make a finding that the County failed to open EH Sparks within
15 four years under Section 4101. As stated above, the Trial Court determined
16 as a matter of law that the 1896 Crook County Circuit Court Order duly
17 “opened” up the Road under *Rendler* rendering Section 4101 inapplicable.
18 As a result, the Trial Court finding does not constitute reversible error and
19 the Trial Court is not required to revise its Opinion.
20

1 **E. The Trial Court’s finding that the Crook County Court**
2 **ordering that the EH Sparks Road be immediately opened**
3 **to the use of the public seems to intimate that the Road**
4 **was already in existence is not reversible error.**

5 Plaintiff argues that it was error for the Trial Court to make a
6 finding that “intimated” that the EH Sparks Road was already in existence
7 when the Crook County Court “opened” the Road in 1896. This finding by
8 the Trial Court does not diminish the Court’s Special Finding and Ruling
9 that the Crook County Court duly “opened” EH Sparks in 1896 based on
10 *Rendler*. As we understand the Court’s finding, this particular finding has
11 no effect on the Trial Court’s ultimate conclusion that the 1896 Order
12 “opened” EH Sparks rendering Section 4101 (and the issue of construction
13 and use) inapplicable. As a result, this finding is not necessary to support
14 the Court’s ultimate conclusion and does not constitute reversible error.

15 **F. Plaintiff’s argument that it offered proof that EH Sparks**
16 **Road was never constructed contrary to the Court’s**
17 **Opinion is meaningless.**

18 This argument, as many of Plaintiff’s previous arguments, is
19 harmless even if accurate since this, once again, goes to Plaintiff’s
20 erroneous legal theory that Section 4101 is applicable (regarding the

1 construction and use issue). It makes no difference to the Trial Court’s
2 ultimate conclusion whether Plaintiff offered proof or not—it simply is a
3 meaningless argument since the Trial Court determined that Section 4101
4 was inapplicable since the Crook County Court “opened” EH Sparks in
5 1896—and any evidence of construction and use was unnecessary or
6 irrelevant.

7 **G. The Doctrine of Abandonment by Nonuser is irrelevant.**

8 This section of Plaintiff’s Request is nothing more than a rehash
9 of Plaintiff’s failed primary argument in this case that EH Sparks Road did
10 not exist as a legal road since it was “conditionally” established in 1896
11 subject to its construction and use within the 4-year period set forth in
12 Section 4101. Plaintiff characterizes Section 4101 as the codification of the
13 Doctrine of Abandonment of Nonuser. In fact, Plaintiff’s entire case in chief
14 is predicated on this Court accepting that *Hislop* and not *Rendler* is the
15 controlling precedent and that the 1896 Order adopted by the Crook
16 County Court did not duly “open” the Road.

17 Plaintiff’s arguments were rejected by the Trial Court and

1 should not now be accepted. Simply put: the Doctrine of Abandonment
2 by Nonuser is not applicable to the facts and law of this case.

3 **H. The Court did not err in making the same finding in its**
4 **Decision as it did in the Summary Judgment clarification**
5 **since it independently made it based on the Trial Court**
6 **record.**

7 Plaintiff claims it was error for the Trial Court to make the same
8 finding in its Decision that it did in its ruling regarding Defendant's Motion
9 for Summary Judgment that EH Sparks Road was lawfully opened in 1896
10 by the Crook County Court. We understand the Trial Court to again
11 independently make that finding based on the evidence and arguments
12 presented at trial. As a result, it was not error for the Court to
13 independently find that EH Sparks Road was lawfully opened pursuant to
14 the 1896 Order adopted by the Crook County Court.

15 IV. CONCLUSION

16 In sum, Plaintiff's Request for alternate findings and different
17 conclusions of law lack merit and do not support a reversal of the Trial
18 Court's Decision. Plaintiff's arguments are the same arguments previously
19 rejected by this Court, and no matter how Plaintiff attempts to dress these

1 arguments they fail as a matter of law based on the facts in this case as
2 found and determined by the Trial Court.

3 Based on the foregoing, De Monte respectfully requests the
4 Court to deny Plaintiff's ORCP 62B Request. Jefferson County and De
5 Monte are prepared to submit a Judgment consistent with the Court's
6 rulings in its Opinion Letter.

DATED this 3rd day of August 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **DEFENDANT DEMONTE'S RESPONSE TO PLAINTIFF'S ORCP 62B REQUEST** on:

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DATED this 3rd day of August 2020.

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