EH SPARKS SPECIAL REPORT TO MEMBERSHIP – NOVEMBER 10th, 2019

On October 7th Judge Hillman signed the courts order for Rebuttal Arguments. On October 21st, Plaintiff received the Rebuttal Arguments from defendants DeMonte and Jefferson County. Plaintiff's counsel Michael Peterkin requested an extension until November 8th to provide his Sur-Rebuttal to the courts. Judge Hillman granted this extension.

Late Friday, November 8th, Plaintiff filed its Sur-Rebuttal in Jefferson County Circuit Court. As provided in Judge Hillmans October 4th Opinion Letter, "No further briefing or argument will be granted unless specifically requested by the court."

Attached are defendant DeMonte and Jefferson County Rebuttal Arguments. Plaintiff's Sur-Rebuttal will be posted upon receipt.

No date has been set for Judge Hillmans ruling in the EH Sparks Matter.

Please visit https://3rrec.com/forums/topic/eh-sparks-special-report-to-membership-november-10th-2019/ for the website posting.

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Randy Panek
President TRLA

Attachments: Defendants Rebuttal Arguments Filed 21, 2019

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 **REPLY TO PLAINTIFF'S CLOSING REBUTTAL ARGUMENT** **Ralph De Monte, Trustee of the De Monte Family Trust**

I. INTRODUCTION

Plaintiff filed its Closing Rebuttal Argument in response to the Closing Arguments filed by Defendant Jefferson County ("Jefferson

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County) and Defendant De Monte ("De Monte"). The court granted Defendants the opportunity to reply to Plaintiff's Closing Rebuttal Argument.

Plaintiff asserts the following in its Closing Rebuttal Argument: (1) Jefferson County and De Monte "misquoted" *Hislop*, and *Hislop* is applicable to the facts of this litigation and dispositive; (2) *Rendler* is not dispositive or factually consistent with the facts of this case; (3) Judge Hillman's Clarification Finding is not the "law of the case"; and (4) Defendants' reliance on Oregon law that the only legal means to vacate a County Road through official action of a governing body is misplaced.

As explained below, De Monte asserts the following in response to Plaintiff's Closing Rebuttal Arguments: (1) Jefferson County and De Monte did not "misquote" *Hislop*, and *Hislop* is not dispositive of this litigation; (2) *Rendler* is consistent with the facts of this case, and supports Judge Hillman's Clarification Finding that the order of the Crook County Court lawfully "opened" Sparks Road in 1896; (3) Judge Hillman's Clarification Finding is not the "law of the case"; and (4) Defendants

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reliance on Oregon law that the only means to vacate a County Road (once "opened") is through official action of either Crook County or Jefferson County is not misplaced.

II. ARGUMENT

A. Defendants did not "misquote" *Hislop* and are therefore not inviting the trial court to commit error.

Plaintiff relies on *Hislop v. Lincoln County*, 249 Or. 259 (1968) ("*Hislop*") to support its position that the 1896 order of the Crook County Court did not "open" Sparks Road, but simply established the road. *Hislop* relies on § 4101 of Hill's Annotated Laws of Oregon, 1892 that provided: "If any part of any road in this State shall not be opened for four years after or from the time of its location, the same shall be vacated."

The Supreme Court in *Hislop* held that the statute was self-executing and that an "unopened" road would cease to exist as a matter of law four years after its location. Therefore, it is Plaintiff's position that the 1896 order of the Crook County Court did not open Sparks Road and it was vacated under § 4101 of Hills Annotated Laws of Oregon 1892 because

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there was no construction and no public use of the road between 1896 and 1900.[1]

Defendants do not misquote *Hislop* in their Closing Arguments. The parties simply disagree whether *Hislop* is applicable and dispositive of the facts of this case. Defendants argue that *Hislop* is not controlling in this case since it stands for the proposition that "an unopened road" ceases to exist by operation of law four years after location of the road. Defendants argued in their Closing Arguments that *Hislop's* holding would *only* apply in the case of roads which were never "opened" under Hill's Annotated Laws of Oregon 1894, § 4065. The statute provided:

> "[T]he court shall cause said [viewers'] report survey, and plat to be recorded, and from thenceforth said road shall be considered a public highway and the…court shall issue an order directing said road to be *opened*." (Emphasis supplied).

In other words, *Hislop* would not be dispositive if there was evidence that Sparks Road was "opened" by order of the Crook County

[1] Plaintiff has the burden of proof in this case to demonstrate that no construction or use of Sparks Road occurred between 1896 and 1900 if this issue is relevant. Plaintiff has not met that burden of proof.

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Court. Here, as Judge Hillman found, Sparks Road was lawfully "opened" in 1896 by order of the Crook County Court.[2]

As previously argued, the appellate decision that is dispositive of the facts of this case is *Rendler v. Lincoln Cty.,* 76 Or. App. 339,343 (1985), aff'd, 302 Or 177, 728 P.2d 21 (1986) ("*Rendler")* where there was a county court order "opening" the road in question. At issue in *Rendler* was whether Benton County's order that an order issue to open the road in question actually "opened" the road. Appellants in *Rendler* argued that the order required that a second order be issued before the road in question was "opened." The Court of Appeals in *Rendler* held: "The order, as a whole, merely follows the language of the statute. The order itself established and opened [the road]; no further order was necessary." *Id*., at 343.

Based on the foregoing, *Hislop* is inapplicable to the facts of this case and distinguishable from *Rendler.*

[2] The 1896 order provided: "And it is further ordered by the Court that the Supervisor of Roads through whose district this road runs immediately open the same to the use of the public."

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B. *Rendler* is dispositive and factually consistent with the facts in this case, and was not intended to overrule *Hislop* since the facts are distinguishable.

The appellate decision that is dispositive of the facts of this case is *Rendler* where there was a county court order "opening" the road in question as explained above. At issue in *Rendler* was whether Benton County's order that an order issue to open the road in question actually "opened" the road.

The parties presented these same arguments to the court during the Summary Judgment proceedings last year. At issue was whether *Hislop* or *Rendler* was dispositive of this case. Defendants argued that *Rendler* was dispositive since the Court of Appeals held that an order "opening" the road was all that was required—nothing further was required. Defendants further argued that *Hislop* was not dispositive since the Supreme Court's holding was limited to cases where the road in question had not been "opened"—the exact opposite of this case where Sparks Road was lawfully "opened" in 1896 by order of the Crook County Court.

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Plaintiff's position is contrary to the Clarification Finding made by Judge Hillman that Sparks Road was lawfully "opened" in 1896 by order of the Crook County Court. The court would not have made that Finding if it believed that an additional step was required to "open" Sparks Road as discussed in *Rendler*. It appears that the court distinguished *Hislop* and *Rendler* in making its Clarification Finding that Sparks Road was lawfully "opened" by the 1896 order of the Crook County Court. Based on the Clarification Finding, it appears that the court determined that *Rendler* was dispositive—not *Hislop*.

Plaintiff argues that *Rendler* is not dispositive and cannot overrule the Supreme Court precedent established in *Hislop*. *Rendler* mentioned but did not overrule *Hislop*. Oregon courts do not lightly overrule their own statutory interpretations and ordinarily regard them as binding precedent unless they are plainly wrong. *State v. Oliver*, 259 Or. App. 104, 107-08 (2013) (citing *Aguilar v. Washington County,* 201 Or. App. 640, 648 (2005).

If *Rendler* and *Hislop* are consistent with their holdings (i.e., if *Hislop* is not plainly wrong), the Court of Appeals in *Rendler* must have

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determined, as Defendants argue here, that the cases are factually distinguishable. The only difference between the two cases is the court order in *Rendler*. In *Hislop,* there were proceedings to establish the road but no court order "*opening*" the road was issued, and the road became vacated after four years under § 4101. In *Rendler*, the Benton County Court issued an order and the road was automatically "opened," and § 4101 was no longer applicable. And here, Sparks Road was declared to be a public highway and was ordered immediately "open" to public use. As was the case in *Rendler*, the Crook County Court's order "opened" the road, and no other action was necessary.

Plaintiff's statement on page 5 of its Closing Rebuttal Argument demonstrates the flaw in its argument that *Hislop* is dispositive rather than *Rendler*: "Thus, the precedent in *Hislop* was not at issue in *Rendler, because unlike Sparks, the road was constructed.* This means that *Rendler* simply stands for the proposition that a county does not have to issue a second order to open a county road once constructed." (Emphasis in original). Plaintiff's Closing Rebuttal Argument, p. 5. This statement misstates the

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basic proposition of *Rendler* because the *Rendler* court did not discuss whether the road in question had been constructed or not, but instead was focused on Benton County's order "opening" the road not the subsequent construction of the road or a second order.

Based on the foregoing, the court can find that *Hislop* is inapplicable to the facts of this case and distinguishable from *Rendler.*

C. Plaintiff's "law of the case" argument is misplaced regarding Judge Hillman's Clarification Letter and Finding that Sparks Road was lawfully opened by order of the Crook County Court in 1896.

As mentioned above, Judge Hillman previously found that Sparks Road was lawfully "opened" in 1896 by order of the Crook County Court in ruling on Defendants' Motions for Summary Judgement pursuant to her Clarification Letter dated February 1, 2019. While Plaintiff is correct that Judge Hillman did not have to make that Finding in ruling on the Motions for Summary Judgment—she had the right to make that Finding and did. Of course, the Clarification Finding has legal significance regarding the remaining issue in this litigation: whether Sparks Road currently exists as a County Road.

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The question posed by Plaintiff in its Closing Rebuttal Argument is whether Judge Hillman's Clarification Finding constitutes the "law of the case" or if the court is free to find and rule anew whether Sparks Road was lawfully "opened" in 1896. It is Plaintiff's position that Judge Hillman's Clarification Finding does not constitute the "law of the case." As explained below, it is Defendant De Monte's position that Plaintiff's "law of the case" argument is misplaced since the court allowed Plaintiff the opportunity to present trial argument and evidence whether Sparks Road was lawfully opened by the Crook County Court in 1896.

During opening statements, counsel for De Monte argued that *to the extent* Judge Hillman's Clarification Finding had legal significance, she should limit the testimony and evidence presented by Plaintiff during trial to the last factual issue whether Sparks Road had been officially vacated by either Crook County or Jefferson County. That is not to say De Monte argued that the Clarification Finding was the "law of the case" as Plaintiff now contends, but that the scope of the issue at trial should be narrowed

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with the understanding that the parties could rely on the Clarification Finding made by Judge Hillman.

Although the court indicated it considered limiting the scope of the trial based on De Monte's request, it ultimately denied the request stating that Plaintiff (who had the burden of proof) would be given the full opportunity to present its case regarding the existence or non-existence of Sparks Road. As a result, Judge Hillman *did not limit* the evidence or argument admissible at trial based on her Clarification Finding that Sparks Road was lawfully opened by county order in 1896.[3]

Much of the case law cited by Plaintiff stands for the assertion that, when applied, the "law of the case" doctrine's preclusive effects after a preliminary hearing too often prohibits parties from making arguments or presenting evidence they are entitled to at trial. *See, e.g.*, *Poet v. Thompson*, 208 Or. App. 442, 451-52 (2006). Much like the case law cited in its Closing Rebuttal Argument, Plaintiff alleges that it did not have the

[3] During trial, counsel for Defendant De Monte objected to any evidence offered by Plaintiff for the purpose of establishing whether Sparks Road was ever constructed or used as irrelevant. The court advised it would consider the objection during its review of the facts and law in making its decision.

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opportunity to be heard at trial as a result of the alleged preclusive effect of Judge Hillman's Clarification Finding. Plaintiff's Closing Rebuttal Argument, p. 8.

That is simply not the case here. As mentioned, the parties were not restricted in any way from presenting any and all evidence or argument they desired at trial, nor were there any other preclusive effects of Judge Hillman's Clarification Finding that inhibited the ability of Plaintiff to do so. As a result, the court's finding that Sparks Road was lawfully "opened" in 1896 had no preclusive effects on what the parties could present at trial and was therefore not the "law of the case."

Judge Hillman did not venture into a complex area of law as Plaintiff asserts when she made her Clarification Finding. Plaintiff's Closing Rebuttal Argument, p. 8. Judge Hillman made the Finding based on what had been presented to her in the Summary Judgment proceedings prior to trial, which are essentially the same arguments presented by the parties at trial and in post-trial briefing.

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Plaintiff has not produced any additional facts or legal argument that would support this court making a different finding than the Clarification Finding made by Judge Hillman on February 1, 2019. Therefore, the court can find that Sparks Road was lawfully "opened" in 1896 by order of the Crook County Court.

D. Defendants' reliance on Oregon Law that the only means to vacate a County Road is through an official act of a governing body is not misplaced and is not inviting the court to apply inapplicable law.

Section V. of Plaintiff's Closing Rebuttal Argument that Defendants reliance on historical statutory law regarding the vacation of County roads "opened" to the public is not misplaced. Once again, Plaintiff's argument assumes that Sparks Road was not "opened" by the 1896 order of the Crook County Court and cites *Hislop* for the proposition that a different vacation process applies than the traditional vacation of a County Road "opened" to the public. Plaintiff's Closing Rebuttal Argument, p. 8-9. As stated above, it's clear in this case that Sparks Road was lawfully "opened" in 1896, and therefore Plaintiff's argument in Section 5 is misplaced.

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The well-established law in Oregon since the date Sparks Road was "opened" in 1896 to the present is that once a county road is dedicated and "opened" to the public, that it cannot be vacated except by the authority of the county court of board of county commissioners. Hill's 2d Edition, § 4061 provided that "no county road shall be…vacated in any county in this state except by the authority of the county court…." See *Wilkens v. Lane County,* 65 Or. App. 494, 498-99, 671 P.2d 1178 (1983); *Martin v. Klamath County,* 39 Or. App. 455, 459-60 (1979); *Wallowa County v. Wade,* 433 Or 253, 72 P 793 (1903).

The court identified the issue of whether Sparks Road had been vacated or extinguished as a genuine issue of fact. Plaintiff bears the burden of proof in this litigation whether Sparks Road had been vacated or extinguished by official act of either Crook County or Jefferson County. Plaintiff did not produce any such evidence because Sparks Road has not been vacated by either of those two counties.

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Based on the foregoing, the court can find that Sparks Road was lawfully opened in 1896 by order of the Crook County Court and has not been vacated and exists today as a County Road.

III. CONCLUSION

Plaintiff attempted to demonstrate in this trial that Sparks Road did not physically exist within the Three Rivers Recreational Area ("TRRA"), and therefore did not exist as a County Road. Defendants argued that such evidence was irrelevant if the court found that Sparks Road was lawfully "opened" in 1896 by the order of the Crook County Court. While Plaintiff's evidence (albeit irrelevant) did not demonstrate that Sparks Road did not exist as a County Road, the evidence produced by Plaintiff demonstrated that a physical road actually exists within TRRA consistent with the original legal description of Sparks Road.

In short, Plaintiff has not met its burden of proof demonstrating that Sparks Road does not exist as a County Road or has been vacated or extinguished. As a result, De Monte respectfully requests the court to make the following findings:

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1. The Crook County Court "opened" Sparks Road in 1896 in accord with Hills Annotated Laws of Oregon, § 4065, and Crook County was not required to do anything further to "open" the road based on *Rendler.*
2. Sparks Road was not extinguished in 1900 under § 4101 of Hill's Annotated Laws of Oregon (1892) because Sparks Road was "opened" in 1896 pursuant to the Order of the Crook County Court.
3. Neither the County nor any other party to this litigation was required to present evidence of the construction and use of Sparks Road to toll § 4101 of Hill's Annotated Laws of Oregon (1892).
4. The Crook County Court Order dedicating Sparks Road and "opening" it to the public was sufficient to establish Sparks Road as an RS 2477 Road.

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5. Neither the County nor any other party to this litigation was required to present evidence of the construction and use of Sparks Road to qualify as an RS 2477 Road.
6. The Heising Land Patent took subject to the Sparks Road (RS 2477) encumbrance.
7. Sparks Road has not been vacated by either Crook County or Jefferson County and exists today as a County Road.

DATED this 21st day of October, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **REPLY TO PLAINTIFF'S CLOSING REBUTTAL ARGUMENT** on:

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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 DE MONTE, trustee of the De Monte Family Trust; and ALLEN TRUST COMPANY, trustee of the Herbert H. Anderson and Barbara B. Anderson Revocable Trust., Defendants.	Case No.: 16CV26227 **DEFENDANT JEFFERSON COUNTY'S REPLY TO PLAINTIFF'S CLOSING REBUTTAL ARGUMENT**

For its Reply to Plaintiff's Closing Rebuttal Argument ("Rebuttal"), Defendant Jefferson County argues as follows:

I. Introduction

By way of its Rebuttal, Plaintiff argues that 1) Defendant DeMonte argues facts not in the trial record, 2) that Defendants misquote *Hislop v Lincoln County,* 249 Or 259, 437 P2d 847 (1968) and that *Rendler v Lincoln County*, 76 Or App 339, 709 P2d 701 (1986) does not control, 3) that the Court should reconsider its February 1, 2019, finding that E.H. Sparks Road was opened by way of the 1896 order of the Crook County Court because such is not the "law of the case" and 4) Jefferson County's argument that under Oregon law only a county is with the power to vacate an opened road is misplaced. Each of Plaintiff's arguments is addressed below.

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II. Defendant DeMonte argues facts not in the trial record.

Plaintiff's first rebuttal argument is directed solely at Defendant DeMonte and requires no reply from Jefferson County.

III. Jefferson County does not misquote *Hislop*, thereby inviting the Court to engage in error; *Rendler* is dispositive.

Jefferson County does not misquote or misread either *Hislop* or *Rendler*. It is Plaintiff who invites error. Plaintiff's statement that Defendants refuse to accept that under *Hislop* a road can be established and later vacated by operation of law misses the mark. It is clear that Plaintiff recognizes the significance of the Court's February 1, 2019 finding that E.H. Sparks Road was lawfully opened in 1896 by the *order* of the Crook County Court, and not through use or construction. This Court's finding was and is dispositive. This is the reason that Plaintiff engages in a misplaced argument concerning the "law of the case doctrine," requesting the Court reconsider its finding, a matter addressed further below. Sparks Road became complete upon the 1896 order of the Crook County Court. Nothing further, including use by the public or construction, was required. The doctrine is announced in *Wallowa County v Wade,* 433 Or 253, 72 P 793 (1903). There plaintiff argued the establishment of an RS 2477 road by (1) its establishment under statutory proceedings; (2) dedication and acceptance; and (3) prescriptive use. The Court found that an RS 2477 road may be established by either order of the county court, or by use, dedication, or statutory process. In so doing it stated as follows:

> "The county court, acting upon such petition and a notice given as required by law, caused the road to be surveyed and marked out upon the ground, and this was followed by continuous user [sic] by the public for more than 13 years . . . This is sufficient to amount to an acceptance of

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> the grant made by Congress, and for the establishment of a highway over state land, *either by dedication or prescription*."

Wallowa County at 256 citing to *Bayard v Standard Oil Co.*, 39 Or 438; 63 P 614 (1901); *Nosler v Coos Bay R. Co.*, 39 Or 331, 64 P 644 (1901) (emphasis added).

In the same discussion the *Wallowa* court went on to confirm that an RS 2477 road becomes *complete* either by the process of dedication and marking, such as occurred in the case now before the Court, or by some use of the public, saying:

> "'. . .[W]hen the location of the highways and roads was made by *competent authority or by public use*, the dedication took effect . . .as of the date of the act; the act having the same operation upon the lines of the road as if specifically described in it.' Wells v. Pennington County (S.D.) 48 N.W. 305, 39 Am.St.Rep. 758. The act of Congress is . . . in effect a dedication of the land, which becomes operative and relates back to the date of the act whenever the public, *either by user [sic] or by some appropriate act of the highway authorities, affirmatively manifests an intention to use a certain definite portion of the public land as a highway.* The right is necessarily indefinite, and, in a sense, floating and liable to be extinguished by a sale or disposition of the land *until the highway is surveyed and marked on the ground, or in some other way identified or designated; but when the public authorities lay out and locate a road over public land of the United States by surveying and marking it on the ground, or by some legislative act, . . . the right becomes* ***complete***, and an intention to accept the dedication is manifested, and subsequent settlers on the land take subject to the easement."

Id. at 257–58 (emphasis added).

Thus, surveying, marking, legislative act identifying or designating the road makes the road complete, as does use by the public. So complete in fact, that subsequent settlers take subject to it, - even without use or construction. The *Wallowa* court, in reaching its conclusion, quoted the Supreme Court of Washington saying:

> "In Smith v. Mitchell, 21 Wash. 537, 58 Pac. 668, 75 Am.St.Rep. 858, the same doctrine is announced; the court holding that *a highway may be established over public land in any of the ways recognized by the laws of the state.* In deciding the case, Mr. Chief Justice Gordon, speaking for the court, said: 'It is a well-known fact that many of the public highways in this

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> state had their inception in adverse user [sic], which ripened into prescription. The act of Congress already referred to does not make any distinction as to the methods recognized by law for the establishment of a highway. It is an unequivocal grant of right of way for highways over public lands, without any limitation as to the method for their establishment, and hence *a highway may be established across or upon such public lands in any of the ways recognized by the law of the state in which such lands are located; and in this state, as already observed, such highways may be established by prescription, dedication, user [sic], or proceedings under the statute.* Any other conclusion would occasion serious public inconvenience.'"

Id. at 259 (Emphasis added).

Thus, an RS 2477 road that is dedicated, created by statutory process, marked and surveyed is complete. As noted, in the case before the Court, Sparks Road was opened by the order of the Crook County Court, it was laid-out, marked on the ground and surveyed. It was had upon a road notice, road petition, and undertaking of $500.00, a survey, a surveyor's report; and upon the assignment of 12 viewers and their viewer's report; and upon the order of Crook County Court that Sparks road be and is a public highway to be immediately opened. Plaintiff's Second Amended and Supplemental Complaint herein, *Exhibit* 4. Plaintiff's own surveyors located the road by the original survey, as well as, the markers found on the ground. Plaintiff's Exhibits 7 and 21 are of what Plaintiff alleges is an accurate resurvey of Sparks Road, containing pictures of the various mile stones found on the ground, engraved with the applicable mile. Plaintiff's Exhibit 9 does the same. It shows where Plaintiff alleges Sparks Road is located. Sparks Road is complete such that all subsequent owners take subject to the easement, -- the road. While Plaintiff is sure to describe the *Wallowa* court's decision as one based on prescriptive use only, it clearly is not.

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Next, as relevant to the instant case, the holding of *Rendler*, *supra*, is clear. It is (1) that an order of the county court issued in 1890 was sufficient to establish and open the road at issue; that no further order was required; and (2) that the circuit court had no jurisdiction under Oregon Revised Statutes to vacate a road once opened. In *Rendler* the trial court held that a certain Road 804 ("804") was properly established and opened by the order of the county court, that it was never vacated or abandoned and that the public had established a prescriptive easement on land abutting Road 804. The appellants, just like the Plaintiff in our case, argued that Road 804 was abandoned under Hill's Annotated Laws of Oregon 1892 (Hill's Code) § 4101, which, as the Court is well aware, provides that "[i]f any part of any road . . . shall not be *opened* for four years from the time of its location, that same shall be vacated." (Emphasis added.) As noted, on February 1, 2019, this Court correctly found that E.H parks road was "lawfully *opened"* in 1896 by order of the Crook County Court. The *Rendler* appellants argued that an unopened road ceased to exist four years after being located because under Hill's Code § 4065 the county court was required to issue an order ". . . directing said road to be opened" and that the county court had never expressly done that. Rather, the order it issued required the viewers report, survey and plat to be recorded, declared the road to be a public highway, and directed ". . . that an order issue to open said road." On this basis the appellants contended that a second order was required to actually open Road 804. The court disagreed. It held that the order, the only order, was sufficient to establish the road as a public highway. That is to say, the *Rendler* court found, just like this Court did in the instant case, that *the* order of the county court established the road. The *Rendler* court did not, at any time, base its ruling on that fact

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that any part of Road 804 was constructed. At issue was whether in 1890, the order was sufficient to establish Road 804, and it was. The court's finding was that the order itself, and only the order itself, established and opened Road 804. Its finding is as follows: "The *order itself* established and opened 804; no further order was necessary." *Id.* at 724 (emphasis added.) *Rendler* does not stand for the proposition, as Plaintiff alleges, "that a county does not have to issue a second order to open a county road if it is already constructed." Plaintiff's Rebuttal, p. 5, ll, 12-13. *Hislop* does not change the holding in *Rendler*. Plaintiff argues that "*Rendler* cannot overrule Supreme Court precedent. . . ." Id at P. 5, ll 1-2. It does not; the cases are consistent. The Court of Appeals did not attempt to or in any way overrule *Hislop*. The argument is a red hearing. As noted in Jefferson County's Final Closing Argument, and as also noted by the *Rendler* court itself, the holding in *Hislop* is that under Hill's Code § 4101 an unopened road ceases to exist by operation of law four years after location. More specifically, the *Rendler* court stated: " In *Hislop v Lincoln County,* 249 Or 259, 437 P2d 847 (1968), the Supreme Court held that the statute was self-executing and that an unopened road ceased to exist by operation of law four years after location." *Rendler, supra*, at 343. In *Rendler*, the road was opened and by the "order itself." *Rendler* is consistent with the facts of our case and it is dispositive.

IV. The Court should not accept Plaintiff's request to reconsider its February 1, 2019 ruling that E.H Sparks Road was "*lawfully opened in 1896 by way of the order of the Crook County Court.*"

After the time of trial and by way of closing argument, Plaintiff actually moves the Court for reconsideration of its finding that "E.H Sparks Road was lawfully opened by way of the 1896 order of the Crook County Court." *Letter Ruling, Hon. Annette C.*

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Hillman, Feb. 1, 2019. It is of no consequence that Plaintiff couches its request as argument, or within an argument regarding the law of the case. It is, plainly, a request for reconsideration. Plaintiff states ". . . the Court can and should in its prudential exercise decide the legal questions and make factual findings anew after trial." Plaintiff's Closing Rebuttal Argument, P. 8, ll 17-18. It is in fact Plaintiff who invites error. Were the Court to revisit its finding anew after trial, then the parties tried the wrong case. Summary judgment and trial are distinct in the litigation timeline. *See Timbercrest, infra.* The purpose of summary judgment is to decide what is to be tried, that is, whether trial of an issue is necessary. By their very nature rulings made upon motion for summary judgment limit the legal and factual issues to be presented at trial. As noted by the court in *Association of Unit Owners of Timbercrest Condominiums v Warren*, 352 Or 583, 288 P.3d 958 (1978) "[s]ummary judgment was designed as a mechanism by which the parties achieve resolution of [a] dispute without trial, and in fact, the very test for determining whether to grant a motion for summary judgment is whether the record presents no triable issue. . . ." *Timbercrest* citing to *Johnson v. Mult. Co. Dept. of Community Justice,* 344 Or. 111, 118, 178 P.3d 210 (2008) (summary judgment is proper only if the record "presents no triable issue of fact"); *Jones v. General Motors Corp.,* 325 Or. 404, 413, 939 P.2d 608 (1997) (test for summary judgment is the existence of a "triable issue"). Plaintiff argues that the Court's letter ruling "deprives plaintiff of the opportunity to present trial argument and evidence." Plaintiff points to no new evidence, law or fact that would warrant such a decision. Plaintiff fails to tell the court why it should find anew. Plaintiff's argument is dedicated only to the law of the case doctrine. Plaintiff was not prohibited at trial or in these proceedings from making any argument or presenting any evidence. Rather, Plaintiff was given latitude to present its case at trial. Plaintiff merely argues the law of the case doctrine, without

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ever arguing why the Court should in any way revisit its findings on summary judgment *after the time of trial.*

V. The only manner in which an open, established road may be vacated is legislative act of the County.

At Section V of is Rebuttal, Plaintiff argues that the law cited by Jefferson County and holding or declaring that a circuit court does not have jurisdiction to vacate an opened established county road is not misplaced. *Hislop v Lincoln County,* 249 Or 259, 437 P2d 847 (1968) does not change this. Again, *Hislop* pertains to unopened roads. *See Rendler, supra.* In its findings of February 1, 2019, the Court found that the remaining issues were whether Sparks Road, now that the court determined that it was lawfully opened was extinguished or vacated. Once opened, only Jefferson County can vacate it. Jefferson County reincorporates its argument and law previously cited.

CONCLUSION

The Court has made the finding that Sparks Road was lawfully opened, consistent with *Rendler. Rendler* and the other law cited, demonstrate that RS 2477 roads may be opened and established by either legislative action. No construction was or is necessary. Jefferson County requests the dismissal of the Plaintiff's Second Amended and Supplemental Complaint, and findings that Sparks Road was not extinguished or vacated under Hill's Code § 4101, that construction of Sparks Road was not required.

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Respectfully submitted,

DATED: October 21, 2019

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CERTIFICATE OF SERVICE

I, Tim Elliott certify that on October 21, 2019, I served a true copy of the foregoing **DEFENDANT JEFFERSON COUNTY'S REPLY TO PLAINTIFF'S REBUTTAL CLOSING ARGUMENT** on the parties and the court by:

☒ Via Email to their last known email address below;

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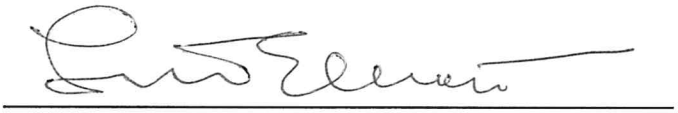

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