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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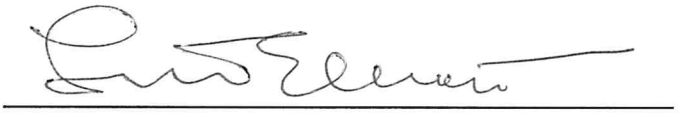

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