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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

August 17, 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 **AMENDED 08/17/2020**

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.

Plaintiff requested that the Court make alternate and additional findings under ORCP 62B and filed an ORCP 62B Request on June 26, 2020 along with a Motion seeking additional time to make that filing. No proposed Order was filed with the Motion for Extension of Time. An Amended Request on June 29, 2020 with no ruling on the Motion seeking additional time. A Motion extending Plaintiff's time to file was granted on July 22, 2020 and Defendants were permitted to file objections or their own Rule 62B Requests on or before August 3, 2020. Defendant Jefferson County filed an Objection to Plaintiff's Rule 62B Request on August 3, 2020. Defendant DeMonte filed a Response to Plaintiff's ORCP 62B Request on August 3, 2020. The Court having reviewed those filings incorporates different and/or additional special findings contained herein. Those not addressed by the Court shall conclusively be deemed denied. ORCP 62B.

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 Court¹ and was therefore a public county road, the same issue carried over to trial. The Court does not rely upon its findings made for the Motion for Summary Judgment, rather this Court considered all evidence presented at trial to make its ultimate findings and ruling in this case.

The Court makes the following finding of fact that a Petition and Road Notice for EH Sparks Road was recorded on July 1, 1896² and further designated in the Jefferson County Road Register as EH Sparks Road by Order of the Crook County Court on November 7, 1896.³

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

¹ Plaintiff's Ex. 6, Defendant's Ex. 101 and Defendant's Ex. 107

² Plaintiff's Ex. 6, Defendant's Ex. 101

³ Defendant's Ex. 107 & 106

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. Plaintiff relies upon Hislop for the argument that EH Sparks road was never opened in 1896 and was therefore extinguished as a matter of law in 1900 because there is no evidence that the Road was ever constructed or used in the four-year period between 1896 and 1900.

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, 1896.⁴ 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 Crook County Court (the Locus in quo then being Crook County) established E.H. Sparks Road on November 7, 1896.⁵ EH Sparks Road had been petitioned for on July 1, 1896, and Notice provided on that day in the Court Record.⁶ On September 9, 1896, a \$200.00 bond was filed with the Crook County Court for the location and establishment of the county road.⁷ 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.⁸ A surveyor's report is included in the record with a description of the EH Sparks Road.⁹ 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

⁴ Plaintiff's Ex. 6, Defendant's Ex. 101

⁵ Plaintiff's Ex. 6, Defendant's Ex. 101

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id

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.¹⁰

Hislop is distinguished from this case in that there was no official act of the governing body opening a road as a matter of law instead the issue was solely whether the road was constructed within the four year period as set forth by Section 4101, Hills 2nd ed (1892). The Court rejects Plaintiff's argument that the Court consider whether EH Sparks road was constructed in the four-year period between 1896 and 1900. Unlike Hislop, in this case we have the Crook County Court opening EH Sparks road. Accordingly, Hislop would only apply in those cases of roads not opened under Section 4065, Hill's Annotated Laws of Oregon 1894. 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.¹¹ The trial evidence doesn't change this Court's finding that EH Sparks Road was lawfully opened in November 1896. Therefore, the Court finds that based on the facts in this case that Hislop is not the controlling case as proffered by Plaintiff and any evidence of construction and use is unnecessary. Further, Section 4101, Hill's 2nd ed. (1892) is inapplicable to the facts in this case. Nothing further was required to establish and open the road beyond the actions of the Crook County Court.

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 1970.¹² 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.¹³ 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.¹⁴ 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.¹⁵ Evidence at trial established that EH Sparks Road was laid out and various markers were located at the same locations shown in the Jefferson County Road Register.¹⁶ Plaintiff's witness Christopher Brown, found and took pictures of the markers which were created to locate the road and he traced on the ground by following the survey path and locating the markers.¹⁷ Even the affidavit of Maurine Corbett-Heising references the existence of "a road".¹⁸

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

¹⁰ Id.

¹¹ Opinion Letter 16CV26227 dated February 1, 2019

¹² Plaintiff's Ex. 12, 9, 32 & 35

¹³ Plaintiff's Ex. 23

¹⁴ Defendant's Ex. 102, 103, 104 & 105

¹⁵ Id.

¹⁶ Defendant's Ex. 101, Plaintiff's Ex. 7

¹⁷ Plaintiff's Ex. 7

¹⁸ Plaintiff's Ex. 6, see pages 8-10

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.

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. 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, Plaintiffs argue that 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.¹⁹ Plaintiff further sets forth that the 1942 Heising Homestead Deed/Land²⁰ 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.²¹ 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 USC 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).

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

¹⁹ Plaintiff's Ex. 1

²⁰ Both parties use the terms Heising Land Patent and Heising Homestead Deed interchangeably. The Court will use the reference Heising Deed hereafter.

²¹ Plaintiff's Ex. 2

basis. Plaintiff reiterates their argument that EH Sparks Road was never “constructed” over unreserved federal land as required to qualify as an RS 2477 Road. Further, Plaintiff sets forth 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 disagrees with Plaintiff and agrees with the authority cited by Defendants in Wallowa v. Wade, 433 Or 253 (1903). The Court in Wallowa 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 County²² and in the Index to Road Records.²³ EH Sparks Road was lawfully established pre 1942 Heising patent by Order of Crook Court on November 7, 1896.²⁴ 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, marked²⁵ and viewed prior to the Crook Court Order.²⁶ The map evidence in this case is inconsistent yet in 1936, 1966, 1977, 1983 there are maps²⁷ which reflect a road in the vicinity of EH Sparks Road that cannot be overlooked but again this Court is not making a 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.²⁸ The Deed is burdened by a pre-existing public road, EH Sparks Road. The Heising Deed is not unassailable with respect to the Road under or on account of 43 U.S.C.A. 2506 for the reason the Heising Deed was taken subject to the Road. Because no defendant sought to annul or otherwise modify the Heising Deed to impose the Road, and because the Heising Deed was taken subject to it, the Court makes no finding or declaration as to Defendants’ standing to annul or modify the Heising Deed.

This Court finds that EH Sparks Road was lawfully opened in 1896 by order of the Crook County Circuit Court²⁹ and not vacated by operation of law or extinguished by deed. 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.

²² Defendant’s Ex. 107

²³ Defendant’s Ex. 106

²⁴ Plaintiff’s Ex. 6, Defendant’s Ex. 101

²⁵ Plaintiff’s Ex 7, Plaintiff’s Ex. 9, Defendant’s Ex. 101

²⁶ Plaintiff’s Ex. 6, Defendant’s Ex. 101

²⁷ Plaintiff’s Ex. 13, 21, 22, 23, Defendant’s Ex. 102, 103, 104, 105

²⁸ Plaintiff’s Ex. 2

²⁹ Opinion Letter 16CV26227 dated February 1, 2019

Therefore, given this is a declaratory judgment action seeking declaratory relief, the Court makes the following declarations:

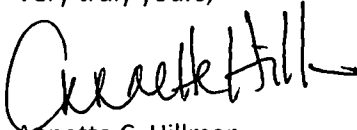
Plaintiff's First Claim for Relief for declaratory judgment against all Defendants that no public road exists within TRRA is denied, the Court, for the reasons set forth in the Opinion Letter and the special findings made herein, declares as follows:

- a. That EH Sparks Road (the "Road") is an existing public road that was not vacated by operation of law on November 7, 1900 pursuant to Section 4101, Hill's Code 2d ed. (1894).
- b. That the 1942 Heising Land Patent ("Heising Deed") is not an unassailable deed absolute that did not reserve the Road, but was taken subject to and burdened by preexisting lawfully opened public roads, including the Road; the Heising Deed did not extinguish or vacate the Road and this fact is not altered because the Heising Deed failed to reference the Road.
- c. That the Heising Deed is not unassailable with respect to the Road under or on account of 43 U.S.C.A. 2506 for the reason the Heising Deed was taken subject to the Road.
- d. Because no defendant sought to annul or otherwise modify the Heising Deed to impose the Road, and because the Heising Deed was taken subject to it, the Court makes no finding or declaration as to Defendants' standing to annul or modify the Heising Deed. Such a finding is precluded by, or unnecessary to, the Court's decision by reason of the Court's other rulings. Similarly, because the Court found that use or construction is not required to open the Road, the Court makes no finding or declaration with respect to Plaintiff's requested declaration in the alternative to the effect that if a single-track trail of some nature was used by the public prior to 1936 the burden on Plaintiff's land is consistent with the scope of that use. The Court has found the Road was lawfully opened in 1896 by order of the Crook County Court and such declaration shall issue.

Plaintiff's Fourth Claim for Relief to quiet title is denied, Plaintiff having confirmed that it only seeks such relief in the event it prevails on their First Claim for Relief.

Defendants are entitled to seek costs and disbursements as requested. The Court will retain limited jurisdiction for that purpose. Mr. Hathaway is to prepare the Declaratory Judgment consistent with the Court's ruling.

Very truly yours,



Annette C. Hillman
Circuit Court Judge

ACH/lb

STATE OF OREGON)
) ss.
County of Jefferson)

I, Linda Branson, Judicial Assistant to Annette C. Hillman, Judge of the Circuit Court, 22nd Judicial District, State of Oregon, hereby certify that I mailed copies of the foregoing opinion letter to the parties names 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 Sates mail at Madras, Oregon, on August 17, 2020; said parties being:

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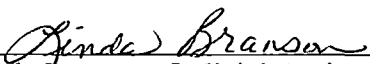
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Copies of the opinion letter were also sent to the email addresses below on August 17, 2020:

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DATED at Madras, Oregon, this 17th day of August 2020.



Linda Branson, Judicial Assistant