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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