

JUN 09 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SWALLEY IRRIGATION DISTRICT,

Plaintiff - Appellee,

v.

GARY ALVIS; GALEN BLYTH;
MEGHAN BLYTH; GARY
DEJARNATT; ROXANNE
DEJARNATT; DAVID M. HANCOCK;
JOHN P. ROBBINS; B. NEIL ROSS;
CHRISTINE A. ROSS; MATTHEW J.
SUMMERS,

Defendants - Appellants,

and

STEWART C. BENNETT; JOHN S.
BRASSFIELD; BRIAN CHRISTEN;
PATRICIA L. CHRISTEN; DAVID A.
DELANEY; SHEILA D. DELANEY;
ANTHONY M. PERRY; CARL J. RAPP;
SHELLY R. RAPP; GARRETT M. RICE;
LARRY W. SCARTH; NICHOLAS W.
SHIMP; GUY VERNON,

Defendants.

No. 08-35263

D.C. No. 6:04-CV-01721-AA

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Submitted June 3, 2009**
Portland, Oregon

Before: GOODWIN, O'SCANNLAIN, and FISHER, Circuit Judges.

Several landowners appeal from the district court's grant of summary judgment to Swalley Irrigation District. The facts are known to the parties and need not be repeated here, except as necessary to explain our decision.¹

The court is satisfied that with respect to both the land subject to the Act of March 3, 1891, 43 U.S.C. § 946, and the so-called "Section Sixteen" land, Swalley's right of way is not limited to the construction of open canals or ditches. *See* 43 U.S.C. § 951; *Jones v. Edwards*, 347 P.2d 846, 848 (Or. 1959); *Kell v. Oppenlander*, 961 P.2d 861, 864 (Or. Ct. App. 1998) (quoting *Bernards v. Link*, 248 P.2d 341, 349 (Or. 1952)); Restatement (Third) of Prop.: Servitudes § 4.10

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

¹ Though the pipeline may be installed by the time this case is submitted, Swalley's request for declaratory judgment is not moot. There is still an "occasion for meaningful relief" insofar as affirmance of the district court's judgment shields Swalley from any future claims for relief. *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005) (en banc) (internal quotation marks and citation omitted).

(2000). Accordingly, the conversion of the existing canal into a pressurized pipeline is permissible so long as it does not increase the burden on the landowners' property.

Here, the landowners have not presented evidence establishing that their property will be devalued by the proposed conversion. *See FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997). The pipeline will not extend beyond Swalley's existing right of way. Removal of any aesthetic benefits provided by the open canal merely eliminates an incidental benefit provided by Swalley's use of the easement; such action does not place an additional burden on the landowners' property.

Accordingly, the judgment of the district court is

AFFIRMED.