FILED
United States Court of Appeals
Tenth Circuit

July 19, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

C. MARK CUPPS; MARK B. KOENIG; CHERYL L. KOENIG; DALE M. CARLSON; PEGGY CARLSON; JOHN E. MCINROY; ANN W. PECK; PHILLIP KOSKI; ANDREA KOSKI; ESTHER SANDOVAL; KAY YUEN HING REVOCABLE TRUST, dated January 8, 2010; FLOYD A. BARBOUR; BARBARA J. BARBOUR; WILLIAM G. CUTLER; BRUCE R. SMITH; DEBRA J. SMITH; JOSEPH RUPINKSKI, JR.; LARRY WEYHRICH; KATHY WEYHRICH; LARAMIE BOAT CLUB, INC., a Wyoming corporation,

Plaintiffs - Appellants,

v.

PIONEER CANAL-LAKE HATTIE IRRIGATION DISTRICT,

Defendant - Appellee.

No. 21-8088
(D.C. No. 2:16-CV-00086-SWS)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **EBEL**, and **EID**, Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

This case requires us to decide whether the district court correctly adhered to our prior Order and Judgment in determining the scope of a federal right-of-way for a reservoir. We previously held the Reservoir's boundaries may only be determined by reference to the original 1909 map depicting the right-of-way as approved by the Secretary of the Interior. Because the district court considered additional factors—factors we earlier deemed irrelevant—we reverse and remand for findings consistent with this Order and Judgment. We have jurisdiction under 28 U.S.C. § 1291.

I.

This is the second time we have considered the scope of the Pioneer Canal-Lake Hattie Irrigation District's (the "Irrigation District") federal right-of-way for the Lake Hattie Reservoir (the "Reservoir"). We discussed the facts in detail in our December 13, 2019, Order and Judgment and presume the parties are familiar with them. *See Cupps v. Pioneer Canal-Lake Hattie Irrigation Dist.*, 799 F. App'x 571, 573–78 (10th Cir. 2019) (unpublished). Here, we briefly summarize those facts necessary to explain our decision.

The Irrigation District's predecessor-in-interest obtained a right-of-way for the Reservoir under the Act of March 3, 1891, 26 Stat. 1095, 1101–02 (1891) (codified as amended at 43 U.S.C. § 946) (the "Act"). The Act provided for canal and ditch companies to obtain rights-of-way through specified public lands

> to the extent of the ground occupied by the water of [the] reservoir and of [the] canal and its laterals, and fifty feet on each side of the marginal limits thereof . . .. Provided, [t]hat no such right of way shall be so located as to interfere with the proper occupation by the Government of any such

> reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

26 Stat. 1101–02 (1891).

In order to earn its right-of-way, the Irrigation District's predecessor-in-interest filed an application with the Secretary of the Interior in 1909. The application included a map of the proposed Reservoir, surveyed by chief engineer W.H. Rosecrans ("Rosecrans' map"), which depicted the proposed boundary line of the Reservoir ("Rosecrans' line"). The Secretary of the Interior approved the application, and the Reservoir was constructed accordingly.

Nearly twenty years later, Congress passed the Small Tract Act of June 1, 1938, which authorized the Secretary of the Interior to sell or lease certain public lands to private parties. *See* An Act to Provide for the Purchase of Public Lands for Home and Other Sites, 52 Stat. 609 (1938). Some of the available land bordered the south side of the Reservoir. In 1949, the Bureau of Land Management ("BLM"), the agency charged with establishing and patenting the new lots, undertook two surveys. First, the BLM resurveyed Rosecrans' line and determined the high-water line of the Reservoir. Second, the BLM surveyed the site for the new Small Tract lots, ensuring they were set back at least forty feet from the Reservoir's high-water line.

Before beginning the retracement of Rosecrans' line, the BLM surveyors noted that "the only relevant map . . . fixing the definite limit of the right-of-way for the

reservoir . . . seems . . . of doubtful value [because] numerous courses and distances describing the transverse are entirely omitted" and that Rosecrans' field notes were not in the file. Aplt. App'x Vol. I at 200, 203, 205. Nevertheless, the BLM surveyors found "the retracement of the right-of-way reveal[ed] some evidence of the original marking of the line." *Id.* at 219. For example, the BLM located twelve wooden stakes in varying conditions, some of which seemed to coincide with Rosecrans' corners and some of which did not. Rosecrans had not made any notes about wooden stakes. The BLM surveyors also discovered errors in Rosecrans' survey, which they described as "negligible." *Id.* To account for these errors, they applied "a correction of two minutes to the right . . . to the record courses of the right-of-way, between identified angle points." *Id.* at 223, 226. The BLM then surveyed the Small Tract lots and patented them to the current owners' (the "Landowners") predecessors-in-interest.[1]

By 2015, water from the Reservoir had flooded the Landowners' properties and caused significant damage. Some of the Landowners sued the Irrigation District, alleging it had exceeded the scope of its right-of-way as defined by Rosecrans' line on the 1909 map and was unlawfully storing water on their land. They requested damages and an injunction to prevent the Irrigation District from flooding their properties. The Irrigation District argued it had not unlawfully stored water on the Landowners' properties because the purpose of the Act had been to store a certain

[1] The BLM performed a second resurvey in 1996, which did not significantly differ from the first.

capacity of water, the scope of the right-of-way was defined by the extent of the land occupied by that water, and the Landowners' properties were subject to the Irrigation District's right-of-way. Following a bench trial, the district court found for the Irrigation District and concluded the "right-of-way easement, as intended to be depicted on Rosecrans' 1909 map, extends to a water elevation of 7,277 feet, plus fifty feet horizontally." *Cupps v. Pioneer Canal-Lake Hattie Irrigation Dist.* (*Cupps I*), 2:16-CV-0086-SWS, 2018 WL 11233256, at *8 (D. Wyo. Mar. 20, 2018), *rev'd and remanded*, 799 F. App'x 571 (10th Cir. 2019) (unpublished). It further found the Irrigation District "has not exceeded that elevation in its administration of Lake Hattie Reservoir since at least 2014, and thus has not unlawfully possessed or stored water on Plaintiffs' properties." *Id.* It then dismissed the Landowners' claims.

The Landowners appealed and we reversed. We held the scope of the Irrigation District's right-of-way is defined solely by Rosecrans' "approved map depicting a specific geographic area," and "other factors that arguably could be advanced as bearing on the scope of its rights—whether elevation or the practical infeasibility of using the right-of-way actually depicted on the map—are irrelevant." *Cupps*, 799 F. App'x at 582. We further held the Secretary of the Interior had "approved [] a line fixed to the original topography because the map does not in any way indicate that the line is transitory, and the factor that allegedly determines the line's varying location (i.e., water elevation) is not expressed on the map . . .." *Id.* at 581. Rosecrans' reference to "level lines" on the map "hardly justifi[ed] . . . the conclusion that the line depicted on the map varies with topographical features *after*

approval in order to maintain a constant elevation." *Id.* (emphasis in original). Thus, the on-the-ground location of the right-of-way boundary is the same today as it was in 1909 when the Secretary of the Interior approved Rosecrans' map.[2]

After we remanded, the Irrigation District, through its surveyor David Coffey, conducted the first complete retracement of the entire Reservoir since Rosecrans' original survey. In so doing, Coffey discovered Rosecrans' survey contained errors in both the angles and distances of the survey calls resulting in a "significant" misclosure.[3]

At the second bench trial, Coffey and Jeffrey Jones, the Landowners' expert witness, provided conflicting testimony as to the present-day location of Rosecrans' line and the reliability of his map. Jones testified Rosecrans' line "was and has been located on the ground" using modern survey methods. Aplt. App'x Vol. II at 66. Coffey testified that "Rosecrans line as it's published can[not] reliably be relocated on the ground." *Id.* at 187. Thus, it was necessary to determine what Rosecrans had

[2] The Irrigation District requested a rehearing *en banc* under Federal Rule of Appellate Procedure 35(a). While a majority of our court voted to deny the motion, several judges would have granted it and joined Judge Carson's dissent from the denial. *See Cupps v. Pioneer Canal-Lake Hattie Irrigation Dist.*, 955 F.3d 850, 851 (10th Cir. 2020) (Carson, J., dissenting from the denial of *en banc* rehearing). Nevertheless, because we did not revisit the case *en banc*, we are bound by the holding of our prior order and judgment. *See United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000) ("We are bound by the precedent of prior panels absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court." (quoting *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (per curium))).

[3] Coffey explained a misclosure is "a distance by which a described polygon fails to close upon itself." Aplt. App'x Vol. II at 183.

intended, which, according to Coffey, was "to use the spillway elevation of the reservoir to define the high-water line" which, in turn, defined the boundary line.[4] *Id.* at 225, 238.

Jones and Coffey also provided conflicting testimony about the accuracy and reliability of the 1949 BLM resurvey. Jones testified he believed the BLM surveyors "made every effort to retrace Mr. Rosecrans' survey as precisely as possible" and the BLM resurvey was the "most accurate retracement of the boundary line for the Lake Hattie Reservoir." Aplt. App'x Vol. I at 154, 157. Coffey disagreed. He said the BLM had "perpetuated" Rosecrans' misclosure error by not applying modern correction methods and had mistakenly not accounted for the actual high-water line of the reservoir. Aplt. App'x Vol. II at 228–30. Further, Coffey testified the BLM had simply assumed the found wooden stakes "were original monuments by Rosecrans," *id.* at 226–27, and used them to draw its line despite Rosecrans' making no mention of wooden stakes, which "would have been customary," *id.* at 192.

Coffey then produced four Sheets, or maps, depicting possible on-the-ground locations of Rosecrans' line today. Sheet One was Coffey's attempt to retrace Rosecrans' line without any adjustment to account for the misclosure error. Coffey testified that, because of the error, Sheet One was not an "accurate depiction of the

[4] A "spillway" is "[a] channel or slope built to carry away surplus water from a reservoir." *Spillway*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/186649 (last visited Nov. 22, 2022). The district court refers to "spillway" and "high-water elevation" synonymously. *See Cupps v. Pioneer Canal-Lake Hattie Irrigation Dist.* (*Cupps II*), No. 2:16-CV-0086-SWS, 2021 WL 5779398, at *2 n.6 (D. Wyo. Nov. 17, 2021).

Rosecrans[’] line on the ground today” and could not “be used to locate Rosecrans line on the ground today with any reasonable reliability.” *Id.* at 211–12. On Sheet Two, Coffey attempted to account for Rosecrans’ errors using the compass rule adjustment method.[5] He testified Sheet Two was an “unreliable” depiction of Rosecrans’ line because he had “to make a tremendous amount of assumptions and adjustments” to create it and, if asked to do it again, he could “start completely over and probably get a different solution.” *Id.* at 216. Coffey said the line depicted on Sheet Two was also not reliable because it did not depict a level line. *Id.* at 219. Jones, on the other hand, said Coffey’s compass rule adjustment “confirm[ed] the general location of the BLM survey very well.” *Id.* at 66. In some places the line on Sheet Two was identical to the BLM resurvey, though in “some places there were slight deviations.” *Id.*

The line depicted on Coffey’s Third and Fourth[6] Sheets reached “*the exact same conclusion*” as the elevation-based line we earlier said was erroneous, although it reached that conclusion by a slightly different method. *Id.* at 238 (emphasis added). Coffey testified he did not base the line on Sheets Three and Four on elevation, *id.* at 237, but on “the level spillway . . . around the lake,” *id.* at 220. He did not base this line “on [Rosecrans’] recorded field notes,” *id.* at 239, and

[5] Jones explained the compass rule adjustment method is a “mathematical model that uses the ratio of a length of a line versus the length of the entire line and apply [*sic*] corrections or changes” to a measured survey. Aplt. App’x Vol. II at 64–65.

[6] Sheet Four is a close-up of part of Sheet Three.

Rosecrans' map did not "reference height of the spillway," *id.* at 119. Regardless, Coffey testified this line best adhered to Rosecrans' intent, which was to draw a level line at the true water line. *Id.* at 222. The line on Sheets Three and Four overlapped with the Landowners' properties in several places.

After hearing the testimony, the district court concluded the errors in Rosecrans' survey made it "an unreliable source for determining the boundary of [the Irrigation District's] right-of-way easement for the Lake Hattie Reservoir." *Cupps v. Pioneer Canal-Lake Hattie Irrigation Dist.* (*Cupps II*), 2:16-CV-0086-SWS, 2021 WL 5779398, at *12 (D. Wyo. Nov. 17, 2021) (unpublished). Because the survey was inaccurate, the district court found it was required to establish the true boundary location by reference to Rosecrans' intent: to draw a level line. It determined Sheets Three and Four best depicted Rosecrans' intent to set out level lines and held the boundary of the Reservoir should be defined by the spillway level of the dam. Because the court further found the Irrigation District had not exceeded the boundary as defined by the line on Sheets Three and Four, and because the Landowners' properties were subject to the right-of-way, the Irrigation District had "not unlawfully possessed or stored water on Plaintiffs' properties." *Id.*, at *14. Finally, it found the Irrigation District was entitled to "the right-of-way easement line itself and the fifty feet from the limits thereof" for access and maintenance purposes. *Id.*, at *13. It then quieted title in favor of the Irrigation District and dismissed the Landowners' claims.

The Landowners now appeal again. They raise four arguments: (1) the district court erred by disregarding Rosecrans' survey because of the misclosure; (2) the district court erred by setting the boundary of the right-of-way at the spillway line; (3) the district court erred by disregarding the BLM resurveys; and (4) the district court erred by finding the Irrigation District's right-of-way included an additional fifty feet from the marginal limits of the water.

II.

This appeal involves both questions of law and fact. "We review the district court's legal conclusions in a bench trial de novo." *Ryan v. Am. Nat. Energy Corp.*, 557 F.3d 1152, 1157 (10th Cir. 2009). "The actual location of a disputed boundary line is a question of fact." *Sweeten v. U.S. Dept. of Agric. Forest Serv.*, 684 F.2d 679, 681 (10th Cir. 1982). "We review factual findings for clear error." *Ryan*, 557 F.3d at 1157. Under this standard, we "pay deference to the district court's findings based upon its observation of the testimony as well as the documentary evidence." *Id.* We will not overturn a finding of fact unless it is not supported by the record or we are "left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). "Of course, if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 n.15 (1982).

a.

We have already addressed which factors the district court may consider in determining the scope of the Irrigation District's right-of-way. Our previous Order and Judgment held the scope of the right-of-way must be determined by reference to the original surveyed line on the approved map. *See Cupps*, 799 F. App'x at 582–83, 585. We held this line is fixed and does not vary with "topographical features *after approval* in order to maintain a constant elevation." *Id.* (emphasis in original). We rejected the Irrigation District's arguments that its right-of-way is defined by either the spillway elevation, the high-water line, the extent of the ground covered by the Reservoir's water, or by Rosecrans' expressed intent to run a level line. *Id.* In fact, we said, these "factors . . . are *irrelevant*." *Id.* (emphasis added).

Under the law of the case doctrine, once we establish a rule of law and remand the case to the district court, that rule of law "should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 619 (1983); *see also Fish v. Schwab*, 957 F.3d 1105, 1139 (10th Cir. 2020), *cert. denied*, 208 L. Ed. 2d 499 (Dec. 14, 2020). The established rule should be followed by "both the trial court on remand and the appellate court in any subsequent appeal." *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1183 (10th Cir. 1995) (alteration omitted). The law of the case doctrine plays a very important role: to "promote finality and prevent re-litigation of previously decided issues." *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1251 (10th Cir. 2011). "Law-of-the-case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Fish*, 957 F.3d at 1139. Without this

doctrine, "an adverse judicial decision would become little more than an invitation to take a mulligan, encouraging lawyers and litigants alike to believe that if at first you don't succeed, just try again." *Entek GRB, LLC v. Stull Ranches, LLC*, 840 F.3d 1239, 1240 (10th Cir. 2016).

Here, the district court did not follow the rule we established in our prior Order and Judgment. Instead, it concluded the errors in Rosecrans' map made it "an unreliable source for determining the boundary" and, because of this, it was required to find and follow the intent of the parties. *Cupps II*, 2021 WL 5779398, at *12. It found Rosecrans intended to depict a level line and, "the near-identical location of the adjusted Rosecrans' line and the physical location of the spillway today is a strong indicator that Rosecrans intended to lay out the level line of the reservoir in accordance with the location of the spillway." *Id.* at *13. It then fixed the Irrigation District's right-of-way boundary at the spillway. And while the district court studiously avoided tying the boundary line to elevation, it drew the line at the same place as it had after the first trial.

The factors the district court relied on and the conclusion it reached are in direct conflict with our 2019 Order and Judgment. Therefore, we reverse its decision that the scope of the Irrigation District's right-of-way is located as depicted in Coffey's Sheets Three and Four.[7]

[7] The Irrigation District briefly argues this situation presents one of the "three exceptionally narrow circumstances in which the law of the case [doctrine] does not apply," Aple. Br. at 28 (quoting *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1281 (10th Cir. 2010)), because "the [2019 Order and Judgment] was

b.

The Landowners next ask us to decide the line depicted on Coffey's Sheet Two is the definite on-the-ground location of Rosecrans' line and therefore the definite scope of the Irrigation District's right-of-way. The district court rejected Sheet Two because it did not depict a level line and "would not allow [the Irrigation District] to store any of its . . . water rights in the Lake Hattie Reservoir." *Cupps II*, 2021 WL 5779398, at *9. As discussed above, we have said both of these factors are irrelevant. However, as we also held in 2019, the Irrigation District's right-of-way boundary must conform to Rosecrans' line as it originally existed on the ground and must be repeatable. The evidence before us conflicts on these two points and does not provide us with any degree of certainty as to whether the line drawn on Sheet Two conforms to Rosecrans' line. We therefore decline to hold Coffey's Sheet Two is the definite location of the Irrigation District's right-of-way boundary line, and we remand to the district court for further factual findings. We will, however, address some of the arguments the parties made to guide the district court in its determination.

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clearly erroneous and would work manifest injustice," *id.* It argues we were wrong to ignore the feasibility of storing water, and our decision "would interfere with or prevent storage of state-regulated water," working manifest injustice. *Id.* at 29. However, we considered and rejected this same argument in our 2019 Order and Judgment and will not reconsider it now. *See Fish*, 957 F.3d at 1141 ("[W]here the earlier ruling . . . was established in a definitive, fully considered legal decision based on a fully developed factual record and a decision-making process that included full briefing and argument, . . . why should we not follow the usual law-of-the-case jurisprudence?" (citations omitted)).

First, the Irrigation District argues, and the district court found, the misclosure Coffey discovered following our 2019 remand "make[s] the line depicted on Rosecrans' 1909 map, in itself, an unreliable source for determining the boundary of [the Irrigation District's] right-of-way easement for Lake Hattie Reservoir." Aple. Br. at 33. Thus, according to the Irrigation District, the court is free to look beyond the approved map and give effect to the intent of the original parties. The Irrigation District does not cite, and we have not found, any case where we disregarded an approved survey simply because it contained a misclosure. On the contrary, we have held it is irrelevant whether an approved survey contained errors. *See United States v. Reimann*, 504 F.2d 135, 139 (10th Cir. 1974) (the location of the boundary as determined by the original survey "takes precedence, even if erroneous (or 'largely fictitious' and 'fatally defective' as found by the Trial Court)"); *United States v. Doyle*, 468 F.2d 633, 636 (10th Cir. 1972) ("The original survey as it was actually run on the ground controls. It does not matter that the boundary was incorrect as originally established." (internal citations omitted)). Neither a court nor a surveyor may correct an error in an original survey once the survey has been approved. 1 Clark on Surveying and Boundaries § 15.12 (6th ed. 1992). Therefore, we reject the argument that the 1909 map should be disregarded because it contains a misclosure.

Second, the Landowners argue the district court must defer to the BLM and fix the line at the location established by the 1949 and 1996 dependent resurveys. We disagree. A resurvey does not determine boundaries, but merely "note[s] and

report[s] [the surveyed land's] character, as it appeared to [the second surveyor], as a means of enlarging the sources of information upon that subject otherwise available." *Gauthier v. Morrison*, 232 U.S. 452, 458 (1914). Therefore, "[t]he generally accepted rule is that a subsequent resurvey is evidence, although not conclusive evidence, of the location of the original line." *Doyle*, 468 F.2d at 636; *see also United States v. Hudspeth*, 384 F.2d 683, 687–88 (9th Cir. 1967). A resurvey very well may be the "best possible evidence" of an original line. 1 Clark on Surveying and Boundaries § 28.02 (8th ed. 2022). But "[w]here the lines of an original government survey lie on the ground and whether any particular tract is on one side or the other of that line are questions of fact which are always open to inquiry in the courts." *Id.*; *see also* 30 Rocky Mt. Min. L. Inst. 20-1 (1984) ("The courts . . . have refused to exalt resurveys to any controlling evidentiary role. Rather, the courts view the resurveys as mere evidence, on a par with all other evidence, on disputed boundary questions."). Therefore, the BLM resurveys are simply evidence of where Rosecrans' line is located, and questions of their accuracy and reliability are questions of fact best left to the district court.

Third, the district court found the Irrigation District is entitled to an additional fifty feet, beyond the marginal limits of the line shown on the approved map, for access and maintenance purposes. We agree. The Act states

> The right of way through the public lands . . . is granted . . . to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof, and, upon presentation of satisfactory showing by the applicant,

> such additional rights of way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs . . ..

43 U.S.C. § 946; *see also* 26 Stat. 1101 (1891) (". . . the right of way . . . is hereby granted . . . to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof . . ."). The plain language of this section automatically grants a right-of-way to the extent the ground is covered by water *and* an additional fifty feet from the marginal limits thereof for access and maintenance purposes. The Act does not require the applicant to show a need for the additional fifty feet; that requirement applies when the applicant seeks additional rights. The line on Rosecrans' map determines the ground to be covered by water. That the approved map does not contain a request for an additional fifty feet beyond this line does not affect the Irrigation District's rights to the additional fifty feet. Such rights were granted automatically with the approval of the map.

Finally, the district court held that the Landowners' properties are subject to the Irrigation District's right-of-way. *Cupps II*, 2021 WL 5779398, at *31. The Landowners do not contest this conclusion. Accordingly, we deem the issue waived and affirm this decision of the district court on this point. *See Havens v. Colorado Dep't of Corrs.*, 897 F.3d 1250, 1266 n.9 (10th Cir. 2018).

III.

In sum, the scope of the Irrigation District's right-of-way is to be determined only by the 1909 line drawn by Rosecrans and approved by the Secretary of the

Interior. Other factors, including the intent of the parties to depict level lines, the elevation of the water, and the practical feasibility of recreating Rosecrans' line are irrelevant and not to be considered. The district court may take into account the BLM's resurveys but need not afford them any special weight. The Irrigation District is entitled to an additional fifty feet from the marginal limits of the scope of the right-of-way for maintenance and access. Finally, the Landowners' properties are subject to the right-of-way to whatever extent it overlaps with their properties.

In light of the above, we REVERSE and REMAND for additional proceedings consistent with this order and judgment.

Entered for the Court

Allison H. Eid
Circuit Judge