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COMMENT

THE DANGER OF PRESUMPTION: A LOOK AT THE RIGHT TO EXCLUDE IN *L.K.L. ASSOCS. V. UNION PACIFIC R.R. CO.*

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I. INTRODUCTION

It is common knowledge that the law evolves with the circumstances of society. It is a domino effect: one historical event happens, and the government must respond to it, and with its response, many more changes happen. At the beginning of railroad operations, the number of running trains with moderate speed was small.[1] Hardly twenty-three miles of

* Juris Doctor Candidate, Oklahoma City University School of Law, May 2024. The smile on my sons' faces means everything to me, and it is to them that I owe my achievements. Thank you, Ramiro, and Jaden, for your patience and for being my motivation and inspiration at every step of my life. I would also like to thank my parents, Ramiro, and Dalila, for being my most considerable support; Professor Nina Smith from the Oklahoma City Community College for her encouragement and support during the beginning of my higher education—her memory will be with me always; Dr. Kate Huber from the English department of the University of Central Oklahoma for her guidance and creative way of challenging my writing skills; and the Oklahoma City University School of Law for allowing me to live my dream of becoming an attorney.

1. Adams v. S. Ry. Co., 84 F. 596, 599 (5th Cir 1898).

railroad existed in the United States in 1830.[2] Thirty years later—a year before the Civil War began—the United States had 30,000 miles of railroad.[3] Nevertheless, this was not enough to support the demands of the war, and Congress passed the Pacific Railway Act of 1862 and "grant[ed] railroads [ten] sections of public domain lands on both sides of the railway."[4] In 1864, the Second Pacific Railway Act doubled the size of the grants.[5] But the 1875 General Railroad Right of Way Act changed the policy concerning railroad grants.[6]

"The Supreme Court initially [interpreted] the 1875 Act as granting railroads something [more significant] than an easement."[7] However, the Court reversed this decision in *Great Northern Railway Railroad Co. v. United States*,[8] establishing that the Act granted only easements.[9] Later in *Brandt Revocable Trust v. United States*,[10] the Court affirmed its decision. An easement is "a vital tool for the productive use[s] of land,"[11] and it is mostly created to allow the use of someone else's property.[12] Further, the Restatement (Third) of Property states that "easements and profits are not possessory interests in land"[13] and that the easement owner is expected to use the easement in ways that are reasonably necessary for the specified purposes.

Moreover, easements might be exclusive or non-exclusive. "Exclusive" refers to the right to exclude others. The degree of exclusivity is variable and involves "who may be excluded and the uses or area from which they may be excluded."[14] To determine exclusivity, the parties' intention is considered together with the circumstances in which the grant

2. American Experience, *Streamliners: America's Lost Trains*, PBS, http://www.pbs.org/wgbh/amex/streamliners/timeline/index.html (last visited June 28, 2022).

3. *Id.*

4. *Id.*

5. *Id.*

6. L.K.L., Assoc., Inc. v. Union Pac. R.R. Co., 17 F.4th 1287, 1307 (10th Cir. 2021) (Briscoe, J., concurring).

7. *Id.* at 1306.

8. Great N. Ry. Co. v. U.S, 315 U.S. 262, 276-77 (1942).

9. *L.K.L., Assoc., Inc.*, 17 F.4th at 1306.

10. Brandt Revocable Tr. v. U.S., 572 U.S. 93, 98 (2014).

11. JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 638 (5th ed. 2021).

12. *Id.*; *See also* RESTATEMENT (THIRD) OF PROP.: Servitudes § 1.2 (AM. L. INST. 2000) (The term "easement" as used in this Restatement describes an "affirmative" easement, the right to make use of the land of another).

13. RESTATEMENT (THIRD) OF PROP.: Servitudes § 1.2 (AM. L. INST. 2000).

14. *Id.*

is created.[15] *Brandt* adopted the Restatement's *nonpossessory* concept of an easement and concluded that, unlike possessory estates, easements might be abandoned by the easement owner, leaving the servient owner[16] with an easement-free property.[17] Nonetheless, neither *Great Northern* nor *Brandt* discussed the railroad's right to exclude. Recently, the Tenth Circuit in *L.K.L., Assoc., Inc. v. Union Pacific Railroad Co.* faced this issue and concluded that the railroad's rights-of-way are exclusive in character.[18] *L.K.L.* represents an opportunity to argue for the servient owner's rights.

This Comment explores the right of the easement owner to exclude the fee owner from encumbered land. First, it explains the 1875 Act's historical background, and then examines the reasoning behind the Tenth Circuit's opinion in *L.K.L.* The Comment then discusses the Tenth Circuit's contradictory application of *Brandt*. Then, it highlights the use of cases that interpreted the pre-1871 acts. Next, it explains the distinction between the rights of a fee estate and an easement, and why that distinction is so important to the easement owner's rights. The analysis explores why the court in *L.K.L.* made a faulty conclusion regarding the railroad's right to exclude. This Comment then ends with a succinct explanation of the concurring opinion over the right to exclude.

II. HISTORICAL BACKGROUND

United States legislators began granting rights to individual railroads in the early 19th century. Railroads became the most efficient means of transportation, and a productive investment.[19] Consequently, Congress passed several acts granting the railroads rights-of-way across public lands, plus the right to use earth, stone, and timber from the ground to facilitate the railroads' construction.[20] But the growing railroad system failed to meet the needs of the Civil War. Thus, Congress enacted the Pacific Railway Act of 1862, which gave "outside of the usual . . . grants

15. *Id.* § 4.1.

16. (The owner of the land burdened by the easement). SPRANKLING, *supra* note 11, at 639.

17. *Brandt*, 572 U.S. at 105.

18. *L.K.L., Assoc., Inc.*, 17 F.4th at 1296.

19. Danaya C. Wright, *The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History: Hash v. United States and the Threat to Rail-Trial Conversions*, 38 ENV'T L. 711, 717 (2008).

20. U.S. v. Union Pac. R.R. Co., 91 U.S. 72, 79 (1875).

to railroads."[21] The Act subsidized large land grants for rights-of-way to construct a transcontinental railroad across the United States.[22] The Act granted "the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, sidetracks, turntables, and, water stations."[23]

Throughout history, courts have discussed the nature of the rights-of-way given by the 1862 Act. Some courts have called it a "limited fee" with an implied condition of reverter.[24] In other words, a fee simple defeasible—an interest that ends when a stated event happens.[25] Other courts have concluded that the Act's scope "[was] something less than a fee simple," but not just an easement.[26]

Later, however, the legislature passed the 1875 General Railroad Right of Way Act. Its scope—according to judicial interpretation—was limited to an easement for *railroad purposes*.[27] In 1942, the Court in *Great Northern* faced the challenge of deciding whether railroads have the right to drill and remove subsurface minerals from their right-of-way.[28] The Court decided that under the 1875 Act, railroads' rights-of-way were only easements, and that railroads did not have the right to the underlying minerals. [29] In 1976, The Federal Land Policy and Management Act terminated the effect of the 1875 Act.[30] Almost forty years later, the Court in *Brandt* had to resolve the ownership issue after a right-of-way was abandoned. The Court based its decision heavily on *Great Northern* and basic common law principles. As a result, it established that the interests

21. *Id.*

22. *Milestone Documents: Pacific Railway Act (1862)* NATIONAL ARCHIVES (May 10, 2022), https://www.archives.gov/milestone-documents/pacific-railway-act (last visited June 25, 2022).

23. *Id.*

24. *See, e.g.*, N. Pac. Ry. Co. v. Townsend, 190 U.S. 267, 271 (1903) ("The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad . . . In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.").

25. Barahona v. Union Pac. R.R. Co., 881 F.3d 1122, 1131 (9th Cir. 2018).

26. *See, e.g.*, Energy Transp. Sys. v. Union Pac. R.R. Co., 435 F. Supp 313, 316 (1977) (first quoting Rice v. U.S, 348 F. Supp. 254, 256 (D. N.D. 1972) and then quoting Wyoming v. Udall, 379 F.2d 635, 640 (10th Cir. 1967)).

27. U.S. v. Union Pac. R.R. Co., 353 U.S. 112, 114 (1957).

28. *Great N. Ry. Co.*, 315 U.S. at 270.

29. *Id.* at 277-80.

30. *Brandt*, 572 U.S. at 93.

acquired under the 1875 Act are only easements and that an easement is a "nonpossessory right to enter and use land in possession of another and obligates the possessor not to *interfere* with the uses authorized by the easement."[31] Further, previous decisions had also established that there is nothing in the language of the 1875 Act that granted the railroads more than easements for railroad purposes. A reversionary concept was not included, nor was there an indication that the rights passed to the railroad constituted a fee simple.[32]

III. THE CASE

A. Facts

In the late-1800s, the Utah Southern Railroad built a track between Salt Lake County and Utah County. Under the Right of Way Act of 1875, the Department of the Interior recognized Utah Southern's right-of-way across the public lands of the United States.[33] Over a century later, Union Pacific succeeded Utah Southern's rights. In the meantime, the fee interest of some of the land upon which the right-of-way runs transferred from the United States to Utah and then to Heber, who leased the land to L.K.L.[34]

Moreover, Heber owned a building on the property that overlapped with the railroad's right-of-way. The parties kept the peace for a long time, but the situation started to take a different direction when Union Pacific informed L.K.L. that their property was located within the railroad's right-of-way and that they needed to sign a lease agreement to use it.[35] The railroad sent the sheriff to relay its message, and demanded immediate removal from their property unless a lease agreement was signed. Heber agreed to lease a portion of his property back from Union Pacific. But one year later, their lease was canceled because L.K.L. signed a direct lease with Union Pacific.

B. Procedural History

In 2015, after interpreting the decision in *Brandt* "to mean that the 1875 Act did not grant Union Pacific the rights to exclusive . . .

31. *Id.*, emphasis added.
32. Beres v. U.S., 64 Fed. Cl. 403, 416 (2005).
33. *L.K.L. Assoc. Inc.*, 17 F.4th at 1291.
34. *Id.* at 1292.
35. *Id.*

possession,"[36] Heber and L.K.L. filed suit against Union Pacific in a Utah state court. They asked to rescind the leases and recover the payments on the grounds of mutual and unilateral mistake.[37] "Heber brought claims for breach of contract, intentional interference with economic relations, unjust enrichment, quiet title, and declarations about whether the lease was a valid contract and the nature of the parties' property rights."[38] Union Pacific removed the case to federal court and filed counterclaims.

The parties' main disagreement was the scope of the easement. L.K.L. and Heber argued that the leases were invalid because Union Pacific could not transfer possessory rights. After all, the railroad's easement was nonpossessory. But Union Pacific argued that it had the right to exclude L.K.L. and Heber, and that it therefore had the right to lease their property back to them.[39] The counsel for L.K.L. and Heber told the court that it was pivotal to solve the easement's nature and that all the other claims would fall into place by solving that issue.[40]

Consequently, the counsel filed a new motion for summary judgment focusing only on the easement's scope, and requested judgment on the rescission claim.[41] The district court reasoned that the railroad received a nonpossessory easement and was thus entitled to exclusive use and possession only for railroad purposes. In addition, the court decided that L.K.L. and Heber were entitled to occupy and utilize the property if they did not interfere with the railroad's use of the property. Furthermore, the court stated that the leases did not serve railroad purposes because they were unnecessary to preserve the railroad right-of-way.[42] Additionally, it refused to apply the incidental use doctrine[43] to interpret the parameters of the railroad purpose requested by Union Pacific.[44] The district court

36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 1293.
41. *Id.*
42. *Id.*
43. *T*he "incidental use doctrine" allows a railroad to use its easement not only for railroad purposes but for other incidental activities that are inconsistent with railroad purposes. *Secs. & Inv. Corp. v. Horse Heaven Hgts.*, 130 P.3d 880, 886 (Wash. Ct. App. 2006). Incidental activities may include a "lease of a portion of its right-of-way where the use is incidental to or not inconsistent with the railroad's continued use of its right-of-way for railroad purposes." *Durango & Silverton Narrow Gauge R.R. Co. v. Wolf*, 411 P.3d 793, 796 (Colo. App. 2013).
44. *Id.*

rejected the rescission claim and all of the counterclaims. Finally, the district court amended its judgment and held that Heber and L.K.L. abandoned all other claims and "declined . . . to revive their abandoned claims."[45] On appeal, both parties contested the scope of the easement, their property rights, and the rejected claims.

C. The Court's Opinion

The Tenth Circuit divided the property rights issue into two sub-issues discussed in sections two and three. In section two, the court decided whether the Act of 1875 gave railroads the right to exclude. And in section three, the court discussed whether the railroad may lease the encumbered land.

1. The Right to Exclude the Fee Owner

The court agreed with *Brandt*'s interpretation of the 1875 Act and held that it is undisputed that the Act grants railroads only easements. Likewise, L.K.L. and Heber focused on *Brandt* to argue that "easements are nonpossessory property interest[s]"[46] therefore, Union Pacific had no right to exclude the fee owner. On the other hand, Union Pacific argued that railroad rights-of-way under the 1875 Act have always been exclusive.[47] On that note, the court looked at the language of the 1875 Act and concluded that, because it prohibited railroads from preventing other railroad companies from using their rails on narrow passages, legislators meant for it to be an "exception that prove[s] the rule of exclusion."[48] The court also highlighted that although the 1875 Act prohibited competitors from being excluded, it did not mention servient owners and their rights.[49]

Furthermore, the court cited early judicial decisions that interpreted railroad grants to be fee simple-like estates with the right to exclude and to possess.[50] Thus, the court concluded that exclusive and permanent use of the burdened land is required to enjoy the easement's rights.[51] It also established that "the fact that an easement can confer exclusivity on its

45. *Id.* at 1294.
46. *Id.* at 1295.
47. *Id.*
48. *Id.*
49. *Id.* at 1296.
50. *Id.* (first quoting W. Union Tel. Co. v. Pa. R. Co., 195 U.S. 540 (1904) then quoting New Mexico v. U.S. Tr. Co. of N.Y., 172 U.S. 171 (1898)).
51. *Id.*

holder is clear,"[52] and cited *Wyoming v. Udall*.[53] In *Udall*, the Tenth Circuit held that the railroad had the right to perpetuity and possession.[54]

Further, the Tenth Circuit discussed the difference between a fee interest and an exclusive easement and held that the main difference is that under an easement, a grantor can regain use of the servient land if the easement is abandoned or fully terminated. The court looked at *Brandt* and explained that because the 1875 Act granted *only an easement* and not a "reversionary interest, . . . Brandt's land became unburdened of the easement"[55] after the railroad abandoned the right-of-way. Similarly, the court discussed *Great Northern* and explained that the United States retained the underlying oil and gas because the railroad had only an easement.[56] The court clarified that it was pivotal to decipher whether the railroad grant was an easement or a fee simple to decide the issues in *Brandt* and *Great Northern*, but that it was irrelevant to decide whether Union Pacific has the right to exclude. And without further explanation, the court decided that a "railroad easement is exclusive in character."[57]

2. Leasing the Encumbered Land

After concluding that Union Pacific has the right to exclude Heber and L.K.L., the court discussed whether Union Pacific might lease the encumbered land back to them. The district court "required . . . railroad purpose[s]"[58] to justify any use of the property, and Union Pacific argued that the district court erred by not applying the incidental use doctrine to the matter.[59] On appeal, the Tenth Circuit decided that "even if the incidental use doctrine [applied], neither the leases nor the underlying business conduct served the railroad purpose."[60] To support its statement, the court cited a Supreme Court case and held that under the 1875 Act, "only an easement for railroad purposes was granted" to the railroads.[61] Further, it established that *Brandt* and other precedents confirmed this

52. *Id.*
53. Wyoming v. Udall, 379 F.2d 635, 640 (10th Cir. 1967).
54. *Id.*
55. *L.K.L. Assoc. Inc.*, 17 F.4th at 1297.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 1298.
60. *Id.*
61. U.S. v. Union Pac. R.R. Co., 353 U.S. 112, 119 (1957).

view.[62]

Regarding the railroad purpose, the court agreed with the Ninth Circuit and reasoned "that a railroad right of way confers more than a right to simply run trains over the land."[63] Then, the court looked at the Act's language and found that the Act provides three types of interests:

> (1) A right of way through the public lands of the United States . . . . . to the extent of one hundred feet on each side of the . . . road; (2) the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; and (3) ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations . . . to the extent of one station for each ten miles of its road.[64]

Therefore, the court held that anything related to these activities, done for the benefit of the railroad, might be considered a railroad purpose.

Moreover, the court discussed the incidental use doctrine and stated that courts have relied on it to determine the "parameters of [the] railroad purpose."[65] In light of a Supreme Court decision,[66] the Tenth Circuit held that the incidental use doctrine might include a license given by the railroad to third parties for constructing buildings upon the encumbered land if it served railroad purposes. Similarly, the incidental use doctrine might allow the railroad to authorize third-party activities within the burdened land, so long as they further a railroad purpose.[67]

Citing the Fifth Circuit, the Tenth Circuit held that a railroad "had the right to lease portions of its unused lands to it patrons for the maintenance of warehouses and other like structures for the receipt and delivery of freight shipments."[68] It also noted that, according to the Fifth Circuit, a

62. *L.K.L. Assoc. Inc*, 17 F.4th at 1298 (quoting Chi. & Nw. Ry. Co. v. Cont'l Oil Co., 253 F.2d 468, 472 (10th Cir. 1958)).

63. *Id.* (quoting Barahona v. Union Pac. R.R. Co., 881 F.3d 1122, 1134 (9th Cir. 2018)).

64. *Id.* at 1298-99 (quoting 43 U.S.C. § 934).

65. *Id.* at 1299.

66. Grand Trunk R.R. v. Richardson, 91 U.S. (1 Otto) 454, 468 (1875).

67. *Id.* at 469.

68. *L.K.L. Assoc. Inc*, 17 F.4th at 1299 (quoting Miss. Inv. Inc. v. New Orleans & Ne. R.R. Co., 188 F.2d 245, 247 (5th Cir. 1951)).

lease to unused land did not constitute abandonment.[69] Similarly, the court noted that the Iowa Supreme Court[70] had approved "a manufacturer's lease of a portion of a railroad's right of way for the construction and use of a warehouse to store the furnaces it produced."[71] The main use of the warehouse was to facilitate railroad shipments. Like the Iowa Supreme Court, the Tenth Circuit held that there was no reason that a railroad may not lease part of its property to third parties to facilitate railroad shipments with the construction of warehouses.[72]

In addition, the Tenth Circuit highlighted that not *every* railroad activity constitutes a railroad purpose. It is about "the nature of the contemplated action" and not about the actor.[73] For that reason, the court held that just because an activity produces revenue for the railroad does not inherently mean it constitutes a railroad purpose.[74] Accordingly, the court held that "the incidental use doctrine applie[d] to the railroad requirement under the 1875 Act."[75] Further, the court held that if neither the lease nor the use of the leased property constituted a railroad purpose, the district court did not err by refusing to apply the incidental use doctrine.[76]

The court began analyzing the use of the leased property and established that if the use of the leased property benefitted railroad purposes, the leases were valid. However, L.K.L. and Heber did not use the railroad to ship their products or interact with the railroad services. In fact, the leases stated that the use of the property must be limited to access the property for unloading, handling, parking, and storing products—and nothing more.[77] According to the court, none of that benefited the railroad. Moreover, Union Pacific argued that L.K.L. and Heber were planning the construction of a spur to transport their goods by rail, but that never happened. Union Pacific also argued that the leases served pivotal railroad interests because L.K.L. and Heber respected, indemnified, and prevented contamination. Nonetheless, the court reasoned that these benefits resulted from the 1875 Act and were not the product of private leases.

69. *Id.*
70. *Anderson v. Inter-State Mfg. Co.*, 132 N.W. 812 (1911).
71. *L.K.L. Assoc. Inc*, 17 F.4th at 1299.
72. *Id.*
73. *Id.*
74. *Id.* at 1300.
75. *Id.*
76. *Id.*
77. *Id.*

Consequently, the court concluded that nothing about the use of the property or the leases helped the railroad. And because neither the leases nor the leased property served railroad purposes, the leases were invalid.[78]

D. Concurring Opinion

In a concurring opinion, Judge Briscoe agreed with the majority that the railroad easement was exclusive in character, but he arrived at that conclusion through a different route.[79] Judge Briscoe rested his opinion on the Restatement (Third) of Property. He noted that the degree of exclusivity assigned to an easement can be variable in range but that it was mainly determined by the intention of the parties reflected in the instrument, considering the circumstances and time in which it was created.[80] Similarly, Judge Briscoe noted that the servient owner has the right to use the servient land if he does not interfere with the easement's purpose.[81]

The concurring opinion presented two scenarios to illustrate a way to determine if there has been interference with the dominant owner's enjoyment of the easement. The first involved a temporary fence along an easement erected by the estate owner. If the fence is temporary, it can be removed easily when the easement owner needs to use the easement; therefore, it does not constitute interference. But if the fence is concrete, removing it might be difficult and expensive; therefore, it constitutes interference.[82]

Consequently, because the parking lot and building that Heber owned on the overlapping land might have been difficult and expensive to remove, it interfered with the use of the easement; therefore, they should have been excluded from their own property. Further, the concurring opinion highlighted that "exclusivity turns not just on the easement holder's current uses of the easement, but also on the easement holder's potential future uses of that easement."[83] Thus, the land should remain available for possible future easement use.[84]

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78. *Id.* at 1301.
79. *Id.* at 1305.
80. *Id.* at 1307-1308 (Briscoe, J., concurring).
81. *Id.*
82. *Id.* at 1310.
83. *Id.*
84. *Id.* at 1311.

E. Union Pacific has the right to exclude L.K.L. and Heber only if their activities interfere with the easement's use.

Union Pacific should have excluded Heber and L.K.L. only if their activities reasonably interfered with the easement's purpose.[85] The court correctly concluded that it was undisputed that the 1875 Act "grant[ed] railroads only an easement and not a fee interest."[86] It also cited *Brandt* to support its holding that an easement is a "*nonpossessory* right to enter and use land in the possession of another."[87] Nevertheless, the court overlooked the fact that owners of possessory estates have exclusive occupation—and may exercise their right to exclude others without explaining interference with their enjoyment of the land—while the easement owner has only the right to exclude to prevent interference with the easement's use.[88]

Thus, the easement owner—Union Pacific—had a nonpossessory right to enter land in possession of Heber and L.K.L. As possessory owners, Heber and L.K.L. enjoyed exclusive occupation and had the right to exclude anyone without having to prove interference with their enjoyment of the land. Union Pacific, on the other hand, could only exercise its right to exclude others to prevent interference with the easement's use.[89] Accordingly, to exclude L.K.L. and Heber, Union Pacific should have had to show that they were interfering with the easement's use.

Furthermore, the court cited the Restatement (Third) of Property to highlight that there are degrees of exclusivity on the rights given by easements and held that it is possible that "an easement can grant its holder exclusive rights."[90] Nonetheless, the court falsely presumed[91] that, because the 1875 Act's language included exceptions to prohibit the exclusion of some entities, these exceptions proved the general rule of exclusion given to the railroads.

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85. *Id.* at 1292; *See also* SPRANKLING, *supra* note 11, at 410 ("a leasehold is seen as an estate in land—a non-freehold estate . . . under this model, the landlord transfers the exclusive right of possession") (L.K.L acquired possession through the lease agreement).
86. *L.K.L. Assoc. Inc*, 17 F.4th at 1294.
87. *Id.* at 1295, emphasis added.
88. Chevy Chase Land Co. v. U.S., 37 Fed. Cl. 545, 565 (1997).
89. *Id.*
90. *L.K.L. Assoc. Inc*, 17 F.4th at 1295.
91. *Id.*

If the legislators had wanted to grant the right to absolute exclusion, they would have presumably included the necessary language in the Act. Instead, it seems that Congress was concerned with preventing the railroad from monopolizing[92] the narrow passages, rather than with giving the railroads the absolute right of exclusion. Additionally, *Brandt* mentioned that one of the reasons Congress passed the 1875 Act was the "public resentment against" the previous lavish acts.[93] Thus, it would be counterintuitive to conclude that Congress intended to give railroads the absolute right to exclude. The language of the 1875 Act does not indicate that the railroad "receives anything other than a right-of-way, in the nature of the right to traverse,"[94] as a reasonable person would understand those words.

Moreover, this precedent established that "absent an express provision to the contrary, the servient owner retains all rights to the property with the exception of the easement and may utilize the easement area in any manner that does not interfere with the easement."[95] Therefore, it seems that the court contradicted itself by first stating that the 1875 Act granted only easements—which it had defined as having nonpossessory rights—and then redefining right-of-way easements to include the attributes of possession with absolute exclusion rights.

Additionally, the court rested its conclusion on cases that discussed the railroads' right-of-way interest given by the Act of 1866.[96] For instance, in *Western Union Telegraph Co. v. Pennsylvania Railroad Co*.,[97] the court held that under the 1866 Act, the telegraph companies did not have the right to occupy and enter the railroad right-of-way because a railroad right-of-way was considered private property devoted to public use with the substantiality of a fee estate.[98] The opinion focused its analysis on the language of the 1866 Act and on other judicial opinions that had given railroad grants fee-estate privileges. Similarly, the court in *New Mexico v. United States Trust Co. of New York*[99] stated that under the 1866 Act, "surely more than an ordinary easement was granted, one having the attributes of the fee, perpetuity, and exclusive use and possession; also

92. *Id.* at 1296.
93. *Brandt*, 572 U.S. at 96-97.
94. *Beres*, 64 Fed. Cl. at 416.
95. Hallaba v. Worldcom Network Services Inc., 196 F.R.D. 630 (2000).
96. Post Roads Act, 14 Stat. at L. 221, Chap. 230.
97. *W. Union Tel. Co. v. Pa. R. Co.*, 197 U.S. 540, 561-64, 569-71 (1904).
98. *Id.*
99. *U.S. Tr. Co. of N.Y.*, 172 U.S. at 183-85.

the remedies of the fee."[100]

The court in *L.K.L.* justified the use of these cases by indicating that their opinions described "intrinsic aspect[s] of all railroad[s'] rights of way."[101] Nevertheless, these authorities based their decisions on their interpretations of the 1866 Act. They did not mention the 1875 Act at all. Because the court explained the concept of a railroad right-of-way through the lens of the 1866 Act, the court contradicted its own opinion that the 1875 Act granted only easements and not fee interests.[102]

Further, the court stated that railroads enjoy the "right in perpetuity to exclusive use and possession." But the phrase's context comes from an Eighth Circuit case quoted in *Udall*.[103] In that case, the Eighth Circuit interpreted the Transportation Act of 1920 and used *New Mexico v. United States Trust. Co. of New York*[104]to explain the privileges of a railroad right-of-way.[105] It concluded that drilling oil and gas would endanger the operation of the trains; thus, it would interfere with its use. Additionally, it established that the fundamental reason for exclusion is to secure the safe operation of the trains and to "enable the railroad company to safely conduct its business and meet the duty of exercising [the] high degree of care."[106] Although the case was decided under different authorities, it coincides with the idea that Union Pacific should not have had the right to exclude Heber and L.K.L. unless their activities endangered the safe use of the rails, which would be considered interference with the use of the easement.

Likewise, the court discussed the difference between a fee estate and an easement but concluded that the distinction is irrelevant. The court stated that because *Brandt* and *Great Northern* did not discuss the issue of exclusivity, their holdings are irrelevant to whether a right-of-way under the 1875 Act has the right to exclude. While it is true that neither case discussed the degree of exclusion, the *L.K.L.* Court's conclusion is faulty. Without clear language, it is difficult to prove that the 1875 Act granted railroads the right to exclude everyone—including the fee owner—for no specific reason.

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100. *Id.*
101. *L.K.L. Assoc. Inc*, 17 F.4th at 1296 n.2.
102. *Id.* at 1294.
103. *Udall*, 379 F.2d at 640.
104. *U.S. Tr. Co. of N.Y.*, 172 U.S. at 183-85.
105. *L.K.L. Assoc. Inc.*, 17 F.4th at 1296 (cited *Udall*, *Udall* quoted *Midland*, which in turned cited *United States Tr. Co. of New York*.).
106. Midland Valley R.R. Co. v. Sutter, 28 F.2d 163, 167-68 (8th Cir. 1928).

It had been established that the pre-1871 acts granted railroads something resembling a fee estate,[107] yet things changed with the enactment of the 1875 Act. According to precedent, the 1875 Act endowed railroads with only easements and not fee estates.[108] A fee estate confers the right to exclusive possession; thus, the owner of a fee estate has the right to exclude everyone for no reason. But when it comes to the easement owner, things are different. The easement owner has only the rights expressed in the provision under which his rights were acquired.[109] If there is no express language of the right to absolute exclusion, the servient owner has the right to use the encumbered land, so long as it does not interfere with the use of the easement.[110] Without indisputable language indicating that the legislators intended to do so, it is much less clear that the 1875 Act intentionally gave railroads the right to exclude everyone—including the fee owner. Because the 1875 Act's language did not give railroads the absolute right to exclude, and because precedent had established that the 1875 Act gave railroads only an easement, the distinction between a fee estate and an easement is relevant, and Union Pacific should not have been able to exclude Heber and L.K.L. unless their activities had interfered with the use of the easement.

Concerning the concurring opinion, Judge Briscoe referenced the Restatement (Third) of Property and concluded that since the building on the overlapping land was a permanent structure, it might have been expensive and difficult to remove; therefore, it interfered with the enjoyment of the land. However, the conclusion goes on to state that "Congress clearly intended for the easement to remain open indefinitely for Union Pacific's . . . use of the disputed property and the remainder of the easement to be exclusive."[111] As discussed, no explicit language in the 1875 Act indicates the easement must be exclusive. The concurring opinion does not quote or cite a passage from the 1875 Act to *clearly* show Congress's intent regarding exclusivity. In fact, the concurring opinion quotes the Restatement to state that "[e]xcept as limited by the terms of the servitude . . . the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with

107. *Barahona*, 881 F.3d at 1131.

108. *See* Great N. Ry. Co. v. U.S., 315 U.S. 262, 276 (1942). ("Congress itself in later legislation has interpreted the Act of 1875 as conveying but an easement.").

109. *Chevy Chase Land Co.*, 37 Fed. Cl. at 565.

110. *Richfield Oil Corp.*,179 Md. at 576.

111. *L.K.L. Assoc. Inc.*, 17 F.4th at 1311.

enjoyment of the servitude." [112]

Accordingly, absent specific language to indicate that Congress intended to grant the right of exclusion to the railroad companies, it is potentially erroneous to conclude Congress intentionally did so. It is also potentially erroneous to conclude that the owner of the servient land must be excluded from his own property when his activities are not interfering with the use of the easement. It is, however, more reasonable to conclude that since the building was a permanent structure, it might have interfered with the use of the easement in the future. Nevertheless, that does not mean that Congress intended to grant railroads the right to exclude the fee owner. After all, it seemed that Union Pacific was not interested in excluding Heber and L.K.L. from the property so long as it received payment.

IV. CONCLUSION

The court's interpretation of the 1875 Act has caused some controversy. The 1875 Act was passed as a response to the extravagant land grants of previous acts.[113] Thus, the court's conclusion is dangerous because it opens the door to unreasonable, selfish claims that would be in direct conflict with one of the purposes of the 1875 Act, which is to reduce the interests of the railroads granted by the previous acts.

"In the bundle of [sticks] we call property, one of the most valued is the right to sole and exclusive possession."[114] Further, an easement is not a possessory interest over the land.[115] Therefore, Union Pacific did not have possession. It only had the right to use the land for railroad purposes. Nevertheless, the individual who enjoys possession has rights above all others.[116] Accordingly, it is unfair that Heber and L.K.L could not use property they possessed for no valid reason. Thus, the court was unfair in deciding that Union Pacific could exclude Heber and L.K.L.

Moreover, while a fee owner enjoys sole possession and might exclude anyone without having to show that the other person will interfere with the easement's use, the easement owner does not have that privilege. The easement owner can only exercise his right to exclude to prevent

112. *Id.* at 1309.
113. *Brandt*, 572 U.S. at 96-98.
114. Caquelin v. U.S., 140 Fed. Cl. 564, 585 (2018).
115. RESTATEMENT (THIRD) OF PROP.: Servitudes § 1.2 (AM. L. INST. 2000).
116. *Caquelin*, 140 Fed. Cl. at 578.

interference with the easement's use.[117] But the majority opinion did not even consider this concept. Consequently, Union Pacific—the easement owner—did not have to prove that Heber and L.K.L interfered with the easement's use, which is a flaw in the court's holding.

An easement is a pivotal instrument for the productive use of the land.[118] Under the 1875 Act, railroads—like Union Pacific—have enjoyed the use of lands they do not possess for rails and trains, constituting a productive use of land. Nevertheless, according to the court, individuals with *possession* rights over the *unutilized* burdened land, like Heber and L.K.L, do not have the privilege to use their land productively. Instead, they must be excluded.

117. *Chevy Chase Land Co.* 37 Fed. Cl. at 565.
118. SPRANKLING, *supra* note 11, at 638.