FILED
United States Court of Appeals
Tenth Circuit

November 10, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LKL ASSOCIATES, INC., a Utah corporation; HEBER RENTALS, a Utah limited liability company,

Plaintiff Counter Defendants - Appellants/Cross-Appellees,

v.

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation,

Defendant Counterclaimant - Appellee/Cross-Appellant.

No. 18-4123

LKL ASSOCIATES, INC., a Utah corporation; HEBER RENTALS, a Utah limited liability company,

Plaintiff Counter Defendants - Appellees,

v.

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation,

Defendant Counterclaimant - Appellant.

No. 18-4130

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:15-CV-00347-BSJ)

Sean Connelly, Connelly Law LLC, Denver, Colorado (David R. Nielson, Kevin M. Bischoff, and Michael D. Lichfield, Skoubye, Nielson & Johansen, LLC, Salt Lake City, Utah, with him on the briefs) for Plaintiff Counter Defendants-Appellants/Cross-Appellees.

J. Scott Ballenger, Latham & Watkins LLP, Washington, D.C. (William M. Friedman and Eric J. Konopka, Latham & Watkins LLP, Washington, D.C., and Julianne P. Blanch and Adam E. Weinacker, Parsons Behle & Latimer, Salt Lake City, Utah, with him on the briefs), for Defendant Counterclaimant-Appellee/Cross-Appellant.

Before **HOLMES**, **BRISCOE**, and **EID**, Circuit Judges.

EID, Circuit Judge.

For almost 18 years, the Union Pacific Railroad ("Union Pacific") charged Heber Rentals, LC ("Heber") and L.K.L. Associates, Inc. ("L.K.L.") rent under a lease that allowed L.K.L. to continue operating a building materials supply business on land that is owned in fee by Heber—and leased to L.K.L.—but encumbered by Union Pacific's right of way. After the Supreme Court stated in 2014 that railroad rights of way like Union Pacific's were "nonpossessory" easements, L.K.L. and Heber stopped paying rent and filed suit against Union Pacific. In addition to requesting declaratory relief, L.K.L. and Heber sought to have their leases rescinded and to receive restitution for rent already paid. Union Pacific brought counterclaims arising out of their nonpayment.

On summary judgment, the district court held that Union Pacific's easement, while nonpossessory, gave it exclusive use and possession rights "insofar as Union Pacific elects to use the land subject to its easement for a railroad purpose." App'x Vol. XVI

at 2760. Although it found that the lease agreements served no railroad purpose, it denied the rescission claim as "untimely and redundant." *Id.* at 2758. In a follow-up order, it ruled that L.K.L. and Heber had abandoned their remaining claims. The district court also rejected all of Union Pacific's counterclaims.

Both parties appeal, contesting the scope of the easement, their respective property rights, and the claims that were rejected or deemed abandoned below. We agree with Union Pacific that its right of way includes the unqualified right to exclude L.K.L. and Heber, but we agree with L.K.L. and Heber that their leases were invalid. Even if the incidental use doctrine applies, neither the leases nor the underlying business conduct furthered a railroad purpose, as the easement requires. Exercising jurisdiction under 28 U.S.C. § 1291, we REVERSE the district court's declaratory judgment rulings to the extent they are inconsistent with this opinion. However, we AFFIRM the district court's ruling that the rescission claim was time-barred. We AFFIRM its rejection of Union Pacific's counterclaim for breach of contract but REVERSE its rejection of Union Pacific's other substantive counterclaims. Finally, we REVERSE the district court's finding of abandonment and REMAND for further proceedings consistent with this opinion.

I.

Between 1871 and 1873, the Utah Southern Railroad Company ("Utah Southern") built a railroad track between Salt Lake County and Utah County, Utah. The Department of the Interior recognized Utah Southern's right of way across the public lands of the United States, to the extent of 100 feet on each side of the central line of that track,

pursuant to the General Railroad Right-of-Way Act of 1875 (the "1875 Act"), 18 Stat. 482, 43 U.S.C. §§ 934–939.

In 1987, Union Pacific succeeded to Utah Southern's right of way by acquiring full ownership of the relevant section of track. Meanwhile, the underlying fee interest in some of the land encumbered by that right of way passed from the United States to Utah to Heber, and Heber leased the land to L.K.L. Heber's property begins at a fence located less than 50 feet west of the track's central line, and a building on its property falls partly within the easement area. This zone of overlap between Heber's fee and Union Pacific's easement launched this litigation.[1]

The parties coexisted without contact until 1997, when Union Pacific informed L.K.L. and Heber that their property fell on the railroad's right of way. Union Pacific asserted that Heber could not use or occupy the property without signing a lease agreement. The railroad sent a letter to Heber demanding that it "immediately remove from the railroad's property all personal property, including buildings, equipment and materials, and refrain from further encroachment upon the railroad's property until such time that an agreement has been executed and payment made in full." App'x Vol. XI at 1727 (emphasis omitted). The railroad also sent a sheriff to get its message across.

In January 1997, Heber agreed to lease a portion of its own property back from Union Pacific because the land was located within Union Pacific's right of way. One

[1] Before the district court, there was some dispute concerning whether Heber's property was encumbered by the easement. We assume such overlap exists, but our ruling about the scope of Union Pacific's easement is not determined or affected by Heber's ownership status.

year later, L.K.L. signed a direct lease with Union Pacific and the lease between Heber and Union Pacific was canceled. Ultimately, L.K.L. and Heber paid Union Pacific at least $8,884.00 and $120,010.69, respectively, in lease payments. L.K.L. stopped making these payments in 2015, having interpreted the Supreme Court's decision in *Marvin M. Brandt Revocable Trust v. United States* to mean that the 1875 Act did not grant Union Pacific the rights to exclusive use and possession that it purported to exercise in dealing with L.K.L. and Heber. 572 U.S. 93 (2014). This lawsuit followed.

On April 16, 2015, L.K.L. and Heber filed suit in Utah state court to rescind the leases and recover their payments on the ground that the parties had been "operating under the mistaken belief that Union Pacific possessed an exclusive right of way." App'x Vol. I at 41. In addition to state law claims for rescission due to mutual and unilateral mistake, L.K.L. and 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. Union Pacific removed the case to federal court and filed counterclaims for breach of contract, encroachment/trespass, ejectment, and a different declaration concerning the parties' property rights.

While the parties agreed that the 1875 Act granted Union Pacific an easement, they fundamentally disagreed about the nature and scope of that easement. L.K.L. and Heber argued that the 1875 Act granted only a nonpossessory easement and that their leases were invalid to the extent they purported to transfer possessory rights that Union Pacific never had. On the other hand, Union Pacific argued that railroad easements have

always been understood to confer an exclusive right to the surface of the right of way, so it had the right to exclude L.K.L. and Heber and then lease them back their property.

As the case developed and expenses accumulated, counsel for L.K.L. and Heber asked the district court to decide the easement's scope. As counsel suggested several times, legal certainty on that front would avoid the need for protracted litigation of their other claims. Counsel told the court that a ruling on the nature of the easement would "resolve this whole case." App'x Vol. XX at 3409. Counsel further explained that if the easement issue was decided against them, they were "done," but that if the question was decided in his clients' favor, "we can look and see if there are issues." *Id.* at 3438. Counsel also told the court that once this pivotal issue was determined, all other issues would "fall by the wayside, one way or the other." *Id.* at 3439. Receptive to an efficient resolution, the court confirmed the arrangement with counsel: "Now you say this is a pivotal question, decide that and everything goes away." *Id.* at 3441. Counsel confirmed: "It's a pure legal question. That's my interpretation, it's all going to go away." *Id.* Based on this discussion, and the district court's instructions, L.K.L. and Heber filed a new motion for summary judgment that focused on the easement's scope and requested judgment only with respect to the rescission claim, part of the declaratory judgment claim, and Union Pacific's counterclaims. The motion added that "[i]f the above relief is granted, Plaintiffs further request that all of their remaining claims be dismissed as moot." App'x Vol. IX at 1475.

Ruling on that motion, and starting with the core legal question concerning the easement's scope, the district court concluded that "Union Pacific received a non-

possessory easement under the 1875 Act" and was entitled to possession only "under a limiting condition . . . the power to possess for a railroad purpose." App'x Vol. XVI at 2754. As such, L.K.L. and Heber could "occupy and utilize . . . property encumbered by the right of way," without paying a lease, "insofar as [they did] not interfere with Union Pacific's election, now or in the future, to use and possess for a railroad purpose." *Id.*

Acknowledging that the "parameters of 'railroad purpose' may not be defined with specificity," the district court held that the leases served no railroad purpose because they were "wholly unnecessary and irrelevant to Union Pacific's ability to preserve the safety and availability of the right of way." *Id.* at 2756. The court reasoned that "[i]t would be an impermissibly expansive reading of the 1875 Act to find that it allows Union Pacific to enter into lease agreements under which Union Pacific receives payments in exchange for letting Plaintiffs engage in business that does not serve a railroad purpose." *Id.* at 2757. The court declined to apply the "incidental use doctrine" urged by Union Pacific to broadly interpret what constitutes a railroad purpose. *Id.* at 2758 n.77 ("[T]he court finds nothing in the text, history, or purpose of the 1875 Act that suggests such a broad interpretation of railroad purpose is appropriately applied to rights of way granted under the 1875 Act.").

The district court went on to reject the rescission claim on two grounds. First, the court determined that the claim was untimely under the applicable three-year statute of limitations because *Brandt* did not change anything with respect to the legal challenges that L.K.L. and Heber could have already made under known facts. Second, the district

court deemed the rescission claim redundant because the underlying lease contract was void and unenforceable for having failed to serve a railroad purpose.

Next, the court denied the declaratory relief requested by L.K.L. and Heber as "in excess of the necessities of the case," but reiterated its interpretation of Union Pacific's easement. *Id.* at 2759. Finally, the court turned to the counterclaims. It rejected Union Pacific's requested declaratory relief for conflicting with its view of the law. The court also granted summary judgment against Union Pacific on (1) its breach of contract claim because there was no enforceable contract; (2) its encroachment/trespass claim because there was no interest to be trespassed or encroached upon; and (3) its ejectment claim because it was premature in that "Union Pacific [had] not indicated that it [wanted] to use the [disputed] property for a railroad purpose." *Id.* at 2760.

Concerned that the district court had closed the case but left several of their claims unresolved, L.K.L. and Heber moved to amend the judgment. At the motion hearing, the court explained that it had considered all claims not discussed in its ruling to be *abandoned* because of counsel's earlier "oral representations." App'x Vol. XX at 3447. The court shared its impression that counsel had viewed this as a "one-issue case" and invited the court to moot all other claims by deciding those at issue in the latest summary judgment motion. *Id.* at 3448. Counsel offered a different interpretation of his comments, comparing the impact of deciding the easement's scope to a "trickle-down effect or domino effect" that would expedite the other issues' resolution. *Id.* However, counsel did agree to abandon count seven of the complaint, the claim to quiet title.

Counsel proceeded to argue the merits of the potentially abandoned claims with the district court. The district court reserved judgment.

The district court ultimately amended its judgment to find that L.K.L. and Heber abandoned all claims other than those discussed in the prior order. Interpreting counsel's statements to the court as negotiating the abandonment of those claims to resolve the case in a "simplified manner," the court declined to allow L.K.L. and Heber to "revive their abandoned claims simply because they [were] unsatisfied with the outcome of their motion." App'x Vol. XVII at 2895. L.K.L. and Heber appeal in Case No. 18-4123. Union Pacific cross-appeals in Case No. 18-4130.

II.

We review the grant of summary judgment de novo. *See Gutierrez v. Cobos*, 841 F.3d 895, 900 (10th Cir. 2016). A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Here, no facts are in dispute, so we proceed to the questions of law this appeal presents. *See Gutierrez*, 841 F.3d at 900 ("We review summary judgment de novo, applying the same legal standard as the district court.").

The first issue in this case is whether a railroad's 1875 Act right of way includes the right to exclude others. We begin with the text. *See, e.g.*, *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). In analyzing the statutory language, we assume "that the ordinary meaning of that language accurately expresses the legislative purpose."

Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 (2009) (internal quotation marks omitted).

In relevant part, the 1875 Act provides: "The right of way through the public lands of the United States is granted to any railroad company . . . to the extent of one hundred feet on each side of the central line of said road." 43 U.S.C. § 934. That this right of way grants railroads only an easement and not a fee interest is undisputed. The Supreme Court said as much in *Brandt*, echoing far older precedent. There, the Court reaffirmed its 1942 finding that it was "'clear from the language of the [1875] Act, its legislative history, its early administrative interpretation and the construction placed upon it by Congress in subsequent enactments' that the railroad had obtained 'only an easement in its rights of way acquired under the Act of 1875.'" 572 U.S. at 104 (quoting *Great N. Ry. Co. v. United States*, 315 U.S. 262, 277 (1942)); *see also United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 119 (1957) (noting the Court's conclusion in *Great Northern* that, after 1871, "only an easement for railroad purposes was granted").

The Court in *Brandt* also used common law principles to define the essential features of an easement—mainly, that it is a "nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." 572 U.S. at 105 (quoting Restatement (Third) of Property: Servitudes § 1.2(1) (Am. Law Inst. 1998)). But the Court left unresolved the degree of exclusivity this right of way affords the grantee.

L.K.L. and Heber focus on *Brandt*'s recitation of a basic property law principle—that easements are a nonpossessory property interest—to advance their argument that, as

a "nonpossessory" easement holder, Union Pacific had no right to exclude the alleged fee owner and its lessee. Under this theory, the 1875 Act granted only a right of passage. As such, L.K.L. and Heber argue that, as the alleged fee owner and its lessee, they can occupy Union Pacific's right of way without authorization. But Union Pacific contends that railroad easements have always been understood to confer an exclusive right to the surface of the right of way. Union Pacific is correct. An 1875 Act easement allows the grantee to exclude everyone—including the grantor and fee owner.

The Third Restatement explains that a nonpossessory easement can still provide the grantee exclusivity. It states that the "degree of exclusivity of the rights conferred by an easement or profit is highly variable." Restatement (Third) of Property: Servitudes § 1.2 cmt. c (Am. Law Inst. 2000). "At one extreme, the holder of the easement or profit has no right to exclude anyone from making any use that does not unreasonably interfere with the uses authorized by the servitude." *Id.* On the other end of the spectrum, "the holder of the easement or profit has the right to exclude everyone, including the servient owner, from making any use of the land within the easement boundaries." *Id.* Therefore, an easement can grant its holder exclusive rights, including the right to exclude the fee owner from the encumbered property. And that is what a railroad's right of way under the 1875 Act does.

Looking to the text, Section 2 of the Act states that "[a]ny railroad company whose right of way . . . passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the" same corridor. 43 U.S.C. § 935. By stipulating that a railroad could not exclude its competitors from physically

narrow passages otherwise within the easement area, Congress carved a textually narrow exception that proved the general rule of exclusion.

In the statute's next sentence, Congress slightly expands the list of entities permitted to operate within the railroad's easement under these conditions, reaffirming the norm of exclusion: "the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway located therein on March 3, 1875." 43 U.S.C. § 935. Because Congress understood the 1875 Act right of way to confer an exclusive easement—one in which the grantee had the right to exclude everyone, including the fee owner—it needed to add these provisions in Section 2 if it intended for anyone else to use the right of way without receiving explicit permission from the grantee. The 1875 Act thus created an exception to prevent railroads from monopolizing narrow physical passages. But at the same time that it saved rival railroads and public roads from exclusion, it made no such reference to the servient estate's rights.

That a railroad's right of way confers an exclusive easement is supported by Supreme Court precedent. The Court has said that "[a] railroad right of way is a very substantial thing. It is more than a mere right of passage." *W. Union Tel. Co. v. Pa. R.R. Co.*, 195 U.S. 540, 570 (1904). The Court further observed that "if a railroad's right of way was an easement it was 'one having the attributes of the fee, perpetuity and exclusive use and possession.'" *Id.* (quoting *New Mexico v. United States Tr. Co. of New York*, 172 U.S. 171, 183 (1898)).[2] The Court has also favorably cited the Iowa Supreme

[2] Although both *New Mexico* and *Western Union* involve a prior statute and were decided at a time that the Supreme Court took a broader view of railroad rights-of-way,

Court's explanation that a railroad easement "is not that spoken of in the old law books, but is peculiar to the use of a railroad . . . . The exclusive use of the surface is acquired." *New Mexico*, 172 U.S. at 183 (quoting *Smith v. Hall*, 103 Iowa 95, 96–97 (1897)). In other words, although the right acquired by a railroad is "technically an easement," it "requires for its enjoyment a use of the land permanent in its nature and practically exclusive." *Id.* (quoting *Hazen v. Boston & Me. R.R.*, 68 Mass. 574, 580 (1854)).

Our precedent echoes these characteristics. In *Wyoming v. Udall*, we said that easements, "so far as railroads are concerned," entail "a right in perpetuity to exclusive use and possession." 379 F.2d 635, 640 (10th Cir. 1967) (citing *Midland Valley R.R. Co. v. Sutter*, 28 F.2d 163, 168 (8th Cir. 1928)). Then, speaking about the 1875 Act in *Boise Cascade Corp. v. Union Pac. R.R. Co.*, we noted that "[t]he whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes." 630 F.2d 720, 724 (10th Cir. 1980) (quoting *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 272 (1903)).

L.K.L. and Heber tell us that *Brandt* stands for the narrow proposition that "the 1875 Act granted an easement and nothing more." Reply Br. at 5. And so in seeking an "exclusive easement—the right to exclude everyone," L.K.L. and Heber would have us believe that Union Pacific seeks a right similar to "a fee interest made on an implied condition of reverter," which the Supreme Court rejected in *Brandt* and *Great Northern*.

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they are instructive to the extent they describe an intrinsic aspect of all railroad rights of way—whether granted pre-1871 or under the 1875 Act, whether described as a fee interest or a nonpossessory easement.

Id. at 10–11. But we do not read these precedents as foreclosing our decision today. After all, an exclusive easement is distinct from a fee interest. As long as the grantor has not "clearly and unequivocally relinquished all interest in the subject area," courts can certainly find that an exclusive easement is not a fee. Jon W. Bruce & James W. Ely, Jr., The Law of Easements & Licenses in Land § 1:28 (2019). This is a meaningful distinction. "The advantage to the grantor of a court's finding a truly exclusive easement rather than a fee is that the grantor can regain use of the area in question if the easement is abandoned or otherwise terminated." *Id.* Indeed, it was this distinction that was crucial to resolving *Brandt*.

In *Brandt*, the Court held that because the 1875 Act granted only an easement—and not an implied reversionary interest, a type of fee—Brandt's land "became unburdened of the easement" when the Wyoming and Colorado Railroad abandoned its right of way in 2004. 572 U.S. at 106. The Court's holding turned on whether the right of way granted under the 1875 Act was an easement or "something more than an easement." *Id.* at 102. The difference between an easement and a possessory interest played an equally important role in *Great Northern*.

In 1907, Great Northern Railway succeeded to an 1875 Act right of way that ran through public lands in Glacier County, Montana. After resources were discovered in this area, Great Northern sought to access the gas, oil, and minerals beneath its right of way. The Government sued to enjoin the railroad from doing so, claiming that the railroad only had an easement and the United States retained all interests beneath the surface. Because the Court found the 1875 Act granted only an easement, it ruled that

Great Northern had no right to the underlying oil and minerals. *Great Northern*, 315 U.S. at 279. This holding aligns with settled principles of property law because an easement, as a nonpossessory interest in land, generally limits use of the burdened property to a particular purpose. Restatement (Third) of Property: Servitudes § 1.2 cmt. d (Am. Law Inst. 2000). To drill for minerals beneath the right of way would have exceeded the easement's boundaries.

But the distinction between an easement and fee title has no bearing on Union Pacific's right to exclusive occupancy in this case. The fact that an easement can confer exclusivity on its holder is clear. Exclusivity is thus consistent with *Brandt*'s guidance that a right of way under the 1875 Act is nothing more than an easement. As discussed, the difference between a fee and an easement plays a pivotal role in determining ownership when a right of way has been abandoned—as in *Brandt*—or when there are questions about the rights to subsurface oil and minerals—as in *Great Northern*. "[T]hat the 1875 Act granted a fundamentally different interest in the rights of way than did the predecessor statutes," *Brandt*, 572 U.S. at 106, is not relevant to whether a railroad with an 1875 Act easement has the right to exclude. As a result, we hold that Union Pacific had the right to exclude L.K.L. and Heber from property they possessed in fee to the extent that Union Pacific's 1875 Act right of way traversed that property. A railroad easement is exclusive in character.

III.

If Union Pacific can exclude L.K.L. and Heber from its right of way, the question becomes whether it may lease the lands its right of way encumbers and, if so, under what

circumstances. The district court required a "railroad purpose" to sustain any use of the property by the railroad, as well as any third-party use authorized by the railroad. It held the leases with Union Pacific were unenforceable because they served no railroad purpose. However, the district court refused to apply the "incidental use doctrine" urged by Union Pacific, which gives a broad interpretation to the railroad purpose requirement. On appeal, Union Pacific argues that we should remand so the district court can apply that doctrine in the first instance. But we need not go so far. We hold that, even if the incidental use doctrine does apply, neither the leases nor the underlying business conduct served a railroad purpose, so the leases were invalid.[3] We need not define the minimum

[3] The partial dissent agrees that the leases are invalid but reaches this conclusion on a "more fundamental" ground: that Union Pacific's property interest is nonpossessory and incapable of being leased. Op. at 1. The partial dissent reads *Brandt* as making clear that an 1875 Act easement is nonpossessory, and reads the Restatement as making clear that the landlord-tenant relationship created by a lease requires transferring a possessory interest. *Id.* at 13 ("Because the 1875 Right-of-Way affords Union Pacific only an easement, and because, as the Supreme Court recognized in *Brandt*, easements are necessarily nonpossessory, it is impossible for Union Pacific to lease its interest in the easement."). We agree, of course, with the first step of the partial dissent's syllogism. An 1875 Act right of way is an easement. However, we think the partial dissent errs in its second presumption by letting general Restatement principles triumph over established principles of railroad easements. *See Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed."). The understanding that railroad easements may be leased is longstanding and basically uncontroverted. *See* Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 Ecology L.Q. 351, 421–25 (2000) (collecting cases). Unlike the partial dissent, we do not think that *Brandt* altered this status quo by saying that 1875 Act rights of way are easements, which was already plain after *Great Northern*.

nexus between a contemplated property use and traditional railroad objectives that is necessary to find a railroad purpose because it is apparent that there is no such nexus here at all.

The Supreme Court has made clear that the right of way granted by the 1875 Act must be used for railroad purposes. In *Union Pacific*, the Court noted its conclusion that, after 1871, "only an easement for railroad purposes was granted." 353 U.S. at 119. In *Brandt*, the Court affirmed that observation. 572 U.S. at 104. Our precedent also reflects this view. *See Chi. & Nw. Ry. Co. v. Cont'l Oil Co.*, 253 F.2d 468, 472 (10th Cir. 1958) ("Upon the filing of the location map, the railroad acquired an easement for railroad purposes" under the 1875 Act). Even the parties agreed below, and maintain on appeal, that Union Pacific's easement may only be used for a railroad purpose. As the district court explained, "Union Pacific's right of way is a function of limited purpose and use." App'x Vol. XVI at 2760.

As for what a "railroad purpose" is, we agree with our sister circuit that "a railroad right of way confers more than a right to simply run trains over the land." *Barahona v. Union Pac. R.R. Co.*, 881 F.3d 1122, 1134 (9th Cir. 2018). Looking to the text of the 1875 Act confirms this conclusion. Section 1 provides qualifying railroad companies three 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 central line of said 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, turnouts, and water

stations . . . to the extent of one station for each ten miles of its road." 43 U.S.C. § 934. In addition to operating trains over the easement, these last two interests permit a railroad to utilize resources on adjacent public lands "for the construction of said railroad" and empower railroad companies to build ancillary structures on nearby public lands. *Id.*

We have said as much before. In *Kan. City S. Ry. Co. v. Ark. La. Gas Co.*, we noted that a railroad right of way confers "more than the mere right of passage over such lands." 476 F.2d 829, 834 (10th Cir. 1973). The railroad "acquires the right to excavate drainage ditches; to construct beneath the surface supports for bridges and other structures; to erect and maintain telegraph lines and supporting poles . . . to construct passenger and freight depots . . . and to use material from the land covered by the right of way to make such fills" to decrease the grades of the rail lines. *Id.*

Courts have often relied on the common law incidental use doctrine to determine the parameters of a railroad purpose. In *Grand Trunk Railroad Co. v. Richardson*, the Supreme Court embraced this doctrine:

> "[W]hile it must be admited [sic] that a railroad company has the exclusive control of all the land within the lines of its roadway, and is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted, we are not prepared to assert that it may not license the erection of buildings for its convenience, even though they may be also for the convenience of others."

91 U.S. 454, 468 (1875). The Court also held that a railroad may authorize a third party to undertake activities that would further a railroad purpose if done by the railroad. *Id.* at 469.

This incidental use doctrine informs courts as to what may be considered a "railroad purpose." In *Mississippi Investments, Inc. v. New Orleans & North Eastern Railroad Co.*, for example, the Fifth Circuit ruled that a railroad had the right to "lease portions of its unused lands to its patrons for the maintenance of warehouses and other like structures for the receipt and delivery of freight shipments." 188 F.2d 245, 247 (5th Cir. 1951). A lease to a third party for receipt and delivery of freight shipments was "not so foreign to railroad purposes as to constitute an abandonment or an additional servitude not permissible under the right of title acquired for railroad purposes." *Id.* at 247 n.2. The Iowa Supreme Court 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. *Anderson v. Inter-State Mfg. Co.*, 152 Iowa 455, 456 (1911). Observing that the principal use of the warehouse was facilitating shipments on the nearby railroad, the court noted that it "can not be seriously questioned" that a railroad company could build and use a warehouse for that purpose. *Id.* at 457. Thus, there was no reason why the railroad could not lease a portion of its property to a third party for the same permissible purpose. After all, a railroad "may within its location erect buildings required in its business, or allow others to erect them." *Id.* (quoting *Heskett v. Wabash, St. Louis & Pac. Ry. Co.*, 61 Iowa 467, 469 (1883)).

But the incidental use doctrine does not automatically consider any purpose employed by a railroad to be a railroad purpose. Rather, the "railroad" aspect of a railroad purpose refers to the nature of the contemplated action, and not whether the actor is a railroad. Permissible purposes under the incidental use doctrine facilitate freight

functions to some cognizable degree, as the cases we have discussed demonstrate. *See Barahona*, 881 F.3d at 1135 ("[A]n appurtenance might be of such minimal or illusory benefit to railroad operations as to make the incidental-use doctrine inapplicable."). For that reason, we do not understand incidental uses to encompass, as some courts have held, any activity that generates revenue for the railroad. *See Cash v. S. Pac. R.R. Co.*, 177 Cal. Rptr. 474, 476 (Cal. Ct. App. 1981) ("A commercial lease as the one involved here produces additional revenue for the railroad, thus defraying the costs of running and maintaining the railroad."). That interpretation would turn the railroad purpose requirement into something else entirely.

We will assume, without deciding, that the incidental use doctrine applies to the railroad purpose requirement under the 1875 Act. As another preliminary matter, we note that we are asking the railroad purpose question with respect to two different endeavors. The first is the lease. The second is the use of the property authorized by the lease. *See Grand Trunk*, 91 U.S. at 468–69. If either furthers a railroad purpose, the district court erred.

We start with the use of the property by L.K.L. and Heber. If that use furthers a railroad purpose, then Union Pacific could pursue it in the first instance, and the lease that authorized it was valid. But L.K.L. and Heber do not ship their products by rail or otherwise interact with Union Pacific's railroad services. Their business relationship with Union Pacific is limited to these leases. Even Union Pacific concedes this point. Cross-Aplt. Br. at 36 ("To our knowledge [L.K.L. and Heber] do not yet ship goods by rail."). The leases themselves specify that use of the property must be limited to "access

and unloading and storage and handling of building products," parking, and "no other purpose." App'x Vol. I at 209. As L.K.L. and Heber argue, "the nonrailroad uses Plaintiffs are making of the land are of *no benefit*" to Union Pacific's railroad operations. Reply Br. at 18.

Union Pacific points to evidence that L.K.L. and Heber sought to build a spur to ship their goods by rail, suggesting that, as a result, "their business activities are credibly within the zone that furthers railroad purposes." Cross-Aplt. Br. at 36. But this spur was never built, and it was not the reason that L.K.L. and Heber came to the land. Even at its broadest, the incidental use doctrine requires actual use. According to Kim Norris, L.K.L.'s president and one of Heber's managers, Union Pacific requested $280,000 to build the spur and another $250,000 for the "privilege" of their business, so the project was too expensive to pursue. App'x Vol. II at 472. The notion that the use of the property advances no railroad purpose, even incidentally, was made clear at oral argument. Asked to confirm whether L.K.L.'s activities have "nothing to do with a railroad purpose," counsel for Union Pacific agreed. Oral Arg. at 16:00–16:30. As a result, the question is whether the leases themselves furthered a railroad purpose.

Union Pacific argues that its lease agreements serve "critical railroad interests." *Id.* at 19:45–19:49. They "secur[e] [a] promise [by L.K.L. and Heber] to respect railroad operations, preserve the condition of the right-of-way, and indemnify the railroad against the risk associated with their presence"; they require L.K.L. and Heber to move if necessary; and they prevent contamination and other hazards. Cross-Aplt. Br. at 36. But we agree with the district court that these abilities are "derived not from a private

contract" with L.K.L. and Heber, "but from a congressional grant under the 1875 Act." App'x Vol. XVIII at 2756. The unqualified right to exclude means that the lease gave Union Pacific nothing more than the rights it already had. *See Barahona*, 881 F.3d at 1135 (an "illusory benefit to railroad operations" is not an incidental use). As a result, it failed to further any railroad purpose, even incidentally.

As counsel for Union Pacific explained at oral argument, these leases were less about Union Pacific's purposes than they were about accommodating L.K.L. and Heber. According to counsel: "We didn't ask for this. The railroad would prefer that this right of way be clear and unobstructed. The railroad is trying to accommodate [L.K.L. and Heber] by letting them remain on terms and conditions that mitigate the risk and expense that their presence is imposing on the railroad." Oral Arg. at 20:09–20:24. But being a "good neighbor," *id.* at 19:04–19:06, is not a railroad purpose. Even under the incidental use doctrine, nothing about the leases helped Union Pacific operate its railroad.[4] Instead, the leases accommodated L.K.L. and Heber.

We conclude that the railroad purpose requirement is not satisfied in this case, even under the broader interpretation captured by the incidental use approach. To the extent the district court's rulings on the parties' declaratory judgment claims were inconsistent with this understanding of the law, they are reversed.

[4] Union Pacific also invokes memoranda from the Department of the Interior to make its railroad purpose and incidental use arguments. We are not bound by these memoranda and do not rely upon them.

IV.

Having discussed the property rights that govern the parties' relationship and inform our reversal of the district court's declaratory judgment rulings, we turn to the substantive claims decided by the district court: the mutual mistake rescission claim dismissed as untimely and redundant, Union Pacific's rejected counterclaims, and the six counts of the complaint that the district court deemed abandoned.

a.

We start with rescission. The district court declined to reach the merits because it found this claim to be both untimely and redundant. With respect to timeliness, it applied Utah's three-year statute of limitations and held that L.K.L. and Heber could have made the claim decades ago based on *Great Northern* by "exercising reasonable diligence and inquiry," and that *Brandt* did not restart the limitations period. App'x Vol. XVI at 2755. We agree that the claim was untimely, so we affirm the district court's rejection without reaching its alternative ground.

All agree that Utah law supplies the applicable statute of limitations, which runs three years from "the discovery by the aggrieved party of the facts constituting the fraud or mistake." Utah Code Ann. § 78B-2-305(3). L.K.L. and Heber argue on appeal that their mistake was thinking Union Pacific had a possessory interest, and they only realized this mistake after *Brandt* was decided in 2014. Alternatively, they argue that Union Pacific is equitably estopped from asserting the statute of limitations as a defense. Union Pacific responds that *Brandt* did not change the law and, even if it did, the operative statute of limitations only applies to the discovery of facts, not legal theories. Union

Pacific also points to a 1997 letter received by L.K.L. that characterized Union Pacific's interest as an easement.

The Utah Supreme Court has explained that the statute of limitations governing this rescission claim imposes a "statutory discovery rule." *Russell Packard Dev., Inc. v. Carson*, 108 P.3d 741, 746 (Utah 2005). That means the limitations period only starts to run "when a plaintiff first has actual or constructive knowledge of the relevant facts forming the basis of the cause of action." *Id.* We need not reach the parties' arguments regarding constructive knowledge because, applying this rule, L.K.L. and Heber had actual knowledge of the facts required to bring this lawsuit long ago.

This statute of limitations is concerned with knowledge of the facts, not the law, and this record clearly demonstrates that L.K.L. and Heber knew the facts. In a 1997 letter, for example, Union Pacific identified its property interest as an "easement." App'x Vol. I at 216. Specifically, Union Pacific stated that it held "title to the right of way obtained under the General Right of Way Act of March 3, 1875 . . . in the nature of a permanent easement in the surface, and that Congress granted to the Railroad the 'exclusive use and possession' of the entire width of the right of way subject only to reversion upon abandonment by the Railroad." *Id.* That was more than enough information for L.K.L. and Heber to seek legal advice regarding the scope of the railroad's property interest and bring suit within the limitations period. *Brandt* changed nothing with respect to law or fact. In *Great Northern*, the Supreme Court stated that the 1875 Act "clearly grants only an easement, and not a fee." 316 U.S. at 271. The *Brandt* Court agreed. 572 U.S. at 110. As a result, L.K.L. and Heber knew all the relevant facts

in 1997: (1) that they had a property interest in the disputed property; (2) that Union Pacific had an 1875 Act easement on the disputed property; and (3) that the parties had a lease contract with respect to the disputed property allegedly based on a misunderstanding with respect to the scope of Union Pacific's rights. Knowledge of the type of property interest each party possessed was enough to start the statute of limitations, notwithstanding disagreement over their scope.

In finding this claim untimely, we reject the argument that Union Pacific was equitably estopped from asserting the statute of limitations as a defense before the district court. L.K.L. and Heber invoke Utah's "concealment version of the discovery rule," which provides that a "defendant who causes a delay in the bringing of a cause of action is estopped from relying on the statute of limitations as a defense to the action." *Warren v. Provo City Corp.*, 838 P.2d 1125, 1130 (Utah 1992). But Union Pacific did not conceal the nature of its interest in the disputed property, so the concealment version of the discovery rule is plainly inapplicable. Union Pacific has an 1875 Act right of way easement and it told L.K.L. and Heber just that in demanding they sign a lease. The parties do not disagree over the type of property right they each possessed; instead, they contest what those rights entail. That does not amount to anything approaching concealment, so estoppel is unwarranted. We agree with the district court that this claim is untimely.

b.

Next, we discuss Union Pacific's counterclaims, which were all rejected by the district court. To the extent the district court's rulings relied upon a legal framework with which we disagree, we reverse and remand for further proceedings.

Union Pacific brought counterclaims for declaratory relief, breach of contract, encroachment/trespass, and ejectment. We have disposed of the declaratory relief issue elsewhere. With respect to the other counterclaims, the district court granted summary judgment on (1) the breach of contract claim because there was no enforceable contract to breach; (2) the encroachment/trespass claim because Union Pacific could only bring that claim to the extent its land use furthered a railroad purpose; and (3) the ejectment claim because it was premature, in that Union Pacific had not "indicated that it want[ed] to use the property for a railroad purpose." App'x Vol. XVI at 2760.

As discussed above, we agree with the district court that Union Pacific failed to meet the railroad purpose requirement, but we take a different view of its right to exclude. First, we affirm the district court with respect to the breach of contract count because we agree the contract was unenforceable. However, because the 1875 Act grants railroads an *unqualified* right to exclude from the surface of their rights of way, we think the district court erred in holding that Union Pacific lacked a railroad purpose with respect to the exercise of its right to exclude. Whereas use of the encumbered property requires a specific railroad purpose, the right to exclude is necessarily always exercised in furtherance of a railroad purpose—that is, the railroad has the unqualified ability to keep its easement unobstructed. *See New Mexico*, 172 U.S. at 184 (A railroad "may at some time want to use more land for side tracks, or other purposes, and it is entitled to have the

land clear and unobstructed whenever it shall have occasion to do so.") (quoting *Southern Pac. Co. v. Burr*, 86 Cal. 279, 284 (1890)); *N. Pac. Ry. Co.*, 190 U.S. at 272 ("The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad."). Union Pacific may exercise its right to exclude without identifying a particular purpose because exclusion from the railroad corridor is itself a railroad purpose. Accordingly, we reverse the district court's rejection of the counterclaims for encroachment/trespass and ejectment.

c.

Finally, we address abandonment. Although our review on summary judgment is de novo, the district court's conclusion that L.K.L. and Heber abandoned much of their complaint in exchange for a ruling on two of its counts is "a primarily factual finding" that we review for clear error. *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1003 (10th Cir. 1996) (overruled on other grounds by *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005)). Finding clear error, we reverse the district court's ruling that these claims were abandoned.[5]

The record reflects a misunderstanding between the court and counsel for L.K.L. and Heber. They agreed to one deal—interpret the easement and the case "goes away"—that had two meanings. App'x Vol. XV at 2379. The court thought that counsel would make the case go away by distilling the complaint down to a few core counts and

[5] Our ruling on abandonment covers counts two, three, four, five, six, and nine of the original complaint. We discuss the district court's rulings on counts one and eight elsewhere, and L.K.L. and Heber separately abandoned count seven.

abandoning the rest. Meanwhile, counsel intended to make the case go away by obtaining a ruling on an important legal issue that would rapidly resolve the remaining claims. We think counsel's interpretation was correct and the district court clearly erred by ruling otherwise.

Looking at the case as a whole, counsel was clearly trying to expedite the litigation by resolving a central legal question—and not offering his clients' causes of action as bargaining chips. *See Davis v. Veslan Enters.*, 765 F.2d 494, 498–99 (5th Cir. 1985) (examining counsel's words "in context" to find it "evident" that abandonment did not occur). Critically, counsel said nothing about "abandoning" the claims at any point in any hearing. Instead, his phrasing contemplated only their simplified and expedited resolution. For example, reviewing some of the language the district court relied upon in finding abandonment, counsel said that a ruling regarding the easement's scope would "resolve this whole case" and obviate the need for a trial. App'x Vol. XVII at 2890. A claim that need not be tried to be resolved, or that is effectively determined by ascertaining a fundamental legal principle, is very different from a claim that has been abandoned. As this case illustrates, only the former can be appealed on its merits.

We recognize that counsel's statements may have reasonably been susceptible to the district court's interpretation. But abandonment is not a trap awaiting the unwary litigant who does not unambiguously decline its danger at every turn. While it may not have been clear error for the district court to initially assume that counsel meant to abandon his claims, it was certainly clear error to rule that the claims were abandoned after a hearing where counsel clarified his contrary position. There, counsel seemed

taken aback by the notion that his clients had abandoned any of their claims, explaining that it was "never [their] intent to abandon [their] right to obtain the money" from Union Pacific. App'x Vol. XX at 3453.

Any doubt was resolved by the motion for summary judgment filed by L.K.L. and Heber. In that motion, they proposed dismissal of all other claims as "moot" if the court granted summary judgment in their favor on the first (rescission) and eighth (partial declaratory relief) counts of the complaint. App'x Vol. IX at 1475. Under a heading in that motion about how the easement issue would resolve the case, L.K.L. and Heber explained that if the court ruled favorably they would "stipulate to the dismissal of the remainder of their claims," and if the court ruled unfavorably their claims would "fail as a matter of law." *Id.* Rejecting the substantive rescission claim clearly rendered the district court's initial order unfavorable to L.K.L. and Heber. But even failure as a matter of law does not equal abandonment, and the district court clearly erred by assuming that it did.

Further supporting our conclusion, counsel for L.K.L. and Heber expressly disclaimed any intent to abandon these claims once the issue was raised. Counsel even discussed their merits at length with the district court during the hearing about whether they had already been abandoned. See *Ellis*, 73 F.3d at 1004 (reversing district court's finding of abandonment where the party had "articulated the legal and factual basis" for the claim). The district court was unambiguously informed of counsel's intent to litigate these claims. Far from attempting to revive discarded causes of action after an unfavorable outcome, as the district court suggested, L.K.L. and Heber were following

the decision tree planted by their motion for summary judgment to its natural next branch.[6] To that end, they sought a ruling on the remaining claims that could, along with the easement issue, either be efficiently appealed or result in relief. But because the district court considered the claims abandoned, L.K.L. and Heber are left only to appeal the finding of abandonment.

Confusion between counsel and the court does not close the courtroom doors. *Cf. Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) ("Jurisdiction existing . . . a federal court's obligation to hear and decide a case is virtually unflagging.") (internal quotation marks omitted). This is particularly true where the operative motion expressly made withdrawal contingent on a *different* outcome and counsel diligently resisted the district court's turn toward abandonment at every step once the misunderstanding was revealed. It may be true that little remains to litigate with respect to these claims. But little is not nothing, and involuntary abandonment is neither what these claims deserved nor what L.K.L. and Heber intended. The district court clearly erred by finding otherwise.

V.

[6] For this reason, we are not persuaded by the partial dissent's argument that "at no point between the final pretrial conference and the entry of the original final judgment did plaintiffs make a serious attempt to litigate those claims on the merits." Op. at 22. That was precisely the deal that L.K.L. and Heber agreed to: postponing resolution of their other claims until the central legal issues were determined. Even Union Pacific seemed to understand this deal. Not once in its motion to amend the partial judgment to resolve these claims did it suggest that the claims had been abandoned.

We AFFIRM the district court's ruling that the mutual mistake rescission claim was time-barred. We AFFIRM its rejection of Union Pacific's counterclaim for breach of contract but REVERSE its rejection of Union Pacific's other substantive counterclaims. We also REVERSE the district court's declaratory judgment rulings to the extent they are inconsistent with this opinion. Finally, we REVERSE the district court's finding of abandonment except with respect to count seven of the complaint and REMAND for further proceedings.

Nos. 18-4123 & 18-4130, *L.K.L. Assocs., Inc. v. Union Pacific R.R. Co.*
BRISCOE, Circuit Judge, concurring in part and dissenting in part.

I agree with much of the majority opinion. I write separately, however, for three reasons. First, although I agree with the majority that the railroad easement at issue in this case is exclusive in character, I arrive at that conclusion in a somewhat different manner than the majority. Second, I agree with the majority that the leases at issue were invalid, but I disagree as to the reason why that is so. Although the majority concludes that the leases were invalid because neither the leases nor the underlying business conduct served a railroad purpose, I conclude that the leases were invalid for a more fundamental reason: because Union Pacific's interest in the property that was the subject of the leases was nonpossessory. Third, I disagree with the majority that the district court clearly erred in finding that L.K.L. and Heber abandoned six of the counts in their complaint. I therefore respectfully concur in part and dissent in part.

I

It is useful, in my view, to begin by reviewing the nature of the property interest that was afforded by Congress to railroads in the General Railroad Right-of-Way Act of 1875 (the 1875 Act), 43 U.S.C. § 934 *et seq.* Section 1 of the 1875 Act, under which Union Pacific's 1875 Right-of-Way was created, stated as follows:

> The right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also 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; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

43 U.S.C. § 934. "The 1875 Act remained in effect until 1976, when its provisions governing the issuance of new rights of way were repealed by the Federal Land Policy and Management Act, § 706(a), 90 Stat. 2793." *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 97 (2014).

The Supreme Court initially construed the 1875 Act as granting railroads something greater than an easement. In *Rio Grande Western Ry. Co. v. Stringham*, 239 U.S. 44 (1915), the Supreme Court addressed "a suit to quiet the title to a strip of land claimed and used by the plaintiff [railroad] as a railroad right of way under the" 1875 Act. *Id*. at 45. The Court concluded that "[t]he right of way granted by this and similar acts is *neither a mere easement, nor a fee simple absolute, but a limited fee*, made on an implied condition of reverter in the event that the [railroad] company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee." *Id.* at 47 (emphasis added).

Importantly, however, the Supreme Court reversed course in *Great Northern R. Co. v. United States*, 315 U.S. 262 (1942). At issue in *Great Northern* was "whether the petitioner [railroad] ha[d] any right to the oil and minerals underlying its right of way acquired under the" 1875 Act. *Id.* at 270. In answering that question, the Court held that

"[t]he Act of March 3, 1875 . . . *clearly grants only an easement, and not a fee*." *Id.* at 271 (emphasis added).

In support of its conclusion, the Court first pointed to the plain language of the 1875 Act:

> Section 1 indicates that the right is one of passage since it grants 'the', not a, 'right of way through the public lands of the United States'. Section 2 adds to the conclusion that the right granted is one of use and occupancy only, rather than the land itself, for it declares that any railroad whose right of way passes through a canyon, pass or defile 'shall not prevent any other railroad company from the use and occupancy of said canyon, pass, or defile, for the purposes of its road, in common with the road first located'.
>
> Section 4 is especially persuasive. It requires the location of each right of way to be noted on the plats in the local land office, and 'thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way'. This reserved right to dispose of the lands subject to the right of way is wholly inconsistent with the grant of a fee. As the court below pointed out, 'Apter words to indicate the intent to convey an easement would be difficult to find' (119 F.2d 825).

Id. at 271–72 (footnotes omitted).

The Court also noted "the history of the times when [the Act] was passed." *Id*. at 273. Between 1850 and 1871, the Court noted, Congress "subsidiz[ed] railroad construction by lavish grants from the public domain." *Id*. That policy, the Court noted, "incurred great public disfavor" and, as a result, "[a]fter 1871 outright grants of public lands to private railroad companies seem to have been discontinued." *Id*. at 274. The 1875 Act, the Court noted, "was a product of the sharp change in Congressional policy with respect to railroad grants after 1871." *Id*. As a result, the Court concluded "it [wa]s

improbable that Congress intended by [the 1875 Act] to grant more than a right of passage." *Id*.

In addition, the Court considered "the contemporaneous administrative interpretation placed on [the 1875 Act] by those charged with its execution." *Id*. at 275. That administrative interpretation, the Court noted, consistently treated the Act as granting railroads only an easement. *Id*. The Court acknowledged that "[a]fter 1915 administrative construction bowed to the" holding in *Stringham* that the right-of-way granted was neither a mere easement, nor a fee simple absolute, but a limited fee. *Id*. at 276. But the Court stated: "We do not regard this subsequent interpretation as binding on the Department of the Interior since it was impelled by what we regard as inaccurate statements in the *Stringham* case." *Id*. Lastly, the Court noted that "Congress itself in later legislation ha[d] interpreted the Act of 1875 as conveying but an easement." *Id*.

Most recently, in *Brandt*, the Court addressed "the question of what happens to a railroad's right of way granted under" the 1875 Act "when the railroad abandons it: does it go to the Government, or to the private party who acquired the land underlying the right of way?" 572 U.S. at 95. This question, the Court noted, "require[d] [it] to define the nature of the interest granted by the 1875 Act." *Id.* at 98. Although the government "maintain[ed] that the 1875 Act granted the railroads something more than an easement," the Court rejected that argument "in large part because [the government] won when it argued the opposite before th[e] Court more than 70 years" earlier in *Great Northern*. *Id.* at 102. Relying heavily on *Great Northern*, the Court concluded that the railroad in

Brandt "had an easement in its right of way over land owned by the Brandts." *Id.* at 104. The Court then proceeded to explain what an easement entails:

> The essential features of easements—including, most important here, what happens when they cease to be used—are well settled as a matter of property law. *An easement is a "nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement*." Restatement (Third) of Property: Servitudes § 1.2(1) (1998). "Unlike most possessory estates, easements . . . may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude." *Id.*, § 1.2, Comment d; *id.*, § 7.4, Comments a, f. In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land. *See Smith v. Townsend*, 148 U.S. 490, 499, 13 S.Ct. 634, 37 L.Ed. 533 (1893) ("[W]hoever obtained title from the government to any . . . land through which ran this right of way would acquire a fee to the whole tract subject to the easement of the company, and if ever the use of that right of way was abandoned by the railroad company the easement would cease, and the full title to that right of way would vest in the patentee of the land"); 16 Op. Atty. Gen. 250, 254 (1879) ("the purchasers or grantees of the United States took the fee of the lands patented to them subject to the easement created by the act of 1824; but on a discontinuance or abandonment of that right of way the entire and exclusive property, and right of enjoyment thereto, vested in the proprietors of the soil").

Id. at 104–05 (emphasis added).

Having outlined the Supreme Court's characterization of the rights afforded to railroads under the 1875 Act, I now turn to address Sections II and III of the majority opinion.

II

Section II of the majority opinion addresses the issue of whether a right-of-way granted to a railroad under the 1875 Act includes the right to exclude

others, and it concludes that a railroad easement is exclusive in character. I agree with this conclusion and much of the supporting analysis.[1] I write separately, however, to explain how I arrived at the conclusion that the railroad easement is exclusive in character.

As the Supreme Court emphasized in *Brandt*, "[a]n easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." Restatement (Third) of Property: Servitudes § 1.2(1) (2000). What the Supreme Court did not address in *Brandt*, because it did not need to, is whether an easement granted under the 1875 Act is exclusive or non-exclusive.

According to the Restatement (Third) of Property, "[t]he term 'exclusive' used in the context of servitudes means the right to exclude others." *Id.* cmt. c. "The degree of exclusivity of the rights conferred by an easement . . . is highly variable and includes two aspects: who may be excluded and the uses or area from which they may be excluded." *Id.* "At one extreme, the holder of the easement . . . has no right to exclude anyone from making any use that does not unreasonably interfere with the uses authorized by the servitude." *Id.* "At the other extreme, the holder of the easement . . . has the right to

[1] Section II of the majority opinion relies, in part, on the Supreme Court's decisions in *New Mexico v. United States Tr. Co. of New York*, 172 U.S. 171 (1898), and *W. Union Tel. Co. v. Pa. R.R. Co*., 195 U.S. 540, 570 (1904). I do not, however, find these decisions useful because both were issued during the period when the Supreme Court viewed the right afforded under the 1875 Act as akin to a fee interest, rather than an easement.

exclude everyone, including the servient owner, from making any use of the land within the easement boundaries." *Id.* "In between are easements where the servitude holder can exclude anyone except the servient owner and others authorized by the servient owner (usually called 'nonexclusive easements') and easements where the servitude holder can exclude the servient owner from use of facilities constructed for enjoyment of the easement . . . , but cannot exclude the servient owner from making other uses that do not unreasonably interfere with uses authorized by the servitude (usually called 'exclusive easements')." *Id.* For example, "[p]ipeline and electric transmission lines are typically 'exclusive' in that the servient owner is not entitled to use the pipeline or transmission poles and lines or license others to do so, but 'nonexclusive' in that the servient owner is entitled to make other uses of the area in which the lines are located so long as the uses do not unreasonably interfere with the pipeline or transmission line." *Id.* "Easements . . . may authorize the exclusive use of portions of the servient estate, and may involve uses that make any actual use of the premises by the transferor unlikely, but they are still considered nonpossessory interests if the transferor is not excluded from the entire parcel and retains the right to make uses that would not interfere with the easement . . . ." *Id.*

Generally speaking, "[a] servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." *Id.* § 4.1(1). "Except as limited by the terms of the servitude determined under § 4.1, the holder of the servient estate is entitled to make any use of the

servient estate that does not unreasonably interfere with enjoyment of the servitude." *Id.* § 4.9. "Actions that make it more difficult to use an easement, that interfere with the ability to maintain and repair improvements built for its enjoyment, or that increase the risks attendant on exercise of rights created by the easement are prohibited . . . , unless justified by needs of the servient estate." *Id.* cmt. c. "In determining whether the holder of the servient estate has unreasonably interfered with exercise of an easement, the interests of the parties must be balanced to strike a reasonable accommodation that maximizes overall utility to the extent consistent with effectuating the purpose of the easement . . . , and subject to any different conclusion based on the intent or expectations of the parties determined under § 4.1." *Id.*

Notably, the Restatement offers two illustrations that have some relevance to the case at hand:

> 1. O, the owner of Blackacre, which is burdened by an easement for a high-voltage electric transmission line, regularly pastures livestock in an area that includes the easement. In the absence of facts indicating that the livestock interfere with the easement owner's ability to maintain the transmission line, O is entitled to use the easement area for pasture.
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> * * *
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> 3. O, the owner of Blackacre, which is subject to an easement for a high-pressure natural gas pipeline, poured a concrete slab and erected a hog barn across the easement area. In the absence of other facts and circumstances, O is not entitled to use Blackacre in this manner because the slab and barn will unreasonably interfere with the easement by increasing the difficulty of maintaining and repairing the pipeline.

Id., Illustrations 1 and 3.

"Questions sometimes arise as to the ability of the servient owner to locate improvements within the boundaries of an easement when the improvement does not interfere with the current uses of the easement." *Id.* cmt. c. "Whether the improvement is an unreasonable interference with the servitude depends on the character of the improvement and the likelihood that it will make future development of the easement difficult." *Id.* "If the improvement is temporary and easily removed, it is generally not unreasonable." *Id.* "The more expensive the improvement or the more difficult its removal is likely to be, the more likely is the conclusion that the improvement is an unreasonable interference with the easement . . . ." *Id.* Again, the Restatement offers two illustrations that have some relevance to the case at hand:

> 5. O, the owner of Blackacre, conveyed to A, the owner of Whiteacre, a 60-foot wide easement for a road to provide access to Whiteacre. There is currently a narrow dirt lane within the easement area. A has no current plans to improve the road, but plans to do so when Whiteacre is eventually subdivided. O is using the area up to the lane for pasture and has erected a temporary fence along the lane to keep the livestock from straying. In the absence of other facts or circumstances, O is entitled to maintain the fence within the easement because the fence will be relatively easy to remove when A wants to widen the road.
>
> 6. Same facts as Illustration 5, except that O has constructed a concrete-block storage facility that extends 15 feet into the easement area. In the absence of other facts or circumstances, it would be reasonable to conclude that O is not entitled to maintain the structure in the easement area because it may be difficult or expensive to secure its removal when the owner of Whiteacre is ready to develop the easement, and it may give rise to a claim of prescriptive right on the part of the owner of Blackacre.

Id., Illustrations 5 and 6.

Supreme Court precedent discussing the 1875 Act is also relevant for purposes of determining the exclusivity of use that was afforded to Union Pacific. According to the Supreme Court, the 1875 "Act is to be liberally construed to carry out its purposes." *Great Northern*, 315 U.S. at 272. And the purpose of the 1875 Act, the Court has held, "was to enhance the value and hasten the settlement of the public lands by inviting and encouraging the construction and operation of needed and convenient lines of railroad through them." *Great Northern Ry. Co. v. Steinke*, 261 U.S. 119, 124 (1923).

These authorities lead me to the same conclusion reached by the majority in Section II of its opinion, i.e., that the 1875 Act afforded Union Pacific an exclusive right to use the disputed property. And that in turn means that there are few, if any, uses that plaintiffs can make of the disputed property that will not interfere with Union Pacific's right of use. *See generally Durango & Silverton Narrow Gauge R.R. Co. v. Wolf*, 411 P.3d 793, 795 (Colo. Ct. App. 2013) ("Under Colorado and federal precedent, railroad rights-of-way are more expansive than ordinary easements because they convey an exclusive right for the railroad to use the right-of-way and to exclude others, including the owner of the servient estate."). The construction of a parking lot and a building anywhere on the right-of-way afforded to Union Pacific under the 1875 Act would, in my view, "unreasonably interfere with [Union Pacific's] enjoyment of the servitude." Restatement (Third) of Property: Servitudes § 4.9. Although there is no evidence or argument that the parking lot and building that plaintiffs (or their predecessors) constructed on the disputed property interfere with Union Pacific's current uses of the

1875 Right-of-Way, the fact remains that it will presumably be expensive and difficult for Union Pacific to remove those features when and if it needs to make use of the disputed property. In addition, the continued existence of the parking lot and building could potentially give rise to a claim of prescriptive right on the part of plaintiffs. For these reasons, I conclude that the parking lot and building must be viewed as unreasonable interferences with Union Pacific's use of the easement.

The district court seemed to suggest that it was permissible for plaintiffs to use the disputed property until such time as Union Pacific needs the disputed property for a "railroad purpose." But that suggestion cannot be correct. As outlined in the Third (Restatement) of Property, 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. Even if Union Pacific has no current plans to develop the disputed property, Congress clearly intended for the easement to remain open indefinitely for Union Pacific's future development and use, and also intended for Union Pacific's use of the disputed property and the remainder of the easement to be exclusive so long as Union Pacific does not use the easement for a non-railroad purpose or abandon the easement.[2]

[2] Such conclusion is consistent with this court's ruling in *Boise Cascade Corp. v. Union Pac. R.R. Co.*, 630 F.2d 720 (10th Cir. 1980). That case, which also involved the Provo Industrial Lead, arose because the railroads (Union Pacific and its predecessors) had "put up a fence 33 feet on each side of the track center line," and "Boise Cascade built a lumber yard and made other improvements within the 67 foot strip." 630 F.3d at 721. Boise Cascade filed a quiet title action to the 67 foot strip, arguing, in part, that it was entitled to the strip "by reason of adverse possession, abandonment, estoppel, and

III

Section III of the majority opinion addresses the question of whether Union Pacific "may lease the lands its right of way encumbers and, if so, under what circumstances." Maj. Op. at 16. Section III concludes that the leases were invalid because "neither the leases nor the underlying business conduct served a railroad purpose."[3] *Id*. at 17.

I agree that the leases were invalid. But not because the leases and the underlying businesses failed to serve a railroad purpose. Rather, I conclude that the leases were invalid because, as the Supreme Court has made clear, the property interest afforded to Union Pacific under the 1875 Act is nonpossessory. *Brandt*, 572 U.S. at 105.

Section 1.2 of the Restatement (Second) of Property provides that "[a] landlord-tenant relationship exists only if the landlord transfers the right to possession of the leased property." Restatement (Second) of Property, Land. & Ten. § 1.2. Comment a

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boundary by acquiescence." *Id*. at 723. This court rejected those claims as "all irrelevant." *Id*. at 724. In doing so, the court noted that "'[t]he whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.'" *Id*. (quoting *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271–72 (1903)).

[3] In arriving at this conclusion, Section III relies, in part, on a 1911 Iowa Supreme Court case, *Anderson v. Inter-state Mfg. Co*., 152 Iowa 455 (1911), and a 1951 Fifth Circuit case, *Miss. Inv., Inc. v. New Orleans & N.E. R.R. Co.*, 188 F.2d 245 (5th Cir. 1951), that cites in part to *Anderson*. I do not believe that either case is a valid source on which to base our decision. Neither case involved a right-of-way granted under the 1875 Act. Further, both cases appear to have treated the railroad property at issue as fee interests, rather than easements.

thereto states, in pertinent part: "The landlord-tenant relationship will not commence until the tenant has a present right to possession" and "[i]n order to satisfy the possession requirement of the landlord-tenant relationship, the transferred interest in the leased property must be one that the owner is legally capable of possessing now or in the future." *Id*. cmt. a. Comment a further provides: "*A nonpossessory interest in land that is incapable of ever becoming possessory, such as an easement, cannot be the subject matter of a landlord-tenant relationship*, although it may be the subject matter of an arrangement that is similar in certain respects, such as its duration." *Id*. (emphasis added).

Because the 1875 Right-of-Way affords Union Pacific only an easement, and because, as the Supreme Court recognized in *Brandt*, easements are necessarily nonpossessory, it is impossible for Union Pacific to lease its interest in the easement.[4] More specifically, it would be impossible for Union Pacific to convey to a purported lessee the present right to possession.

The majority does not dispute the Restatement principles I have outlined above that require a lessor to transfer possession of the subject property to the lessee. Nor does the majority dispute that that the easement that was granted to Union Pacific is

[4] It may well be that Union Pacific could, with respect to the easement it received under the 1875 Act, enter into "an arrangement" with a third-party "that is similar in certain respects" to a lease. Restatement (Second) of Property, Land. & Ten. § 1.2 cmt a. That issue, however, is not before us in this case.

nonpossessory. Nevertheless, the majority asserts that I have "err[ed] . . . by letting general Restatement principles triumph over established principles of railroad easements." Maj. Op. at 17 n.3. According to the majority, there is an "understanding that railroad easements may be leased" that "is longstanding and basically uncontroverted." Maj. Op. at 17 n.3.

In fact, however, there is no such "longstanding and basically uncontroverted" "understanding" or "principle" that "railroad easements may be leased." Tellingly, the majority does not cite to a single case holding that a railroad easement granted under the 1875 Act may be leased by a railroad to a third-party (and I am unaware of any such cases). Instead, the majority cites only to a pre-*Brandt* law review article that "discuss[es] the history of nineteenth-century railroad land acquisition practices," "analyze[s] the scope of the easement limited for railroad purposes," and ultimately focuses on the question of whether "the exclusive character of the easement and its extensive scope confer upon the railroad the power to grant licenses or subeasements to utility companies or allow recreational trail use." Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 Ecology L.Q. 351, 351, 388 (2000). In "attempt[ing] to deduce a coherent theory about the nature, parameters, and powers of the limited railroad easement," the article begins by correctly noting that "[t]he cardinal rule in property law is that one cannot sell what one does not own." *Id*. at 389, 390. But the article then makes what, in light of *Brandt*, are clear

misstatements of the law by first suggesting that "courts have agreed that the railroad easement is a unique and difficult-to-define property right that does not clearly fit into the easement or fee categories," and in turn asserting that "[b]ecause the easement is so exclusive as to be nearly equivalent to the fee, the railroad is clearly within its rights to lease land for its necessary operations."[5] *Id*. at 394, 422. Although the Supreme Court's characterization of the right afforded to a railroad under the 1875 Act has, by its own admission, changed over time, *Brandt* now makes clear that a right-of-way granted under the 1875 Act is, notwithstanding its unique characteristics, an easement subject to the

[5] In support of this latter statement, the article cites to four state court decisions: *State Highway Comm'n v. Union Elec*., 148 S.W.2d 503 (Mo. 1941); *Mize v. Rocky Mountain Bell Tel. Co*., 100 P. 971 (Mont. 1909); *Luedeke v. Chicago & N.W. Ry. Co*., 231 N.W. 695 (Neb. 1930), and *Fort Worth & Rio Grande Ry. Co. v. Sw. Tel. & Tel. Co*., 71 S.W. 270 (Tex. 1903). None are remotely on point. *State Highway Comm'n* involved parcels of land that were acquired by a railroad from private individuals. 148 S.W.2d at 504. *Mize*, as far as I can determine, did not involve a railroad easement at all, and instead involved power lines that were owned and maintained by a combination light, power and railway company. *Luedeke* was an action brought by an individual plaintiff "to recover damages which the plaintiff claim[ed] resulted by reason of the negligence of the defendant" railway company "in obstructing certain streets with a freight train and delaying the fire department in reaching the plaintiff's property which was burning." 231 N.W. at 696. To be sure, there is reference in *Luedeke* to the plaintiff having licensed or leased from the railway company the right to construct an unloading device on the railway company's right-of-way. But the opinion did not address the legality of the license or lease, nor did the opinion address how the railway company obtained the right-of-way in the first place. Lastly, *Fort Worth* involved a condemnation proceeding instituted by a telephone company against a railway company so that the telephone company could build upon the railway company's right-of-way a telegraph and telephone line. No lease was at issue. Further, the opinion does not address how the railway company obtained its right-of-way.

general Restatement principles of property law. Thus, the suggestion in the article that a railroad easement is a fee-like property right that may be leased is simply wrong.

As for the majority's assertion that I have erred in applying the general Restatement principles to the easement that Union Pacific received by way of the 1875 Act, I would note that the majority itself relies on those same general principles in resolving the exclusivity of Union Pacific's easement, yet offers no serious explanation for why those principles should not apply in determining whether Union Pacific may lease its easement. Maj. Op. at 12, 16. In any event, the Supreme Court in *Brandt* gave every indication that rights of way granted to a railroad under the 1875 Act are easements subject to the general Restatement principles that apply to all easements.

IV

In Section IV, the majority opinion addresses the substantive claims that were decided by the district court. I agree with all of Section IV except for subsection c, which concludes that the district court clearly erred in finding that L.K.L. and Heber abandoned six of the claims contained in their original complaint (Counts Two, Three, Four, Five, Six, and Nine).[6] I am unable to conclude, after reviewing the record on appeal, that the

[6] To review: Count Two alleged a claim for rescission on the basis of unilateral mistake. Count Three sought a declaration that the lease agreements failed for lack of consideration. Count Four sought a declaration that the leases were invalid for failure of consideration. Count Five alleged a claim for breach of contract due to Union Pacific's failure to transfer the right to possess the disputed property. Count Six alleged a claim for intentional interference with economic relations. And Count Nine alleged a claim for unjust enrichment/quantum meruit.

district court committed clear error. *See Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1003 (10th Cir. 1996) ("We treat the district court's conclusion as a primarily factual finding that Plaintiffs abandoned their intentional discrimination claim, and review for clear error . . . ."). As the Supreme Court made clear long ago, the "clearly erroneous" standard of review that we apply to a district court's factual findings "plainly does not entitle [us] to reverse [those] finding[s] . . . simply because [we are] convinced that [we] would have decided the [issue] differently." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). Instead, we must defer to a district court's factual findings because of "the superiority of the trial judge's position to make determinations of credibility" and because of the "expertise" that a district court develops "in fulfilling" its role as a "finder of fact." *Id*. at 574. As I shall proceed to explain, the district court in this case was in a vastly superior position to assess the statements and credibility of plaintiffs' counsel than we are.

The district court held a final pretrial conference on July 14, 2017. During that conference, the district court discussed with plaintiffs' counsel the claims that were being asserted by plaintiffs. Plaintiffs' counsel noted that plaintiffs had "alleged in [their] complaint a claim for abandonment adverse possession," but he stated they "[we]re not really serious about those claims." Aplt. App., Vol. 20 at 3408. The district court responded: "Shall we dismiss them if you're not serious?" *Id.* Plaintiffs' counsel responded: "If you'd like, we can. The reason they are in [the complaint] is because *Brandt* had some language . . . that said [that a railroad's interest in its right-of-way] can

be abandoned." *Id.* (italicization added). The district court then stated: "Let's talk about what you're suggesting is that half a dozen or so causes of action separate and apart from the ownership question and the clash [sic] question are capable of being dismissed by your agreement." *Id.* at 3408–09. Plaintiffs' counsel then stated: "I think once the Court makes the legal ruling, it's going to resolve this whole case. Once you just tell us whether the 1875 Act gave us possession or not, we'll be done." *Id.* at 3409. Plaintiffs' counsel explained:

> So our position is we've got a strip of property here that the railroad has never needed and has never used, but if they decided they needed to use it, they would have the right to be able to come use it and we would have to let them do it because we can't interfere.
> * * *
> But until that happens – and I don't think it will ever happen, they don't see any need for it. Until that happens, we have the right to use it for other purposes, and those are reserved to the possessor, and it makes sense to have the property put to beneficial use like it has been here and all along this line. And it doesn't make any sense at all to force these things to be torn down for a reason other than the railroad wants to try to get rent from us on property they don't need and have never used, then they are going to make us tear our buildings down. We're saying the law doesn't allow that.

Id. at 3409–10.

Shortly thereafter, the district court asked plaintiffs' counsel: "As far as you're concerned, the other[] [claims] are tagalongs?" *Id.* at 3415. Plaintiffs' counsel responded: "That is correct. And our principal claim, Count 1, is for [rescission of the leases based upon] mutual mistake. And we think once you make your legal ruling on what the effect of the 1875 Act is, whether it granted possession or not, then this case –

that issue will be decided, that claim." *Id.* at 3415. Plaintiffs' counsel then continued and stated, in pertinent part:

> And I'm saying once you make the decision on whether [Union Pacific] ha[s] possession or not, then that is decided, and they have a claim or they don't. And if they do, they win. And if they don't, then we – if they don't, then we win. And just like happened in *Brandt* and *Great Northern*, once the court was able to decide what was given in 1875, everything else was made known. And that's the way it is here. As soon as you make that ruling, everything is going to trickle – and we will either win on our mutual mistake claim or we won't. If we win on it, I anticipate – I will consult with my client, but my anticipation would be I don't know why we would want to pursue any other claims. That's what we need.
>
> If we lose on it, the case is over. In neither scenario will we be at trial with witnesses exploring whether the boundary marker moved. That's not going to happen. We just have a legal issue that needs to be decided. And when it's decided, we're done.
>
> And so that I think is the critical thing and that's what we are really asking the Court strongly is to rule on that as fast as we can because it's very expensive for us to do what we did today and to do these other things that we think are not going to matter at the end of the day. Once you make that legal ruling, we're done. We either tear our building down and we move off, or we get to stay there.
>
> We've got a dispute between neighbors, and we are coming to federal court. We've got a court that can tell us what this federal statute means. And do we have to tear the building down or can we keep it. Do we have to pay them rent or not. Just tell us and we can be good neighbors again and get back – and they can use it for railroad purposes and we're not going to interfere with that. We're going to get back to business and stop bleeding the money that they are paying doing all of this. So that's our plea to you.

Id. at 3415–16 (italicization added).

Later during the pretrial conference, plaintiffs' counsel stated: "The one issue we have in this case that will decide everything is a pure legal issue for your decision, and

we have already briefed that." *Id.* at 3437–38. Plaintiffs' counsel also noted that their motion for partial summary judgment remained outstanding and pertained to their claims "for rescission, lack of consideration, quiet title, declaratory relief," as well as Union Pacific's "counterclaims." *Id.* at 3439. Plaintiffs' counsel further noted that all of these claims and counterclaims "focus[ed] on . . . the issue of possession. Once you decide that issue of what was given in 1875, all these are just going to fall by the wayside, one way or the other." *Id.*

The district court directed plaintiffs to file an amended motion for summary judgment focusing on the one issue that plaintiffs' counsel believed to be critical to all of the claims, i.e., the nature of the interest that was afforded to Union Pacific by the Act of 1875. *Id.* at 3439–40. The district court also, with the agreement of plaintiffs' counsel, stayed all of the other pending motions for summary judgment. *Id.* at 3441. In addition, the district court expressly authorized Union Pacific to argue in its response to plaintiffs' amended motion for summary judgment, that plaintiffs had no interest in the disputed property and thus lacked standing. *Id.* at 3442.

Plaintiffs filed an amended motion for summary judgment that focused on just two of the claims alleged in their complaint: rescission of the leases on the basis of mutual mistake (Count One) and declaratory relief which would determine Union Pacific's interest in the property that is the subject of the leases (Count Eight). Plaintiffs argued in their amended motion for summary judgment that "[on]ce the [district court] determine[d] whether the 1875 Act conveyed the exclusive right of possession to the

railroad, it w[ould] create a domino effect resolving the remaining issues and claims." *Id*., Vol. IX at 1474. More specifically, plaintiffs asserted that if the district court determined that Heber Rentals owned the right of possession with respect to the disputed property, then Counts One and Eight of their complaint "should be granted and [Union Pacific's] counterclaims should be dismissed." *Id.* at 1472. Plaintiffs stated they "w[ould] stipulate to the dismissal of the remainder of their claims following a favorable ruling on Counts [One] and [Eight], leaving the case resolved." *Id.* at 1517.

At the August 24, 2017 hearing on plaintiffs' amended motion for summary judgment, plaintiffs' counsel stated that they "ha[d] a one issue motion, and that is whether the 1875 Act conveyed to the railroad a right of possession. And we have moved for summary judgment on that basis seeking summary judgment on our claim for rescission on the grounds of mutual mistake." *Id.*, Vol. XVII at 2891.

Nearly a year later, during a July 17, 2018 hearing on the parties' respective motions to alter or amend the judgment, plaintiffs' counsel stated his belief that "there [we]re still some claims pending" notwithstanding the district court's resolution of plaintiffs' amended motion for summary judgment. *Id*., Vol. XX at 3446. The district court responded: "I thought they had been abandoned." *Id*. at 3447. Plaintiffs' counsel stated in response: "We had an intent to abandon them if we received judgment on our rescission claim." *Id*. The district court replied: "Well, . . . your oral representations to the Court during both the pretrial and the motion itself indicated otherwise." *Id*. Plaintiffs' counsel conceded that he "ha[d] created a false impression" with the court

regarding the plaintiffs' remaining six claims and "apologize[d]" for that. *Id.* at 3450. Plaintiffs' counsel also, upon questioning by the district court, conceded that the amended motion for summary judgment did not seek a ruling on those six claims. *Id.* But plaintiffs' counsel denied any intention to abandon those six claims.

Considering this evidence as a whole, I am not persuaded that the district court clearly erred in finding that plaintiffs' counsel abandoned all but Counts One and Eight of their complaint. From the time of the final pretrial conference until the initial judgment was entered, it is undisputed that plaintiffs' counsel focused exclusively on Counts One and Eight and believed incorrectly that a ruling by the district court on whether Union Pacific had a right to possess the disputed property would conclusively resolve those claims and Union Pacific's counterclaims. Plaintiffs' counsel also suggested repeatedly to the district court that such a ruling would effectively resolve the case. To be sure, plaintiffs' counsel, and in turn plaintiffs' amended motion for summary judgment, made fleeting references to the other six claims. But at no point between the final pretrial conference and the entry of the original final judgment did plaintiffs make a serious attempt to litigate those claims on the merits.

I would therefore affirm the district court's finding that plaintiffs abandoned the six claims that were not discussed in plaintiffs' amended motion for summary judgment.