United States Department of the Interior

OFFICE OF THE SOLICITOR
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Memorandum

To: Secretary
Assistant Secretary for Land and Minerals Management
Assistant Secretary for Water and Science
Director, Bureau of Land Management

From: Acting Solicitor and Principal Deputy Solicitor

Subject: Withdrawal of Solicitor's Opinion M-37025 issued on November 4, 2011, and Partial Withdrawal of Solicitor's Opinion M-36964 issued on January 5, 1989

This memorandum analyzes the scope of a railroad's rights within a right-of-way granted pursuant to the General Railroad Right-of-Way Act of March 3, 1875, 18 Stat. 482. This issue was most recently addressed in Solicitor's Opinion M-37025 – *Partial Withdrawal of M-36964 – Proposed Installation of MCI Fiber Optic Communications Line Within Southern Pacific Transportation Co.'s Railroad Right-of-Way* (hereinafter "M-37025").[1] Opinion M-37025:

- Withdrew portions of a Solicitor's Opinion M-36964[2] concerning rights under the 1875 Act; and

- Determined that "a railroad's authority to undertake or authorize activities [within an 1875 Act right-of-way] is limited to those activities that derive from or further a railroad purpose."[3]

On June 30, 2017, M-37025 was temporarily suspended and withdrawn in order to determine if the analysis set forth in the opinion is complete and whether post-2011 decisions should be factored into the opinion.[4] In light of further analysis of the general history and review of recent case law concerning the 1875 Act, this memorandum permanently withdraws M-37025 and supersedes Solicitor's Opinion M-36964 only with respect to the Department's interpretation of the 1875 Act.

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[1] 2011 DEP SO LEXIS 10 (Nov. 4, 2011).
[2] Solicitor's Opinion M-36964 – *Proposed Installation of MCI Fiber Optic Communications Line Within Southern Pacific Transportation Co.'s Railroad Right-of-Way*, 96 Interior Dec. 439 (Jan. 5, 1989) (hereinafter "M-36964").
[3] M-37025 at 4.
[4] Temporary Suspension of Solicitor Opinion M-37025, "*Partial Withdrawal of M-36964-- Proposed Installation of MCI Fiber Optic Communications Line Within Southern Pacific Transportation Co.'s Railroad Right-of-Way*" (June 30, 2017) (hereinafter "Temporary Suspension of Solicitor Opinion M-37025").

For the reasons set forth below, this memorandum concludes that the rights-of-way granted to railroad companies under the 1875 Act allow railroad companies to lease portions of their easements to third parties without permit or grant from the Bureau of Land Management ("BLM"), provided that such leases are limited to the surface, broadly defined,[5] of the easement and do not interfere with the continued use of the easement as a railroad.

The scope of this memorandum is limited to the rights of railroads holding easements across public lands under the 1875 Act. It does not opine on any rights railroads may have with respect to easements that originate from other sources.

I. Background

A. Pre-1875

As the territory of the contiguous United States expanded through the early-to-mid-19th Century, the country sought a "fast and reliable way to transport people and property to those frontier lands" to encourage settlement and development.[6] To fill this need, "[b]eginning in 1850, Congress embarked on a policy of subsidizing railroad construction by lavish grants from the public domain."[7] These efforts were bolstered by the Civil War, which "spurred the effort to develop a transcontinental railroad," as a means to "'furnish a cheap and expeditious mode for the transportation troops and supplies,' help develop 'the agricultural and mineral resources of this territory,' and foster settlement."[8]

While the exact form could vary from grant-to-grant, the "lavish grants from the public domain" during this period generally took the form of "rights of way through the public domain accompanied by outright grants of land along those rights of way," often conveyed in a "checkerboard blocks."[9] This policy enabled railroad companies to "either develop their lots or sell them, to finance construction of rail lines and encourage the settlement of future customers."[10]

Over time, this policy generated an increasing number of detractors. Critics argued that the policy of providing large land grants to railroad companies conflicted with the goal of "encourag[ing] individual citizens to settle and develop the frontier lands," in part because they claimed "the railroads moved too slowly in placing their lands on the market and into the hands of farmers and settlers."[11] As a result of these and other criticisms, "Congress enacted the last checkerboard land-grant statute for railroads in 1871."[12] This shift in policy was confirmed by a House resolution adopted in 1872 which stated:

> That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every

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[5] *See infra* Section III(A)(iii).
[6] *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1260 (2014).
[7] *Great N. R.R. Co. v. United States*, 315 U.S. 262, 273 (1942).
[8] *Brandt*, 134 S. Ct. at 1260 (quoting *United States v. Union Pac. R.R. Co.*, 91 U.S. 72, 80 (1875)).
[9] *Id.* at 1261 (citing P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 362-368 (1968)).
[10] *Id.*
[11] *Id.*
[12] *Id.* (citing GATES, *supra* note 9, at 380).

> consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law.[13]

Nevertheless, even as Congress moved away from the "lavish grants" of the 1850s and 60s, Congress still sought to "encourage development of the Western vastness" by granting rights-of-way across public lands.[14] Accordingly, "Congress passed at least 15 special acts between 1871 and 1875 granting to designated railroads 'the right of way' through public lands, without any accompanying land subsidy."[15]

B. The 1875 Act

Rather than continue providing rights-of-way on a case-by-case basis, in 1875, Congress passed "An act granting to railroads the right of way through the public lands of the United States," better known as the General Railroad Right-of-Way Act of March 3, 1875 (the "1875 Act" or the "Act").[16] This Act gave railroad companies the ability to claim a right-of-way on public lands and to use certain materials on adjacent public lands, provided that they met several enumerated preconditions. Pursuant to the Act, railroad companies claimed rights-of-way over large tracts of public lands from 1875 until the passage of the Federal Land Policy and Management Act ("FLPMA") in 1976, which repealed the Act.[17] While FLPMA's repeal of the Act foreclosed claims to new rights-of-way, it did not divest companies of the valid right-of-way grants obtained through the 1875 Act. Thus, railroad companies maintained rights-of-way over large tracts of public lands.

Throughout this period, railroad companies leased land within their rights-of-way, including within those obtained under the 1875 Act, to third parties.[18] For example, in testimony before Congress in 1961, representatives from three major railroad companies explained how and why they leased portions of their respective rights-of-way to third parties. Southern Pacific Railroad, making no distinction between rights-of-way obtained under the 1875 Act and land obtained through other transactions, represented that it had entered into leases "covering the use of portions of such rights-of-way for warehouse, industrial, storage, and related purposes in connection with the shipment and delivery of freight by rail," as well as leases with adjacent landowners and others "for other purposes."[19] Southern Pacific went on to clarify its view that

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[13] *Id.* (quoting Cong. Globe, 42d Cong., 2d Sess. 1585 (1872)).
[14] *Great N. R.R. Co.*, 315 U.S. at 274.
[15] *Brandt*, 134 S. Ct. at 1261 (citing *Great N. R.R. Co.*, 315 U.S. at 274).
[16] Chap. 152, 18 Stat. 482 (Mar. 3, 1875).
[17] Pub. L. No. 94-579, § 706 (1976).
[18] *See generally* Danaya C. Wright & Jeffery 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, 359 (2000) ("While the challenges are new, the uses are not; for over a century, the railroads have been granting rights to utility companies to string cables and run pipelines in their corridors."); *id.* at 361 ("Multiple uses of these [railway] corridors was the rule, not the exception, regardless of whether the railroads owned their corridor land in fee simple or possessed only an easement over the land.").
[19] *Use and Disposition of Railroad Right-of-Way Grants: Hearing on H.R. 6630 and HR. 6945, H.R. 3229, H.R. 3346, and H.R. 5745, H.R. 6161, H.R. 7436, and H.R. 7550 Before the Subcomm. on Public Lands of the H. Comm. on Interior and Insular Affairs*, 87th Cong. 81 (1961) (statement of J.C. Waterman, General Attorney, Southern Pacific Co.).

such leases need not be limited to specific railroad purposes, stating "[i]t is judicially recognized that a railroad company is entitled to lease portions of its rights-of-way for nonrailroad purposes subject to termination upon reasonably short notice when required for railroad purposes."[20]

In the same hearing, the Vice President and Western General Counsel of Union Pacific Railroad Company represented that Union Pacific had entered into approximately 2,000 leases for industrial and manufacturing purposes and an additional 2,000 leases, covering approximately 1,878 miles, for agricultural purposes.[21] Union Pacific went on to note that many of these agricultural leases were defensive in nature, entered into to allow adjacent landowners to enter and utilize portions of the Union Pacific rights-of-way without creating a potential claim over the land through adverse possession.[22] Union Pacific further clarified that these lease numbers did not account for the "hundreds of persons and companies who have licenses to cross [Union Pacific's] granted right-of-way with highways, pole lines, wire lines, pipelines, etc."[23]

Similarly, a representative from the Northern Pacific Railway Company stated:

> [T]he Northern Pacific, like other railroads whether they be land-grant railroads or not, leases those portions of its right-of-way not actually occupied with railroad facilities. In urban areas the leases are made with industries that make use of rail transportation. In rural areas, the leases are made with abutting landowners, thereby permitting them to enlarge their holdings for the purpose of raising crops or for grazing purposes, thereby increasing productivity to the benefit of the lessor, lessee, public at large, and the U.S. Government.[24]

Northern Pacific went on to represent that in 1961 it had approximately 24,129 right-of-way leases, including 13,435 which were entered into for a nominal fee to prevent adverse possession claims and permit the maintenance and crossing of "culverts, pipelines, transmission lines, etc." through the right-of-way.[25]

While the precise numbers in this testimony are dated, for nearly ninety years railroad companies and their third party lessees viewed leasing portions of railroad rights-of-way for both railroad and nonrailroad purposes as a common, legal, and accepted practice under federal land grant statutes, including the 1875 Act.[26]

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[20] *Id.* at 83.
[21] *Id.* at 90-91 (statement of F.J. Melia, Vice President and Western General Counsel, Union Pacific Railroad Co.).
[22] *Id.* at 90.
[23] *Id.* at 91.
[24] *Id.* at 103 (statement of George R. Powe, Assistant General Manager, 212-A Properties and Industrial Development, Northern Pacific Railway Co.).
[25] *Id.* at 103-104 (statement of F.J. Melia, Vice President and Western General Counsel, Union Pacific Railroad Co.).
[26] *But see ST Servs.*, 169 IBLA 207 (June 27, 2006) (noting that BLM viewed a pipeline on land subject to a railroad easement as a trespass on federal lands and requested rent payments). The Interior Board of Land Appeals subsequently reversed the BLM's determination and mandated that BLM refund prior rent payments, reasoning that the railroad possessed the exclusive right under the 1875 Act to authorize the pipeline. *Id.*

C. M-36964 and Subsequent Case Law

The Department of the Interior also interpreted the 1875 Act as granting railroads the right to authorize third parties uses within the rights-of-way. In particular, the Acting Solicitor issued an opinion on January 5, 1989, concluding that Southern Pacific was within the scope of its right-of-way under both pre-1875 land grants and the 1875 Act to permit MCI to install fiber optic cable within Southern Pacific's right-of-way.[27] With respect to the 1875 Act, the opinion reasoned that the easement granted by the 1875 Act was "tantamount to fee ownership," providing Southern Pacific with sufficient authority to "utilize and authorize MCI to utilize the subsurface for a fiber optic line."[28]

In 2005, the District Court for the Southern District of Indiana criticized the 1989 M-Opinion, stating that M-36964 "did not cite any law" for the proposition that easements granted under the 1875 Act are tantamount to a fee interest, and "ignore[d] the Supreme Court's decision in *Great Northern*, which took pains to distinguish between the 'limited fee' granted by pre-1871 statutes and the easements granted by later statutes."[29] Instead, the court in *Home on the Range* concluded that the use of railroad easements was limited to "railroad purposes," and did not include the ability to lease land for fiber optic cables.

In response to the criticisms of the District Court in *Home on the Range* and questions surrounding a proposed water pipeline, the Solicitor issued a new opinion concerning the scope of rights-of-way under the 1875 Act.[30] Opinion M-37025 withdrew M-36964 with respect to the scope of rights-of-way under the 1875 Act, and concluded that a railroad's authority to undertake or authorize activities is limited to those activities that "derive from or further a railroad purpose," where activities with both railroad and commercial purposes were permitted, but activities that "bear no relationship to the construction or operation of a railroad" were beyond the scope of the right-of-way.[31]

After the release of the Opinion M-37025, the Supreme Court weighed in on the nature of land grants under the 1875 Act in *Brandt*, concluding that such grants are easements, not limited fees. In addition, the U.S. District Court for the Central District of California ruled that all activities must serve a "railroad purpose" in order to fall within the scope of the 1875 Act, and that commercial pipelines do not serve a railroad purpose as a matter of law.[32]

In light of recent judicial decisions that relate to the 1875 Act, Opinion M-37025 was temporarily suspended and withdrawn by Memorandum issued by the Acting Solicitor to

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[27] M-36964, 96 Interior Dec. at 451.
[28] *Id.* at 450-451.
[29] *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999, 1021-23 (S.D. Ind. 2005) (citing *Great N. R.R. Co.*, 315 U.S. 262).
[30] M-37025 at 1.
[31] *Id.* at 12-13.
[32] *In re SFPP Right-of-Way Claims*, No. SACV 15-00718 (DFMx); SACV 15-00986; SACV 15-01362 JVS; CV 15-7492, 2016 U.S. Dist. LEXIS 86417 (C.D. Cal. June 7, 2016) appeal pending sub non *Serrano v. Union Pac. R.R. Co.*, No. 8:15-cv-00718-JVS-DFMx (C.D. Cal., May 5, 2015).

determine if the analysis set forth in the opinion is complete and whether post-2011 decisions should be factored into the opinion.[33]

II. The Law

A. The 1875 Act

The 1875 Act reads in part:

> Sec. 1. That the right of way through the public lands of the United States is hereby 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, turn-outs, 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.
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> Sec. 2. That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. . . .
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> Sec. 4. That any railroad-company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way . . . .

i. Supreme Court Case Law Interpreting the 1875 Act

United States v. Denver & Rio Grande Railway Company provided one of the first opportunities for the Court to examine the 1875 Act.[34] The Court in *Denver & Rio Grande* examined the purpose of the 1875 Act in the context of a dispute over timber taken by the railroad company from adjacent federal lands. Per the Court, "[t]he general nature and purpose of the act of 1875 were manifestly to promote the building of railroads through the immense public domain

[33] Temporary Suspension of Solicitor Opinion M-37025, *supra* note 4.
[34] 150 U.S. 1 (1893).

remaining unsettled and undeveloped at the time of its passage."[35] Congress "intended to promote the interests of the government in opening to settlement, and in enhancing the value of those public lands through or near which such railroads might be constructed."[36]

The Court also noted that while "the well-settled rule of this court [is] that public grants are construed strictly against the grantees, ... they are not to be so construed as to defeat the intent of the legislature or to withhold what is given either expressly or by necessary or fair implication."[37] Given the lofty aims of the legislature in adopted the 1875 Act, the Court set forth a more accommodating rule of construction for evaluating the scope of rights claimed under the 1875 Act:

> When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.[38]

Thus, *Denver & Rio Grande* stands for the proposition that the purpose of the 1875 Act extends beyond the advancement of the parochial pecuniary rights of railroad companies to the promotion of the broad public interest in opening, settling, and increasing the value of public lands and, that given this broad public-oriented purpose, the scope of the rights-of-way granted under the Act should be construed liberally.

In *Rio Grande Western Railway Company v. Stringham*, the Court sought to characterize the nature of the right-of-way granted to railroad companies under the 1875 Act.[39] In the context of an action to quiet title, the Court determined that "the 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 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."[40]

Less than thirty years later, the Court again examined rights of way granted under the 1875 Act and reversed course. The Court in *Great Northern* examined the scope of rights under the 1875 Act and the circumstances surrounding its passage in the context of a claim by the Great Northern Railway Company to the minerals located beneath the right-of-way granted under the 1875 Act.[41] With respect to the history of the Act, the Court observed that the 1875 Act reflected a general post-1871 policy shift away from granting subsidies in public lands to railroad

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[35] *Id.* at 8.
[36] *Id.*
[37] *Id.* at 14.
[38] *Id.* (citing *Bradley v. N.Y. & New Haven R.R. Co.*, 21 Conn. 294 (1851) and EDWARD L. PIERCE, A TREATISE ON THE LAW OF RAILROADS 491 (Boston: Little, Brown, and Company 1881)).
[39] 239 U.S. 44 (1915).
[40] *Id.* at 47.
[41] *Great N. R.R. Co. v. United States*, 315 U.S. 262 (1942).

companies.[42] Focusing on this "sharp change in Congressional policy with respect to railroad grants after 1871,"[43] the Court concluded that post-1871 enactments reflected not just a difference in degree of public support, but a difference in kind: land grants before 1871 provided railroads with "limited fee" ownership over the land, while post-1871 enactments provided a mere easement over the land. Based upon the conclusion that the 1875 Act conveyed "but an easement," the Court concluded that railroad companies had no right to develop oil and minerals underlying their 1875 rights-of-way.[44]

In *Marvin M. Brandt Revocable Trust v. United States*, the Court relied heavily on the opinion in *Great Northern* to reaffirm that the 1875 Act conveyed an easement to the railroad companies, while the pre-1871 statutes conveyed a limited fee interest.[45] In reaffirming *Great Northern*, the Court focused in part on the need for stability in the law, particularly where land titles are concerned. Specifically, the Court noted that a contrary position would reverse a seventy-year-old holding and "decline[d] to endorse such a stark change in position, especially given 'the special need for certainty and predictability where land titles are concerned.'"[46]

ii. Limited Fees vs. Easements

The distinction between a limited fee with a reverter and an easement in the context of railroad grants is significant. One major difference is the disposition of the right-of-way if the railroad company forfeits or abandons it. A limited fee with a reverter vests title to the land in the railroad, with the possibility of the United States reclaiming title should the land be forfeited or abandoned. In effect, this arrangement serves to keep title to public lands out of the hands of settlors.

By changing the nature of the right-of-way granted to railroad companies from a limited fee to an easement, Congress made it easier for clear title to pass to settlors by operation of law. Looking to common law principles, the Court in *Brandt* observed:

> "Unlike most possessory estates, easements . . . may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude." [*Restatement (Third) of Property: Servitudes*] *§ 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.[47]

Put more explicitly, if the government were to transfer public lands to homesteaders or other property owners subject to a railroad easement:

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[42] *Id.* at 273-275.
[43] *Id.* at 275.
[44] *Id.* at 276.
[45] 134 S. Ct. 1257.
[46] *Id.* at 1268 (quoting *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979)).
[47] *Id.* at 1265.

> [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.[48]

This distinction is significant because it helped further "Congress's intent to divest the United States of any title or interest it had retained to railroad rights of way, and to vest that interest in individuals to whom the underlying land had been patented."[49]

Thus, the switch in 1871 from granting limited fee estates with a right of reverter to granting easements made it easier for the federal government to divest title of public lands to homesteaders and others, particularly when railroad companies forfeited or abandoned their rights-of-way, ameliorating the concern of pre-1871 critics that railroads were too slow to divest title of unused lands.

B. Law of Easements

The Court in *Brandt* confirmed that railroad rights-of-way granted under the 1875 Act are easements. In general, "an 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."[50] Easements may be appurtenant, meaning the rights of the easement are tied to the owner or occupier of a particular piece of land, or in gross, meaning "that the benefit or burden of a servitude is not tied to ownership or occupancy of a particular unit or parcel of land"; and either kind may be personal, meaning that the benefits of the easement are not transferable.[51] In general, servitudes "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."[52] Where there are multiple reasonable interpretations, "that which is more consonant with public policy should be preferred."[53]

Today, "most courts hold that easements in gross are apportionable if they are *exclusive* (meaning that the owner of the servient estate has no right to use the easement in the same way as the easement owner)."[54] As explained in an earlier version of the Restatement of Property:

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[48] *Id.* (quoting *Smith v. Townsend*, 148 U.S. 490, 499 (1893)).
[49] *Id.* at 1268.
[50] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2(1) (2000).
[51] *Id.* § 1.5.
[52] *Id.* § 4.1(1).
[53] *Id.* § 4.1(2).
[54] JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 225 (2d ed. 2005); *see also* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 9.9 (2017) ("Courts have generally concluded that an easement in gross is capable of division when the instrument of creation so indicates or when the existence of an 'exclusive' easement gives rise to an inference that the servitude is apportionable." (citations omitted)); Alan David Hegi, Note, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 VAND. L. REV. 109, 129 (Jan. 1986) ("The resulting rule states that an easement holder can divide his interest only if his original grant was exclusive. According to this rule, because the landowner has granted away all of his rights to the easement area, he cannot object to his grantee's division of the easement if the total use remains within the extent of the original grant." (citations omitted)).

> Though apportionability may be to the disadvantage of the possessor of the servient tenement, the fact that he is excluded from making the use authorized by the easement, plus the fact that apportionability increases the value of the easement to its owner, tends to the inference in the usual case that the easement was intended in its creation to be apportionable. This inference is very strong in cases where an increase in use is in fact advantageous to the possessor of the servient tenement.[55]

This is particularly true when the easement in question is a commercial easement.[56]

Apportionment is not without limits, however. In general, "[b]enefits in gross may be divided among two or more independent owners if division of the benefit does not contravene the intent of the parties . . . and if the division does not unreasonably increase the burden on the servient estate."[57] Determining whether a proposed use unreasonably increases the burden on the servient estate "is primarily [a determination] of fact, based on inferences that may be drawn from the language and circumstances" where "the outcome in any particular case may be affected by the level of generality with which the purpose is defined."[58] In general, "[t]he purpose of an easement created by express grant . . . is often defined more generally."[59] Further, "[i]n resolving conflicts among the parties to servitudes, the public policy favoring socially productive use of land generally leads to striking a balance that maximizes the aggregate utility of the servitude beneficiary and the servient estate."[60]

III. Legal Analysis

The Court in *Great Northern* and *Brandt* made clear that the right-of-way granted under the 1875 Act is an easement. It also has opined that the easement does not convey rights to the underlying oil and minerals,[61] and should be construed to the extent consistent with its unique nature by utilizing common law principles.[62] But the Court has not decided the extent to which the easement authorizes a railroad company to lease land to third parties for commercial or other purposes. Certain lower courts, and the 2011 M-Opinion, take a narrow view of the rights granted under the 1875 Act, limiting the right to lease only if the third party use would further a railroad purpose, and then further limit the right by taking a cramped view of what furthers a railroad purpose. This narrow view is unsupported by the text and purpose of the Act, and conflicts with long established and settled expectations of landowners and companies. As discussed below, when the appropriate analysis is applied that reflects the purpose and text of the Act, it is evident that railroad companies may lease land within their easements to third parties, provided such leases are limited to the "surface" of the land, broadly defined, and do not interfere with railroad operations.

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[55] RESTATEMENT (FIRST) OF PROPERTY § 493 (1944).
[56] *See generally* Jeffery M. Heftman, Note, *Railroad Right-of-Way Easements, Utility Apportionments, and Shifting Technological Realities*, 2002 U. ILL. L. REV. 1401, 1404 (2002) ("Most commercial easements in gross are readily assignable." (citing JOHN CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 342 (2d ed. 1975)).
[57] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 5.9, Comment a (2000).
[58] *Id.* § 4.10, Comment d.
[59] *Id.*
[60] *Id.* § 4.10, Comment b.
[61] *Great N. R.R. Co.*, 315 U.S. at 279.
[62] *Brandt*, 134 S. Ct. at 1265.

A. A Railroad Company Does Not Exceed the Scope of its Right-of-Way When Leasing to Third Parties for Uses that Do Not Interfere with Railroad Operations

There can be no legitimate dispute that a railroad company may lease land to a third party so long as the third party use does not exceed the scope of the easement and thereby unreasonably burden the servient estate. The grant of a right-of-way under the 1875 Act is a general grant to the claimant railroad company and is not tied to any specific parcel of land; accordingly, easements created under the 1875 Act are easements in gross.[63] Railroad easements such as those granted under the 1875 Act are atypical because they are exclusive use easements.[64] Exclusive easements in gross are generally apportionable by the owner of the easement.[65] The main limitation on such

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[63] *See* RESTATEMENT (FIRST) OF PROPERTY § 454 (1944) ("An easement is in gross when it is not created to benefit or when it does not benefit the possessor of any tract of land in his use of it as such possessor."); SINGER, *supra* note 54, at 216 ("If an easement is one that would be either useful or commercially marketable apart from ownership of nearby land (such as a utility easement), the presumption is likely to be that it was intended to be in gross." (citing *Jones v. Cullen*, No. CX-98-1269, 1998 WL 811558 (Minn. Ct. App. Nov. 24, 1998)); Richard J. Kane & Ronald G. Todd, *Railroad Easements: Who Should Pay the Freight for Environmental Contamination?*, 7 DICK. J. ENV. L. POL. 147, 166 (Fall 1998) ("Railroad easements are rarely made in the form of an easement appurtenant. Instead, they are made as an easement in gross, that is, a right to use a parcel of land without the use being related to any other parcel of land in particular." (citing ALVIN L. ARNOLD & JACK KUSTNET, THE ARNOLD ENCYCLOPEDIA OF REAL ESTATE 253-54 (1978))).

[64] While Section 2 of the Act does contemplate some shared use of the right-of-way in narrow passages, it is generally the exception rather than the rule. Further, it contemplates shared uses with other transportation enterprises, not the owner of the servient estate. Thus, the easement is still exclusive vis-à-vis the owner of the servient estate. *See Idaho v. Or. S.L.R. Co.*, 617 F. Supp. 207, 212 (D. Idaho 1985) ("Congress, in granting the 1875 Act rights-of way . . . did, however, intend to give the railroads an interest suitable for railroad purposes – a right-of-way, which, by definition, carried with it the right to exclusive use and occupancy of the land."). *See also W. Union Tel. Co. v. Penn. R.R. Co.*, 195 U.S. 540, 570 (1904) ("[I]f a railroad's right-of-way was an easement it was 'one having . . . perpetuity and exclusive use and possession . . . . '" (quoting *New Mexico v. U.S. Trust Co.*, 172 U.S. 171, 183 (1898)). *See also Durango & Silverton Narrow Gauge R.R. Co. v. Wolf*, No. 12CA1632, 2013 Colo. App. LEXIS 1211, at *5 (Colo. App. Aug. 1, 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."). *See generally* 2 H.G. WOOD, A TREATISE ON THE LAW OF RAILROADS § 242 at 769 n.1 (Boston, Boston Book 1889) (quoted in Brief of Amicus Curiae New England Legal Foundation in Support of Petitioners at 6, *Brandt*, 134 S. Ct. 1257 (No. 12-1173)) ("The railroad company must, from the very nature of their operations, in order to [i.e., for the purpose of] security of their passengers, workmen, and the enjoyment of the road, have the at all times to the exclusive occupancy of the land.").

[65] *See* RESTATEMENT (FIRST) OF PROPERTY § 493, Comment c (1944) ("Though apportionability may be to the disadvantage of the possessor of the servient tenement, the fact that he is excluded from making the use authorized by the easement, plus the fact that apportionability increases the value of the easement to its owner, tends to the inference in the usual case that the easement was intended in its creation to be apportionable. This inference is very strong in cases where an increase in use is in fact advantageous to the possessor of the servient tenement."); SINGER, *supra* note 54, at 225 ("Most courts hold that easements in gross are apportionable if they are *exclusive* (meaning that the owner of the servient estate has no right to use the easement in the same way as the easement owner), but that they are not apportionable by the easement owner if they are nonexclusive (where the servient estate owner retains the right to conduct the same use as the easement owner over the same path)."). *See also* Hegi, *supra* note 54, at 129 ("The resulting rule states that an easement holder can divide his interest only if his original grant was exclusive. According to this rule, because the landowner has granted away all of his rights to the easement area, he cannot object to his grantee's division of the easement if the total use remains within the extent of the original grant." (internal citations omitted)).

apportionments is that they may not be contrary to the intent of the parties or unreasonably burden the servient estate.[66]

Applying these principles to the rights granted under the 1875 Act, it becomes evident that the right-of-way granted to a railroad company encompasses the right to lease to third parties so long as the leased use does not interfere with railroad operations. This conclusion is based on the text of the Act as well as its underlying purpose and is consistent with common law interpretation of easements.

i. The Text of the 1875 Act Does Not Limit the Right-of-Way Grant Solely to Railroad Purposes

The text of the Act is the starting point to determine the rights granted by Congress. As the Court has stated, "[t]he act itself speaks the will of Congress, and this is to be ascertained from the language used."[67] Thus, consistent with the ancient maxim *a verbis legis non est recedendum*, it is necessary to begin with the text of the law itself to assess whether apportionment is consistent with its principles.[68]

In assessing the text of the 1875 Act, we are mindful of the Court's guidance to apply a "liberal construction" to Congressional railroad grants:

> When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.[69]

In this case, the language and structure of the 1875 Act provides a railroad company the right to the use and occupancy of a 200 hundred foot wide strip of land to construct and operate a railroad. Of critical importance, the Act itself places no limits on the ability of railroad companies to lease portions of their easements to third parties, provided those activities do not interfere or inhibit the operation of a railroad.

As a preliminary matter, it is clear that the construction and operation of a railroad is a condition of the 1875 Act easements. Section 1 grants land to "any railroad company," defines

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[66] SINGER, *supra* note 54, at 225 ("The *Restatement (Third)* provides, instead, that easements in gross can be divided unless this is contrary to the intent of the parties who created the easement or 'unless the division unreasonably increases the burden on the servient estate.'" (quoting RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 5.9 (2000)). *See also* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 8.11, at 465 (3d ed. 2000).

[67] *United States v. Union Pacific Railroad Company*, 91 U.S. 72, 79 (1875).

[68] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012) (quoting Digest 32.69 pr. (Marcellus)).

[69] *Leo Sheep Co. v. United States*, 440 U.S. 668, 683 (1979) (quoting *Denver & Rio Grande*, 150 U.S. at 14).

the geographic scope of the right-of-way by reference to the "central line of said road," limits the ability of railroads to utilize resources on adjacent public lands to those necessary "for the construction of said railroad," and limits the use of adjacent public lands for ancillary structures "to the extent of one station for each ten miles of road." Section 4 is explicit on this score, providing that "if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road." Thus, Congress conditioned the right-of-way granted under the 1875 Act on the construction and operation of a railroad. Apportionments that interfere with or preclude the construction and operation of a railroad on the 1875 Act right-of-way could lead to the extinguishment of rights thereunder.

Although Congress conditioned the grant of a right-of-way under the 1875 Act on the construction and operation of a railroad, it did not state that the center-line easement could *only* be used for the construction and operation of such railroad. Congress in fact was careful not to restrict the uses within the center-line easement, in contrast to the other grants it provided in the Act.

Section 1 of the 1875 Act gives qualifying railroad companies three interests:

- A "right of way through public lands of the United States . . . to the extent of one hundred feet on each side of the central line of said road;"

- "[T]he 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*" (emphasis added); and

- "[G]round adjacent to such right of way *for station-buildings, depots, machine shops, side-tracks, turn-outs, and water stations*, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of road." (emphasis added).

The text of the Act clearly evinces the intent of the parties to limit the uses and scope of two out of three rights granted under Section 1 to actions serving an enumerated railroad purpose:

- The ability of railroads to take materials from adjacent lands is limited to such takings being necessary for the construction of the railroad; and

- The ability to use adjacent ground is limited to uses for certain specified incidental purposes.

Only one interest is not limited solely to a railroad purpose: the right-of-way for the railroad surrounding its central line.

The general canons of statutory interpretation counsel against reading limitations into the right-of-way granted under the 1875 Act where none is specified, particularly where, as here, such a requirement is explicitly included for the other interests specified in the statute. Under the canon of *casus omissus pro omisso habendus est*, nothing may be added to what the text states or

reasonably implies.[70] As Justice Frankfurter counseled, "[w]hatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. [Those interpreting statutes] must not read in by way of creation."[71] The text of the 1875 Act does not limit the center-line right-of-way solely to railroad purposes, and thus one should not be read in by judicial or administrative fiat.

In addition, the canon of *expressio unius est exclusion alterius*, or the expression of one thing implies the exclusion of others (the negative implication canon), counsels against implying limitations on the center-line easement.[72] Congress clearly limited two out of three interests granted under the 1875 Act solely to specified railroad purposes. The inclusion of these purpose limitations counsels against inferring a similar limitation where none is explicitly provided.[73] This analysis is bolstered by the "liberal construction" that the Court has directed be applied to railroad rights-of-way. At minimum, this liberal construction canon counsels against prohibitions by implication.

ii. Leasing to Third Parties is Consistent with the Purpose of the Act Where the Use Does not Interfere with Railroad Operations

As described above, the text of the 1875 Act does not define the purpose of the railroad easement narrowly. The Supreme Court has explained that "[t]he Act was the product of a period and, 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed.'"[74] As the Court has noted, "[b]y the 1870s, legislators across the political spectrum had embraced a policy of reserving public lands for settlers rather than granting them to railroads."[75] Nevertheless, there was still a need for internal improvements in order to "encourage development of the Western vastness."[76] Thus, "[d]uring this time . . . even the reform faction

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[70] *See* SCALIA & GARNER, *supra* note 68, at 93.

[71] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM L. REV. 527, 533 (1947).

[72] *See* SCALIA & GARNER, *supra* note 68, at 107.

[73] This view is further reinforced by other contemporary statutes. Between 1872 and 1876, Congress passed at least ten acts granting rights-of-way to railroad companies that included specific purpose requirements. *See* Portland, Dalles, and Salt Lake Act of April 12, 1872, ch. 437, 17 Stat. 52 (granting a strip of land to a railroad company "for the purpose of aiding in the construction of a railroad and telegraph line); Act of June 1, 1872, ch. 240, 17 Stat. 212 (granting a railroad company two rights of way "for the purpose of enabling [the company] . . . to build and extend their line" and "for the construction of a railroad and telegraph," respectively); Act of June 8, 1872, ch. 359, 17 Stat. 340 (granting a right of way to a railroad company "for the construction of a railroad"); Act of June 10, 1872, ch. 437, 17 Stat. 393 (granting a right-of-way through public lands "for the purpose of aiding [the railroad company] . . . to construct and operate a railroad"); Act of Mar. 3, 1873, ch. 291, 17 Stat. 612 (granting a right-of-way "for the purpose of enabling [the company] . . . to build and extend its line "); Act of June 18, 1874, ch. 307, 18 Stat. 81 (authorizing the Secretary of War to grant a permit to a railroad company "to lay and use a curved track" over a reservation); Act of June 23, 1874, ch. 481, 18 Stat. 280 (requiring that "the mode and purpose of occupation shall first be submitted and approved by the Secretary of War" before permitting a railroad company to lay track across a military arsenal); Act of June 20, 1874, ch. 348, 18 Stat. 130 (granting a railroad company a right of way "for a railroad" between two named cities); Act of July 3, 1876, ch. 162, 19 Stat. 72 (granting a railroad company a right of way "for the purpose of constructing a railroad and telegraph-line"); Act of May 24, 1876, ch. 112, 19 Stat. 56 (granting a railroad company a right of way "for the purpose of constructing a railroad").

[74] *Great N. R.R. Co.*, 315 U.S. at 273 (quoting *Union Pac.*, 91 U.S. at 79).

[75] *Brandt*, 134 S. Ct. at 1261 (internal citations omitted).

[76] *Great N. R.R. Co.*, 315 U.S. at 274.

permitted and supported federal railroad right-of-way grants . . . because such rights-of-way were still necessary in much of the country for transportation."[77] Accordingly, in *Denver & Rio Grande*, the Court explained:

> The general nature and purpose of the act of 1875 were manifestly to promote the building of railroads through the immense public domain remaining unsettled and undeveloped at the time of its passage. It was not a mere bounty for the benefit of the railroads that might accept its provisions, but was legislation intended to promote the interests of the government in opening to settlement, and in enhancing the value of those public lands through or near which such railroads might be constructed.[78]

The Court in *Great Northern* made the same point, emphasizing that the 1875 Act was designed to enhance the value of public lands and promote settlement: "The Act was designed to permit the construction of railroads through the public lands and thus enhance their value and hasten their settlement."[79]

Thus, facilitating the construction of railroads was a means to an intended end. Congress's broadly defined intent in enacting the 1875 Act was twofold: promoting settlement of the vast Western expanse and facilitating economic development along the railway lines.[80] Both of these goals are consistent with a permissive approach to the lease of land within an 1875 easement to a third party so long as the third party use does not interfere with the operation of the railroad.

iii. Leasing to a Third Party Does Not Place an Unreasonable Burden on the Servient Estate If the Use Does Not Interfere With Railroad Operations

As noted earlier, an easement holder may only divide and apportion its interest in the land. The easement holder may not go beyond its interest to create an unreasonable burden on the

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[77] Darwin P. Robert, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift,"* 82 U. COLO. L. REV. 85, 130 (2011).

[78] *Denver & Rio Grande*, 150 U.S. at 8.

[79] *Great N. R.R. Co.*, 315 U.S. at 272.

[80] On this point, we disagree with the court in *Home on the Range*, 386 F. Supp. 2d 999. In *Home on the Range*, the court rejected the argument that "the purpose of all this legislation was to develop western lands," ruling instead that the 1875 Act required a narrow "railroad purpose" for all activities. *Id.* at 1020-21. We believe that such a narrow interpretation would serve to frustrate the concerns that led to the change in Congressional policy in the early 1870s. The post-1871 shift in policy was predicated on the fear that railroads were in effect hoarding public lands and preventing their productive use by other members of society, particularly agrarian homesteaders. As noted above, railroad easements are generally exclusive, even against the owner of the servient estate. The only way for homesteaders to legally access railroad land for productive uses was with the permission of the railroad. In fact, as the railroad company's 1961 testimony illustrates, this is precisely what happened: railroad companies leased land, including portions of their easements obtained under the 1875 Act, to local farmers, often for a merely nominal fee. A strict railroad purpose requirement would have prevented this outcome. Farming, particularly farming that does not result in produce being shipped over the rail lines, is likely not a strictly "railroad purpose." Under a strict railroad purpose requirement railroad companies would have been and continue to be prohibited from leasing 1875 easement land to adjacent farmers. Because railroads have an exclusive right to the land, they are the only entity that can provide such access. Thus, this interpretation would have frustrated the purpose of the 1875 Act by not only removing public lands from the stock available to homesteaders but forbidding any voluntary means for farmers to access the lands claimed by the railroads.

servient estate. In assessing whether an activity creates an unreasonable burden, it is necessary to look at the factual circumstances surrounding the grant, including the relevant language and circumstances. In general, easements created by express grant are construed more broadly,[81] and conflicts are resolved in favor of uses that maximize the aggregate utility of both the servitude and servient estate.[82]

Taken together, these factors weigh in favor of a broad understanding of permissible activities. The scope of the easements granted to railroad companies under the 1875 Act is exceptionally broad. Unlike traditional easements for right-of-way and passage, they grant the railroad exclusive possession and use of the surface lands within the right of way. This is in part because "[t]he inherent risk facing trespassers around the operation of railroad tracks precludes any safe uses of the land available to the landowner holding the underlying fee."[83] The right granted to railroad companies under the 1875 Act is a right to the use and occupancy of the surface of the land for such time as a railroad is operated in the right-of-way.

In *Great Northern*, the Court looked to the text of the 1875 Act, concluding that "the right granted is one of use and occupancy only."[84] Even when they are "only" using and occupying the land, railroads are "very substantial things."[85] Even modern trains are loud – the Federal Railway Administration estimates that railroad horns may reach over 110 dBA at a distance of 100 feet, louder than a vehicle siren at a distance of 50 feet and just below the level of a jet engine at 500 feet, while rail cars alone traveling at 50 miles per hour can reach over 80 dBA at a distance of 100 feet.[86] As the 1875 Act indicates, railroad operation requires a substantial number of ancillary structures, including, but not limited to station-buildings, depots, machine shops, side tracks, turn-outs, and water-stations, that occupy land both above and below the surface of the soil. Railroads require semi-permanent physical infrastructure to move a large volume of freight and material, including hazardous materials.[87] Given these nearly all-encompassing uses that constitute traditional railroad use and occupancy, the standard for what activity falls within the scope of the easement without further burdening the servient estate is fairly expansive.

Further, these rights are not limited to the "surface" as colloquially defined. Rather, the surface is more than "merely . . . the soil covering the surface" and includes uses that "do not

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[81] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.10, Comment d (2000) ("The purpose of an easement created by express grant . . . is often defined more generally.").

[82] *Id.* § 4.10, Comment b ("In resolving conflicts among the parties to servitudes, the public policy favoring socially productive use of land generally leads to striking a balance that maximizes the aggregate utility of the servitude beneficiary and the servient estate.").

[83] Heftman, *supra* note 56, at 1409 (citing *Campbell v. Sw. Tel. & Tel. Co.*, 158 S.W. 1085, 1086 (Ark. 1913)).

[84] *Great N. R.R. Co.*, 315 U.S. at 271.

[85] *W. Union Telegraph Co. v. Penn. R.R. Co.*, 195 U.S. 540, 570 (1904) ("A railroad right of way is a very substantial thing. It is more than a mere right of passage.").

[86] United States Department of Transportation, Federal Railroad Administration, Horn Noise FAQ, https://www.fra.dot.gov/Page/P0599 (last visited Aug. 31, 2017).

[87] *See* Kane & Todd, *supra* note 63, at 154 ("Rail transportation accounts for approximately 40% of ton-miles of hazardous substances transported yearly. In 1991, railroads generated 65.9 billion hazardous substance ton-miles on movements greater than 200 miles. Approximately 200,000 tons of hazardous wastes (as distinguished from hazardous substances in general) are transported by rail in the United States each year." (internal citations omitted)).

unreasonably interfere with the extraction of minerals."[88] For example, the Tenth Circuit in *Kansas City Southern Railway Co. v. Arkansas Louisiana Gas Co.* held that railroad companies "ha[ve] substantial surface and subsurface rights, which [they are] entitled to have protected," including:

> [T]he 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 with part of the poles beneath the surface; to construct passenger and freight depots, using portions of the land below them for foundations; to construct signals; to make fills and cuts to decrease the grades of their rail lines, and to use material from the land covered by the right of way to make such fills; and to construct a roadbed and lay its ties and rails thereon.[89]

Likewise, in *Mellon*, the court concluded that "the right-of-way surface includes the non-mineral topsoil that would be occupied by a buried fiber optic line."[90]

This scope is not unlimited, however. As the Court in *Great Northern* clarified, railroad rights under the 1875 easement do not extend to subsurface minerals. In this context, the term "surface" serves to distinguish the railroad company's interest from the subsurface mineral rights that remain with the servient estate.[91] In our view, the distinction between "surface" and "subsurface" is one of kind, rather than degree. The subsurface mineral estate does not encompass all below-ground uses. Rather, it is limited to the extractable minerals below the surface, such as oil, gas, and coal. This estate is distinct from the "surface" because these minerals have value in and of themselves that can be extracted and separated from the land. Thus, the scope of a railroad easement under the 1875 Act does not extend to activities that would extract these minerals, or unreasonably interfere with the extraction of these minerals. Correspondingly, the "surface" estate is not limited to just the area above ground, but extends down into the soil, provided it does not unreasonably impede the extraction of subsurface minerals.[92]

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[88] 6-48 THOMPSON ON REAL PROPERTY § 48.08 (Thomas Eds. 2017); *see, e.g.*, *Watt*, 462 U.S. at 52 (discussing Congress's purpose for severing the surface estate from the mineral estate in the Stock-Raising Homestead Act of 1916, and based on "whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated," concluding that "Congress' underlying purpose in severing the surface estate from the mineral estate was to facilitate the concurrent development of both surface and subsurface resources").

[89] 476 F.2d 829, 834-35 (10th Cir. 1973).

[90] 750 F. Supp. at 231.

[91] For example, in *Northern Pacific Railway Co. v. Soderberg*, 188 U.S. 526, 529-31 (1903), the Supreme Court discussed how to define "minerals" reserved as part of the railroad grant to Northern Pacific Railroad Co. in the Act of 1864. In concluding that granite fell within the meaning of mineral and thus was included within the mineral reservation, the Court rejected a definition of minerals as limited to substances "mined," "since many valuable deposits of gold, copper, iron and coal lie upon or near the surface of the earth, and some of the most valuable building stone, such, for instance, as the Caen stone in France, is excavated from mines running far beneath the surface." *Id.* at 530. This discussion provides support for the notion that the mineral estate is a property interest in the extraction of minerals for value and not a property interest that simply represents a division of the surface and subsurface. *See also Burke v. Southern Pac. R. Co.*, 234 U.S. 669, 691-93 (1914) (referring to federal railroad land grants (as well as other land grants like the Homestead Act, Desert Lands Act, etc.) and the mineral reservations in those grants as "mineral lands" and "non-mineral lands").

[92] The district court in *In re SFPP Right-of-Way Claims*, No. SACV 15-00718 (DFMx); SACV 15-00986; SACV 15-01362 JVS; CV 15-7492, 2016 U.S. Dist. LEXIS 86417 (C.D. Cal. June 7, 2016), following the California Court

The scope of easements granted under the 1875 Act is broad and is not limited solely to uses that further railroad purposes. Given this fact, and the extensive encumbrance railroads have historically placed on land within their right-of-way, we conclude that any use that does not interfere with the continued use of the easement for the operation of a railroad and that does not extend beyond the scope of the surface, broadly defined, will not unreasonably burden the servient estate.

iv. Judicial Decisions Rejecting the Authority of Railroad Companies to Lease Have Erred by Applying the Wrong Standard of Construction and Over Reading *Union Pacific*

M-37025's reliance on *Home on the Range* was misplaced because the court reached the wrong conclusion in determining that uses of rights-of-way under the 1875 Act necessarily require a railroad purpose. Specifically, the court erred in two ways: by applying the wrong canon of construction for railroad grants; and by over reading dicta in *Union Pacific*.[93]

a. The Court in *Home on the Range* Applied an Incorrect Paradigm for Statutory Construction

First, and most significantly, the court applied the wrong paradigm for statutory construction. The court in *Home on the Range* applied the "'established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it'" to conclude that "[n]one of these iterations of the general rule governing construction of grants accommodates the interpretation of the 1875 Act sought by" the defendants.[94] The court went on to dismiss a more liberal interpretation of railroad grants advocated in Opinion M-36964, citing to *Denver & Rio Grande*, on the ground that "[i]n articulating the above-quoted canon, the Court was merely rejecting an artificially narrow interpretation of the 1875 Act."[95] This misreads *Denver & Rio Grande* and disregards *Leo Sheep*.[96]

This approach misreads *Denver & Rio Grande*. The "narrow interpretation of the 1875 Act that would have required that timber taken adjacent to the line of the railroad be used to

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of Appeals in *Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.*, 231 Cal. App. 4th 134 (2014), erroneously interpreted the 1875 Act as granting the railroad lesser rights in the subsurface than the surface of the right-of-way. *See* 2016 U.S. Dist. LEXIS 86417 at *21-22 (citing 231 Cal. App. 4th at 162-165). Based on this distinction, the district court concluded that the right-of-way subsurface may be used only as *necessary* for the railroad's "construction and operation." *Id.* As discussed in the text accompanying this footnote, this conclusion misapprehends the nature of, and distinction between, surface and subsurface estates in land. The distinction between the two estates is not one of physical location – i.e., whether a particular use occurs on the surface or the land or below it – but rather on the nature of the use. Accordingly, in *Great Northern* the Court held that the railroad did not have a right to subsurface oil and minerals, even when such resources would be used for specific railroad purposes, while the Tenth Circuit in *Kansas City Southern Railway Co.* permitted a number of uses below the ground.

[93] 353 U.S. 112 (1957).

[94] *Home on the Range*, 386 F. Supp. 2d at 1021 (quoting *Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 59 (1983)).

[95] *Id.* at 1023.

[96] 440 U.S. 668.

construct only adjacent sections of the track"[97] could be, and was, answered with recourse to the text of the Act read through the lens provided by basic tools of statutory interpretation. The Court's invocation of a cannon of liberal construction was invoked at the end of the opinion as an alternative means of bolstering its statutory interpretation; as such, it has broader implications than just for the "narrow interpretation of the 1875 Act" at issue in *Denver & Rio Grande*.

These broader implications are apparent in *Leo Sheep*. In *Leo Sheep*, the Court explicitly rejected the government's reliance on the "familiar canon of construction that, when grants to federal lands are at issue, any doubts 'are resolved for the Government, not against it,'" stating "this Court long ago declined to apply this canon in its full vigor to grants under the railroad Acts."[98] Instead, the proper standard is the "liberal construction" standard described in *Denver & Rio Grande*, which the Court approvingly described as "harmoniz[ing] the longstanding rule [described above] . . . with the doctrine in *Winona* [declaring that railroad grants 'are to receive such a construction as will carry out the intent of Congress']."[99] While the *Denver & Rio Grande* case may have been resolved around a "narrow interpretation," the question in *Leo Sheep* -- "[w]hether the Government has an implied easement to build a road across land that was originally granted to the Union Pacific Railroad under the Union Pacific Act of 1862"[100] – was far more complex and required an in-depth evaluation of the attendant history.

Tellingly, the court in *Home on the Range* did not cite or reference *Leo Sheep* in its discussion of the appropriate canon of construction. Accordingly, we believe that the court erred in applying an incorrect standard to evaluate railroad rights under the 1875 Act.[101]

b. The Court in *Home on the Range* Takes Dicta from *Union Pacific* Out of Context to Import a Purpose Requirement Where None is Found in the Text

Second, the court in *Home on the Range* places significant weight on the "clear implication of *Union Pacific*" that "purposes that are not incidental to or do not facilitate the operation of the railroad are beyond the scope" of the railroad grants.[102] This appears to take dicta in *Union Pacific* out of context. The crux of the case in *Union Pacific* is whether pre-1871 grants conveyed oil and

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[97] *Home on the Range*, 386 F. Supp. 2d at 1023.

[98] *Leo Sheep*, 440 U.S. at 682 (quoting *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 617 (1978)).

[99] *Id.* (quoting *Winona & St. Peter R.R. Co. v. Barney*, 113 U.S. 618, 625 (1885)).

[100] *Id.* at 669.

[101] We further note that the district court in *In re SFFP Right-of-Way Claims* appears to make the same error. In *In re SFFP*, the court states that the "easement under the 1875 Act must be construed according to the canon of construction that dictates that 'any ambiguity in a grant is to be resolved favorably to a sovereign grantor,'" 2016 U.S. Distr. LEXIS 86417, *21 (quoting *Great N. R.R. Co.*, 315 U.S. at 272), without mention of the preceding line in *Great Northern* that "[t]he Act is to be liberally construed to carry out its purposes." *Great N. R.R. Co.*, 315 U.S. at 272. The import of this omission is made plain by the related omission of *Leo Sheep*, which, as described above, reaffirmed that the liberal construction canon enunciated in *Denver & Rio Grande* is the appropriate canon for reviewing railroad grants. As with *Home on the Range*, the court in *In re SFFP* does not cite to or discuss the standard set forth in *Leo Sheep*.

[102] *Home on the Range*, 386 F. Supp. 2d at 1024. The *Home on the Range* court determined that since *Union Pacific* suggested that all railroad activity must serve a railroad purpose under the pre-1871 acts, and since *Great Northern* suggested that the post-1871 acts were narrower, all grants, whether pre- or post-1871 must serve a railroad purpose. *Id.*

mineral rights to railroad companies. The Court's summation in *Union Pacific* strongly suggests that they do not, regardless of whether the specific oil and mineral extraction serves a railroad purpose. To wit, the Court concluded:

> To complete the distinction, Mr. Justice Murphy with his usual discernment added, "None of the cases involved the problem of rights to subsurface oil and minerals."
>
> The latter statement goes to the heart of the matter. There are no precedents which give the mineral rights to the owner of the right of way as against the United States. We would make a violent break with history if we construed the Act of 1862 to give such a bounty. We would, indeed, violate the language of the Act itself. To repeat, we cannot read "mineral lands" in § 3 as inapplicable to the right of way granted by § 2 and still be faithful to the standard which governs the construction of a statute that grants a part of the public domain to private interests.[103]

Tellingly, the Court does not cite the lack of a railroad purpose as a causal variable in its summation. It instead relies on the general principle that the United States does not give mineral rights as part of its grant of a right of way, be it in easement or limited fee, and the specific language of § 3 of the 1862 Act which excepted "mineral lands" form the grant to the railroad. Together, this strongly suggests that the Court's aside regarding a "railroad purpose" is dicta.

Furthermore, the aside in *Union Pacific* regarding railroad purposes originated with the specific language of the authorizing statute. The Act of July 1, 1862, at issue in *Union Pacific*, itself included an explicit railroad purpose requirement.[104] As noted, unlike other authorizing statutes, including the July 1, 1862 Act, the 1875 Act does not have an explicit purpose requirement.[105] Thus, the interpolation of the *Union Pacific* Court's railroad purpose aside into the *Home on the Range* court's analysis of the 1875 Act takes that language out of its specific statutory context.

While the court made an excellent attempt to grapple with an exceedingly difficult area of the law in *Home on the Range*, it nevertheless erred in concluding that uses of easements granted under the 1875 Act must serve a railroad purpose by applying the wrong canon of construction and interpretation and by relying on dicta that is limited to the specific context of the July 1, 1862 Act.

v. Settled Expectations Support A Broad Interpretation

In *Brandt*, the Court observed that there is a "'special need for certainty and predictability where land titles are concerned.'"[106] While there have been sporadic challenges, for the better part of over 130 years it was generally believed that railroad companies had the ability to lease access

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[103] *Union Pac.*, 353 U.S. at 119-120 (quoting *Great N. R.R. Co.*, 315 U.S. at 278).

[104] Act of July 1, 1862, § 2, 12 Stat. 489 (1862) (granting a right of way "for the construction of said railroad and telegraph line").

[105] *See supra* Section III(A)(i).

[106] 134 S. Ct. at 1268 (quoting *Leo Sheep*, 440 U.S. at 687).

to their easements to third parties.[107] This view was explicitly adopted by the Department of the Interior in Opinion M-36964, and remained the explicit operative policy of the Department of the Interior for over twenty years.

As a result of this tacit and later explicit understanding, "for over a century, the railroads have been granting rights to utility companies to string cables and run pipelines in their corridors."[108] In part because these rights were generally understood and accepted, hard statistics on the scope of such leases are difficult to obtain. In the course of the 1961 hearing, the Department of the Interior provided significant testimony that admitted that the Department did not know the extent of such uses because it "has not in the past investigated these, has no system or program to follow up on these [and] . . . cannot say what the future attitude or plan will be at this time."[109]

The testimony from railroad representatives in the same hearing, described in Section I (Background) above, suggests that this practice was extensive, with each railroad company present representing that it had entered into tens of thousands of leases for access to its various rights-of-way. More recently, it is estimated that railroad companies have received over $2 billion in payments from utility companies between the mid-to-late 1980s and early 2000s.[110]

The expectations at issue are not only those of the railroad company easement holders. It is also those of the people who have leased land from the railroad companies. As the 1961 testimony reflects, this category of people has included thousands of farmers and homesteaders, many of whom gained access to easement land for nominal payments. It also includes significant portions of our nation's critical telecommunications and utilities infrastructure. As of the early 2000s, "more than one-half of MCI's and Sprint's fiber optic lines run parallel to right-of-ways," while Quest "placed more than two-thirds of its 20,000 miles of lines along railroad right-of-ways and other easement corridors."[111]

Furthermore, Congress considered existing railroad grants over federal lands leading up to the passage of FLPMA in 1976. Section 509 of FLPMA specifically recognizes the continued validity of any "right-of-way or right-of-use" authorized by prior laws.[112] The legislative history for this provision suggests railroad right-of-way grants would be protected.[113] It is clear from these examples that Congress (and the Department) understood some of the complexities

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[107] Some of these concerns regarding uncertainty in the law are described by the court in *Union Pacific Railroad Company v. Santa Fe Pipelines, Inc.*, 231 Cal. App. 4th 134, 149-150 (Cal. App. 2014). As the court notes, "[n]evertheless, the Railroad continued to grant easements to the pipeline. *Id.* at 150.

[108] Wright, *supra* note 18, at 358.

[109] *Use and Disposition of Railroad Right-of-Way Grants: Hearing on H.R. 6630 and HR. 6945, H.R. 3229, H.R. 3346, and H.R. 5745, H.R. 6161, H.R. 7436, and H.R. 7550 Before the Subcomm. on Public Lands of the H. Comm. on Interior and Insular Affairs*, 87th Cong. 35 (1961) (testimony of Karl S. Landstrom, BLM Director).

[110] Heftman, *supra* note 56, at 1409 (citing Frank W. Wilner, *Selling the Brooklyn Bridge*, J. COM., Aug. 30, 1999, at 28; *Hallaba v. Worldcom Network Serv., Inc.*, No. 98-CV-895-H, 2000 U.S. Dist. LEXIS 13974, at *2 n.1 (N.D. Okla. Mar. 31, 2000).

[111] *See id.* at 1411 (citing Brian O'Reilly, *Telecom's Real Estate Problem: This Land is Their Land, Maybe*, FORTUNE, July 5, 1999, at 30).

[112] 43 U.S.C. § 1769(a).

[113] H.R. REP. NO. 94-1724, at 65 (1976); *see also* S. REP. NO. 94-583, at 75 (1975) (Section 509(a) "insures that rights-of-way granted . . . are not affected" by FLPMA); S. REP. NO. 93-207, at 46 (1973) (Section 509 "confirms the legality of previously granted rights-of-way or rights-of-use in accordance with their terms").

associated with federal railroad grants, including the 1875 Act, but actively chose not to legislate and instead recognized the need to protect the broad uses and activities occurring within such rights-of-way.

Over the past 130 years, "[m]ultiple uses of these [railway] corridors was the rule, not the exception, regardless of whether the railroads owned their corridor land in fee simple or possessed only an easement over the land."[114] In our view, the direction to BLM to evaluate those prior actions, even on a "case-by-case" basis, improperly inserts BLM in a role akin to a retroactive title evaluator with respect to activities within 1875 Act rights-of-way that may have existed for up to 100 years prior to the passage of FLPMA. This is particularly true with respect to activities in such rights-of-way that existed prior to 2011 because Congress and the Department have long acquiesced to the use of those rights-of-way for a variety of purposes. Retroactive evaluation would upset long-settled expectations.

As the Restatement notes, "[i]n resolving conflicts among the parties to servitudes, the public policy favoring socially productive use of land generally leads to striking a balance that maximizes the aggregate utility of the servitude beneficiary and the servient estate."[115] To the extent that there is a conflict in the interpretation of apportionments of railroad easements, a broad standard serves to maximize aggregate utility both by promoting beneficial uses of the land and by ensuring stability in the underlying property rights.

B. Even if the Scope of an 1875 Act Easement is Limited to Railroad Purposes, It Should Be Interpreted Broadly In Accordance With The Incidental Use Doctrine.

The Court has previously noted that railroad rights-of-way may "be occupied by [the railroad] itself or by others, in the manner which it may consider best fitten to promote, or not to interfere with, the public use."[116] Even assuming *arguendo* that the scope of a railroad's easement under the 1875 Act is limited to "railroad purposes," the common law incidental use doctrine provides wide latitude for railroads to exercise discretion in leasing access to their easements.[117]

The incidental use doctrine "states that a railroad may lease a portion of [its] right-of-way where the use is incidental to or not inconsistent with the railroad's continued use of its right-of-

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[114] Wright, *supra* note 18, at 361.

[115] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES, § 4.10, Comment b (2000).

[116] *Hartford Fire Ins. Co. v. Chi., Milwaukee & Saint Paul Ry. Co.*, 175 U.S. 91, 99 (1899). The Court in *Hartford Fire Insurance* analyzed an insurance claim arising from the lease of land within a railroad right-of-way "'for the purpose of erecting and maintaining thereon a cold storage warehouse'" with "no stipulation concerning, or even any mention of, any transportation of goods over the railroad, or any relation of the railroad company as a common carrier to the lessee or to the public; and . . . nothing in the record to show that such a relation existed between the railroad company and the lessee, or that the warehouse was built or maintained for the benefit of the public, or of the railroad corporation, or of any one but the partnership." *Id.* at 96-97. Rather than serving to invalidate the lease, the lack of evidence "that the warehouse was built or maintained for the benefit of the public, or of the railroad corporation, or of any one but the partnership," was central to the Court's decision to uphold the validity of the agreement against a challenge that its insurance provisions were contrary to public policy. *Id.* at 97.

[117] *But see In re SFPP Right-of-Way Claims*, 2016 U.S. Dist. Lexis 86417 (rejecting the application of the incidental use doctrine to 1875 rights-of-way). For the reasons set forth in this section, we believe the district court erred in *In re SFPP Right-of-Way Claims*.

way for railroad purposes."[118] This doctrine traces its roots back to the Court's ruling in *Grand Trunk Railroad Company v. Richardson*. The Court in *Grand Trunk* reasoned:

> [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.[119]

Accordingly, the Court held that the railroad in *Grand Trunk* could grant a third party license to construct facilities for the receipt and delivery of freight, noting:

> [I]f the company might have put up the buildings, why might it not license others to do the same thing for the same object; namely, the increase of its facilities for the receipt and delivery of freight? The public is not injured, and it has no right to complain, so long as a free and safe passage is left for the carriage of freight and passengers.[120]

Thus, under the incidental use doctrine, a railroad may undertake commercial activity, including authorizing a third party to undertake commercial activity, as long as the activity is incidental to the operation of the railroad and a "free and safe passage is left" for the operation of the railroad.

Over the past 140 years, courts have applied the incidental use doctrine to a wide variety of third party commercial uses that go well beyond the direct operation of the railroad. These permissible third party uses include, but are not limited to:

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[118] *Durango & Silverton*, 2013 Colo. App. LEXIS 1211, *8. The court went on to note that "[u]nder the incidental use doctrine, the focus of our inquiry is the burden on the railroad, not the burden on the [servient estate owner]." *Id.* at *13-14. *See also Int'l Paper Co. v. MCI Worldcom Network Servs.*, 202 F. Supp. 2d 895, 902 (W.D. Ark. 2002) ("[S]o long as the railroad is occupying any portion of the right-of-way, the railroad is entitled to grant licenses or easements to third parties provided the additional use may reasonably be considered to be of benefit to the railroad."); *Mellon v. S. Pac. Trans. Co.*, 750 F. Supp. 226, 230-31 (W.D. Tex. 1990) ("The test for determining right-of-way uses is whether the subject use is inconsistent with the purposes for which the right-of-way was granted. In *Union Pacific*, the Supreme Court stated the railroad right-of-way uses which are incidental to, or consequential upon, those things which the legislature has authorized, ought not, unless specifically prohibited, to be held by judicial construction to be ultra vires." (citing *United States v. Union Pa. R.R. Co.*, 353 U.S. 112 (1957))); *Marthens v. B & O R.R.*, 289 S.E. 2d 706, 711 (W. Va. 1982) ("Generally it has been held that a railroad company may permit third persons to use or lease a portion of its right-of-way for non-railroad purposes where such use is not inconsistent and does not interfere with the use of the ... right-of-way for railroad purposes." (citing *Mo.-Kan.-Tex. R.R. Co. v. Freer*, 321 S.W.2d 731 (Mo. App. 1959); *Mitchell v. Ill. Cent. R.R. Co.*, 51 N.E.2d 271 (Ill. 1943)); *Wash. Sec. & Inv. Corp. v. Horse Heaven Heights, Inc.*, 130 P.3d 880, 886 (Wash. App. 2006) ("[T]he incidental use doctrine permits a railroad to use its easement to conduct not only railroad activities 'but also any other incidental activities that are not inconsistent and do not interfere with the operation of the railroad.'" (quoting *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n*, 126 P.3d 16, 27 (Wash. 2006))).

[119] 91 U.S. 454, 468 (1875).

[120] *Id.* at 469.

- The leasing of land for the maintenance of warehouses and other similar structures for the receipt and delivery of freight;[121]

- The construction of combined bulk and retail oil facilities;[122]

- The leasing of land within a railroad easement for the construction for private warehouses;[123]

- The leasing of land for the construction and operation of "a public grain elevator and warehouse;"[124]

- The permitting of "the erection and use of elevators, corn cribs, lumber yards and lime houses;"[125]

- The construction of a "team track" and leasing of land to a commercial roofer;[126]

- The granting of an easement within a railroad right-of-way for the installation of fiber optic cable;[127]

- The leasing of land for a recreational trail;[128]

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[121] *Miss. Invs., Inc. v. New Orleans & N. E. R.R. Company* 188 F.2d 245, 247 (5th Cir. 1951) (examining "whether Railroad, having an easement in land, has the general 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" and concluding that it did, reasoning that the leases "were for a use consistent with the purposes for which the easements were acquired"). The easement at issue in *Mississippi Investments, Inc.* arose from a private conveyance under which the "land was conveyed for the 'sole and only purposes of Depot, sidings and switches and other railroad purposes.'" *Id.* at 246. Even with this express limitation, the court still found that 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.

[122] *Mitchell*, 51 N.E.2d at 274 (reasoning that the railroad "has the right to do all things with its right of way, within the scope of its charter powers, which may be essential or incidental to its full and complete use to accomplish the purpose for which the easement was acquired," where the purpose of the easement was explicitly limited to "railroad purposes").

[123] *Neitzel v. Spokane Int'l. Ry. Co.*, 80 Wash. 30, 33 (1914) (stating that as part of the lease agreement, the lessee agreed to "route their freight over the respondent's line of road"). The underlying easement at issue was limited to "public purposes." *Id.* at 32.

[124] *Gurney v. Minneapolis Union Elevator Co.*, 63 Minn. 70, 73 (1895) ("The defendant's licensor, the railway company, was expressly authorized by its charter to condemn lands for the purpose, among others, of constructing and maintaining all buildings necessary for the complete operation of its railroads. That elevators are reasonably, if not absolutely, necessary for the complete operation of a railway in this state is a fact so obvious that it may be safely assumed without argument.").

[125] *Illinois Cent. R. Co. v. Wathen*, 17 Ill. App. 582, 585 (1885).

[126] *Cash v. Southern Pacific R.R. Co.*, 177 Cal. Rptr. 474 (Cal. App. 1981). The court noted that the commercial lease was permissible in part because "[a] commercial lease as the one involved here produces additional revenue for the railroad, thus defraying the costs of running and maintaining the railroad." *Id.* at 476.

[127] *Mellon*, 750 F. Supp. at 229-30; *Int'l Paper Co.*, 202 F. Supp. 2d 895; *Hynek v. MCI World Comms. Inc.*, 202 F. Supp. 2d 831 (N.D. Ind. 2002). *But see Home on the Range*, 386 F. Supp. 2d at 1021-23.

[128] *Durango & Silverton*, 2013 Colo. App. LEXIS 1211, at *11 ("[Defendant] cites no cases, and we have found none, that decline to apply the incidental use doctrine to determine a railroad's authority to use or lease part of its right-of-way. While the doctrine has traditionally been used to allow railroads to lease their rights-of-way for

- The granting of leases to five private parties, including "two to wholesale grocery concerns, one to a wholesale beer dealer, and one to a wholesale liquor dealer;"[129]

- The granting of licenses to third parties "allowing them to build various structures on the railroad right-of-way, including a saloon, a doctor's office, a barbershop, a hardware store and a furniture store;"[130]

As these examples illustrate, the incidental use doctrine provides wide latitude for railroads to lease land within their rights-of-way. As one court has summarized, many commercial "uses for a railroad right of way have been held to be proper since they contribute to the railroad's business," thus in general "a railroad may use its right of way for many commercial purposes unless specifically prevented from so doing."[131]

Thus, even assuming that an 1875 Act right-of-way is limited to a "railroad purpose," as long as the proposed use is not otherwise prohibited, provides some incidental benefit to the railroad, and does not inhibit the continued use of the right-of-way for railroad operations, the railroad company may lease land within their 1875 rights-of-way for third party uses.

IV. Conclusion

Based on the foregoing, we conclude that the rights-of-way granted to railroad companies under the 1875 Act include the right to lease portions of their easement to third parties without BLM permit or grant, provided that such leases are limited to the surface, broadly defined,[132] of the easement and do not interfere with the continued use of the easement as a railroad.

The scope of this memorandum is limited to the rights of railroads holding easements across public lands under the 1875 Act. It does not opine on any rights railroads may have with respect to easements that originate from other sources.

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commercial activities and to build structures, no logical reason exists to limit a railroad from leasing part of its right-of-way for a public purpose, such as a recreation trail." (internal citations omitted)).

[129] *Wildy v. Atchison, Topeka & Santa Fe Railway Co.*, 71 N.M. 370, 372 (N.M. 1963). The deed at issue read "This deed is made upon the express condition that the land above conveyed is occupied by the Pecos Valley Railway Company, or its successors for purposes and business of a railroad character or for the convenience of such company or its successors in handling its freight or other business or upon which to erect or permit erected such warehouses and yards as may be needed by its shippers and upon the express condition that if at any time it should cease to be used for such purposes then this conveyance shall become null and void and the property herein described shall at once revert to the grantors, their heirs or assigns." *Id.*

[130] *Int'l Paper Co.*, 202 F. Supp. 2d at 901 (citing to *Ritter v. Thompson*, 144 S.W. 910, 911 (Ark. 1912)). The court in *Ritter* clarified that a deed granting the railroad an easement for railroad purposes "was entire; and, so long as the railway company was using any portion of the strip of land conveyed for its right-of-way or easement, it had the right to use and possession of all of it." *Ritter*, 144 S.W. at 911.

[131] *Long Beach v. Pac. Elec. Ry. Co.*, 283 P.2d 1036, 1038 (Cal. 1955).

[132] *See supra* Section III(A)(iii).