Property Owners Beware: The Minnesota Supreme Court Has Twice "Misconstrued" Express Easements

Christopher R. Duggan

Follow this and additional works at: http://open.mitchellhamline.edu/wmlr

Recommended Citation
Available at: http://open.mitchellhamline.edu/wmlr/vol25/iss4/3
PROPERTY OWNERS BEWARE: THE MINNESOTA SUPREME COURT HAS TWICE “MISCONSTRUED” EXPRESS EASEMENTS

Christopher R. Duggan†

I. INTRODUCTION

The Minnesota Supreme Court recently issued two important decisions concerning the interpretation of express easements.¹ Both cases involved gas pipeline easements over and through rural land.² In each case the controversy centered on the extent of the easement, which was described in indefinite terms by the grant.³ In Bergh & Misson Farms, Inc. v. Great Lakes Transmission Co.,⁴ the issue was whether the pipeline company’s general “right of ingress and egress” to its pipeline needed to be exercised

† J.D. Candidate May 2000, William Mitchell College of Law; Ph.D., History, 1993, Northwestern University; B.A., University of Minnesota, 1985.
2. See Scherger, 575 N.W.2d at 579; Bergh & Misson Farms, 565 N.W.2d at 25.
3. See Scherger, 575 N.W.2d at 579; Bergh & Misson Farms, 565 N.W.2d at 26.
4. 565 N.W.2d 23 (Minn. 1997).
in a "reasonable" fashion. In Scherger v. Northern Natural Gas Co., the focus was the meaning and extent of the utility's blanket easement grant, which described the whole property rather than the specific location of the pipeline. The issue was whether the grant included the right to relocate the pipe elsewhere on the property.

The Minnesota Supreme Court gave an expansive interpretation of both easements, ruling against the landowner in each case. Despite imprecision and omissions in the terms of the grants, the court held that both instruments were clear, unambiguous and complete expressions of the easement. As such, the court refused to circumscribe in any way the language of the grants or the boundaries of the easements.

This note analyzes these decisions in light of traditional principles for interpretation of easements. Section II lays out the basic rules governing construction of express easements, and the application of such rules to indefinite rights of way and indefinite utility easements. Section III discusses the background facts and particular holdings of the two cases. Section IV analyzes the decisions, arguing that they involve misapplication of established interpretive principles and serious misconstructions of the easement grants. Section V concludes by emphasizing that these cases represent a serious and disturbing departure from established law.

II. INTERPRETATION OF INDEFINITE EASEMENTS

The Minnesota courts have used a standard set of principles for construing indefinite easements. These principles restrict the easement, confining it to firm boundaries and reasonable usage. The courts have refused to treat indefinite grants as unrestricted grants.

A. Basic Rules of Interpretation for Express Easements

The extent of an easement depends on the intentions of the original parties. As an early Minnesota decision stated, "The cardinal rule of construction is to ascertain and give effect to the intention of the parties to the deed." Intention is "the essence of every agreement," and the

5. Id. at 26.
6. 575 N.W.2d 578 (Minn. 1998).
7. See id. at 580.
8. See id.
9. See Scherger, 575 N.W.2d at 581; Bergh & Misson Farms, 565 N.W.2d at 27.
10. See Scherger, 575 N.W.2d at 580-81; Bergh & Misson Farms, 565 N.W.2d at 26-27.
court should construe the easement in conformity therewith unless prevented by a rule controlling the creation of easements. The parties' intention involves their agreement about such things as length, width and location. More fundamentally, however, it involves their "purpose" for making the agreement. As one decision noted, the parties to an instrument have "some definite and specific object or purpose in view" as expressed by their language, and the "sole office of the rules of judicial construction is to ascertain and declare that purpose."

The primary source for determining the parties' intention is the language of the grant. When an easement results from a written conveyance, "its extent depends entirely upon the construction of the terms of the grant." The grant "fixes" the easement's extent, such that no inter-


14. These qualities are the primary physical attributes of right of way easements. See JON W. BRUCE & JAMES W. ELY, THE LAW OF EASEMENTS & LICENSES IN LAND ¶ 7.02[2][b], at 7-6-7-7 (rev. ed. 1995).

15. See Washington Wildlife Preservation, Inc. v. State, 329 N.W.2d 543, 545 (Minn. 1983) (permitting use of a railroad easement for a public footpath because the latter use is "consistent with the purpose for which the easement was originally acquired"); Farnes, 281 Minn. at 226, 161 N.W.2d at 300 (stating that courts should construe an ambiguous easement as giving the grantee the fullest use of the easement "consistent with its purpose").

The purpose of the easement provides a strong indication of its scope. One treatise notes that "[i]n determining the extent of a right-of-way, it is proper to consider the whole scope and purpose of the deed creating it, the manifest intent of the parties in its execution, and the situation of the property." 2 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 386, at 561 (John S. Grimes ed., 1961). The same authority states that "[t]he purpose for which an easement is established is the test for determining the mode and extent of its user." Id. at 563.

16. Security Trust Co. v. Joesting, 96 Minn. 163, 167, 104 N.W. 830, 832 (1905) (construing an ambiguous deed); see also Ingelson v. Olson, 199 Minn. 422, 426, 272 N.W. 270, 273 (1937) (holding that the court should seek the intentions of the parties in construing an indefinite easement).

17. See Restatement of Property § 483 cmt. d (1944) ("So far as language is capable of performing the function for which it was chosen, it is the primary source for the ascertainment of the meaning of a conveyance."). Several leading Minnesota decisions have relied on the Restatement of Property for interpretation of express easement grants. See, e.g., Highway 7 Embers, Inc. v. Northwestern Nat'l Bank, 256 N.W.2d 271, 275 (Minn. 1977) (citing Restatement of Property §§ 482-83); Minneapolis Athletic Club v. Cohler, 287 Minn. 254, 258, 177 N.W.2d 786, 789 (1970) (citing Restatement of Property § 482); Farnes, 281 Minn. at 226, 161 N.W.2d at 300 (citing Restatement of Property § 483).

18. Highway 7 Embers, 256 N.W.2d at 275.
interpretation can contradict its terms. If the grant is clear and unambiguous, the court must consider only the terms of the grant, excluding all extrinsic evidence.

In interpreting the grant, Minnesota courts apply various rules of construction. They construe the entire grant rather than a detached part of it, and they seek to “harmonize and unite” inconsistent provisions in accordance with the plain intentions of the parties. They ignore the technical meaning of words if literal interpretation would defeat the parties’ clear intention. Finally, the courts construe doubtful terms in favor

19. See Minneapolis Athletic Club, 287 Minn. at 258, 177 N.W.2d at 789 (“The process which creates an easement necessarily fixes its extent and therefore the extent of the easement created by a conveyance is fixed by the terms of the conveyance.”); see also RESTATEMENT OF PROPERTY § 482 (1944) (“The extent of an easement created by a conveyance is fixed by the conveyance.”).

20. See generally Highway 7 Embers, 256 N.W.2d at 275 (holding that “circumstances surrounding the grant” may be considered only when ambiguities exist in the terms of the grant). The heavy emphasis placed upon the granting language is shown by the rule that nonuse of an express easement will not result in its extinction. See Simms v. William Simms Hardware, Inc., 216 Minn. 290, 291, 12 N.W.2d 783, 787 (1943); Pergament v. Loring Properties, Ltd., 586 N.W.2d 778, 782 (Minn. Ct. App. 1998).

21. Recent Minnesota decisions suggest that construction of the grant should occur before any finding of ambiguity therein. See Lien v. Loraus, 403 N.W.2d 286, 288 (Minn. Ct. App. 1987) (holding that the extent of an express easement “depends entirely upon the construction of the terms of the grant. Only when ambiguities exist may the circumstances surrounding the grant be considered.”); see also Washington Wildlife Preservation, Inc. v. State, 329 N.W.2d 543, 546 (Minn. 1983); Highway 7 Embers, 256 N.W.2d at 275. This procedure contradicts previous Minnesota decisions. See, e.g., Security Trust Co. v. Joesting, 96 Minn. 163, 166, 104 N.W. 830, 832 (1905) (stating that the court should use rules of construction to ascertain the parties’ intention only when it “is not made clear by their written contract”). It also departs from standard practice in other jurisdictions, which generally apply the rules of construction only after finding the instrument to be ambiguous. See 9 THOMPSON ON REAL PROPERTY §§ 82.13(a) & 82.13(b), at 408-10, 412 (David A. Thomas ed., 1994).

22. See Witt v. St. Paul & N. P. Ry. Co., 38 Minn. 122, 127, 35 N.W. 862, 864-65 (1888) (holding that “the court must consider all parts of the instrument, and the construction must be upon the entire deed, and not upon disjointed parts of it”); Sanborn v. City of Minneapolis, 35 Minn. 314, 317, 29 N.W. 126, 126 (1886) (stating that the court must construe the “entire deed”).

23. Joesting, 96 Minn. at 167, 104 N.W. at 832; see also Romanchuk v. Plotkin, 215 Minn. 156, 164, 9 N.W.2d 421, 426 (1943) (stating that rules of construction are interpretive aids for discovering intention and that the court must not destroy “the plain intention of the parties as gathered from the entire instrument”).

24. See Aldrich v. Soucheray, 133 Minn. 382, 385, 158 N.W. 637, 639 (1916) (refusing to construe “excepting” according to its technical legal meaning). Another early decision stressed that the court must not place “too much stress . . . on the grammatical construction or forms of expression used” if a contrary intention appears in the instrument, and that the grantor may convey an easement by adopt-
of the grantee. 25 If the scope of the easement becomes clear after application of these rules, the courts will enforce the grant as written. 26

The courts proceed to further analysis only if the grant remains ambiguous. 27 A finding of ambiguity is the "critical step" in interpretation of easements, permitting the court to clarify and define the terms of the grant. 28 Ambiguity in deeds is a somewhat malleable concept and occasionally appears to be "little more than an ipse dixit of the courts." 29 However, ambiguity always involves indefiniteness in the terms of the grant, such that "the extent of the easement is not clearly declared." 30

Minnesota case law has recognized two main types of ambiguity. The most common variety involves imprecise or contradictory language in the grant. 31 In Ingelson v. Olson, 32 for instance, the court held an easement grant to be ambiguous because it used the words "approximately" and "more or less" to describe the location of the servitude. 33 Ambiguity of this sort has been called "patent ambiguity" because it appears on the face
of the document. The second type of ambiguity results from omission. It occurs when the grant fails to specify important attributes of the easement, offering an “incomplete” description of the servitude. Such ambiguity usually involves omission of key physical dimensions of the easement, such as its width or location within the servient tenement. It can also result from failure to specify the permissible burden of use on the easement. The most striking decisions regarding “ambiguity by omission” have involved rights of way leading to lakes. In *Farnes v. Lane* and *Lien v. Loraus*, the Minnesota Supreme Court and Minnesota Court of Appeals, respectively, held lake passageway grants to be ambiguous because they failed to state whether the grantees could build a dock at the water’s edge. According

34. *See* 9 *THOMPSON ON REAL PROPERTY*, *supra* note 21, § 82.13(b)(1), at 411.
35. *See Kretz*, 127 Minn. at 310, 149 N.W. at 651 (holding that the court may examine extrinsic evidence “when the extent of the easement is not clearly declared”); *see also* 2 E. ALLAN FARNsworth, *Farnsworth ON CONTRACTS* § 7.15-7.16, at 327-38 (2d ed. 1998) (discussing the problem of omissions in contract law).
36. *See BRUCE & ELY*, *supra* note 14, ¶ 8.02[1], at 8-3-8-4 (stating that “where the terms of the easement are imprecise or incomplete, courts consider other circumstances to aid their interpretation of the written instrument”). Discussing an “incomplete” easement grant, one Minnesota decision explained that “[t]he rights conveyed and reserved in this conveyance... were for the court to ascertain, in the absence of apt words in the reservation clauses expressing and defining those rights.” *Callen v. Hause*, 91 Minn. 270, 271, 97 N.W. 973, 974 (1904).

In Minnesota, an easement grant need only describe the servient tenement and the intention of the parties. *See Ingelson*, 199 Minn. at 427, 272 N.W. at 274. As a result, an instrument may omit key physical dimensions of the servitude yet still remain a valid grant. *See, e.g.*, *Callen*, 91 Minn. at 271, 97 N.W. at 974 (upholding a right of way grant that omitted the course and entry points of the easement).

37. *See Callen*, 91 Minn. at 270-72, 97 N.W. at 973-74 (invoking grant that omitted the location of the way); *Lidgerding v. Zignego*, 77 Minn. 421, 424, 80 N.W. 360, 361 (1899) (invoking grant that failed to mention the width of the right of way).
38. *Giles v. Luker*, 215 Minn. 256, 259-60, 9 N.W.2d 716, 718 (1943) (concerning whether an easement to cross land “by foot or wagon” included use by gravel trucks); *Kretz v. Fireproof Storage Co.*, 127 Minn. 304, 310, 149 N.W. 648, 651 (1914) (invoking a right of way to an identified lot that contained a building covering two additional lots).
40. 281 Minn. 222, 161 N.W.2d 297 (1968).
41. 403 N.W.2d 286 (Minn. Ct. App. 1987).
42. *See Farnes*, 281 Minn. at 225-26, 161 N.W.2d at 300-01 (holding that right of way was uncertain for failure to mention the existence or non-existence of right to build and use a dock); *Lien*, 403 N.W.2d at 288-89 (holding that grant of a pedestrian walkway to a lake, which made no mention of docking rights, was ambiguous).
to the courts, this omission made the easements uncertain and ambiguous, even though the granting language was otherwise clear and unambiguous.

If the grant is ambiguous, the courts may resolve the uncertainty in two ways. First, the court may examine the circumstances surrounding the grant to determine the parties' intention. "As the language of the grant becomes less precise," explained one decision, "the circumstances of the grant grow in importance as an interpretive aid." In particular, courts have considered such circumstances as the location and structural characteristics of the land, previous use of the land by the grantor, and (rarely) preliminary negotiations of the parties. Courts have also examined the "practical construction" of the grant, that is, how the original parties interpreted and exercised their respective rights under the grant.

43. See Farnes, 281 Minn. at 225-26, 161 N.W.2d at 300-01; Lien, 403 N.W.2d at 288-89. Neither Lien nor Farnes specified exactly why the lake access easements were ambiguous. The Supreme Judicial Court of Maine, however, explained the Farnes holding in this manner: "generally, access to a body of water is sought for particular purposes beyond merely reaching the water, and where such purposes are not plainly indicated, a court may resort to extrinsic evidence to assist the court in ascertaining what they may have been." Badger v. Hill, 404 A.2d 222, 226 (Me. 1979) (interpreting Farnes and Hudson v. Lee, 393 P.2d 515, 515 (Okla. 1964)). Other jurisdictions have also declared lake-access easements to be ambiguous when they fail to mention docking rights. See, e.g., Metcalf v. Houk, 644 N.E. 2d 597, 601 (Ind. Ct. App. 1994); Walter W. Krieger, Recent Developments in Property Law, 25 Ind. L. REV. 1375, 1383-86 (1992) (discussing three cases that held omission of docking rights made easement grants ambiguous).


45. Id. (paraphrasing the RESTATEMENT OF PROPERTY § 483 cmt. d (1944)).

46. See Kretz v. Fireproof Storage Co., 127 Minn. 304, 309-10, 149 N.W. 648, 651 (1914) (holding that an appurtenant easement granted for one lot also served adjoining lots when a single building stood on all the lots at the time of the grant); Callen v. Hause, 91 Minn. 270, 272, 97 N.W. 973, 974 (1904) (stating that when the language of a reservation is indefinite, the court should examine among other things "the nature and situation of the property conveyed").

47. See Callen, 91 Minn. at 272, 97 N.W. at 974 (stating that grantor's use of easement before the grant may be considered in determining which lands were benefited by the grant); see also Miller v. Snedeker, 257 Minn. 204, 215, 101 N.W.2d 213, 222 (1960) (holding that "[w]here a way is granted without fixing its location, but there is a way already located at the time of the grant, such way will be held to be the location of the way granted unless a contrary intention appears").

48. See Sandretto v. Wahlsten, 124 Minn. 331, 334, 144 N.W. 1089, 1090 (1914) (holding that negotiations and preparations of the parties, among other extrinsic evidence, showed the correct location of land ambiguously described in a deed).

49. See Simms v. William Simms Hardware, 216 Minn. 283, 291, 12 N.W.2d 783, 787 (1943) (citing Sandretto); Bruns v. Willems, 142 Minn. 473, 479, 172 N.W.
Such extrinsic evidence serves to clarify and define the easement, filling in gaps left by the indefinite grant.  

Many ambiguities, however, cannot be resolved by examining the intent of the original parties. In many cases, the original parties did not consider the matter causing the uncertainty. No agreement can eliminate every uncertainty because the parties cannot afford to negotiate every detail or possible contingency of the transaction.

In such cases, Minnesota courts interpret the indefinite terms according to the rule of "reasonable use." Under this well-established
principle, the extent of the easement is that "reasonably necessary to the full enjoyment" of the use intended by the parties. The courts assume that "the grantor intended to permit a use of the easement which was reasonable under the circumstances and the grantee expected to enjoy the use to the fullest extent consistent with its purpose." The parties' rights balance each other, being "so limited, each by the other, that there may be a due and reasonable enjoyment of both." An easement, therefore, contains only the right to a "reasonable and usual" enjoyment of its terms.

The reasonable use principle serves as a gap-filler, giving content to indefinite terms that cannot be clarified by the parties' intention. As such, it allows the court to supply terms whose absence would otherwise cause the easement to fail because of uncertainty.

55. See Bruce & Ely, supra note 14, ¶ 8.02[1][a], at 8-6; 2 Thompson, supra note 15, § 386, at 559; F. T. Chen, Annotation, Extent and Reasonableness of Use of Private Way in Exercise of Easement Granted in General Terms, 3 A.L.R.3d 1256, 1260 (1965) (noting that "reasonableness of use is the operational test" in defining the legitimate mode of use on general rights of way); W. W. Allen, Annotation, Width of Way Created by Express Grant, Reservation, or Exception not Specifying Width, 28 A.L.R.2d 253, 255-56 (1953) (stating that courts generally define an unspecified width in a right of way as a "reasonable" one in view of the purpose of the grant).

56. Giles v. Luker, 215 Minn. 256, 260, 9 N.W.2d 716, 718 (1943); see also Lidgerding v. Zignego, 77 Minn. 421, 424, 80 N.W. 360, 361 (1899) (stating that a grant to cross land near or upon a boundary line "necessarily implies the right to use a strip of land of the width reasonably necessary to the enjoyment of the uses for which the grant was made").

57. Farnes v. Lane, 281 Minn. 222, 226, 161 N.W.2d 297, 300 (1968); see also Bruns v. Willems, 142 Minn. 473, 479, 172 N.W. 772, 774 (1919) ("The interests of both the servient and dominant estate must be considered in the use made of an easement.").

58. Giles, 215 Minn. at 260, 9 N.W.2d at 718 (quoting Minto v. Salem, L. & P. Co., 250 P. 722, 725 (1926)).


60. Regarding gap-fillers and implied terms, see 2 Farnsworth, supra note 35, § 7.16, at 331-38. Farnsworth notes that courts formulate implied terms based on considerations about the presumed expectations of the parties and basic notions of justice. See id. at 334-36. Both considerations underlie the reasonable use principle.

61. See Roger A. Cunningham et al., The Law of Property § 8.9, at 458 (2d ed. 1993) (noting that "many decisions hold that, rather than for the grant to fail, a [right of] way that is reasonable and convenient for both parties is implied"). An early Minnesota decision explicitly dismissed the argument that omission of the width of an easement rendered the grant void. See Lidgerding, 77 Minn. at 424, 80 N.W. at 361. The Lidgerding court used the reasonable use principle to supply the missing term, holding that the grant "necessarily implies the right to use a strip of land of the width reasonably necessary to the enjoyment of the uses for which the grant was made." Id.
In applying these principles, the courts adopt a special approach when dealing with secondary or "ancillary" easements. Secondary easements are rights "necessary to the enjoyment" of the primary easement, and include the right to access, maintain and repair the primary easement. One common secondary easement is the right of utility companies to trim trees that impinge on telephone or electric lines. Though grants often mention these secondary easements, courts in any case will imply them into the grant on grounds that "a grant carries with it all things, as included in it, without which the thing granted cannot be enjoyed." Because of their derivative purpose—to support effective use of the main easement—secondary easements are often intended to remain flexible. As a result, Minnesota courts have made little attempt to describe their specific boundaries and dimensions. Instead, the courts impose the reasonable use principle upon such easements, requiring that they be exercised with due regard for the servient owner's rights and

62. St. Anthony Falls Water-Power Co. v. City of Minneapolis, 41 Minn. 270, 275, 43 N.W. 56, 57-58 (1889).

63. See Reed v. Board of Park Comm'rs, 100 Minn. 167, 172-73, 110 N.W. 1119, 1121 (1907) (holding that owner of a drainage easement could clean out obstructions placed in the ditch where it crossed another's land downstream); see also Bruns v. Willems, 142 Minn. 473, 479, 172 N.W. 772, 774 (1919). For a general discussion of the scope of secondary easements, see Bruce & Ely, supra note 14, ¶ 8.07[2], at 8-54-8-56.

64. See St. Paul Realty & Assets Co. v. Tristate Tel. & Tel. Co., 122 Minn. 424, 425-26, 142 N.W. 807, 807-08 (1913). One such easement authorized the power company "to enter upon" the grantor's land "to cut and trim trees to the extent necessary or advisable" to construct, repair and maintain electric lines. Daly v. Duwane Constr. Co., 259 Minn. 155, 159-60, 106 N.W.2d 631, 634 (1960).

Minnesota Statutes section 222.37 now subjects utility tree-trimming to regulation by local ordinance. See Minn. Stat. § 222.37, subd. 1 (1998); see also Miller-Lagro v. Northern States Power Co., 582 N.W.2d 550, 553 (Minn. 1998) (deciding on grounds of local ordinance rather than common-law principles whether power company exceeded its rights in trimming trees).

65. St. Anthony Falls Water-Power, 41 Minn. at 274, 43 N.W. at 57. This is a general rule; one treatise has noted that "conveyances of a primary easement are construed also to convey those so-called secondary easements needed for the full enjoyment of the primary easement." 4 Richard R. Powell, Powell on Real Property § 34.21[2], at 188-90 (Patrick J. Rohan ed., 1998).

66. Section 300.045 of the Minnesota Statutes, which requires utilities to give the grantor a specific description of their easements, makes an exception for "temporary easements for construction." Minn. Stat. § 300.045(a) (1998 & Supp. 1999). The statute recognizes the flexible dimensions intended by the parties for this type of easement. See id.

67. See St. Paul Realty, 122 Minn. at 425-26, 142 N.W. at 807-08 (failing to define area within which telephone company must stay in exercising its right to trim impinging trees); Reed, 100 Minn. at 172-73, 110 N.W. at 1121 (declining to specify where easement holder could enter servient tenement in exercise of secondary easement to repair drainage ditch).
without causing unnecessary damage to the burdened land. Rather than defining the physical borders of secondary easements, the courts insist only that such easements be exercised reasonably.

The ultimate effect of these interpretive principles has been to limit the scope of written easement grants. Indefinite grants often seem to convey expansive, unrestricted easements. By omitting the easement's key physical dimensions, such grants appear to leave such dimensions untrammeled by limitations. The rules of interpretation, however, assume that indefinite grants are imperfectly described grants, not unlimited grants. The courts recognize unrestricted easements only when expressed in explicit and specific language.

B. Interpretation of Indefinite Rights of Way

Minnesota courts have often applied the above-stated principles when interpreting express rights of way. A right of way is an easement that gives the owner the privilege of passing over another's land. A right
of way grant is indefinite if it fails to specify the location or dimensions of the way, or the extent of permissible use thereon. In such cases, the courts generally have sought to circumscribe and limit the extent of the grant.

The most common problem involves rights of way that are indefinite as to location. To be valid, an easement need only describe the affected property and the intention of the parties. As a result, many easement grants contain inadequate descriptions of the physical dimensions of the servitude. In some cases, the instrument locates the pathway using imprecise or equivocal language. In other cases, the grant entirely omits description of the pathway and simply describes the servient tenement. The latter grants are known as blanket or floating easement grants.

Blanket rights of way pose special interpretive problems. Because such grants describe the entire servient tenement, they appear to convey

western Tel. Exch. Co., 60 Minn. 539, 543, 63 N.W. 111, 112 (1895).

74. See generally 2 THOMPSON, supra note 15, §§ 387-88, at 567-86 (discussing rules for defining easements when location and width remain unclear).

75. See generally 2 THOMPSON, supra note 15, § 385, at 552-56 (compiling the principles used for clarifying the extent of permissible use when the right of way grant is unclear).

76. See infra notes 92-117 and accompanying text.


78. See Ingelson v. Olson, 199 Minn. 422, 427, 272 N.W. 270, 274 (1937) (stating that "[i]n describing an easement, all that is required is a description which identifies the land which is subject of the easement, and expresses the intention of the parties"); see also BRUCE & ELY, supra note 14, ¶ 7.02[2], at 7-2.

79. See BRUCE & ELY, supra note 14, ¶ 7.02[2], at 7-3.

80. See, e.g., Ingelson, 199 Minn. at 425, 272 N.W. at 273; Lidgerding v. Zignego, 77 Minn. 421, 423, 80 N.W. 360, 361 (1899) (involving a right of way described as "upon or near" a specified boundary line).

81. See, e.g., Callen v. Hause, 91 Minn. 270, 270, 97 N.W. 973, 973 (1904) (involving grant "to pass over the described premises at all times with farming implements"). This sort of indefinite grant must be distinguished from a grant that reserves the right of designation to one of the parties. See Larson v. Amundson, 414 N.W.2d 413, 417 (Minn. Ct. App. 1987). The latter type of grant is "not an indefinite grant per se," but simply an instrument "specifically retaining and reserving the right to locate the easement in the future." Id.

82. See generally Barbara N. Lawrence, Real Property: The Effect of Floating Easements Held by Pipeline Companies on Marketability of Title and Land Values, 37 OKLA. L. REV. 180, 180-81 (1984) (discussing the prevalence, interpretation and significance of blanket pipeline easement grants). One court has defined a blanket easement as a grant "that fails to define or specify either the location, width, length or other dimensions of the actual strip(s) of property to be (or actually utilized." TCI of North Dakota, Inc. v. Schriock Holding Co., 11 F.3d 812, 816 (8th Cir. 1993).
the right of cross over every part of the land. Minnesota courts, like those of most other states, have uniformly rejected this interpretation of blanket rights of way.

Minnesota courts construe blanket rights of way based on three principles that first appeared in the 1904 case Callen v. Hause. The Callen case involved a grant that simply conveyed the right to "pass over" a described plot of land. In construing this instrument, the court assumed first that the grant described only the servient tenement and not the easement. The physical dimensions of the easement, it presumed, remained entirely undefined by the grant. Second, the Callen court held that the blanket grant was inherently indefinite and ambiguous, permitting consideration of extrinsic evidence to determine the easement's location and dimensions. Third, the court held that the easement itself consisted of one fixed way within the property description in the grant.

83. See, e.g., Callen, 91 Minn. at 270, 97 N.W. at 973 (involving grant of "the right of way to said Reid and assigns for teams and cattle to pass over the described premises at all times with farming implements," thus appearing to permit crossing the land at any and every location). The term "right of way" does not designate the physical path but rather the legal privilege, and does not itself limit a grant to one way. See 2 Bouvier, supra note 73, at 3444.

84. See Callen, 91 Minn. at 271-72, 97 N.W. at 974 (holding by implication that a right of way to pass over a defined tract granted only one, fixed, "reasonably suitable" pathway over the land); see also Ingelson, 199 Minn. at 428, 272 N.W. at 274 ("When the right of way is not bounded in the grant, the law bounds it by the line of reasonable enjoyment.").

85. See Thompson, supra note 15, § 386, at 563 (noting the general rule that a blanket right of way "does not operate to give a right-of-way over the entire tract described, but merely a right to use a convenient way over such tract sufficient for the purposes intended by the grant").

86. 91 Minn. 270, 97 N.W. 973 (1904).

87. See id. at 270, 97 N.W. at 973.

88. See id. at 270-71, 97 N.W. at 973 (holding that the right of way needed to be "laid off" or "designated" within the tract); see also Bruce & Ely, supra note 14, ¶ 7.02[5], at 7-14-7-15 (noting that some grants describe tracts of such size as to create uncertainty whether they designate the easement or the land within which the easement lays).

89. See Callen, 91 Minn. at 271, 97 N.W. at 974 (holding that blanket right of way did not designate the location of the easement). Regarding this point, an earlier New York decision explained that a blanket right of way does not give "the right to pass over every part" of the described property, but only such right as is "necessary in order to pass and repass in the usual way, and with the usual means." Grafton v. Moir, 29 N.E. 974, 976 (N.Y. 1892).

90. See Callen, 91 Minn. at 272, 97 N.W. at 974 (holding that blanket easement was "not fully clear and unambiguous," necessitating consideration of extrinsic evidence).

91. See id. at 270, 97 N.W. at 973 (holding blanket easement of way limited the grantee to one way, which needed to be "laid off or designated"); see also Hedderly v. Johnson, 42 Minn. 443, 447, 44 N.W. 527, 528 (1890) (stating that the courts
Once the court determines that the location of the right of way is indefinite, it looks at extrinsic evidence to determine its placement. If a way existed at the time of the grant, the court will treat this location as the way unless the grant states otherwise. If a way did not exist already, the court looks at the practical construction of the grant by the parties. The grantor possesses the right to choose the location, but if he fails the grantee may choose the way.

In any case, the location must conform to the rule of reasonable use. As one decision announced, if "the right of way is not bounded in the grant, the law bounds it by the line of reasonable enjoyment." It must be "a convenient and suitable way" that does not "unreasonably interfere with the rights of the owner of the servient estate." Once a route has been designated, followed by long acquiescence in its use, the route may not be relocated without the consent of both parties.

Another uncertainty affecting rights of way is indefiniteness as to width. Only one Minnesota case, Lidgerding v. Zignego, has dealt with

---

construe a grant to give a definite location to the easement, unless the language of the easement indicates otherwise); 2 THOMPSON, supra note 15, § 384, at 550-51 ("A private way is the right of one man to travel over the land of another by some particular route or line.").

92. See Ingelson v. Olson, 199 Minn. 422, 428, 272 N.W. 270, 274 (1937); Callen, 91 Minn. at 271, 97 N.W. at 974; Lidgerding v. Zignego, 77 Minn. 421, 424, 80 N.W. 360, 361 (1899).


94. See Ingelson, 199 Minn. at 428, 272 N.W. at 274; Callen, 91 Minn. at 271, 97 N.W. at 974.

95. See Ingelson, 199 Minn. at 428, 272 N.W. at 274.

96. See supra notes 54-61 and accompanying text.

97. Ingelson, 199 Minn. at 428, 272 N.W. at 274 (quoting Grafton v. Moir, 29 N.E. 974, 976 (N.Y. 1892)).

98. Id.

99. See Sabin v. Rea, 176 Minn. 264, 265, 223 N.W. 151, 151 (1929); see also St. Paul, Minneapolis & Manitoba Ry. Co. v. St. Paul Union Depot Co., 44 Minn. 325, 335, 46 N.W. 566, 569 (1890) (stating in dicta that "when a right of way is once located and occupied it is fixed forever"). Drafters of the Restatement (Third) of Property have proposed changing this rule to permit unilateral relocation of an easement by the servient owner under certain circumstances. See RESTATMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8 & cmt. f (Tentative Draft no. 4, 1994). For analysis of the implications of this change, see The Right of Owners of Servient Estates to Relocate Easements Unilaterally, 109 HARV. L. REV. 1693 (1996) (criticizing the proposed change); Douglas B. Harris, Balancing the Equities: Is Missouri Adopting a Progressive Rule for Relocation of Easements?, 61 MO. L. REV. 1039 (1996) (welcoming the proposed alteration).

100. See generally Allen, supra note 55 (discussing the general rules for determining the width of a way when undefined in the grant).

101. 77 Minn. 421, 80 N.W. 360 (1899).
this problem. In *Lidgerding*, a “right of way to cross on foot or with teams” made no mention of passageway’s width. Refusing to void the grant for uncertainty, the court filled in the omission using the reasonable use principle. The grant, it held, “necessarily implies the right to use a strip of land of the width reasonably necessary to the enjoyment of the uses for which the grant was made.” A similar rule for defining an uncertain width is used in at least twenty-one other jurisdictions.

A third problem involves indefiniteness as to the burden of use on the way. In resolving this issue, Minnesota courts have relied primarily on the reasonable use rule rather than extrinsic circumstances. The leading case in this area, *Giles v. Luker*, held that a grantee may use the easement in any manner “reasonably necessary to the full enjoyment” of his grant, so long as he does not infringe the reasonable rights of the servient owner. On this ground, the *Giles* court permitted gravel trucks to use an unrestricted way only during daylight hours at reasonable speeds. Another decision used the reasonable use principle to set the height of an alley at that point which would reasonably serve both dominant and servient owners. Courts have cited the principle to permit reasonable use of a right of way by the servient owner, as for instance by constructing a

---

103. *Lidgerding*, 77 Minn. at 425, 80 N.W. at 361.
104. *Id.* at 424, 80 N.W. at 361.
106. See generally *Chen*, supra note 55 (discussing the standard principles used to determine the permissible burden of use on rights of way where the grant does not specify the extent of use).
107. 215 Minn. 256, 9 N.W.2d 716 (1943). In this case, the holder of a general right of way began using it to haul gravel in large trucks, which created dust and noise that interfered with the servient owner’s summer resort business. *See id.* at 257-60, 9 N.W.2d at 717-18.
108. *Id.* at 260, 9 N.W.2d at 718.
109. *See id.* The court not only limited the time and speed of the trucks, but also instructed the lower court to order the easement holder to spray the road next to the servient owner’s cottages “to minimize the dust created by [the] haulage.” *Id.* at 261, 9 N.W.2d at 718.
110. *See Kretz v. Fireproof Storage Co.*, 127 Minn. 304, 149 N.W. 648 (1914) (holding that a right of way must be kept “at a level reasonably calculated” to serve both the servient and the dominant tenement owners).
The courts' interpretation of indefinite rights of way, therefore, works to pin down and restrict the grant. An indefinite right of way is restricted to one stationary and reasonable location, which cannot be moved without the consent of both parties. The courts circumscribe its width and burden of use to reasonable proportions based on the easement's purpose and the respective rights of the parties. Strictly speaking, the courts do not abridge or decrease the easement; rather they define its true boundaries and thereby limit its possible extent. The courts simply supply "definiteness and precision" to the easement, preventing it from becoming an "onerous" burden on the servient tenement.

C. Interpretation of Indefinite Utility Easements

Utility easements are a type of right of way. The right of passage consists of the privilege of sending gas, electricity, telephone transmissions and the like across and through the servient tenement. The main distinction from ordinary rights of way is that utility ways require continual occupation of the easement by immovable lines, poles, pipes and similar

102, 103 (1906); Giles, 215 Minn. at 260, 9 N.W.2d at 718.
114. See supra notes 86-99 and accompanying text.
115. See supra notes 100-113 and accompanying text.
116. The courts describe this limitation process as "ascertainment," "designation," "determination" or "definition" of the easement. See, e.g., Ingelson v. Olson, 199 Minn. 422, 428-29, 272 N.W. 270, 274 (1937); Sabin v. Rea, 176 Minn. 264, 265-266, 225 N.W. 151, 151-52 (1929); Callen v. Hause, 91 Minn. 270, 271-72, 97 N.W. 973, 974 (1904).
117. See Hedderly v. Johnson, 42 Minn. 443, 446, 44 N.W. 527, 528 (1890) (construing an easement grant to refer to an existing railroad line rather than a future line because the latter interpretation would transform the easement into "a float" that "would be more onerous to the grantee than a definitely located easement").
119. See Cater v. Northwestern Tel. Exch. Co., 60 Minn. 539, 544, 63 N.W. 111, 113 (1895) (holding that a highway right of way includes within it "the transportation of persons and property, or the transmission of intelligence").
support structures.  
Utility easements frequently take the form of blanket grants, where the conveyance describes the servient land and the purpose of the easement, but not its specific location or dimensions. Before Scherger v. Northern Natural Gas Co.,\(^\text{122}\) described herein, no Minnesota court had ruled on the extent of blanket utility grants.

Minnesota has enacted legislation to address blanket utility grants, however.\(^\text{123}\) Minnesota Statutes section 300.045, originally enacted in 1973, provided that all public service corporations, including pipeline companies, must “definitely and specifically” describe any easements acquired over private property.\(^\text{124}\) The second part of the statute, added in 1993 and recently recodified as subsection (c), stated that:

When a question arises as to the location of an easement across specific property and the recorded description does not include a definite and specific description of the easement . . . , the public service corporation holding the easement shall, upon written request by the specific property owner, produce and record in a timely manner a definite and specific description [of the easement].\(^\text{125}\)

Although pipeline companies are not public service corporations, the Minnesota Attorney General has determined that they nevertheless fall

---

\(^{120}\text{See id. at 545-46, 63 N.W. at 113 (noting telegraph, telephone, railroad and trolley easements require immovable fixtures). Utility easements also differ from ordinary easements because they can be created by condemnation. See Minn. Stat. § 222.36 (1998).}\)

\(^{121}\text{See Lawrence, supra note 82, at 181.}\)

\(^{122}\text{575 N.W.2d 578 (Minn. 1998).}\)

\(^{123}\text{See Minn. Stat. § 300.045 (1998) (recodified as Minn. Stat. § 300.045(a) (Supp. 1999)).}\)

\(^{124}\text{See Minn. Stat. § 300.045 (1998) (recodified as Minn. Stat. § 300.045(a) (Supp. 1999)).}\)

\(^{125}\text{Minn. Stat. § 300.045 (1998). The statute was amended in 1999 by the legislature in response to the Scherger decision. See infra note 247 and accompanying text. The amended and recodified subsection now provides:}\)

When a question arises as to the location, width, or course of an easement across specific property and the recorded description does not include a definite and specific description of the location, width, or course of the easement . . . , the public service corporation holding the easement shall, upon written request by the specific property owner, produce and record in a timely manner an instrument that provides a definite and specific description [of the easement].

\text{Minn. Stat. § 300.045(c) (Supp. 1999) (emphasis added to indicate new language).}
within the meaning of this statute.\(^\text{126}\)

Section 300.045 suggests that blanket utility grants remain subject to the rules governing indefinite rights of way. First, it implicitly assumes that blanket utility grants are indefinite. According to the statute, the easement is not defined by the property description but rather consists of a "specific" area within the "corners" of such property description.\(^\text{127}\) Second, the statute implies that the "real" easement consists of one fixed location, because it must be capable of "definite and specific" description.\(^\text{128}\) Third, the statute effectively limits the "real" easement to the area surrounding the utility fixtures (pipe, poles, lines), since no utility would provide a specific description that failed to include its transmission fixtures.\(^\text{129}\) The statute, in short, treats blanket utility easements like ordinary rights of way, viewing them as grants of a single, immovable corridor centering on the utility's fixtures.

Other states have taken a similar view of blanket utility easements, applying the general principles used in construction of indefinite rights of way.\(^\text{130}\) The decisions depend heavily on the exact language used in the grant.\(^\text{131}\) They also differ in how they resolve questions about the burden of such easements, such as the permissible number or size of buried pipes.\(^\text{132}\) Nevertheless, several principles consistently appear.

\(^\text{127}\) See MINN. STAT. § 300.045 (1998) (recodified as MINN. STAT. § 300.045(b) (Supp. 1999)). The statute states that the public service corporation must provide a "definite and specific description" by giving either (a) "specific legal reference points as to the location of the easement in relation to the corners of the specific property" or (b) a drawing that locates the easement "in relation to the corners of the specific property involved." \Id.
\(^\text{128}\) See id. § 300.045 (1998) (recodified as MINN. STAT. § 300.045(b)(2) (Supp. 1999)) (stating that the "definite and specific description" of the easement must show the points where the easement "enters and departs from the property").
\(^\text{129}\) If the transmission fixtures lay outside the "definite and specific description," the utility would be subject to an action for trespass. See Northern States Power Co. v. Franklin, 265 Minn. 391, 396-97, 122 N.W.2d 26, 30 (1963).
\(^\text{130}\) See BRUCE & ELY, supra note 14, ¶ 7.02[5], at 7-14-7-16; Lawrence, supra note 82, at 186-88.
\(^\text{131}\) See Callen v. Hause, 91 Minn. 270, 270, 97 N.W. 973, 973 (1904); Lidgerding v. Zignego, 77 Minn. 421, 423, 80 N.W. 360, 361 (1899); see also supra notes 86-113 and accompanying text.
\(^\text{132}\) See, e.g., Sorrell v. Tennessee Gas Transmission Co., 314 S.W.2d 193, 195 (Ky. 1958) (emphasizing the grant's specific language that additional pipes need not be parallel to the original pipes); Boland v. Natural Gas Pipeline Co. of America, 816 S.W.2d 843, 844 (Tex. App. 1991, no writ) (stressing the instrument's specific grant to the pipeline utility of the right to choose the "route or routes" of the pipes).
\(^\text{133}\) Compare Winslow v. City of Vallejo, 84 P. 191, 191-92 (Cal. 1906) (holding that a right of way to lay "any water pipes or mains" was fixed by grantee's use to
First, the decisions largely agree that a blanket utility grant is indefinite as to its physical dimensions and therefore subject to restriction.\textsuperscript{134} Only when the language of the grant clearly burdens the entire servient tenement do the courts treat the easement as an unrestricted servitude.\textsuperscript{135} Second, the course or location of the "real" easement is fixed by the location of the utility's lines (pipe, wire, etc.).\textsuperscript{136} When the utility lays its pipe (or hangs its wires), it effectively designates the location of the actual easement, which becomes limited to this path.\textsuperscript{137} Third, the width of the easement is the line of reasonable enjoyment necessary to fulfill the purposes of the grant.\textsuperscript{138}

Blanket utility easements, in short, are governed by the same restrictions.

one pipe of same size as originally laid), \textit{with} Knox v. Pioneer Natural Gas Co., 321 S.W.2d 596, 600 (Tex. Civ. App. 1959, writ ref'd n.r.e.) (holding that easement to lay gas pipeline was not limited to the pipe size originally installed by the grantee), \textit{and} Kleinheider v. Phillips Pipe Line Co., 528 F.2d 837, 841-42 (8th Cir. 1975) (holding that easement to lay and maintain "a pipe line or pipe lines" was not limited to the number of pipelines originally laid). For criticism of the doctrine in Winslow, see Notes and Recent Decisions, \textit{Easements: Effect of User in Determining Extent of Grant Made in General Terms}, 31 CAL. L. REV. 442 (1943).

134. \textit{See, e.g.}, Capital Elec. Power Ass'n v. Hinson, 84 So. 2d 409, 412 (Miss. 1956) (holding that a right of way easement containing "general terms as to location, length, or terminal points" is "uncertain and ambiguous"). \textit{But see Boland,} 816 S.W.2d at 844-45 (holding that easement permitting pipelines "at route or routes" selected by grantee was not ambiguous and essentially covered the entire servient tenement).

135. \textit{See, e.g., Sorrell}, 314 S.W.2d at 194-95 (holding that pipeline grant permitting construction of "additional lines not necessarily parallel to any existing line" created a vested, expansible easement that permitted "additional lines to be laid across any portion of the land"); \textit{Boland,} 816 S.W.2d at 844 (stressing the instrument's specific grant to the pipeline utility of the right to choose the "route or routes" of the pipes).

136. \textit{See, e.g., Hinson,} 84 So. 2d at 413 (holding that electric company's placement of its lines "fixes" its right and "limits it to the particular course or manner in which it has been enjoyed"); Hamilton v. Transcontinental Gas Pipe Line Corp., 110 So. 2d 612, 614 (Miss. 1959); Mielke v. Yellowstone Pipeline Co., 870 P.2d 1005, 1006 (Wash. Ct. App. 1994) (holding that location of pipeline, unspecified in grant, was fixed by installation of original pipeline).

137. \textit{See 2 THOMPSON, supra note 15, § 385, at 556} ("If the grant of an easement is in general terms the exercise of the right fixes it and limits its exercise. The grantee cannot later extend the enjoyment of the easement.").

138. \textit{See, e.g., Lone Star Gas Co. v. Childress,} 187 S.W.2d 936, 940 (Tex. Civ. App. 1945) (holding that the width of a blanket pipeline easement is that "reasonably needed" to attain the purposes of the grant); \textit{Mielke,} 870 P.2d at 1006 (holding that width of pipeline easement, unspecified in grant, is "bounded by the line of reasonable enjoyment"). \textit{See also Flynn v. Michigan-Wisconsin Pipeline Co.,} 161 N.W.2d 56, 61-62 (Iowa 1968) (stating that a court should not define the specific width of a pipeline easement in a declaratory judgment, but should rather determine the permissible width in specific fact situations according to the rule that the width is that "reasonably necessary to the enjoyment of the easement").

Published by Mitchell Hamline Open Access, 1999
tive principles affecting indefinite rights of way. Unless the granting lan-
guage indicates otherwise, both Minnesota statute and case law from other
jurisdictions confine these grants to one corridor of reasonable width for
achieving the purposes of the grant.

* * *

The general effect of Minnesota’s easement interpretation has been
the prevention of heavy, unintentional burdens on property. The courts refuse to extend easements “by legal construction beyond the ob-
jects originally contemplated or expressly agreed upon by the parties.” Faced with indefinite easements, the courts have sought to define and
limit their dimensions and permissible uses. They have refused to find
unrestricted easements unless the original parties showed a clear inten-
tion to create them. The cases described next, however, dramatically
departed from these policies.

III. THE CASES

A. Bergh & Misson Farms, Inc. v. Great Lakes Transmission Co.

This case involved a written easement instrument for an under-
ground gas pipeline on land leased and farmed by Bergh and Misson
Farms, Inc. (“B & M”). The landowners, Arlo and Dorothy Bergh,
granted the easement using a pre-printed form supplied by the grantee,
Great Lakes Gas Transmission Co. (“Great Lakes”). The instrument
granted Great Lakes a 125-foot corridor that ran diagonally through the
land for about 2,400 feet. Great Lakes obtained the right to construct,

139. See, e.g., Hedderly v. Johnson, 42 Minn. 443, 447, 44 N.W. 527, 528 (1890)
(stating that the court will avoid treating an easement as a “float” that the domi-
nant owner can locate at will because such interpretation would place an “oner-
ous” burden on the servient owner).
140. Thompson v. Germania Life Ins. Co., 97 Minn. 89, 92, 106 N.W. 102, 104
(1906).
141. See Highway 7 Embers, Inc. v. Northwestern Nat’l Bank, 256 N.W.2d 271,
278 (Minn. 1977).
142. See Scherger v. Northern Natural Gas Co., 575 N.W.2d 578, 579 (Minn.
1998); Bergh & Misson Farms, Inc. v. Great Lakes Transmission Co., 565 N.W.2d
23, 24 (Minn. 1997).
143. 565 N.W.2d 23 (Minn. 1997).
144. See id. at 24-25. Bergh and Misson Farms was a corporation owned by the
daughter of the landowners and her husband. See Appellant’s Brief and Appendix
at 2, Bergh & Misson Farms (No. C8-96-603).
145. See Appellant’s Brief and Appendix at A-1 and A-2, Bergh & Misson Farms
(No. C8-96-603) (being a copy of the right of way agreement).
146. See Bergh & Misson Farms, 565 N.W.2d at 25. The 1970 agreement was a
maintain, repair and replace the pipeline at any time.\textsuperscript{147} In addition, it received “the right of ingress and egress to and from said right-of-way... until said easement is exercised and so long as the same is used for any of the purposes granted herein.”\textsuperscript{148} The grant permitted Great Lakes to “temporarily use work space as needed” for constructing, maintaining and removing the pipeline, and Great Lakes agreed to pay for any resulting “damages to crops, timber, livestock and improvements.”\textsuperscript{149}

The key issue involved the meaning and extent of the ingress/egress clause. In June of 1994, Great Lakes determined that a section of the pipe required recoating.\textsuperscript{150} Without consulting B & M, Great Lakes created a pathway to the worksite.\textsuperscript{151} For the next six weeks, it drove heavy equipment in and out to perform the repair.\textsuperscript{152} During this time, twelve to fifteen inches of rain fell.\textsuperscript{153} Great Lakes’ repair activities rutted the land, clogged the drainage system, and exacerbated flooding of the fields.\textsuperscript{154} B & M’s sugar beet crop sustained considerable damage.

B & M sued Great Lakes for trespass on the grounds that the pipeline company exceeded the scope of its ingress/egress easement.\textsuperscript{155} B & M sought to recover triple damages for the trespass, as authorized by section 548.05 of the Minnesota Statutes.\textsuperscript{156} The ingress/egress easement, it argued, needed to be exercised in a “reasonable” way, and this Great Lakes failed to do.\textsuperscript{157} The trial court rejected this argument, excluding evidence
regarding the reasonableness of the use and refusing to issue a jury instruction on trespass. The court of appeals reversed, holding that even unrestricted easements must be exercised in a reasonable manner and that the jury should consider the issue.

The supreme court agreed with the trial court. It held that the terms of the easement were clear and unambiguous, despite the omission of any information regarding the location or dimensions of ingress/egress. The agreement, it stressed, identified the servient tenement, the purpose for which access could be exercised, and the consequences for damage resulting from such exercise. As such, the agreement defined "all of Great Lakes' rights and responsibilities" in using the access easement. The court emphasized that when the language of the easement grant is clear and unambiguous, the court's power to determine its extent is limited. On these grounds, the court argued that it had "no occasion to read a reasonableness requirement into the easement grant."

B. Scherger v. Northern Natural Gas Co.

The Schergers owned a farm in Dodge County subject to an easement held by Northern Natural Gas ("Northern"). The easement agreement, executed in 1931 by the Schergers' predecessors, granted Northern "the right, privilege and easement to construct, maintain and operate pipe lines . . . over and through" the Schergers' land, with the right to replace the line. The agreement was a blanket easement grant, describing the affected property according to its legal boundaries without specifying the actual location of the intended use.

Pursuant to the agreement, Northern installed a pipeline across the

159. See id.
161. See Bergh & Misson Farms, 565 N.W.2d at 25.
162. See id. at 26.
163. See id. at 26-27.
164. Id. at 27.
165. See id. at 26-27 (citing Highway 7 Embers, Inc. v. Northwestern Nat'l Bank, 256 N.W.2d 172, 176-77 (Minn. 1977)).
166. Id. at 27.
167. 575 N.W.2d 578 (Minn. 1998).
168. See id. at 579.
169. See id.
171. See supra note 82 and accompanying text.
172. See Scherger, 575 N.W.2d at 579.
land in 1932, which remained undisturbed for the next sixty-three years. In 1995, Northern indicated to the Schergers that it intended to replace the existing pipe with a new pipe running fifty to three hundred feet away from the old line. The Schergers demanded a "definite and specific description" of the easement pursuant to Minnesota Statutes section 300.045. Northern indicated that the blanket grant gave it the right to place the new pipe anywhere on the property and that it would provide the description only after installation of the new pipe.

The Schergers sued a writ of mandamus to compel Northern to initiate condemnation proceedings for the new pipe. The trial court granted summary judgment for Northern on grounds that the easement was clear and unambiguous and that it granted Northern the right to replace the line. The Minnesota Court of Appeals reversed, holding that the original pipe fixed the course of the easement, and that the new line must fall within "the line of reasonable enjoyment" of this location.

The supreme court reversed. It assumed that the property description in the grant described the easement and not merely the servient tenement. It therefore held that the agreement was clear and unambiguous, and thus that "the court's power to determine the extent of the easement granted is limited." Interpreting the blanket grant according to its "plain language," the court held that it authorized Northern to re-

173. See id.
174. See id.
175. See id.; supra notes 123-126 and accompanying text (explaining the statute and noting recent amendments to the statute).
176. See Scherger, 575 N.W.2d at 579.
177. See id. at 580. Obtaining a writ of mandamus is the standard procedure for asserting a claim for inverse condemnation. See Vern Reynolds Constr., Inc. v. City of Champlin, 539 N.W.2d 614, 616-17 (Minn. Ct. App. 1995); see also MINN. STAT. § 586.01 (1998). The Scherger court stressed that mandamus is "an extraordinary remedy" suitable "where there exists no adequate remedy at law." Scherger, 575 N.W.2d at 579 n.1 (citing McIntosh v. Davis, 441 N.W.2d 115, 118 (Minn. 1989)). The court stated that the remedy was not appropriate for this case because "the essence of this action was the request for a judicial declaration as to the scope and validity" of the 1931 easement. Id.
178. See Scherger, 575 N.W.2d at 580.
180. See Scherger, 575 N.W.2d 578, 579 (Minn. 1998).
181. See id. at 580. The court's assumption appears in the way it framed the issues. The main question, in its view, was not the location or boundaries of the easement, but rather "whether Northern ... has the right under the terms of the 1931 easement agreement to replace the pipeline ... with a new pipeline, at a different location within the easement." Id. (emphasis added).
182. Id. (quoting Bergh & Misson Farms, Inc. v. Great Lakes Transmission Co., 565 N.W.2d 23, 26 (Minn. 1997)).
place pipeline anywhere within the land described in the easement.\textsuperscript{183} Nothing in the literal language of the grant "limits or restricts in any way the location within the easement of any additional or replacement pipelines."\textsuperscript{184}

In addition, the court held that section 300.045 of the Minnesota Statutes applies only to easements obtained after the statute's effective date of 1973.\textsuperscript{185} "There is simply nothing in this statute to suggest that the legislature intended the language to apply to easements acquired before its enactment."\textsuperscript{186}

\textbf{IV. ANALYSIS OF THE CASES}

The Minnesota Supreme Court misinterpreted the scope of the easements in both the \textit{Bergh & Mission Farms} and \textit{Scherger} cases. In each case, the error resulted from a misapplication of basic principles of interpretation, in particular the ambiguity doctrine.\textsuperscript{187} The court erroneously viewed both grants as "clear and unambiguous," and therefore immune to definition and restriction.\textsuperscript{188} Refusing to limit the literal language of the instruments, the court issued extreme interpretations of the grants in favor of the utilities.\textsuperscript{189} As a result, the property owners suffered losses and inconveniences certainly not contemplated by the original parties to the agreements.

\textbf{A. Ambiguity in the Easements}

The court's most serious error resulted from its faulty notion of ambiguity. Both decisions assumed that ambiguity in easement grants results from \textit{vague language} in the instrument.\textsuperscript{190} In each case, the court suggested that the central issue was whether "\textit{the language granting the easement} is clear and unambiguous."\textsuperscript{191} If the wording appears clear, "the court's
PROPERTY OWNERS BEWARE

power to determine the extent of the easement granted is limited."\(^{192}\) The court essentially equated ambiguity with linguistic uncertainty.

Under traditional principles, however, ambiguity centers on the easement, not the granting language.\(^{193}\) Ambiguous grants are those that fail to define the easement's scope, especially its physical dimensions.\(^{194}\) Such indefiniteness may result not only from vague granting language but also from omissions, i.e., instances where "the parties have failed to express themselves in writing."\(^{195}\) As a result, even clearly worded grants may suffer from ambiguity if the extent of the easement remains unclear.\(^{196}\) In both the Bergh & Misson Farms and Scherger cases, the court overlooked the presence of ambiguity by omission in the grants. In both cases, the grant failed to "definitely designate or locate" the easement.\(^{197}\)

The ambiguity was obvious in the ingress/egress easement at issue in the Bergh & Misson Farms case. The grant described the easement as a "right of ingress and egress," and supplemented it with the right to "temporarily use work space as needed."\(^{198}\) It also described the servient tenement and the permissible purposes for access.\(^{199}\) Such information is the bare minimum necessary to create a valid easement in Minnesota.\(^{200}\) The grant completely omitted the key physical dimensions of the easement: location, direction, termini and width.\(^{201}\) Nor did it indicate the burden of use, such as the number or types of vehicles permitted under the eas-

\(^{192}\) Bergh & Misson Farms, 565 N.W.2d at 26; see also Scherger, 575 N.W.2d at 580. The full statement is as follows: "when the language granting the easement is clear and unambiguous, the court's power to determine the extent of the easement granted is limited." Bergh & Misson Farms, 565 N.W.2d at 26. As authority for this statement, the Bergh & Misson Farms court cited Highway 7 Embers, Inc. v. Northwestern National Bank, 256 N.W.2d 271, 276-77 (Minn. 1977). However, the Highway 7 Embers court made a different point: when the "written description" in an easement "is capable of exact interpretation," the court may not construct "any reasonable easement" for the parties. Highway 7 Embers, 256 N.W.2d at 277.

\(^{193}\) See, e.g., Hedderly v. Johnson, 42 Minn. 443, 446-47, 44 N.W. 527, 528 (1890). The Hedderly court stated that easement grants possess "definiteness and precision" when the instrument gives "means for determining when, and precisely where, the easement was reserved." Id. (emphasis added).

\(^{194}\) See supra notes 31-43 and accompanying text.

\(^{195}\) Callen v. Hause, 91 Minn. 270, 271, 97 N.W. 973, 974 (1904); see also Kretz v. Fireproof Storage Co., 127 Minn. 304, 310, 149 N.W. 648, 651 (1914); supra notes 35-43 and accompanying text.

\(^{196}\) See Farnes v. Lane, 281 Minn. 222, 225-26, 161 N.W.2d 297, 300-01 (1968); Lien v. Loraus, 403 N.W.2d 286, 288-89 (Minn. Ct. App. 1987); supra notes 38-43 and accompanying text.

\(^{197}\) Sabin v. Rea, 176 Minn. 264, 265, 223 N.W. 151, 151 (1929).

\(^{198}\) Bergh & Misson Farms, 565 N.W.2d at 25.

\(^{199}\) See id.

\(^{200}\) See Ingelson v. Olson, 199 Minn. 422, 427, 272 N.W. 270, 274 (1937).

\(^{201}\) See Bergh & Misson Farms, 565 N.W.2d at 25.
The Bergh & Misson Farms grant, in short, failed to define the central physical features of the easement. The damage clause, so stressed by the court, did not clarify these dimensions in any way. It simply specified the utility's liability for damage resulting from use of the easement. Though the court recognized that the grant contained "broad terms," it did not view such imprecision as evidence of "ambiguity." According to traditional principles, however, such imprecision is the touchstone of ambiguity and opens up the instrument to clarification and limitation.

The Scherger grant was even more ambiguous. In assessing the grant, however, the Scherger court did not dismiss evidence of imprecision in the grant. Rather, it failed to see the imprecision at all.

The Scherger court's errors stemmed from a basic misunderstanding of blanket easement grants. It assumed that Northern's grant described the easement itself and not merely the servient tenement. The grant, it held, conveyed an easement covering the entire tract in the instrument. Because the property description was legally accurate, the court viewed the grant as "clear and unambiguous" and worthy of literal enforcement according to its "plain meaning."

In so holding, the court completely misconstrued the "plain meaning" of blanket easement grants. Like other states, Minnesota has always treated blanket rights of way as descriptions of the servient tenement, not the easement. It has assumed that the easement in such grants remains undefined, existing somewhere within the described property. The same principle applies to blanket utility grants like the Scherger conveyance. Minnesota Statutes section 300.045 prohibits new blanket utility easements because they fail to describe and locate the easement. As the statute recognizes, the true easement consists of a smaller pathway that "enters and departs from the property" at specific points.

202. See id.
203. See id. at 26-27.
204. See id. at 26.
205. See id.
206. See supra notes 27-43 and accompanying text.
207. See Scherger v. Northern Natural Gas Co., 575 N.W.2d 578, 580 (Minn. 1998) (holding that the easement consisted of the tract described by the agreement).
208. See id.
209. See id. at 580-81.
210. See supra notes 83-91 and accompanying text.
211. See id.
212. See supra notes 127-129 and accompanying text.
213. See MINN. STAT. § 300.045 (1998) (recodified as MINN. STAT. § 300.045(a) (Supp. 1999)).
214. Id. § 300.045 (1998) (recodified as MINN. STAT. § 300.045(b)(2) (Supp.
PROPERTY OWNERS BEWARE

Even Northern recognized this principle. Its brief to the court described blanket grants as “undefined” easements and distinguished them from “defined easements which describe a specific corridor running through the property.” Moreover, Northern’s letter to the Schergers’ counsel, cited in the brief, admitted that the easement was undefined and that “definition of the easement” would occur at a later date.

Certain types of blanket utility grants, it is true, give rights to utilize the entire servient estate. No such grants have come before a Minnesota court. Courts in other jurisdictions, however, only recognize such grants when the instrument clearly indicates or implies this intent, for example by indicating that the utility may lay additional lines not necessarily parallel to the existing lines. Northern’s easement does not fall into this class. Though the easement was expansible, permitting Northern to lay multiple pipes, expansible easements do not convey rights over an entire servient estate.

The Scherger grant, in short, offered no physical description of the easement. As such, it constituted an ambiguous instrument subject to definition and limitation by the court.

B. Limitation of the Easement Grants

Because the court found no ambiguity in the grants, it refused to define or limit the easements in any way. This procedure conforms to the

1999))
215. Appellant’s Brief and Appendix at 3-4, Scherger (No. CX-96-2319). At other times, Northern took care to refer to its servitude on the Scherger land as a “defined easement.” See id. at 10.
216. See id. at A-74 (containing November 3, 1995 letter from Northern’s Right-of-Way Supervisor to Schergers’ counsel). The letter stated that Northern “is willing to define the present pipe line easement across the Scherger property. The definition of easement will be done after all construction activities are complete.” Id.
217. See supra note 135 and accompanying text.
218. Before the Scherger case, Minnesota courts had not considered the scope of any blanket utility grant, much less a blanket utility grant that conveyed rights to utilize the entire servient tenement. See Scherger v. Northern Natural Gas Co., 562 N.W.2d 328, 330 (Minn. Ct. App. 1997), rev’d, 575 N.W.2d 578 (Minn. 1998) (noting that the issue of replacing a pipeline under a blanket utility grant was “an issue of first impression in Minnesota,” and utilizing case law from other jurisdictions to decide the case).
219. See supra note 135 and accompanying text.
220. See Scherger, 575 N.W.2d at 580 (stating that the agreement allowed Northern to “construct, maintain, and operate pipelines”).
221. See supra notes 134-137 and accompanying text.
traditional principle that clear and unambiguous grants should be enforced literally. In the present cases, however, this procedure transformed broad imprecise language into unrestricted language. The Bergh & Misson Farms decision essentially gave Great Lakes the right to access its pipeline in an unreasonable manner—without regard to any property right possessed by the Berghs—so long as it pays market compensation. The Scherger holding granted Northern the right to lay any quantity of pipes, in any direction, over every inch of the Scherger farm. By failing to restrict the grant, the court gave the utilities a windfall of rights over the servient tenements.

The correct approach was to restrict the grants by defining the actual limits of the easements. As an early decision stated, the rights conveyed by an instrument are "for the court to ascertain" when the instrument omits "apt words . . . expressing and defining these rights." Minnesota courts have looked at two basic things to clarify imprecise easements: extrinsic evidence and the reasonable use rule. Application of these rules would have produced a more rational construction of the grants.

The court should have restricted the Bergh & Misson Farms grant according to the reasonable use principle. As a secondary easement, the ingress/egress easement need not have been limited to a single immovable path (the usual rule for right of way easements). The granting language, in fact, suggests that the parties intended flexible access rights. The grant included rights to use "temporary construction space as needed," a very elastic specification. Also, the damage clause, requiring automatic payment for injuries to the land, suggests that the parties foresaw and prepared for flexible emergency access.

223. See supra notes 27-29 and accompanying text.
225. See BRUCE & ELY, supra note 14, ¶ 7.02[1], at 7-3 (describing unrestricted easements of this sort as indefinite and yet subject to the reasonable use principle).
226. See supra notes 62-69 and accompanying text. Minnesota Statutes section 300.045 specifically exempts "temporary easements for construction" from its requirement that utility easements be capable of "specific and definite description." MINN. STAT. § 300.045 (1998) (recodified as MINN. STAT. § 300.045(a) (Supp. 1999)).
227. See Bergh & Misson Farms, 565 N.W.2d at 25 (quoting the language of the easement).
228. Id. (emphasis added).
229. See id. at 26-27. The brief of amicus curiae Northern Natural Gas Company emphasized that pipeline companies draw up broad ingress/egress easements to prepare for emergency access:

The right of ingress and egress . . . is crucial to the safe operation and maintenance of any utility, and particularly a natural gas pipeline. If an emergency occurs, the most expedient access to the pipeline may be
Though flexible, the *Bergh & Misson Farms* easement remained subject to the reasonable use principle. Minnesota case law requires that secondary easements be used without causing "unnecessary injury or damage" to the servient tenement. Like all easements, the ingress/egress easement existed only for reasonable uses and could not be exercised in an "absolute, irrelative, and uncontrolled" manner. Though the easement was not "bounded by the grant," the law "bounds it by the line of reasonable enjoyment."

The court should have restricted the *Scherger* grant according to the traditional rules for locating indefinite rights of way. Other jurisdictions have applied these rules to blanket utility grants. Pipeline decisions from these jurisdictions formed the basis of the Minnesota Court of Appeals' sensible decision in the *Scherger* case.

Under the Minnesota rules governing indefinite rights of way, the location of Northern's easement centered on its 1932 pipe. Minnesota courts generally have determined the location of an indefinite way according to the practical construction of the parties. The grantor possesses across the adjacent property of the landowner. For that reason, utility companies specifically include language in easement agreements to allow such access. In the event that it is necessary to exercise that right of access, the easement agreements also provide that the landowner is entitled to be compensated for any resulting damages caused to the landowner by such use.

---

Brief for Amicus Curiae Northern Natural Gas Company at 3, *Bergh & Misson Farms* (No. C8-96-603).

230. See *Bruce & Ely*, supra note 14, ¶ 7.02[1], at 7-3 (noting that in cases of unrestricted easements, whose location is intentionally left imprecise, the servient owner remains "protected by the general principle that an easement holder cannot utilize the easement in an unreasonable manner").

231. *Bruns v. Willems*, 142 Minn. 473, 479, 172 N.W. 772, 774 (1919) (describing limitations on implied secondary easement to repair road); see also *Reed v. Board of Park Comm'rs*, 100 Minn. 167, 172-73, 110 N.W. 1119, 1121 (1907) (using similar language to describe the limitations on implied secondary easement to clean out a drainage ditch); supra notes 68-69 and accompanying text.


234. See supra notes 92-105 and accompanying text.

235. See supra notes 130-138 and accompanying text.


237. See id.

238. See supra notes 92-95 and accompanying text. The exception is when a way existed at the time of the grant. See *Miller v. Snedeker*, 257 Minn. 204, 215, 101 N.W.2d 213, 222 (1960).
first right to designate the pathway, followed by the grantee. Once located, the course of the easement remains fixed and cannot be moved without the consent of both parties. These principles clearly apply to utility and pipeline easements, and other jurisdictions have so applied them. As such, Northern’s placement of the 1932 pipe should be seen as a designation of the easement that “fixed” its course.

Under Minnesota case law, the width of Northern’s easement is that necessary for reasonable use of its grant. Minnesota precedent states that a right of way “necessarily implies the right to use a strip of land of the width necessary to the enjoyment of the uses for which the grant was made.” Another decision adds that if “the right of way is not bounded in the grant, the law bounds it by the line of reasonable enjoyment.” Case law from other states strongly reinforces this principle. As such, the width of Northern’s easement is a fact question and consists of that area reasonably necessary to exercise its rights under the grant.

C. Misinterpretation of Section 300.045

In addition to misinterpreting the common law, the Minnesota Supreme Court also seriously misconstrued Minnesota Statutes section 300.045 in the Scherger decision. The court’s discussion of the statute was obscure and inarticulate, making analysis of its reasoning difficult. However, its interpretation involved at least two serious errors.

First, the court misinterpreted the basic scope of the statute. The court stated that the second part of section 300.045 was “intended to
PROPERTY OWNERS BEWARE

...protect landowners from marketability of title problems caused by easements covering large tracts of land." This explanation is clearly incorrect. The second part of section 300.045 targeted imprecise easements, not large easements. It covered any easement where "the recorded description of the easement does not include a definite and specific description of the easement." The statute redressed such uncertainty by requiring the utility to supply a "definite and specific description" of its ill-defined easement. Section 300.045 carefully addresses the central problem of blanket utility grants: their failure to describe the easement's physical dimensions.

The court's misreading of the statutory objective is significant. By defining the statute's target as large easements, the court implied that section 300.045 essentially decreased their size, cutting them down to a smaller area. Such a reduction, applied retroactively, might constitute a taking under Minnesota law or expose the statute to attack on constitutional grounds. Though the court did not pursue this point, its misunderstanding may have resulted in its denial of retroactivity to the statute.

Second, the court erred by denying that the second section of 300.045, now codified as subsection (c), could be enforced retroactively. The court's conclusion appears baffling in light of the statute's plain language, which covered easements having a "recorded description." Re-

249. Scherger, 575 N.W.2d at 581 (emphasis added). The court's statement probably reflected its belief that blanket easement grants involved "easement[s] granted over a large defined area of property" rather than easements undefined by the grant, which described only the servient tenement. Id.; see also supra notes 84-89 and accompanying text.


251. Id. (emphasis added). The 1999 amendment altered this language to read "a definite and specific description of the location, width, or course of the easement." Act of May 21, 1999, ch. 184, 1999 Minn. Laws 790-91 (emphasis on new language added to the statute).

252. See MINN. STAT. § 300.045 (1998) (recodified as MINN. STAT. § 300.045(a) (Supp. 1999)).

253. See supra notes 84-89 and accompanying text.


255. See MINN. CONST. art. I, § 13 ("Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured."); see also Petition of Dresch, 233 Minn. 274, 281, 47 N.W.2d 106, 110 (1951) ("An easement is Property, and when taken for public use the owner ordinarily is entitled to compensation."); Grossman Invs. v. State, 571 N.W.2d 47, 50 (Minn. Ct. App. 1997) ("A taking or damage can arise out of any interference by the state with the ownership, possession, enjoyment or value of private property.").

256. See Scherger, 575 N.W.2d at 581 (holding that neither of the two provisions of section 300.045 apply to the Scherger grant because it was created "before the enactment of the statute in 1973").

257. MINN. STAT. § 300.045 (1998).
corded easements are existing easements and clearly include easements created before passage of the statute. The statute, in short, showed a clear legislative intent for retroactive application. 258 Even Northern admitted that the second section of 300.045 applied to utility easements predating the statute’s passage. 259 By ruling otherwise, the court ignored the express intent of the Minnesota Legislature.

In May 1999, the Minnesota Legislature expressed its discontent with the court’s interpretation that section 300.045 was not retroactive. 260 The statute now expressly states that section 300.045 applies to “every easement over private property acquired by a public service corporation, regardless of when the easement was acquired or created.” 261 This alteration, passed by a nearly unanimous legislature, restores the statute’s original meaning. 262 The legislative revisions did not, however, correct the court’s misunderstanding of the statute’s scope.

V. CONCLUSION

These decisions represent extreme and one-sided interpretations of express easements. The opinions reveal misunderstandings of basic interpretive rules, particularly the rules regarding ambiguity and reasonable use. The holdings violate Minnesota precedents as well as the consensus position of other states. The Scherger decision, moreover, disregards the clear language and meaning of Minnesota Statutes section 300.045 by preventing retroactive application of its second section. The court should restore the traditional rights of servient owners by quickly reversing these indefensible decisions.

258. See id. The statute thus satisfied the criteria of section 645.21 of the Minnesota Statutes, which states that “[n]o law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.” MINN. STAT. § 645.21 (1998).

259. See Appellant’s Brief and Appendix at 20, Scherger (No. CX-96-2319) (“Clearly, the legislature intended this section to apply to all new and existing easements in the state.”).


261. See MINN. STAT. § 300.045(c) (Supp. 1999).

262. The vote in the Minnesota House of Representatives was 129 yeas, 1 nay. See JOURNAL OF THE HOUSE, 81st Legis. Sess. 4078 (Minn. 1999). The vote in the Senate was unanimous in favor of the change. See JOURNAL OF THE SENATE, 81st Legis. Sess. 2450 (Minn. 1999).

263. See MINN. STAT. § 300.045(c) (Supp. 1999). Whereas the old statute applied to grants that failed to specify the easement’s “location,” the amended statute applies to grants that fail to specify the easement’s “location, width, or course.” Act of May 21, 1999, ch. 184, 1999 Minn. Laws 790-91. Perhaps this clarification could be read as emphasizing that the statute targets indefinite rather than large easements.