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Minnesota Rails-To-Trails on the Line in State V. Hess

Karla Vehrs

Comment

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In 1898, Thomas and Harriet Walker,[1] along with W.T. and Clotilde Joyce, granted the Brainerd and Northern Minnesota Railway Company a tract of land to be used as a "right-of-way" for a new rail line through part of northern Minnesota.[2] The deed described a strip of land 100-feet wide, crossing through two counties.[3] The corridor was maintained as an active line until 1985, when then owner, Burlington Northern Railway Company, discontinued service on the Brainerd-Bemidji-International Falls route.[4] In 1991, the State of Minnesota, through the Department of Natural Resources (DNR), acquired title to the corridor through a quitclaim deed and officially opened the new Paul Bunyan State Trail along ninety miles of that land.[5] As a recreational trail, the land is now used primarily for hiking, cycling, in-line skating, and snowmobiling.[6]

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* J.D. Candidate 2006, University of Minnesota Law School; B.A. 2002, University of Wisconsin-Madison. The author would like to thank editors David Bryce and Ryan Stai, Law School Dean Alex Johnson, Professor David Stras, and Robin Wolpert for their help and insight. Special thanks to Michael Staab and to my parents, Van and Karen Vehrs, for their encouragement and support.

1. Thomas Walker was born in 1840 in Ohio and came to Minnesota in 1862. State v. Hess, 684 N.W.2d 414, 417 n.1 (Minn. 2004). Walker purchased vast acres of pinelands and later opened lumber mills in various locations including Crookston, Minnesota. *Id.* Throughout his life, Walker kept a valuable art collection, which later formed the beginnings of the well-known Walker Art Center in Minneapolis. *Id.*

2. *Id.* at 417.

3. The deed conveyed lands in both Cass and Hubbard counties, located in north central Minnesota. *Id.* For a map of Minnesota counties, see GEOGRAPHIC INFO. SERVS., LEGISLATIVE COORDINATING COMM'N, COUNTY BOUNDARIES, *available at* http://www.commissions.leg.state.mn.us/gis/pdf/misc/counties.pdf (last visited Feb. 17, 2005).

4. *Hess*, 684 N.W.2d at 418.

5. *Id.*

6. For information on the trail, see MINNESOTA DNR, PAUL BUNYAN

In 1998, two landowners with property abutting the strip of land began to blockade the trail, intending to build a private driveway along the former rail line.[7] The DNR intervened in 2002, filing suit against the two property owners and obtaining a temporary injunction.[8] The parties raised the issue of whether the 1898 Walker and Joyce deed gave the railroad an easement, in which case the DNR most likely would not have been able to acquire any interest in the land for trail use, or whether it created a fee simple determinable, in which case Minnesota law would step in to extinguish the possibility of reverter and allow the DNR full ownership of the trail.[9] Both sides moved for summary judgment, and the trial court granted the DNR's motion, concluding that it now held the land in fee simple.[10] In *State ex rel. Department of Natural Resources v. Hess*, the Minnesota Court of Appeals reversed the trial court's decision, holding in the defendants' favor that the 1898 deed granted only an easement.[11] The Minnesota Supreme Court reversed in *State v. Hess*, finding that the deed granted a fee simple determinable and that the private property owners' interest in the corridor had since been extinguished under a state property statute.[12]

Despite the media attention given to *Hess* as a victory for trails enthusiasts, the future utility of the Minnesota Supreme Court's decision is questionable. Though its mission was to decide the case on the basis of the Walker and Joyce's intent in 1898, the court went to great pains to distinguish and discredit several precedent cases, which all found railroad deeds to have conveyed easements.[13] In cases such as *Hess* that must rely on the parties' understanding of the law in a past era to accurately discern intent, this type of approach creates a dilemma for future disputes. Courts may now be forced either to follow the

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STATE TRAIL, *at* http://www.dnr.state.mn.us/state_trails/paul_bunyan/index.html (last visited Feb. 9, 2005).

7. *Hess*, 684 N.W.2d at 419.

8. *Id.*

9. *See id.*

10. *See* State *ex rel.* Dep't of Natural Res. v. Hess, 665 N.W.2d 560, 563 (Minn. Ct. App. 2003), *rev'd*, 684 N.W.2d 414, 427 (Minn. 2004).

11. *Id.* at 564.

12. *Hess*, 684 N.W.2d at 426–27.

13. *See* Chi. Great W. R.R. v. Zahner, 177 N.W. 350, 351 (Minn. 1920); Norton v. Duluth Transfer Ry., 151 N.W. 907, 908 (Minn. 1915); Chambers v. Great N. Power Co., 110 N.W. 1128, 1129–30 (Minn. 1907); *see also infra* Part I.C. and table 2.

Hess reasoning or to conform to the original intent of grantors, thereby creating the possibility that individuals will be deprived of the real property that should lawfully belong to them. Furthermore, by failing to state its obvious policy preference for trails, the court created a mere temporary bandage for the Paul Bunyan State Trail and similar rail-trails in Minnesota. As a result of the clear inconsistencies between *Hess* and other relevant case law, little now stands to prevent other landowners from rehashing the old railroad deeds relevant to their lands and trying their odds against trail operators to win back public rails-to-trails land for private ownership.

Minnesota is believed to have more miles of rail-trails than nearly any other state,[14] a factor that undoubtedly contributes to the State's well-known recreational lifestyle and enjoyment of the outdoors. With the potential for legal challenges to the trails ever present,[15] this fact places Minnesota in a unique position to devise a more permanent solution to rail-trails and serve as an example for other states facing similar difficulties. By looking to previous cases and scholarly analysis of the issue, the Minnesota legislature or courts should aim to establish a set of guidelines to aid in making more principled decisions in rails-to-trails disputes. In doing so, it is essential that the government work to maintain a satisfactory balance between traditionally strong protections for private property and the public interest in the outdoors and recreation. A failure to find an adequate solution will result in a disincentive to invest, fewer new trails for Minnesota residents and tourists, and uncertainty about the future of existing trails.

Many issues raised in *Hess* are characteristic of the disputes that arise when old railroad lines are converted to recreational trails.[16] For that reason, *Hess* provides a useful starting

14. With 1301 miles, Minnesota was estimated to have more miles of rail-trails than any other state. Peter Marteka, *In 40 Years, New Trails Abound*, HARTFORD COURANT, Apr. 22, 2003, at B3.

15. *See infra* note 189.

16. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.2 cmt. g (2000) (pointing out that modern disputes surrounding old transportation rights-of-way often arise after the parties to the original deed are no longer available, that the nature and value of the land at stake is often substantially different than it was at the time the deed was created, and that disputes surrounding these deeds often turn on whether a court interprets them to grant an easement or a fee). Other related cases have involved the so-called shifting public uses doctrine under which courts are sometimes able to reconcile trail use with the original railroad or transportation purpose for which the right-of-way was intended. *See, e.g.*, State by Wash. Wildlife Pres., Inc. v. State, 329

point for examining creative answers to rails-to-trails challenges. In such cases, courts are often required to interpret old conveyances that contain facially ambiguous language.[17] They must determine the intent of the original parties to the deed and decide which type of common law land use right or possessory estate corresponds to that intent.[18] Due to often contradictory language, rails-to-trails cases are commonly subject to multiple interpretations and are frequently reversed on appeal.[19] In addition, the ambiguity of the language, the nature of deed construction required, and the stakes riding on these cases often mean that courts face additional pressures from trail users, private landowners,[20] and legislatures.[21] As a result, the State of Minnesota should consider revisiting *Hess* and use it to begin an examination of what can be done to address

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N.W.2d 543, 545 (Minn. 1983) (holding that use of a former railroad right-of-way for trail purposes is consistent with the original scope of the easement).

17. *See, e.g.*, King County v. Rasmussen, 299 F.3d 1077, 1084–88 (9th Cir. 2002); Brown v. State, 924 P.2d 908, 911–15 (Wash. 1996); City of Manhattan Beach v. Superior Ct., 914 P.2d 160, 164–69 (Cal. 1996); Macerich Real Estate Co. v. City of Ames, 433 N.W.2d 726, 728–29 (Iowa 1988); McKinley v. Waterloo R.R., 368 N.W.2d 131, 136–38 (Iowa 1985); *Wash. Wildlife Pres., Inc.*, 329 N.W.2d at 545; Moore v. Mo. Friends of the Wabash Trace Nature Trail, Inc., 991 S.W.2d 681, 685–88 (Mo. Ct. App. 1999).

18. For a concise account of cases that have been decided in favor of easements or fees, see A.E. Korpela, Annotation, *Deed to Railroad Company as Conveying Fee or Easement*, 6 A.L.R.3d 973 (1966).

19. *See, e.g.*, State v. Hess, 684 N.W.2d 414, 417 (Minn. 2004); *Brown*, 924 P.2d at 911.

20. The concerns of private landowners, particularly in rural areas, include a loss of privacy, harm to wildlife, and a decrease in property values, as well as consequences for themselves and others from trail users wandering off the trails and onto their lands. *See* Richard Meryhew, *Le Sueur Bike Trail Has Fans and Fiesty Foes*, STAR TRIB. (Minneapolis), Sept. 10, 1991, at 1B.

21. The National Trails System Act, for example, spells out a federal public interest in the matter by stating:

> [i]n order to provide for the ever-increasing outdoor recreation needs of an expanding population and in order to promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation, trails should be established (i) primarily, near the urban areas of the Nation, and (ii) secondarily, within scenic areas and along historic travel routes of the Nation, which are often more remotely located.

16 U.S.C. § 1241(a) (2000). In addition, Congress has added a rule of construction to rails-to-trails property disputes by stating that, in cases in which a deed is determined to have conveyed merely an easement, courts should interpret usage of those easements for trails to constitute only an interim use and not an actual abandonment of the rights-of-way for railroad purposes. *See id.* § 1247(d).

the legal issues presented by old railroad deeds as well as the unique public and private interests inherent to them today.

Part I of this Comment examines the history of railroads, the rails-to-trails program, and general principles of deed construction. Part II outlines the Minnesota Supreme Court's *Hess* decision and its reasoning. Part III critiques the *Hess* opinion, evaluating the court's approach to interpreting the parties' intent in the 1898 deed, and Part IV examines the consequences that interpretation will likely have for future cases. Finally, Part V offers other possible approaches to the rails-to-trails problem that may be more likely to achieve the court's underlying policy goals while still adhering to settled case law.

I. BACKGROUND

A. HISTORY OF RAILROADS IN THE UNITED STATES AND THE SUBSEQUENT SHIFT TO TRAILS

From the mid-nineteenth through the early twentieth centuries, railroads in the United States grew and developed rapidly. In 1830, there were only twenty-three miles of railway in the United States,[22] but by 1916 that number had grown to 254,000 miles.[23] As the industrial era blossomed and the nation's border pushed westward, railroads provided affordable and efficient access to places not reachable by waterway.[24] Railroad companies acquired much of their land at first through congressional grants of private condemnation authority,[25] purchased other tracts from private landowners, and won

22. PBS AM. EXPERIENCE, STREAMLINERS: AMERICA'S LOST TRAINS, *at* http://www.pbs.org/wgbh/amex/streamliners/timeline/index.html (last visited Dec. 22, 2004).

23. *Id.*

24. *See* Emily Drumm, Note, *Addressing the Flaws of the Rails-to-Trails Act*, 8 KAN. J.L. & PUB. POL'Y 158, 158–59 (1999); Robin W. Foster, Note, Rltd Railway Corporation v. Surface Transportation Board: *A Jurisdictional Derailment—Has the Sixth Circuit Thrown the Switch on the Congressional Policy of Promoting "Railbanking," the Conversion of Abandoned Railroad Tracks into Recreational Hiking and Biking Trails?*, 27 N. KY. L. REV. 601, 606 (2000).

25. Early on, state and federal lawmakers provided railroad companies with "condemnation authority for the purpose of acquiring right-of-ways." Jeffrey M. Heftman, Note, *Railroad Right-of-way Easements, Utility Apportionments, and Shifting Technological Realities*, 2002 ILL. L. REV. 1401, 1406. Under that and other legislative land-granting regimes, Congress conveyed to the railroads approximately 90,000,000 acres. *See* Drumm, *supra* note 24, at 159. The railroads carved rights-of-way for trains out of this land and sold much of the remainder to private parties to promote settlement and industry. *See id.*

much of the remainder from holdout property owners through "formal condemnation proceedings."[26] To obtain land from private property owners, the railroads often negotiated with many individuals with distinct bargaining strengths and motivations.[27] The result was a haphazard set of conveyances and interests with a wide variety of granting language and intentions, covering 272,000 miles of rail lines by the peak of the railroad boom in 1920.[28]

With the advent of the automobile and the increased efficiency and convenience of truck shipping, the utility of railroads declined quickly.[29] As of 1989, only 141,000 miles of train lines were still in use.[30] Estimates predicted the rate of decline would continue at the pace of approximately 3000 miles annually through 2000.[31]

In 1968, Congress began to pave the way for future trails policies by passing the National Trails System Act, which defined a federal interest in encouraging outdoor recreation and appreciation of scenic and historic routes.[32] Then in 1976 Congress passed the Railroad Revitalization and Regulatory Reform Act,[33] intending to prevent permanent loss of railroad rights-of-way through conversion to trails.[34] However, because the responsible government agencies failed to act with sufficient speed to convert abandoned lines into trails, many opportunities for conversion were lost.[35]

The goal was to create business along the newly forming corridors. *Id.*

26. Jill K. Pearson, Note, *Balancing Private Property Rights with Public Interests: Compensating Landowners for the Use of Railroad Corridors for Fiber-Optic Technology*, 84 MINN. L. REV. 1769, 1772–73 (2000).

27. *See id.*; *see also* Gregg H. Hirakawa, Comment, *Preserving Transportation Corridors for the Future: Another Look at Railroad Deeds in Washington State*, 25 SEATTLE U. L. REV. 481, 486 (2001) (describing the process by which some railroad representatives would knock on landowners' doors with "form deeds in hand" and give them the option of either selling their land outright or having it seized under eminent domain).

28. *See* Preseault v. ICC, 494 U.S. 1, 5 (1990).

29. *See* Hirakawa, *supra* note 27, at 487.

30. *Id.* at 488.

31. *Preseault*, 494 U.S. at 5.

32. National Trails System Act, Pub. L. No. 90-543, 82 Stat. 919 (1968) (codified as amended at 16 U.S.C. §§ 1241–1251 (2000)); *see also* Drumm, *supra* note 24, at 160.

33. Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, 90 Stat. 31 (codified as amended at 45 U.S.C. §§ 801–836 (2000)).

34. *Preseault*, 494 U.S. at 5–6.

35. *See* H.R. REP. NO. 98-28, at 2 (1983); *see also Preseault*, 494 U.S. at 5–

This led Congress to pass the National Trails System Act Amendments of 1983.[36] As an alternative to outright abandonment, Congress used the amendments to establish an "interim" or temporary designation specifically for trail use, so long as "the route itself remains intact for future railroad purposes."[37] Procedurally, the amendments authorize the Interstate Commerce Commission (now the Surface Transportation Board) to withhold right-of-way "abandonment" labels,[38] which are otherwise required by regulation for relieving railroads of their accountability for a line,[39] when a government or private entity is willing to assume responsibility for the corridors and operate them as recreational trails.[40] By creating an "interim" designation, the amendments allow trail operators to circumvent restrictive language in deeds that otherwise would clearly extinguish railroads' right or estate upon abandonment of a right-of-way for railroad purposes.[41]

B. GENERAL PRINCIPLES FOR INTERPRETING RAILROAD DEEDS

State and federal courts must regularly discern the nature and scope of the property interests acquired by railroads in the distant past. Such disputes commonly arise in rails-to-trails cases, utility easement challenges, and other related quiet title actions in which surrounding landowners seek a determination that they are the rightful titleholders to such lands. The types of land interests and rights established through railroad deeds may range from fee simple absolute to easements.[42] While a fee simple absolute is the most complete form of land ownership, courts have most commonly found railroads' land interests to consist of either a fee simple determinable or an easement.[43]

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6 (noting that by 1983, Congress recognized that the 4-R Act had not been successful in converting abandoned rail lines to recreational trails).

36. National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 42 (codified as amended at 16 U.S.C. §§ 1241–1251 (2000)).

37. H.R. REP. NO. 98-29, at 8.

38. 16 U.S.C. § 1247(d) (2000).

39. *See* OFFICE OF PUB. SERVS., SURFACE TRANSP. BD., OVERVIEW: ABANDONMENTS & ALTERNATIVES TO ABANDONMENT 4 (1997), *available at* http://www.stb.dot.gov/stb/docs/Abandonments%20and%20Alternatives.pdf (last visited Feb. 17, 2005) [hereinafter STB ABANDONMENTS OVERVIEW].

40. 16 U.S.C. § 1247(d).

41. *See id.*

42. 7 THOMPSON ON REAL PROPERTY, THOMAS EDITION § 60.03(a)(7)(iii) (David A. Thomas ed., 1994). An overview of the principles contained in this section can be found *infra* in table 1.

43. *See id.*

Although the rights accompanying a fee simple determinable differ greatly from those of an easement, the two may appear very similar when a purpose is specified for a land conveyance. "A 'determinable fee' has been defined as a fee-simple estate to a person and his heirs, with a qualification annexed providing that it must terminate whenever the qualification is at an end."[44] An easement, on the other hand, "is a right to make use of the land of another for some definite and limited purpose or purposes."[45]

Two main reasons exist for the difficulties that courts face in deciding what type of property interest a deed conveyed to railroads. First, state laws supply the substantive standards that courts must use in interpreting railroad conveyances or any other property law issues.[46] Because state laws vary greatly, the result has been widespread "diversity of treatment of such cases."[47] Second, due to the nature and speed with which many thousands of miles of railroad rights-of-way were pieced together, such deeds often differ significantly in their choice of language and detail.[48] Despite these hindrances, however, the sizeable body of railroad conveyance case law has resulted in a number of commonly discernable rules of interpretation.[49]

The most important principle for interpreting deeds, as well as contracts generally, dictates that when attempting to determine the nature of the interests created by a deed, courts first "look to the deed to ascertain and give effect to the intention of the parties to the instrument."[50] In doing so, courts must consider the entirety of the writing, not merely disjointed parts of it.[51] If the language of the instrument is ambiguous, a court

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44. 2 THOMPSON, *supra* note 42, § 20.02, at 834.

45. WILLIAM F. WALSH, A TREATISE ON THE LAW OF PROPERTY § 282 (2d ed. 1937).

46. Heftman, *supra* note 25, at 1407.

47. *Id.*

48. *See id.*

49. *See generally* Korpela, *supra* note 18 (outlining general rules of interpretation that have developed for railroad deeds and describing cases from around the United States that have resulted in a variety of interpretations and outcomes); *see also infra* table 1.

50. State v. Hess, 684 N.W.2d 414, 423 (Minn. 2004) (citing Consol. Sch. Dist. No. 102 v. Walter, 66 N.W.2d 881, 883 (Minn. 1954); Sec. Trust Co. v. Joesting, 104 N.W. 830, 831–32 (Minn. 1905)).

51. *Hess*, 684 N.W.2d at 423 (citing *Sec. Trust Co.*, 104 N.W. at 832); *see also* 15 DUNNELL MINN. DIG. *Deeds* § 1.11(b), at 348 (4th ed., 1992).

may then look to extrinsic evidence to better discern the intent of the parties.[52] However, because courts must necessarily interpret the intent of old deeds that relied upon the contemporaneous state of the law, "settled rules of construction should have more weight than a court's conjecture as to the intent of the parties."[53]

Table 1: Overview of Common Railroad Deed Interpretation Principles

Deed Element	Language Favoring Fee Simple Finding	Language Favoring Easement Finding
Purpose for conveyance	Grant of land to railroad	"For a railroad right-of-way"
Nature of land or right-of-way	More conventionally shaped plot of land or right; notable resale value independent of surrounding land	Long, narrow right-of-way; of little use to anyone other than railroad at time of conveyance
Consideration	Substantial consideration, presumably near market value	Little or nominal consideration
Bargaining strength	Grantor capable of arm's-length bargaining with railroad	Railroad with superior drafting sophistication and grantor with less bargaining strength

1. Purpose for Conveyance

A major issue courts address in interpreting railway deeds concerns the stated purpose of the grant, such as for right-of-

52. *Hess*, 684 N.W.2d at 423 (citing *Sec. Trust Co.*, 104 N.W. at 832); 15 DUNNELL MINN. DIG., *supra* note 51, § 1.11(b), at 348.

53. 15 DUNNELL MINN. DIG., *supra* note 51, § 1.11(a), at 347.

way or railway purposes. When a purpose for the conveyance is expressed in a deed, some courts have held the statement to be "merely descriptive of the use to which the land is to be put [with] no effect to limit or restrict the estate conveyed."[54] However, others have found that such a limitation displays an unequivocal intent to convey a mere easement.[55]

In cases in which the stated purpose is for a "right-of-way," the most common interpretation is that the parties intended to create an easement.[56] This presumption is strengthened by substantial authority which points out that even in cases containing a habendum clause[57] with language such as "to the grantee, her heirs and assigns forever, in fee simple," an easement was nonetheless intended.[58] At the same time, however, many courts have also taken note of an 1891 Supreme Court case,[59] in which Justice Samuel Blatchford stated that the term "right-of-way" can have two distinct meanings: "It sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed."[60] Despite this dual meaning, a "right" or "right-of-way" is generally held to be indicative of an easement, whereas a grant of actual "land" commonly denotes a fee simple.[61] Those cases that rely on Justice Blatchford's alternative interpretation generally do so to reconcile such language with conflicting parts of the deed and to obtain a uniform result.[62]

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54. *See* Korpela, *supra* note 18, § 3a.

55. *Id.*

56. *Id.*

57. A habendum clause is defined as "[t]he part of an instrument, such as a deed or will, that defines the extent of the interest being granted and any conditions affecting the grant. The introductory words to the clause are ordinarily *to have and to hold*." BLACK'S LAW DICTIONARY 728 (8th ed. 2004).

58. Korpela, *supra* note 18, § 3a. For example, in the Washington case of *Brown v. State*, the dissenting judge stated that "in cases where the granting clause of a deed declares the *purpose* of a grant to be a right-of-way for a railroad, the deed passes an easement only, not a fee, though it be in the usual form of a full warranty deed." 924 P.2d 908, 919 (Wash. 1996) (Sanders, J., dissenting) (citations omitted).

59. *See, e.g.*, Severns v. Union Pac. R.R., 125 Cal. Rptr. 2d 100, 105 (Cal. Ct. App. 2002); CSX Transp., Inc. v. Rabold, 691 N.E.2d 1275, 1278 (Ind. Ct. App. 1998).

60. Joy v. City of St. Louis, 138 U.S. 1, 44 (1891).

61. Korpela, *supra* note 18, § 3a.

62. *See, e.g.*, *infra* note 125 and accompanying text.

Courts also consider other factors relating to the purpose of a conveyance. For example, they may examine whether the grantor reserved the right to use any of the land at issue. Language reserving such a right would create a presumption in favor of an easement.[63] Additionally, the specified mode of transportation for which the deed was created can be of significance due to the distinct nature of such grantees. If the conveyance is for the creation of a street or highway and the land is thus conveyed to a public entity, a presumption exists in favor of a fee simple estate.[64] This is because operable laws often specify that land used for public streets and subsequently abandoned must return to adjoining land parcels, creating little risk for landowners in simply granting a fee simple absolute for use as a street.[65] In the case of conveyances to private railroad companies, however, "the frequency with which railroad uses have been abandoned"[66] is a key factor in concluding that most reasonable grantors would only intend to convey an easement.[67]

2. Nature of the Land or Right-of-way

The type and location of the right-of-way create an additional set of presumptions. For example, the width of the land granted has been found relevant to determining the intent of the original grantor.[68] Long and narrow rights-of-way that were pieced together specifically for railroad purposes were generally of little or no value to anyone but railroad operators at the time of the original conveyance.[69] These may therefore create a presumption that an easement was intended so that the strip may

63. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.2 cmt. g (2000).

64. *See id.*

65. *See id.*

66. *Id.*

67. *Id.* Presumably this distinction is based on the perceived permanence of each mode of transportation. However, this prompts the question of how courts will interpret conveyances to municipalities for street use many years from now when humans will perhaps rely on something other than streets and motor vehicles for transportation and such land use will no longer be advantageous.

68. *See, e.g., In re* Chi. & N.W. Ry., 127 F.2d 1001, 1005 (7th Cir. 1942); Daugherty v. Helena & N.W. Ry., 252 S.W.2d 546, 548 (Ark. 1952); Norton v. Duluth Transfer Ry., 151 N.W. 907, 908 (Minn. 1915).

69. *Cf.* Heftman, *supra* note 25, at 1410–11 (discussing the use of railway corridors for fiber optic cables, which require the type of linear placement best found in railroad easements).

be rejoined with the dominant estate upon termination of railroad usage and form a more valuable tract of land.[70]

3. Valuable Consideration

On occasion courts also examine how much consideration was paid for the right-of-way or strip of land, though many are cautious not to overly emphasize this element for a variety of reasons. Generally speaking, evidence that the grantee paid market value for the land may suggest the creation of a fee simple interest, and evidence of little or nominal consideration may indicate an easement.[71] However, in analyzing the effect of the stated consideration, one should also consider other factors that might have impacted the amount. These could include the motivation of the grantor, the use to which the land was previously devoted, or whether the particular grantor had reason to state a greater or lesser amount than actually received.[72] For example, if a grantor stood to benefit his business or industry with the presence of a rail line, he might have been willing to accept less consideration at the outset in exchange for "proximity to a functioning railroad."[73] Unfortunately for later deed interpretation, these external factors seldom appear in the language of the deed.

On the other side of the issue, a statement of little or nominal consideration might be equally as inconclusive in some cases. A property law treatise contemporaneous to the 1898 deed noted that, "[a]s between the parties to a deed at the present day, no consideration, expressed or unexpressed, is necessary," and that "[a] deed of conveyance . . . operates to pass the title, as between the parties, as effectually as if it had been made for an adequate valuable consideration."[74] For that reason, a statement of nominal consideration may not represent

70. Korpela, *supra* note 18, § 3b.

71. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.2 cmt. g (2000).

72. *See, e.g.*, Ala. & Vicksburg Ry. v. Mashburn, 109 So. 2d 533, 536 (Miss. 1959).

73. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.2 cmt. g (2000); *cf.* Drumm, *supra* note 24, at 159 (noting the ability of railroads to sell land along new developing rail lines to "lure settlers and future customers" and in turn increase their own business). The simultaneous boom of both the railroad network and railway towns points strongly to the economic benefit experienced by both producers of goods and the railroad companies.

74. 1 LEONARD A. JONES, A TREATISE ON THE LAW OF REAL PROPERTY § 266 (1896).

the actual amount paid for the right or land interest, and such a clause may therefore be of little aid in interpreting the deed.

4. Contract Principles Applicable to Deed Interpretation

Finally, most standard rules of contract interpretation are also relevant to railroad deeds. For instance, "[t]he superior sophistication and drafting opportunity of the railroad vis-à-vis the grantor may buttress th[e] conclusion" that the instrument was intended to convey an easement rather than an estate in land.[75] In addition, the construction given to the deed by the parties themselves speaks directly to their intent in drafting such a deed.[76] In some cases, courts may find direct evidence of such intent in later deeds from the same grantor relating to the same or nearby land.[77]

C. MINNESOTA CASES INTERPRETING RAILROAD CONVEYANCES

Four main Minnesota cases addressed right-of-way conveyances to railroad companies prior to *Hess*.[78] First, *Chambers v. Great Northern Power Co.*, decided in 1907, inquired into "the nature of the title acquired by the railroad company [through] condemnation proceedings."[79] Here, the court's analysis focused predominantly on the type of estate that a railroad was able to attain through a legislatively authorized exercise of eminent domain.[80] The court held that, in the absence of a contrary legislative intent, "[t]he language employed . . . clearly imports that a mere easement was granted for so long a time as the land should be occupied and used for the purpose of operating a railroad."[81]

The Minnesota Supreme Court then decided *Norton v. Duluth Transfer Railway Co.* in 1915.[82] *Norton* required the court first to decide whether a deed from a private landowner to the railroad company created a fee simple or an easement.[83] The

75. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.2 cmt. g (2000).

76. 15 DUNNELL MINN. DIG., *supra* note 51, § 1.11(e), at 349.

77. *See, e.g.*, State v. Hess, 684 N.W.2d 414, 426 (Minn. 2004) (analyzing the effect of a subsequent deed from the original grantors three years after the railroad deed was executed).

78. For a brief comparison of precedent cases and *Hess*, see *infra* table 2.

79. Chambers v. Great N. Power Co., 110 N.W. 1128, 1129 (Minn. 1907).

80. *See id.* at 1129–30.

81. *Id.*

82. 151 N.W. 907 (Minn. 1915).

83. *Id.* at 908.

court held that the deed created an easement, noting factors such as "so long as" in the granting clause, the width of the right-of-way, the stated purpose for the grant, and the absence of "forever" in the habendum clause.[84] Additionally, the court held that the railroad company abandoned the rail line when it ceased operation on the line for ten years and removed its track from the land in question.[85]

The third case, *Chicago Great Western Railroad Co. v. Zahner*, was decided in 1920 and again raised the issue of whether a deed to a railroad created a fee simple or an easement.[86] The court discussed the limited width of the right-of-way, the warranty deed with which the strip was conveyed, and the purpose to which the land was to be put.[87] Without engaging in significant analysis, the court held that "[w]ithin the principle of our holdings there was no intent to grant a fee, but an intent to grant a railroad right-of-way easement, which would revert upon abandonment."[88]

The final case, *State by Washington Wildlife Preservation, Inc. v. State*, required the construction of fourteen individual deeds pertaining to nearly ten miles of a former railroad right-of-way that had been converted for trail use.[89] However, because the resolution of the fee simple versus easement issue was unnecessary, the court avoided the question altogether and held that, regardless of what interests were created in the railroad, the original language was broad enough to allow for application of the so-called shifting public uses doctrine: "[u]se of the right-of-way as a recreational trail is consistent with the purpose for which the easement was originally acquired, public travel, and it imposes no additional burden on the servient estates."[90] Thus, prior to *Hess*, the Minnesota Supreme Court had never interpreted a conveyance to a railroad to have passed in fee. In each case, the court either expressly found that the railroad had acquired an easement or bypassed the question because of its irrelevance to the resolution of the case.

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84. *Id.*

85. *Id.* at 909.

86. Chi. Great W. R.R. v. Zahner, 177 N.W. 350, 350–51 (Minn. 1920).

87. *Id.* at 350.

88. *Id.* (citations omitted).

89. State by Wash. Wildlife Pres., Inc. v. State, 329 N.W.2d 543, 544–45 (Minn. 1983).

90. *Id.* at 545.

Table 2: Comparison of Deed Elements in *State v. Hess* and Relevant Precedent

	Chambers v. Great Northern Power Co.	**Norton v. Duluth Transfer Railway Co.**	**Chicago Great Western Railroad Co. v. Zahner**	**State v. Hess**
Land or right conveyed	"All such lands within the limits of the line of such railroad"	"All that tract or parcel of land"	"Portions of lots three and four"	"Strip, belt, or piece of land"
Purpose for conveyance	"For such purposes to be by them held and possessed"	"For right-of-way purposes"	"To be used for a track . . . on said land for commercial purposes"	"For right-of-way and for railway purposes"
Limiting language	"So long as the same shall be used for such purposes"	"So long as the same shall be used as a right-of-way . . . and a railroad way"	—	"[So] long as the said strips of land shall be used for Right-of-way and for Railway puposes"
Width of land or right-of-way	Two hundred feet in width	Seventy-five feet wide	Within fifty feet of the rails of the spur	One hundred feet wide
Holding	**Easement**	**Easement**	**Easement**	**Fee simple determinable**

D. MINNESOTA'S MARKETABLE TITLE ACT

While resolution of the defeasible fee versus easement issue was not necessarily decisive in past cases, the Marketable Title Act launched the issue to the forefront, causing defeasible fees to have a vastly different effect than easements in certain cases. Adopted in 1943, the Act sets forth "the policy of the state of Minnesota that, except as herein provided, ancient records shall not fetter the marketability of real estate."[91] The Act provides that no person may claim to have an outstanding interest in land, such as a possibility of reverter, if that interest has been in existence for over forty years.[92] The only way to avoid operation of the statute is to record that interest and the purported basis for its existence with the county recorder in the same manner as one would record title.[93]

When a litigant seeks to invoke the Marketable Title Act, Minnesota courts follow a two-prong test.[94] First, the party seeking to use the Marketable Title Act to his benefit must have a fee simple title of record for at least forty years.[95] Second, the party against whom the Act is sought to be enforced must have demonstrated conclusive evidence of abandonment of "all right, claim, interest, incumbrance or lien" in the property.[96] If a court determines that this test has been satisfied, the Act extinguishes the outstanding interest in the real property and grants the fee owner unfettered title.

The goal of the Act is to conclusively determine the status of all interests in real property by searching all title records up to forty years old, avoiding the "cumbersome and uncertain" process of an unlimited title search.[97] However, because its application is limited to a "source of title," the Act affects only possessory estates and has no impact on lesser rights such as easements or licenses.[98] The practical impact is that, where a party's estate might have otherwise been for a limited purpose only, the passage of forty years and the failure of the opposing party to record his or her reversionary interest results in a de-

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91. MINN. STAT. § 541.023, subd. 5 (2000).
92. *See id.* § 541.023, subd. 1.
93. *See id.*
94. Wichelman v. Messner, 83 N.W.2d 800, 819 (Minn. 1957).
95. *Id.*
96. MINN. STAT. § 541.023, subd. 5 (2000); *Wichelman*, 83 N.W.2d at 819.
97. Hersh Properties, LLC v. McDonald's Corp., 588 N.W.2d 728, 732 (Minn. 1999).
98. MINN. STAT. § 541.023, subd. 7 (2000).

feasible fee becoming a fee simple absolute. As applied to rails-to-trails disputes, a finding that an original deed created a fee simple determinable now often allows a trail to go forward as a fee simple absolute. On the other hand, a finding of an easement typically gives rise to a secondary analysis, such as in *State by Washington Wildlife Preservation, Inc. v. State*,[99] as to whether the scope of the easement might encompass trail use.[100] Consequently, courts' determinations as to the nature of ancient railroad deeds, in conjunction with the Marketable Title Act, now have a major impact on the outcome of rails-to-trails cases.

II. REASONING AND HOLDING IN *STATE V. HESS*

The Minnesota Supreme Court in *State v. Hess* analyzed whether the 1898 deed from the Walkers and Joyces to the railroad company created a fee simple determinable or an easement.[101] Because no Minnesota case has established a uniform summary of the principles with which to evaluate disputes concerning old railroad conveyances, the court undertook an examination of several elements within and without the 1898 deed.[102] The court ultimately reached the conclusion that the railroad, and thus the DNR, received a fee simple determinable to the corridor, and that the failure of the abutting landowners to record their possibility of reverter in the property resulted in that interest being extinguished under the Marketable Title Act.[103]

The *Hess* court began its analysis with a discussion of prior case law interpreting railroad deeds.[104] The three cases upon which it relied all resulted in the conclusion that the deeds created easements, rather than fees.[105] The court sought to distinguish all three from *Hess* by pointing out that in none of those cases was the fee simple versus easement decision "material to the outcome of the cases,"[106] and that their conclusions there-

99. 329 N.W.2d 543 (Minn. 1983).

100. *See id.* at 546–47.

101. State v. Hess, 684 N.W.2d 414, 417 (Minn. 2004).

102. *Id.* at 423–26.

103. *Id.* at 426–27.

104. *Id.* at 420–21; *see* discussion *supra* Part I.C.

105. *See* Chi. Great W. R.R. v. Zahner, 177 N.W. 350, 351 (Minn. 1920); Norton v. Duluth Transfer Ry., 151 N.W. 907, 908 (Minn. 1915); Chambers v. Great N. Power Co., 110 N.W. 1128, 1129–30 (Minn. 1907).

106. *Hess*, 684 N.W.2d at 421.

fore were not binding. In addition, the court noted that the zeitgeist[107] of the early twentieth century included an "anti-railroad animus [that] caused many courts to hold that all ambiguities and presumptions were to be resolved in favor of the grantor landowners."[108] The court also argued that turn-of-the-century courts "imposed a binary structure on railroad title disputes"[109] to support its view that courts in that time period erred in failing to consider that railroad deeds might have created other interests, such as defeasible fees.[110]

Next, the court discussed the Marketable Title Act, pointing out that it now makes the fee simple versus easement determination material to the outcome of such cases.[111] In a footnote, the court again drew a parallel between laws such as the Marketable Title Act and "a strong public interest . . . in preserving [rail] corridors for trails and utilities."[112] According to the court's argument, deciding cases such as *Hess* in favor of the railroad or its assigns conforms to the parties' expectations when the original parties to the deed are deceased and the corridor is still of some use.[113]

The court then turned to the 1898 deed, recognizing that determinations of the type of conveyance made in railroad deeds "usually turn on a case-by-case examination of each deed."[114] Its discussion included analysis of several different aspects of the deed: the language specifying that "strips of land" were granted;[115] the inclusion of "so long as" in the limiting language of the habendum clause;[116] the use of the phrase "for Right-of-way and for Railway Purposes";[117] the width of the strip of land;[118] the provision allowing for the placement of

107. Zeitgeist is defined as "the general intellectual, moral, and cultural climate of an era." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1456 (11th ed. 2003).

108. *Hess*, 684 N.W.2d at 421 n.6 (quoting Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 ECOLOGY L.Q. 351, 377 (2000)).

109. *Id.*

110. *Id.*

111. *Id.* at 422; *see* discussion *supra* Part I.D.

112. *Id.* at 422 n.7 (quoting Wright & Hester, *supra* note 108, at 385).

113. *See id.*

114. *Id.* at 423.

115. *Id.*

116. *Id.* at 423–24.

117. *Id.* at 424.

118. *Id.* at 425.

snow fences outside the borders of the deeded land;[119] the relinquishment of dower rights specified in the deed;[120] and the original parties' treatment of the conveyance in a future deed.[121]

Relying on these factors, the court found that the deed created a fee simple determinable in favor of the railroad. First, it noted that the deed conveyed "land rather than mere use of the land," a factor which according to common interpretation standards gives rise to a presumption of a fee interest.[122] Second, the court held that "the use of the phrase 'so long as' in the habendum clause provides clear evidence of the grantors' intent to convey a determinable fee because the phrase 'so long as' is typically used in a conveyance of a fee simple determinable."[123]

In analyzing the phrase "right-of-way," the court ultimately found its inclusion in the deed to be inconclusive.[124] While the court did note that use of the phrase "has been frequently cited as evidence that a conveyance is an easement," it disregarded this common rule as "not necessarily" indicative of that conclusion.[125] The court relied upon Justice Blatchford's secondary meaning of "right-of-way" as a phrase merely describing the property being conveyed and further cited a recent Iowa case holding that all such conveyances, whether intended to be a fee or an easement, will have a similar purpose.[126]

The court discussed the remaining elements of the deed that contributed to its decision in less depth. It noted that the legal description of the land in the 1898 deed defined it as "100 feet in width"[127] and went on to analyze a provision for snow fences alongside the 100-foot strip for the right-of-way.[128] It concluded that, since the language allowing for the snow fences was different from that conveying the land or right-of-way for the railroad itself, the only possible conclusion was that the

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119. *Id.*
120. *Id.*
121. *Id.* at 426.
122. *Id.* at 423; *see supra* note 61 and accompanying text.
123. *Hess*, 684 N.W.2d at 424.
124. *Id.* at 425.
125. *Id.* at 424.
126. *Id.* at 424–25 (citing Lowers v. United States, 663 N.W.2d 408, 410–11 (Iowa 2003)).
127. *Id.* at 425.
128. *Id.*

provision for the right-of-way created a fee while the provision for snow fences created an easement.[129]

The court also briefly analyzed the relinquishment of dower rights provided for in the deed. It concluded that this clause would have been meaningless if the parties had intended to create merely an easement, and that its inclusion in the deed therefore provides further evidence in favor of a fee interest.[130] The only case law the court cited in support of this notion, however, was a 1989 Arkansas case, which determined that the deeds at issue conveyed mere easements despite the relinquishment of dower rights.[131]

Finally, the court noted that a 1901 deed from the same grantor that conveyed land adjacent to the railroad right-of-way specifically "except[ed] and reserve[ed] therefrom the land heretobefore conveyed to the Park Rapids and Leech Lake Railway and to the Brainerd and Northern Minnesota Railway for right-of-way."[132] It determined that by including this clause in a subsequent deed, the parties to the 1898 deed understood that they no longer possessed any rights in the railroad's strip of land.[133]

Upon reaching the conclusion that the 1898 deed created a fee simple determinable, the court applied the Marketable Title Act to the surrounding landowners' possibility of reverter.[134] Because the landowners failed to record their interests in that land within the requisite forty-year period, the court determined that they had given up their claim to the land and that the DNR held title to the Paul Bunyan State Trail in fee simple absolute.[135]

III. THE COURT MISCONSTRUED THE ORIGINAL PARTIES' INTENT

Though claiming to be consistent with precedent, the Minnesota Supreme Court's examination of the deed, the surrounding circumstances, and relevant case law reveal a clear policy

129. *Id.*

130. *Id.*

131. *Id.*; *see* Brewer & Taylor Co. v. Wall, 769 S.W.2d 753, 755 (Ark. 1989); *see also Hess*, 684 N.W.2d at 431 (Blatz, C.J., dissenting).

132. *Hess*, 684 N.W.2d at 426.

133. *Id.*

134. *Id.* at 426–27.

135. *Id.* at 427.

preference in favor of the trail.[136] The court analyzed elements of the deed capable of interpretation as a fee simple determinable and distinguished them from similar analysis in precedent cases by discrediting the precedent as incomplete and uninformed. In addition, the court adopted a myopic view of external circumstances to determine that the parties intended to create a fee simple determinable rather than an easement. A closer look at precedent, the language of the deed, and the surrounding facts, reveals that the court misinterpreted the original intent of the 1898 deed and arrived at the wrong legal conclusion. While this outcome may have served an important public interest in saving the Paul Bunyan State Trail, the court's deviation from settled law is troubling and will likely have the unforeseen effect of forcing courts in future cases either to decide in favor of the original parties' intent or to follow its *Hess* ruling.

A. THE COURT'S DISREGARD FOR CASE LAW PRECEDENT MISPLACES ORIGINAL INTENT

The Minnesota Supreme Court's approach to precedent case law in *State v. Hess* disregards past courts' understandings of property law and, specifically, railroad conveyances. For areas of the law such as property law, which are heavily based on early common law tradition and evolving usages, contemporaneous court decisions are often the best source from which to discern the common understanding of the law in a past time period. While such an understanding may only serve to illustrate historical narratives in other fields of law, it remains of crucial importance in property law. Only by examining the meaning that contemporaneous individuals gave to similar deed language can one determine with any certainty what type of interest the parties intended to create.

The first case discussed in *Hess* on the issue of easement versus fee simple is *Chambers v. Great Northern Power Co.*[137] The *Hess* court notes only that the right-of-way acquired through condemnation proceedings in that case was determined to be an easement and then argues that the distinction between an easement and a fee simple was ultimately irrele-

136. *See id.*

137. 110 N.W. 1128, 1129 (Minn. 1907); *see supra* note 79 and accompanying text.

vant to the case's outcome.[138] Such a discussion of *Chambers* is misleading for two reasons. First, the *Hess* court gives the appearance that this case should not be controlling because the finding of an easement was merely dicta.[139] A closer look at that case, however, reveals that the *Chambers* court divided its analysis into two distinct sections and arrived at two clearly stated conclusions, the first being that an easement was created.[140]

More importantly, after finding that the deed at issue created an easement, the *Chambers* court said, "[n]o reason occurs to us why any distinction should be made in the nature of the title granted by the state of its own lands and the title to be acquired from private owners."[141] The court's reasoning thereby reveals a significant, underlying premise of railroad deeds: because private landowners did not convey anything but easements for railroad rights-of-way, neither should courts interpret conveyances from public lands as anything greater than easements. The failure of the *Hess* court to address this presumption weakens its ultimate conclusion that the original grantors intended to create something greater than an easement.

The next case discussed in *Hess* is *Norton v. Duluth Transfer Railway Co.*[142] The *Hess* court's approach to this case is particularly noteworthy because it focuses most strongly on the losing party's argument that the deed created "an absolute fee title limited only as to use, namely, railroad right-of-way purposes."[143] Only after the *Hess* court sets forth this argument does it note that the holding in *Norton* found the deed to convey an easement rather than a fee simple.[144] The *Hess* court claims that the "absolute fee title" subject to a specific purpose advocated by the appellants in *Norton* might have caused the *Norton* court to consider only the distinction between a fee simple absolute and an easement, thereby ignoring the obvious possibility of a fee simple determinable.[145] This, however, ignores the plain fact that a fee simple determinable *is* a fee interest

138. *Hess*, 684 N.W.2d at 420.
139. *See id.*
140. *Chambers*, 110 N.W. at 1129–30.
141. *Id.* at 1130.
142. Norton v. Duluth Transfer Ry., 151 N.W. 907 (Minn. 1915).
143. *Id.* at 908.
144. *Hess*, 684 N.W.2d at 420.
145. *Id.* at 421 n.6.

subject to a specific purpose, which demonstrates that the *Norton* court did in fact consider the argument but rejected it in favor of an easement.[146]

Additionally, the *Hess* court attempts to discredit the holding in *Norton* by noting that the distinction between an easement and a fee simple determinable was technically irrelevant to the outcome of the case.[147] This disregard for the *Norton* finding is simply not supported by the plain language of the opinion: "A reading of the [conveyance] leaves in our minds no fair doubt of the intention of the parties. . . . The only conclusion, as it seems to us, is that the parties intended . . . to convey to the company an easement only."[148] Regardless of whether this language is considered a holding or dicta, it nonetheless represents the Minnesota Supreme Court's clear understanding of the law of railroad conveyances at that time.

The final case that the court distinguishes from *Hess* is *Chicago Great Western Railroad Co. v. Zahner*.[149] The *Zahner* court determined as well that the deed at issue conveyed an easement rather than a fee.[150] Again, the *Hess* court distinguishes this from the case at hand by pointing out that *Zahner* never considered the possibility of a fee simple determinable, and that even if it had, such a distinction would have been meaningless to the underlying issue in the case.[151] As with the previous two cases, however, it is inappropriate for the *Hess* court to disregard these holdings as mere dicta. In *Zahner*, as in *Norton*, the court clearly begins its opinion by noting that there are two questions before it for consideration, one of them being "[w]hether a deed to the plaintiff railroad company conveyed the fee or a railroad right-of-way easement."[152] The *Zahner* court accordingly broke down its analysis between the two distinct issues and arrived at holdings for each.[153] The *Hess*

146. "A base or determinable fee may be created to continue so long as the land is devoted to a particular use, such as a conveyance of particularly described real estate 'to be used for railroad purposes only,' or for church purposes." 2 THOMPSON, *supra* note 42, § 20.02, at 839 (quoting Epworth Assembly v. Ludington & N. Ry., 211 N.W. 99 (Mich. 1926)); *see also Hess*, 684 N.W.2d at 430 (Blatz, C.J., dissenting).

147. *Hess*, 684 N.W.2d at 421.

148. *Norton*, 151 N.W. at 908.

149. Chi. Great W. R.R. v. Zahner, 177 N.W. 350 (Minn. 1920).

150. *Id.*

151. *Hess*, 684 N.W.2d at 420–21.

152. *Zahner*, 177 N.W. at 350.

153. *Id.* at 351–52.

court's struggle to distinguish precedent is ultimately unconvincing in light of the plain similarities between the *Hess* deed and those at issue in the prior cases.

B. THE STATE OF THE FEE SIMPLE DETERMINABLE AT THE TIME OF THE 1898 DEED

The *Hess* court did not explicitly overrule *Chambers*, *Norton*, and *Zahner*, but it nonetheless took an unmistakable stance that those opinions had erred in not adequately considering the possibility that the deeds created fees simple determinable. This position might not be noteworthy, but for the fact that the court's stated goal in *Hess* was "to ascertain and give effect to the intention of the parties to the instrument."[154] Whatever the current understanding of the law of property interests may be, the job of the court was to determine the parties' expectations over 100 years ago. *Chambers*, *Norton*, and *Zahner*, which interpreted contemporaneous conveyances and were decided in the years following the creation of the 1898 deed, all found easements to have been created and each exemplified the conventional expectations of railroad deeds during that time period.[155] As a result, the Minnesota Supreme Court's decision in *Hess* misapplies the law as it stood in 1898 and fails to uphold the original intent of the deed.

Various pieces of evidence appear in case law and scholarly works supporting the notion that easements are the more likely interpretation of most railroad deeds. As noted above, the *Chambers* case—the earliest of the three Minnesota cases—states that land conveyances to railroads, whether from the state or from private parties, passed no more than an easement.[156] This position is supported by the fact that *Chambers*, *Norton*, and *Zahner* all found the railroad conveyances at issue to be easements.[157] Indeed, the Minnesota Supreme Court

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154. *Hess*, 684 N.W.2d at 423.

155. The title at issue in *Chambers* was founded upon condemnation proceedings that took place in 1869 and the case was decided in 1907. Chambers v. Great N. Power Co., 110 N.W. 1128, 1128 (Minn. 1907). In *Norton*, the court did not explicitly state in which year the deed was issued, but from the facts that it did state, the right-of-way was clearly granted sometime prior to 1896; the court decided the case in 1915. Norton v. Duluth Transfer Ry., 151 N.W. 907, 907 (Minn. 1915). And in *Zahner*, the right-of-way deed was issued in 1905 and the case was decided in 1920. *Zahner*, 177 N.W. at 350.

156. *See supra* note 141 and accompanying text.

157. For discussion of the *Chambers*, *Norton*, and *Zahner* holdings, see *supra* notes 79–88 and accompanying text.

again confirmed *Norton* and *Zahner* in a 1954 case, noting that "[i]n both cases a railroad right-of-way was involved and the court properly gave effect to the unmistakable intent of the parties."[158] *Hess* is thus the first and only case from the Minnesota Supreme Court to find that a grant to a railroad conveyed a fee title.

It is also commonly known that by 1900 many courts had adopted a simplified view of the law relating to railroad land interests, considering fees simple absolute and easements to be the only possible constructions of railroad deeds.[159] One need not look further than *Chambers*, *Norton*, and *Zahner* for evidence of this limited view.[160] In addition, John C. Gray's prominent nineteenth- and early twentieth-century treatise on the rule against perpetuities argued that the Statute of Quia Emptores had essentially done away with the determinable fee.[161] The same sentiment is reflected in George W. Thompson's 1930 property treatise, which states that "[determinable] estates are recognized [only] in some states."[162] Consequently, absent compelling evidence of intent to create a fee simple, it is unlikely that the original parties intended for the 1898 deed to be interpreted as anything but an easement.

C. THE PROPER RESULT FOR THE 1898 DEED IN LIGHT OF *NORTON* AND *ZAHNER*

However willing landowners may or may not have been at the end of the nineteenth century to grant a fee simple determinable for a railroad right-of-way, it remains imperative that courts evaluate each deed individually to discern the original parties' intent. Nevertheless, an examination of various deed elements mentioned in *Norton* and *Zahner* as compared with their treatment in *Hess* reveals that the supposed intent of the original grantors in *Hess* cannot be easily reconciled with the intent afforded to similarly situated grantors in *Norton* and

158. Consol. Sch. Dist. No. 102 v. Walter, 66 N.W.2d 881, 883 (Minn. 1954).

159. Wright & Hester, *supra* note 108, at 377. The authors attribute this to an "anti-railroad animus" in the courts during the time period. *Id.* However, courts may have felt justified in taking this stance given the railroads' often invasive practices in obtaining land. *See supra* note 27.

160. *See* discussion *supra* Part I.C.

161. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES §§ 20–23, (4th ed. 1942); *see also* 2 THOMPSON, *supra* note 42, § 20.02, at 832 n.101.

162. GEORGE W. THOMPSON, A PRACTICAL TREATISE ON ABSTRACTS AND TITLES WITH FORMS § 43, at 60 (2d ed. 1930).

Zahner. Regardless of whether one believes that *Norton* and *Zahner* were decided correctly, their precedent is of undeniable value in forming a clearer picture of how the law of railroad deeds was understood in that time period. In addition, analysis of various unique elements of the *Hess* deed as compared with treatment of those subjects in contemporaneous property treatises points to the conclusion that the original grantors most likely intended to create an easement.

1. "Land"

The *Hess* court first notes the use of the word "land" in the granting clause, "rather than [a] mere use of the land."[163] The court views the inclusion of "land" as a sign that the grantors intended to create a defeasible fee. At the same time, however, the record shows that the deed at issue in *Norton* conveyed a "tract or parcel of land,"[164] and that in *Zahner* the deed conveyed "portions of lots three and four."[165] Given that both *Norton* and *Zahner* found those deeds to have created easements, the *Hess* court erred in constructing "land" as necessarily indicative of a fee interest.

2. "So Long As"

The court next pointed to use of the phrase "so long as" in the habendum clause as further evidence of its conclusion, stating that "the phrase 'so long as' is typically used in a conveyance of a fee simple determinable."[166] However, it failed to mention that the same "so long as" language was also a part of the *Norton* deed.[167] Indeed, the court in *Norton* viewed this phrase simply as proof of the railroad's limited permissible use for the land in question.[168]

3. "Right-of-Way"

While the court devotes substantially more time to its discussion of the phrase "for Right-of-way and for Railway Purposes" contained in the habendum clause, it ultimately con-

163. State v. Hess, 684 N.W.2d 414, 423 (Minn. 2004).
164. Norton v. Duluth Transfer Ry., 151 N.W. 907, 908 (Minn. 1915).
165. Chi. Great W. R.R. v. Zahner, 177 N.W. 350, 350 (Minn. 1920).
166. *Hess*, 684 N.W.2d at 424.
167. *Norton*, 151 N.W. at 908.
168. *Id.*

cludes that its inclusion is simply indecisive.[169] In contrast, the *Norton* court held that the language "as a right-of-way for tracks and side tracks and a railroad way" evidenced the parties' intent to convey the right-of-way for a limited use only.[170] In that case, because such language appeared in the habendum clause, the court found it indicative of the "limitations upon the estate granted."[171] Instead of following *Norton*'s lead, however, the *Hess* court deemed the usage of "right-of-way" in this case to be a "purpose" rather than a limitation on the type of estate, which allowed the court to sidestep *Norton*'s precedent.[172]

4. Snow Fences

One unique aspect of the 1898 deed is a provision allowing the railroad to erect portable snow fences within 150 feet of the center line of the right-of-way. The deed specifies: "And with the right to said Company, its successors and assigns to protect cuts which may be made on said lands, by erecting on both sides of, or within one hundred and fifty feet from the said center line, Portable snow Fences."[173] The court concludes that because this language is separate from the rest of the deed and clearly specifies a "right" being conveyed (and therefore an easement), the parties must have understood the distinction between their language here and in the main granting clause, and the main granting language must therefore have been intended to be a fee.[174] One obvious fact behind this clause, however, is missing from the court's analysis: snow fences are not necessary during all months of the year. According to the deed, the snow fences are not permanent, but are "portable" and therefore temporary. In fact, the deed specifies that the snow fences may only be in place from October through May each winter.[175] As a result, this provision is equally susceptible of another interpretation: that the snow fences are contained in a separate, more limited clause because they necessitate a separate and more limited easement than the railroad right-of-way itself.

169. *Hess*, 684 N.W.2d at 425.
170. *Norton*, 151 N.W. at 908.
171. *Id.*
172. *Hess*, 684 N.W.2d at 424.
173. *Id.* at 425.
174. *Id.*
175. *See* Hess Deed, at 3 (1898) (photocopy of original on file with author).

5. Dower Rights

The court next relies on the relinquishment of dower rights in the 1898 deed as further evidence of an intent to convey a fee simple estate.[176] The court's logic, however, contains an inherent flaw. While a husband was not entitled to rob his wife of her dower rights unilaterally, it was firmly established that "where a wife joins her husband in a deed by signing it, it will operate as a valid relinquishment of her dower, [even if] the body of the deed does not describe her as grantor, or name her or her dower."[177] Consequently, if the grantors had created a fee simple estate, dower rights would have been automatically relinquished with the inclusion of the wives' signatures, and the clause specifically addressing dower rights would be superfluous. However, the creation of an easement, as something less than an estate in property, would not affect dower rights. As a result, the express relinquishment of dower rights in the deed more likely than not demonstrates that the parties understood that they were conveying less than a fee estate.

Additionally, the inclusion of a provision specifically relinquishing dower rights is logical in the context of a railroad conveyance. As the railroad company was about to make a substantial investment in the right-of-way cut from this and many other tracts of land, it undoubtedly required dependability in each section of its right-of-way. If Harriet Walker, Clotilde Joyce, or any other woman retaining rights to the property along the line had decided to assert their full dower rights upon the death of their husbands, it would have been fatal to the entire rail line.

6. "Excepting and Reserving" in a Subsequent Deed

Finally, the court looked to a 1901 deed from the Joyces conveying "land in Hubbard County adjacent to the railway corridor created by the 1898 deed."[178] After describing the land being conveyed, this deed provided, "[e]xcepting and reserving therefrom the land heretobefore conveyed to the Park Rapids and Leech Lake Railway and to the Brainerd and Northern Minnesota Railway for right-of-way."[179] The *Hess* court interpreted this to be additional evidence of the parties' original in-

176. *See id.*
177. THOMPSON, *supra* note 162, § 370, at 527.
178. *Hess*, 684 N.W.2d at 426.
179. *Id.*

tent to create a fee simple interest in the railroad.[180] However, a closer look at the property law doctrine of exceptions and reservations reveals quite the opposite conclusion.

An exception, as used in deeds, withholds from the scope of the grant something that otherwise would pass to the grantee.[181] A reservation does the same, but creates a right or interest that did not previously exist.[182] The language typically used to create an exception is "saving and excepting" or simply "excepting," and that used to create a reservation is "reserving."[183] Such language as "excepting and reserving" that appears in the 1901 deed is sometimes "used indiscriminately," in light of only the minor difference between the two.[184]

Most notably, however, an early twentieth-century property treatise revealed that a common usage for reservations had developed in application to easements, so that "easements are . . . said to be reserved."[185] Consequently, in contrast to the Minnesota Supreme Court's understanding of the exceptions and reservations doctrine, this clause actually provides evidence that the Joyces did not believe they had conveyed a fee simple interest to the right-of-way at issue. If they had believed that the 1898 deed conveyed a fee to the railroad, they would have instead excluded from the description of land in the second deed that portion comprising the railroad right-of-way.[186] The land occupied by the right-of-way would have been irrelevant to the subsequent deed. Instead, the inclusion of the "excepting and reserving" clause denotes that something less than a fee interest (i.e. an easement) already existed on that portion of land so described.

IV. CONSEQUENCES OF THE COURT'S INTERPRETATION

While the Minnesota Supreme Court succeeded in holding the Paul Bunyan State Trail together in *State v. Hess*, the long-term effect of its analysis will be to send a message to the

180. *Id.*
181. THOMPSON, *supra* note 162, § 310, at 447.
182. *Id.* at 448.
183. *Id.* at 449.
184. *Id.*
185. *Id.* at 449.
186. This is particularly true in light of the fact that the land covered by the 1901 deed was only "adjacent" to the railroad right-of-way and not intersected by it. *See* State v. Hess, 684 N.W.2d 414, 426 (Minn. 2004).

state's landowners and courts that deed interpretation need not rely on settled law, and that the outcome of a case may well depend on the public policy preferences of a given judge. This will do little to prevent countless landowners from retrieving the old deeds relevant to their lands and challenging the state's purported ownership of rail-trails.[187] By working so hard to distinguish the elements in *Hess* from past precedent, the only principle likely to be of use in future cases is the well-established rule of interpretation that "[t]o determine the nature of the conveyance at issue, we look to the deed to ascertain and give effect to the intention of the parties to the instrument."[188] The results may range from unforeseeable litigation costs for the state at best, to a mandated and prohibitively expensive compensation regime for abutting landowners at worst.[189] If the State of Minnesota were forced to reimburse private parties at fair market value for the taking of their lands, the overwhelming cost would likely shut down the trails permanently.[190]

Of particular concern now is the question of how to interpret railroad conveyances, given that the *Hess* deed, determined to be a fee simple determinable, is "virtually identical" to

187. Following the court of appeals decision in favor of the private landowners, a Minnesota newspaper quoted an attorney involved in the case as saying, "[t]he ramification is that a lot more ancient deeds will become bones of contention. . . . It will raise questions as to the validity of title to all of the trails that are in existence now." *Minnesota Court of Appeals: DNR Loses Dispute over Trail Ownership*, ST. PAUL PIONEER PRESS, Sept. 12, 2003, at 2B (quoting attorney Peter Seed). The following day, another Minnesota newspaper reported that a group of 100 to 150 landowners along another state rail-trail had retained counsel to look into the possibility of legal action similar to that involved in *Hess*. Michelle Tan, *Ruling Rekindles Wobegon Dispute*, ST. CLOUD TIMES, Sept. 13, 2003, at 1B.

188. *Hess*, 684 N.W.2d at 423.

189. For an in-depth discussion of nationwide litigation underway surrounding rails-to-trails cases, see *Litigation and Its Effect on the Rails-to-Trails Program: Hearing Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 107th Cong. (2002) [hereinafter *Rails-to-Trails Hearing*]. At that hearing, Thomas L. Sansonetti, assistant attorney general with the U.S. Department of Justice, stated that, "[t]he number of rails-to-trails cases that the Environment Division handles has increased dramatically in the last few years. In 1990, we had one case, with one claimant. Now we have 17 cases, scattered across the nation, with approximately 4,550 claimants." *Id.* at 14.

190. Of the thirteen major trails promoted by the Minnesota DNR on its Web site, at least ten are constructed upon old railroad rights-of-way. *See* MINNESOTA DNR, STATE TRAILS LIST, *at* http://www.dnr.state.mn.us/state_trails/list.html (last visited Feb. 9, 2005).

the *Norton* deed, determined to be merely an easement.[191] While in many instances the more recent holding should control, cases that require a finding of original intent from an earlier time period are unique. In these cases, the holding more accurately reflecting the original intent is the one decided closer in time to original conveyance, because the earlier court presumably has a better understanding of contemporaneous law and prevailing social mores. Since the very foundation of our property law is an adherence to the intent expressed in a deed,[192] the Minnesota Supreme Court created a troublesome dilemma for similar disputed deeds in the future: either find in favor of original intent or follow *Hess*.

V. OTHER PROPOSALS FOR ADDRESSING THE RAILS-TO-TRAILS PROBLEM

A. A MULTIPRONG TEST FOR DEED INTERPRETATION

The Minnesota Supreme Court could have used *Hess* to establish a multiprong balancing test based on deed elements that have arisen in prior Minnesota cases interpreting railroad conveyances. This proposal would serve to substantiate the reasonableness of landowners' expectations in bringing quiet title actions against trail operators by allowing courts to sift through competing land ownership claims in a more principled manner. In addition, such a test would help to increase predictability for litigants within the state courts by allowing them to more easily assess the validity of their claims.

The Supreme Court of Washington adopted this approach in *Brown v. State*,[193] and since then, other cases have followed its lead and relied on the same set of factors.[194] The test articulated in *Brown* instructs courts to examine such factors as the purpose for the conveyance; whether the deed conveyed a strip of land for a limited use; whether it created a right-of-way over land; whether it granted only a limited right to construct, operate, or maintain a railroad; whether it created a right of reverter; whether the consideration was substantial or nominal;

191. "To begin, we turn to *Norton*, the precedent of our court that interprets virtually identical deed language as that at issue here." *Hess*, 684 N.W.2d at 429 (Blatz, C.J., dissenting).

192. *See, e.g.*, *id.* at 423.

193. 924 P.2d 908, 912 (Wash. 1996) (en banc).

194. *See, e.g.*, King County v. Rasmussen, 299 F.3d 1077, 1084 (9th Cir. 2002); Ray v. King County, 86 P.3d 183, 187 (Wash. Ct. App. 2004).

and whether the deed contained a habendum clause.[195] In addition, the Missouri Court of Appeals recently applied its own balancing test to a rails-to-trails dispute, examining "(1) whether the deed includes language conveying a 'right-of-way'; (2) the amount of consideration; and (3) language in the deed limiting the use of the land for railroad purposes."[196]

Opponents of a balancing test for railroad conveyances might argue that it has the potential to lose sight of original intent in favor of modern judicial efficiency and consistency. However, by effectively examining prior case law such as *Norton* and *Zahner* and maintaining the measure of flexibility normally built into such a test, the Minnesota courts would be able to apply it without straying from the law at the time such deeds were created. In addition, by relying on rules of construction as they stood when the deeds were written, courts would be more likely to accurately reflect the intent of original grantors.

In Minnesota, therefore, a balancing test might include (1) whether the deed contains the phrase "right-of-way" or other language indicating a purpose for the conveyance;[197] (2) whether the habendum clause uses "forever," rather than more narrow, limiting language;[198] and (3) whether the width and shape of the land at issue would serve any use other than a railroad right-of-way in such a form.[199] Each of these three elements was raised in previous Minnesota cases dealing with railroad conveyances, which makes them obvious choices for a balancing test. However, the court could also add further elements that it considers both well-settled and fundamental to a railroad deed inquiry.

The effect of a firmer test such as this would be significant for the consistency of land ownership disputes and the overall amount of rails-to-trails litigation. Such a balancing test creates a more predictable regime of deed interpretation and takings compensation and reduces the government's overall cost of the rails-to-trails program. Litigation surrounding rails-to-trails has increased sharply since 1990, now constituting one of

195. *Brown*, 924 P.2d at 912.

196. Moore v. Mo. Friends of the Wabash Trace Nature Trail, Inc., 991 S.W.2d 681, 685–86 (Mo. Ct. App. 1999).

197. Chi. Great W. R.R. v. Zahner, 177 N.W. 350, 350 (Minn. 1920); Norton v. Duluth Transfer Ry., 151 N.W. 907, 908 (Minn. 1915).

198. *Norton*, 151 N.W. at 908.

199. *Id.*; *Zahner*, 177 N.W. at 350.

the formidable costs to the system,[200] and without further changes from courts or legislatures, there is no sign that this trend will cease. As a public policy matter, the federal rails-to-trails program was originally estimated to cost the federal government nothing but has instead resulted in "complex and resource-intensive litigation [and] significant Federal budgetary concerns."[201]

B. POLICY PREFERENCE AS APPLIED TO AMBIGUOUS DEEDS

The Minnesota Supreme Court's opinion in *Hess*, though legally troublesome, was hailed as a victory for public policy. After the court decided the case, a Minnesota newspaper cited three main reasons for its satisfaction with the court's ruling.[202] First, the court's conclusion served to reopen the Paul Bunyan State Trail to full, unobstructed use.[203] Second, the decision would help prevent similar threats to the state's rail-trails.[204] Finally, the ruling served as an adequate rebuff to "a mean-spirited obstruction by a few landowners who can be fairly described as spiteful."[205]

Although the court purported to reach its decision on the basis of the 1898 deed and other extrinsic evidence, a closer look at the opinion reveals undeniable public policy underpinnings. The article by Danaya Wright and Jeffrey Hester, from which the court drew two lengthy citations in its footnotes, provides a clear example of this position.[206] The *Hess* dissent also recognized this theme, stating that:

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200. *See supra* text accompanying note 189.

201. *Rails-to-Trails Hearing*, *supra* note 189, at 3 (statement of Bob Barr, Chairman, House Subcommittee on Commercial and Administrative Law).

202. *Paul Bunyan Trail: A Win for Users—and Taxpayers*, STAR TRIB. (Minneapolis), Aug. 1, 2004, at AA4. Another article from a Minnesota newspaper had similarly stated in 2003 that, "[b]e it biking, hiking, horses or motorized vehicles, Minnesotans love their public recreational trails. That's why more than 1300 miles of such trails exist statewide." *Our View: State's Recreation Trails Must Be Saved*, ST. CLOUD TIMES, Sept. 24, 2003, at 5B.

203. *Paul Bunyan Trail: A Win for Users—and Taxpayers*, *supra* note 202.

204. *Id.*

205. *Id.*

206. The Wright & Hester article, in a portion not cited by the court, argues that, "[t]he better approach is to interpret the deed to convey fee simple absolute to the railroad, or a defeasible fee that converts to a fee simple absolute through destruction of the reversion." Wright & Hester, *supra* note 108, at 384. For context within the case and the specific quotes used, see State v. Hess, 684 N.W.2d 441, 421–22 nn.6–7 (Minn. 2004).

> the majority's over-reliance on one law review article to support its public policy reasoning is troubling, particularly when taken in combination with the nonexistent and/or meaningless distinctions it makes when comparing similar deed language and the decided case law. Our responsibility is to decide the issues at hand in the context of the law as it is. To hold otherwise is to overturn previous case law, and the majority admits no such alteration in the law.[207]

The consequence of the court's reasoning, as outlined above, will likely be to compromise precisely those public policy interests which the court sought to uphold. An approach that clearly acknowledged a policy preference for otherwise ambiguous deeds would yield a more permanent solution for the state rails-to-trails system and align state law more closely with federal law, which already contains a stated public policy interest in the trails.[208]

An analogous statement of public policy preference appears in several Indiana Supreme Court cases.[209] There, the court adopted a policy in 1964 of resolving any ambiguity in deeds in favor of the original grantors, and thus in favor of finding easements.[210] The court's reasoning behind establishing this policy involved a determination that, after abandonment for the intended purposes, "such severance [of the right-of-way from surrounding property] generally operates adversely to the normal and best use of all the property involved."[211] Several cases since that time have reaffirmed the policy and applied it to a variety of deeds.[212]

In a similar way, the Minnesota Supreme Court could have articulated a public policy preference that the conversion of former rail lines into recreational trails operates as the "normal and best use of all the property involved." By doing so, it could dictate to lower courts that, in cases of irreconcilable ambigu-

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207. *Hess*, 684 N.W.2d at 433 (Blatz, C.J., dissenting). In addition, the Wright & Hester article was cited by a federal district court specifically addressing policy reasons for its support of the shifting public uses doctrine. Hynek v. MCI World Communications, 202 F. Supp. 2d 831, 838 (N.D. Ind. 2002).

208. *See supra* note 21 (discussing the federal law).

209. *See* Hefty v. All Other Members of the Certified Settlement Class, 680 N.E.2d 843, 855 (Ind. 1997); Brown v. Penn Cent. Corp., 510 N.E.2d 641, 644 (Ind. 1987); Consol. Rail Corp., v. Lewellen, 666 N.E.2d 958, 962 (Ind. App. 1996).

210. Ross, Inc. v. Legler, 199 N.E.2d 346, 348 (Ind. 1964).

211. *Id.*

212. *See Hefty*, 680 N.E.2d at 855; *Brown*, 510 N.E.2d at 644; *Lewellen*, 666 N.E.2d at 962.

ity, old railroad deeds are to be interpreted in favor of the grantee railroads where there is an important public interest in the use or preservation of the corridor.[213] To simultaneously protect the trails and safeguard the rights of private landowners, the court might, for example, limit the scope of irreconcilably ambiguous cases to those containing reference to "land" as well as a "right."[214] Such a line of reasoning would establish a more principled way to distinguish past precedent such as *Norton* and *Zahner* from modern cases like *Hess* in which arguably very different interests are at stake. In addition, this approach would likely serve the court's public policy ends better than any other because of the unpredictable ambiguity contained in many railroad conveyances.[215]

One additional benefit to this policy is its conformance with landowners' reasonable expectations. Indeed, two principal reasons for the public's lack of sympathy toward the abutting landowner-plaintiffs in *Hess* were repeatedly cited. First, many considered their blockading tactics "mean-spirited."[216] Second, many people also felt that, under the circumstances in which they acquired the land in question, it was unreasonable for the landowners to expect that the strips of land would revert to their possession. One of the families involved in the suit against the DNR owns three parcels of land along the Paul Bunyan State Trail.[217] The family purchased the first of the parcels while the railroad was still in use and the other two after the state trail was already open.[218] The other landowner involved also purchased his tract of land after the trail had opened.[219] He bought the land from his parents, who had owned it while the railroad was still in operation.[220] The main point of such an argument, therefore, is that a finding in favor of such landowners would create an undesirable windfall in their favor.

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213. The popularity of rail-trails around the country is well-documented. The Rails-to-Trails Conservancy estimates that "over 100 million Americans use rail-trails, of which there are more than 1000 nationwide for a total of more than 11,000 miles of trails." *See Rails-to-Trails Hearing*, *supra* note 189, at 15 (prepared statement of Thomas L. Sansonetti, Department of Justice).

214. *See* Korpela, *supra* note 18, § 3a.

215. *See supra* notes 25–28 and accompanying text.

216. *See Paul Bunyan Trail: A Win for Users—and Taxpayers*, *supra* note 202.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

A public policy in favor of trail use for ambiguous deeds would go a long way to prevent this.

C. LEGISLATIVE SOLUTIONS

While an explicit public policy alternative may have been one possibility for the Minnesota Supreme Court at the time it was deciding *Hess*, an effective solution to the problem now would be a state legislative act analogous to the statement of public policy in the National Trails System Act. That Act expressly acknowledges "the ever-increasing outdoor recreation needs of an expanding population and [the need for] the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation."[221]

In addition, the State's legislature is in a unique position to create a more flexible law addressing railroad deeds. To accommodate the possibility that the public interest may shift over time, the legislature could pass a statement similar to that in Indiana by declaring that interpretation of ambiguous instruments should be resolved in favor of "the normal and best use of all the property involved."[222] In this way, one might be able to reconcile *Hess* with prior case law, where a finding in favor of the railroad would not have conformed with prevailing land use policy and would have severely disrupted the parties' expectations.

One further solution that would aid courts in reaching principled decisions in rails-to-trails cases is a law prescribing rules of construction for ambiguous deeds. For example, under New Jersey law, "[e]very deed conveying lands shall, unless an exception be made therein, be construed to include all the estate, right, title, interest, use, possession, property, claim, and demand whatsoever, both in law and equity, of the grantor, including the fee simple if he had such an estate."[223] As applied to rails-to-trails controversies, such a law would allow courts to find that a fee simple absolute passed to the railroad whenever the deed specified a conveyance of "land." In addition, this would still allow for fair compensation in cases in which deeds refer to a mere "right," since those instruments would not fall within the scope of such a statute.

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221. National Trails System Act, 16 U.S.C. § 1241(a) (2000).
222. Ross, Inc. v. Legler, 199 N.E.2d 346, 348 (Ind. 1964).
223. N.J. STAT. ANN. § 46:3-13 (West 2003).

CONCLUSION

State v. Hess succeeded in holding the Paul Bunyan State Trail together for now, drawing significant praise from many corners of the press and public. However, to the extent the Minnesota Supreme Court hoped to save the Paul Bunyan State Trail and shield the State's recreational trails from similar attacks in the future, its analysis and reasoning may actually disserve the public policy it seeks to protect. The court's decision will likely have the unforeseen effect of encouraging greater property dispute litigation, while at the same time leaving the State's courts with few answers to the problems presented in such cases. By examining the parties' original intent but reaching different conclusions on nearly all factors than contemporaneous cases or property law doctrines would instruct, the court created a legal void. It did not overrule *Norton* and *Zahner*, yet strayed too far from such case law to afford lower courts any sound notion of how to interpret similar deeds in the future.

A more desirable approach would have been the presentation of a principled set of guidelines with which to evaluate future rails-to-trails cases or, alternatively, an honest acknowledgement of a public policy preference. At this point in time, though, it is vital to the future of Minnesota's trail system that the State's legislature take up the issue and examine creative solutions for such cases. As the nation's leader in rails-trails, Minnesota is now at an opportune juncture to pave the way for unique responses to the growing cost of rails-to-trails litigation.

As our society's standard of living grows ever more comfortable and individuals are increasingly able to choose greater recreation time over more work, the demand for scenic and historic trails will only continue to increase into the foreseeable future. "[G]eneration Xers have certain expectations . . . to have a large amount of free time. They don't want to be workaholics. . . . And what do they want to do with that free time? They're going to spend it at the Y[MCA]. They're going to spend it on the bike paths."[224] At the same time, however, old deeds and claims to title will continue to be brought forward and into the courts, which will inevitably necessitate a more principled approach to adjudicating competing interests. Consequently, Minnesota and other states would be wise to consider this big

224. Jonathan Roos, *City Views Super-Y as Major Draw*, DES MOINES REG., May 15, 2000, at 1B.

picture and to search for innovative alternatives that reconcile legitimate public and private interests in former railroad rights-of-way.