

1999

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

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Duggan, Christopher R. (1999) "Property Owners Beware: The Minnesota Supreme Court Has Twice "Misconstrued" Express Easements," *William Mitchell Law Review*: Vol. 25: Iss. 4, Article 3.
Available at: <http://open.mitchellhamline.edu/wmlr/vol25/iss4/3>

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PROPERTY OWNERS BEWARE: THE MINNESOTA SUPREME COURT HAS TWICE "MISCONSTRUED" EXPRESS EASEMENTS

Christopher R. Duggan[†]

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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

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1. See *Scherger v. Northern Natural Gas Co.*, 575 N.W.2d 578 (Minn. 1998); *Bergh & Misson Farms, Inc. v. Great Lakes Transmission Co.*, 565 N.W.2d 23 (Minn. 1997).

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.⁵ In *Scherger v. Northern Natural Gas Co.*,⁶ 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.⁷ The issue was whether the grant included the right to relocate the pipe elsewhere on the property.⁸

The Minnesota Supreme Court gave an expansive interpretation of both easements, ruling against the landowner in each case.⁹ 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.¹⁰ 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."¹¹ Intention is "the essence of every agreement,"¹² 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.

11. *Witt v. St. Paul & N. P. Ry. Co.*, 38 Minn. 122, 127, 35 N.W. 862, 864 (1888); *see also Farnes v. Lane*, 281 Minn. 222, 226, 161 N.W.2d 297, 300 (1968) (stating that construction of ambiguous writings aims to ascertain the parties' intent).

courts should construe the easement in conformity therewith unless prevented by a rule controlling the creation of easements.¹³ The parties' intention involves their agreement about such things as length, width and location.¹⁴ More fundamentally, however, it involves their "purpose" for making the agreement.¹⁵ 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."¹⁶

The primary source for determining the parties' intention is the language of the grant.¹⁷ When an easement results from a written conveyance, "its extent depends entirely upon the construction of the terms of the grant."¹⁸ The grant "fixes" the easement's extent, such that no inter-

12. *Sanborn v. City of Minneapolis*, 35 Minn. 314, 317, 29 N.W. 126, 126 (1886) (interpreting a deed as granting an easement of way rather than an estate in land).

13. *See Aldrich v. Soucheray*, 133 Minn. 382, 385, 158 N.W. 637, 639 (1916).

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.

pretation can contradict its terms.¹⁹ If the grant is clear and unambiguous, the court must consider only the terms of the grant, excluding all extrinsic evidence.²⁰

In interpreting the grant, Minnesota courts apply various rules of construction.²¹ They construe the entire grant rather than a detached part of it,²² and they seek to "harmonize and unite" inconsistent provisions in accordance with the plain intentions of the parties.²³ They ignore the technical meaning of words if literal interpretation would defeat the parties' clear intention.²⁴ 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)(4) & 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

ing "any suitable language to evidence such intention." *Witt*, 38 Minn. at 127-28, 35 N.W. at 865.

25. See *Romanchuk*, 215 Minn. at 160, 9 N.W.2d at 424; *Eastman v. St. Anthony Falls Water-Power Co.*, 43 Minn. 60, 63, 44 N.W. 882, 883 (1890) (describing this principle as a "well-established rule of construction"); *Witt*, 38 Minn. at 127, 35 N.W. at 864 (stating that "any ambiguity or uncertainty is to be resolved in favor of the grantee"). This ancient rule actually rests on the "more precise rule that a deed will be construed against the party responsible for its preparation." 9 THOMPSON ON REAL PROPERTY, *supra* note 21, § 82.13(b)(2), at 413. Nevertheless, courts often apply it mechanically even when the grantee drafted the deed and constituted the stronger and more sophisticated party. See *id.* § 82.13(e), at 423.

26. See *Highway 7 Embers*, 256 N.W.2d at 277 (holding that easement was "capable of exact interpretation," and therefore the court cannot modify it by equitable interpretation); see also *Oleson v. Bergwell*, 204 Minn. 450, 454, 283 N.W. 770, 773 (1939) (stating that if the language of a contract is "plain and unambiguous," there will be "no room for construction"). For an overview of the rules for construction of deeds, from the standpoint of Texas law, see Student Symposium, *Operation and Construction of Deeds*, 6 ST. MARY'S L.J. 806 (1975).

27. See *Highway 7 Embers*, 256 N.W.2d at 275 ("Only when ambiguities exist may the circumstances surrounding the grant be considered.").

28. See 9 THOMPSON ON REAL PROPERTY, *supra* note 21, § 82.13(e), at 422.

29. *Id.* § 82.13(a)(4), at 411.

30. *Kretz v. Fireproof Storage Co.*, 127 Minn. 304, 310, 149 N.W. 648, 651 (1914).

31. See, e.g., *Ingelson v. Olson*, 199 Minn. 422, 425, 272 N.W. 270, 273 (1937) (involving approximate description of right of way); *Sandretto v. Wahlsten*, 124 Minn. 331, 333-34, 144 N.W. 1089, 1090 (1914) (involving deed that contained two inconsistent descriptions of the land); *Lidgerding v. Zignego*, 77 Minn. 421, 423, 80 N.W. 360, 360 (1899) (involving right of way described as "upon or near" a stated boundary line).

32. 199 Minn. 422, 272 N.W. 270 (1937).

33. See *id.* at 425, 272 N.W. at 273.

of the document.³⁴

The second type of ambiguity results from omission.³⁵ It occurs when the grant fails to specify important attributes of the easement, offering an "incomplete" description of the servitude.³⁶ Such ambiguity usually involves omission of key physical dimensions of the easement, such as its width or location within the servient tenement.³⁷ It can also result from failure to specify the permissible burden of use on the easement.³⁸ The most striking decisions regarding "ambiguity by omission" have involved rights of way leading to lakes.³⁹ In *Farnes v. Lane*⁴⁰ and *Lien v. Loraus*,⁴¹ 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.⁴² 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 (involving grant that omitted the location of the way); *Lidgerding v. Zignego*, 77 Minn. 421, 424, 80 N.W. 360, 361 (1899) (involving 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) (involving a right of way to an identified lot that contained a building covering two additional lots).

39. See *Farnes v. Lane*, 281 Minn. 222, 161 N.W.2d 297 (1968); *Lien v. Loraus*, 403 N.W.2d 286 (Minn. Ct. App. 1987).

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.⁴³

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.⁴⁴ "As the language of the grant becomes less precise," explained one decision, "the circumstances of the grant grow in importance as an interpretive aid."⁴⁵ In particular, courts have considered such circumstances as the location and structural characteristics of the land,⁴⁶ previous use of the land by the grantor,⁴⁷ and (rarely) preliminary negotiations of the parties.⁴⁸ 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.⁴⁹

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).

44. See *Highway 7 Embers, Inc. v. Northwestern Nat'l Bank*, 256 N.W.2d 271, 275 (Minn. 1977).

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.⁵⁰

Many ambiguities, however, cannot be resolved by examining the intent of the original parties.⁵¹ In many cases, the original parties did not consider the matter causing the uncertainty.⁵² No agreement can eliminate every uncertainty because the parties cannot afford to negotiate every detail or possible contingency of the transaction.⁵³

In such cases, Minnesota courts interpret the indefinite terms according to the rule of "reasonable use."⁵⁴ Under this well-established

772, 774 (1919) (holding that evidence of grantee's improvements to right-of-way easement was admissible to show "how the parties construed the ambiguity of the description in the deed . . . by ever since using and working the road upon the exact place where it now is and where it is claimed defendant trespassed"); *Kretz*, 127 Minn. at 311, 149 N.W. at 651 (holding that "the conduct of later owners, including plaintiff" confirmed that an easement benefiting one named lot was also intended to benefit two other lots).

50. See *Kretz*, 127 Minn. at 311, 149 N.W. at 651 (clarifying how many lots were served by the easement); *Callen*, 91 Minn. at 272, 97 N.W. at 974 (determining the physical location of an easement whose dimensions were not described in the grant). Because of the statute of frauds, however, courts exclude extrinsic evidence for purposes of filling in or adding to a *land description*. See *Bosold v. Ban Con, Inc.*, 392 N.W.2d 724, 726 (Minn. Ct. App. 1986) (stating in regards to a land description that "[e]xtrinsic evidence cannot be used to supply a missing term to a written conveyance; it can only be used to explain an unclear term"); see also *Miracle Constr. Co. v. Miller*, 251 Minn. 320, 324, 87 N.W.2d 665, 669 (1958); *Taylor v. Allen*, 40 Minn. 433, 433-34, 42 N.W. 292, 292 (1889); MILTON R. FRIEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* § 1.3, at 119-21 (5th ed. 1991).

51. See 3 HERBERT THORNDIKE TIFFANY, *THE LAW OF REAL PROPERTY* § 802, at 320 (Basil Jones ed., 3d ed. 1939) (stating that easements sometimes contain "matters as to which, so far as appears, there was no actual intention," in which case the court must apply supply a "presumed" or "fictitious" intention).

52. See, e.g., *International Lumber Co. v. Staude*, 144 Minn. 356, 359, 175 N.W. 909, 911 (1919) (noting in regards to a conveyance that "a situation has arisen which was not within the contemplation of either party to the deed when it was executed"). As one article points out, "[a]mbiguity in contractual instructions is normally unintended, i.e., it is surprising to the parties involved." Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 72 CAL. L. REV. 261, 269 (1985).

53. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 92-93 (1989) (noting that incompleteness in contracts often results because "the transaction costs of explicitly contracting for a given contingency are greater than the benefits"); see also *Hartung v. Billmeier*, 243 Minn. 148, 150, 66 N.W.2d 784, 787-88 (1954) (stating that "any offer or agreement is indefinite and uncertain in some degree since words are but imperfect symbols of what each party understands and intends").

54. See *Ingelson v. Olson*, 199 Minn. 422, 426, 272 N.W. 270, 274 (1937) (stating that indefinite rights of way are bounded "by the line of reasonable enjoyment").

principle,⁵⁵ the extent of the easement is that "reasonably necessary to the full enjoyment" of the use intended by the parties.⁵⁶ 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."⁵⁷ The parties' rights balance each other, being "so limited, each by the other, that there may be a due and reasonable enjoyment of both."⁵⁸ An easement, therefore, contains only the right to a "reasonable and usual" enjoyment of its terms.⁵⁹

The reasonable use principle serves as a gap-filler, giving content to indefinite terms that cannot be clarified by the parties' intention.⁶⁰ As such, it allows the court to supply terms whose absence would otherwise cause the easement to fail because of uncertainty.⁶¹

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)).

59. *Minneapolis Athletic Club v. Cohler*, 287 Minn. 254, 257, 177 N.W.2d 786, 789 (1970).

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,⁶² and include the right to access, maintain and repair the primary easement.⁶³ One common secondary easement is the right of utility companies to trim trees that impinge on telephone or electric lines.⁶⁴ 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."⁶⁵ Because of their derivative purpose—to support effective use of the main easement—secondary easements are often intended to remain flexible.⁶⁶ As a result, Minnesota courts have made little attempt to describe their specific boundaries and dimensions.⁶⁷ 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.⁶⁸ Rather than defining the physical borders of secondary easements, the courts insist only that such easements be exercised reasonably.⁶⁹

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.⁷⁰ By omitting the easement's key physical dimensions, such grants appear to leave such dimensions untrammelled by limitations.⁷¹ The rules of interpretation, however, assume that indefinite grants are imperfectly described grants, not unlimited grants.⁷² 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.⁷³ A right

68. See *Bruns*, 142 Minn. at 479, 172 N.W. at 774-75 (stating that secondary easement to repair road must involve a "proper improvement" made without causing "unnecessary injury or damage" to the servient owner or his land); *St. Paul Realty*, 122 Minn. at 425-26, 142 N.W. at 807-08 (holding that telephone company must, "if practically possible," trim branches "in such manner as not to injure the trees," exercising due regard to the servient owners' property rights); *Reed*, 100 Minn. at 172-73, 110 N.W. at 1121 (holding that secondary easement to clean out drainage ditch must be "exercised in such a manner as to cause no unnecessary damage to the owner of the land below"). One commentator has noted:

When details about "secondary easements" are not spelled out, the general principle is that "reasonable" uses are intended. What is reasonable depends upon the surrounding circumstances, most importantly, in the case of an easement appurtenant, the activities that one might be expected to conduct on the dominant tenement.

CUNNINGHAM, *supra* note 61, § 8.9, at 458.

69. Minnesota's application of the reasonable use principle to secondary easements conforms to the general rule for interpreting such easements. See BRUCE & ELY, *supra* note 14, ¶ 8.07[2], at 8-55 (stating that "[t]he easement holder . . . must make reasonable use of the right to enter and maintain an easement and is not permitted to unreasonably increase the burden on the servient tenement").

70. 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" that places no restrictions on the location, width or direction of the easement).

71. See *id.*

72. See *supra* notes 35-61 and accompanying text.

73. See 2 JOHN BOUVIER, BOUVIER'S LAW DICTIONARY 3444 (Francis Rawle ed., 3d rev. ed. 1914); see also *Bosell v. Rannestad*, 226 Minn. 413, 418, 33 N.W.2d 40, 43 (1948). The passage may occur by foot, vehicle or animals. See *Cater v. North-*

of way grant is indefinite if it fails to specify the location or dimensions of the way,⁷⁴ or the extent of permissible use thereon.⁷⁵ In such cases, the courts generally have sought to circumscribe and limit the extent of the grant.⁷⁶

The most common problem involves rights of way that are indefinite as to location.⁷⁷ To be valid, an easement need only describe the affected property and the intention of the parties.⁷⁸ As a result, many easement grants contain inadequate descriptions of the physical dimensions of the servitude.⁷⁹ In some cases, the instrument locates the pathway using imprecise or equivocal language.⁸⁰ In other cases, the grant entirely omits description of the pathway and simply describes the servient tenement.⁸¹ The latter grants are known as blanket or floating easement grants.⁸²

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.

77. See generally William B. Johnson, Annotation, *Location of Easement of Way Created by Grant Which Does Not Specify Location*, 24 A.L.R.4TH 1053 (1983) (discussing principles used in various jurisdictions to locate indefinite rights of way).

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.⁸³ Minnesota courts,⁸⁴ like those of most other states,⁸⁵ 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*.⁸⁶ The *Callen* case involved a grant that simply conveyed the right to "pass over" a described plot of land.⁸⁷ In construing this instrument, the court assumed first that the grant described *only* the servient tenement and *not* the easement.⁸⁸ The physical dimensions of the easement, it presumed, remained entirely undefined by the grant.⁸⁹ 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.⁹⁰ Third, the court held that the easement itself consisted of *one fixed* way within the property description in the grant.⁹¹

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.⁹² If a way existed at the time of the grant, the court will treat this location as the way unless the grant states otherwise.⁹³ If a way did not exist already, the court looks at the practical construction of the grant by the parties.⁹⁴ The grantor possesses the right to choose the location, but if he fails the grantee may choose the way.⁹⁵

In any case, the location must conform to the rule of reasonable use.⁹⁶ 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."⁹⁷ It must be "a convenient and suitable way" that does not "unreasonably interfere with the rights of the owner of the servient estate."⁹⁸ 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.⁹⁹

Another uncertainty affecting rights of way is indefiniteness as to width.¹⁰⁰ Only one Minnesota case, *Lidgerding v. Zignego*,¹⁰¹ 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).

93. See *Miller v. Snedeker*, 257 Minn. 204, 215, 101 N.W.2d 213, 222 (1960).

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 RESTATEMENT (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.¹⁰² In *Lidgerding*, a “right of way to cross on foot or with teams” made no mention of passageway’s width.¹⁰³ 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.”¹⁰⁴ A similar rule for defining an uncertain width is used in at least twenty-one other jurisdictions.¹⁰⁵

A third problem involves indefiniteness as to the burden of use on the way.¹⁰⁶ 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*,¹⁰⁷ 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.¹⁰⁸ On this ground, the *Giles* court permitted gravel trucks to use an unrestricted way only during daylight hours at reasonable speeds.¹⁰⁹ 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.¹¹⁰ Courts have cited the principle to permit reasonable use of a right of way by the *servient owner*,¹¹¹ as for instance by constructing a

102. Search of Westlaw database MN-CS using the following terms-and-connectors query: EASEMENT & WIDTH /P (INDEFINITE UNDEFINED INDETERMINATE VAGUE UNSPECIFIED IMPRECISE AMBIGUOUS UNCLER UNCERTAIN) (Apr. 3, 1999).

103. *Lidgerding*, 77 Minn. at 425, 80 N.W. at 361.

104. *Id.* at 424, 80 N.W. at 361.

105. See Allen, *supra* note 55, at 255-56 & Later Case Service at 30-31 (noting that the following states interpret an undefined width as a “reasonable” or “convenient” one: Alabama, California, Connecticut, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New Jersey, New York, Pennsylvania, Texas, Vermont, Virginia, Washington, and West Virginia).

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).

111. See *Thompson v. Germania Life Ins. Co.*, 97 Minn. 89, 91-92, 106, N.W.

walkway over the right of way.¹¹² The principle also underlies the easement holder's right to use new, improved technology in exercising the right of passage.¹¹³

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.¹¹⁴ 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.¹¹⁵ Strictly speaking, the courts do not abridge or decrease the easement; rather they define its true boundaries and thereby limit its possible extent.¹¹⁶ The courts simply supply "definiteness and precision" to the easement, preventing it from becoming an "onerous" burden on the servient tenement.¹¹⁷

C. Interpretation of Indefinite Utility Easements

Utility easements are a type of right of way.¹¹⁸ The right of passage consists of the privilege of sending gas, electricity, telephone transmissions and the like across and through the servient tenement.¹¹⁹ 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.

112. See *Minneapolis Athletic Club v. Cohler*, 287 Minn. 254, 258-59, 177 N.W.2d 786, 789-90 (1970).

113. See *Washington Wildlife Preservation, Inc. v. State*, 329 N.W.2d 543, 546-47 (Minn. 1983); *Cater v. Northwestern Tel. Exch. Co.*, 60 Minn. 539, 543, 63 N.W. 111, 112 (1895).

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, 223 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").

118. Utility easement grants often describe the servitude as a "right of way." See, e.g., *Winslow v. City of Vallejo*, 84 P. 191, 191 (Cal. 1906); *Flynn v. Michigan-Wisconsin Pipeline Co.*, 161 N.W.2d 56, 58 (Iowa 1968); *Strauch v. Coastal States Crude Gathering Co.*, 424 S.W.2d 677, 679 (Tex. App. 1968).

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.¹²⁰

Utility easements frequently take the form of blanket grants,¹²¹ 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.*,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.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.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].¹²⁵

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

120. 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. See Lawrence, *supra* note 82, at 181.

122. 575 N.W.2d 578 (Minn. 1998).

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

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

125. 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].

MINN. STAT. § 300.045(c) (Supp. 1999) (emphasis added to indicate new language).

within the meaning of this statute.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.¹²⁷ Second, the statute implies that the "real" easement consists of one fixed location, because it must be capable of "definite and specific" description.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.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,¹³⁰ applying the general principles used in construction of indefinite rights of way.¹³¹ The decisions depend heavily on the exact language used in the grant.¹³² They also differ in how they resolve questions about the burden of such easements, such as the permissible number or size of buried pipes.¹³³ Nevertheless, several principles consistently appear.

126. See 7 Op. Att'y Gen. 131 (1974).

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.*

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").

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).

130. See BRUCE & ELY, *supra* note 14, ¶ 7.02[5], at 7-14-7-16; Lawrence, *supra* note 82, at 186-88.

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.

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).

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.¹³⁴ Only when the language of the grant clearly burdens the entire servient tenement do the courts treat the easement as an unrestricted servitude.¹³⁵ Second, the course or location of the "real" easement is fixed by the location of the utility's lines (pipe, wire, etc.).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.¹³⁷ Third, the width of the easement is the line of reasonable enjoyment necessary to fulfill the purposes of the grant.¹³⁸

Blanket utility easements, in short, are governed by the same restric-

one pipe of same size as originally laid), *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), *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, *Easements: Effect of User in Determining Extent of Grant Made in General Terms*, 31 CAL. L. REV. 442 (1943).

134. 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"). *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. 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"); *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. 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. 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. 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); *Mielke*, 870 P.2d at 1006 (holding that width of pipeline easement, unspecified in grant, is "bounded by the line of reasonable enjoyment"). 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").

tive principles affecting indefinite rights of way. Unless the granting language 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.¹³⁹ The courts refuse to extend easements "by legal construction beyond the objects originally contemplated or expressly agreed upon by the parties."¹⁴⁰ 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 intention to create them.¹⁴¹ The cases described next,¹⁴² however, dramatically departed from these policies.

III. THE CASES

A. *Bergh & Misson Farms, Inc. v. Great Lakes Transmission Co.*¹⁴³

This case involved a written easement instrument for an underground gas pipeline on land leased and farmed by Bergh and Misson Farms, Inc. ("B & M").¹⁴⁴ 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").¹⁴⁵ The instrument granted Great Lakes a 125-foot corridor that ran diagonally through the land for about 2,400 feet.¹⁴⁶ 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 dominant owner can locate at will because such interpretation would place an "onerous" 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.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."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."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.¹⁵⁰ Without consulting B & M, Great Lakes created a pathway to the worksite.¹⁵¹ For the next six weeks, it drove heavy equipment in and out to perform the repair.¹⁵² During this time, twelve to fifteen inches of rain fell.¹⁵³ Great Lakes' repair activities rutted the land, clogged the drainage system, and exacerbated flooding of the fields.¹⁵⁴ B & M's sugar beet crop sustained considerable damage.¹⁵⁵

B & M sued Great Lakes for trespass on the grounds that the pipeline company exceeded the scope of its ingress/egress easement.¹⁵⁶ B & M sought to recover triple damages for the trespass, as authorized by section 548.05 of the Minnesota Statutes.¹⁵⁷ The ingress/egress easement, it argued, needed to be exercised in a "reasonable" way, and this Great Lakes failed to do.¹⁵⁸ The trial court rejected this argument, excluding evidence

blanket easement grant, but the parties redrafted the grant in 1990 to locate easement more specifically pursuant to section 300.045 of the Minnesota Statutes. *See id.*

147. *See* Appellant's Brief and Appendix at A-1 to A-2, *Bergh & Misson Farms* (No. C8-96-603).

148. *Bergh & Misson Farms*, 565 N.W.2d at 25.

149. *Id.*

150. *See id.*

151. *See id.* Great Lakes' path of approach differed from a route, chosen with the Berghs' input, for an earlier maintenance project. *See* Respondent's Brief at 3, *Bergh & Misson Farms* (No. C8-96-603).

152. *See Bergh & Misson Farms*, 565 N.W.2d at 25.

153. *See id.*

154. *See id.*

155. *See id.* The trial jury awarded over \$19,000 for property damages. *See id.*

156. *See id.* at 24-25. Exceeding the scope of an easement constitutes trespass. *See* Northern States Power Co. v. Franklin, 265 Minn. 391, 396, 122 N.W.2d 26, 30 (1963) (holding that maintenance of power lines that are "unauthorized by the deed of easement" constitutes trespass unless the landowner consents).

157. *See Bergh & Misson Farms*, 565 N.W.2d at 24-25; MINN. STAT. § 548.05 (1998). Section 548.05 provides in part that "[w]hoever shall carry away, use or destroy any wood, timber, lumber, hay, grass, or other personal property of another person, without lawful authority, shall be liable to the owner thereof for treble the amount of damages assessed therefor in an action to recover such damages." MINN. STAT. § 548.05 (1998).

158. *See Bergh & Misson Farms*, 565 N.W.2d at 26.

regarding the reasonableness of the use and refusing to issue a jury instruction on trespass.¹⁵⁹ 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.¹⁶⁰

The supreme court agreed with the trial court.¹⁶¹ 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.¹⁶² 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.¹⁶³ As such, the agreement defined "all of Great Lakes' rights and responsibilities" in using the access easement.¹⁶⁴ 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.¹⁶⁵ On these grounds, the court argued that it had "no occasion to read a reasonableness requirement into the easement grant."¹⁶⁶

B. Scherger v. Northern Natural Gas Co.¹⁶⁷

The Schergers owned a farm in Dodge County subject to an easement held by Northern Natural Gas ("Northern").¹⁶⁸ The easement agreement, executed in 1931 by the Schergers' predecessors,¹⁶⁹ 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.¹⁷⁰ The agreement was a blanket easement grant,¹⁷¹ describing the affected property according to its legal boundaries without specifying the actual location of the intended use.¹⁷²

Pursuant to the agreement, Northern installed a pipeline across the

159. *See id.*

160. *See Bergh & Misson Farms, Inc. v. Great Lakes Gas Transmission Co.*, No. C8-96-603, 1996 WL 571450, at *2 (Minn. Ct. App. Oct. 8, 1996).

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.*

170. *Scherger v. Northern Natural Gas Co.*, 562 N.W.2d 328, 329 (Minn. Ct. App. 1997).

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.¹⁷³ 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.¹⁷⁴ The Schergers demanded a "definite and specific description" of the easement pursuant to Minnesota Statutes section 300.045.¹⁷⁵ 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.¹⁷⁶

The Schergers sued a writ of mandamus to compel Northern to initiate condemnation proceedings for the new pipe.¹⁷⁷ 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.¹⁷⁸ 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.¹⁷⁹

The supreme court reversed.¹⁸⁰ 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,¹⁸¹ and thus that "the court's power to determine the extent of the easement granted is limited."¹⁸² 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.

179. *Scherger v. Northern Natural Gas Co.*, 562 N.W.2d 328, 330-31 (Minn. Ct. App. 1997).

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.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."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 1973.¹⁸⁵ "There is simply nothing in this statute to suggest that the legislature intended the language to apply to easements acquired before its enactment."¹⁸⁶

IV. ANALYSIS OF THE CASES

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

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 *vague language* in the instrument.¹⁹⁰ In each case, the court suggested that the central issue was whether "*the language granting the easement is clear and unambiguous.*"¹⁹¹ If the wording appears clear, "the court's

183. *See id.* at 580-81.

184. *Id.* at 581.

185. *See id.* (discussing the statute as it read prior to the 1999 amendments).

186. *Id.*

187. *See supra* notes 27-43 and accompanying text.

188. *See infra* Part IV.A.

189. *See infra* Part IV.B.

190. *See Scherger v. Northern Natural Gas Co.*, 575 N.W.2d 578, 580-81 (Minn. 1998) (focusing on the written language of the agreement in concluding that it was "clear and unambiguous"); *Bergh & Misson Farms v. Great Lakes Transmission Co.*, 565 N.W.2d 23, 26 (Minn. 1997) (stressing that the grant's terms were "broad" yet at the same time "clear and unambiguous").

191. *Bergh & Misson Farms*, 565 N.W.2d at 26; *see also Scherger*, 575 N.W.2d at 580 (quoting *Bergh & Misson Farms*).

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 ease-

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.

ment.²⁰²

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,²⁰³ did not clarify these dimensions in any way. It simply specified the utility's liability for damage resulting from use of the easement.²⁰⁴ Though the court recognized that the grant contained "broad terms," it did not view such imprecision as evidence of "ambiguity."²⁰⁵ According to traditional principles, however, such imprecision is the touchstone of ambiguity and opens up the instrument to clarification and limitation.²⁰⁶

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.²⁰⁷ The grant, it held, conveyed an easement covering the entire tract in the instrument.²⁰⁸ 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."²⁰⁹

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.²¹⁰ It has assumed that the easement in such grants remains undefined, existing somewhere within the described property.²¹¹ The same principle applies to blanket utility grants like the *Scherger* conveyance.²¹² Minnesota Statutes section 300.045 prohibits new blanket utility easements because they fail to describe and locate the easement.²¹³ As the statute recognizes, the true easement consists of a smaller pathway that "enters and departs from the property" at specific points.²¹⁴

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.

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."²¹⁵ 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.²¹⁶

Certain types of blanket utility grants, it is true, give rights to utilize the entire servient estate.²¹⁷ No such grants have come before a Minnesota court.²¹⁸ 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.²¹⁹ Northern's easement does not fall into this class. Though the easement was expansible, permitting Northern to lay multiple pipes,²²⁰ expansible easements do not convey rights over an entire servient estate.²²¹

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.²²² This procedure conforms to the

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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.

222. *See Bergh & Misson Farms, Inc. v. Great Lakes Transmission Co.*, 565 N.W.2d 23, 26 (Minn. 1997).

traditional principle that clear and unambiguous grants should be enforced literally.²²³ 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.”²²⁴ 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.²²⁵ 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).²²⁶ The granting language, in fact, suggests that the parties intended flexible access rights.²²⁷ The grant included rights to use “temporary construction space *as needed*,” a very elastic specification.²²⁸ Also, the damage clause, requiring automatic payment for injuries to the land, suggests that the parties foresaw and prepared for flexible emergency access.²²⁹

223. See *supra* notes 27-29 and accompanying text.

224. *Callen v. Hause*, 91 Minn. 270, 271, 97 N.W. 973, 974 (1904).

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.²³⁰ Minnesota case law requires that secondary easements be used without causing "unnecessary injury or damage" to the servient tenement.²³¹ Like all easements, the ingress/egress easement existed only for reasonable uses and could not be exercised in an "absolute, irrelative, and uncontrolled" manner.²³² Though the easement was not "bounded by the grant," the law "bounds it by the line of reasonable enjoyment."²³³

The court should have restricted the *Scherger* grant according to the traditional rules for locating indefinite rights of way.²³⁴ Other jurisdictions have applied these rules to blanket utility grants.²³⁵ Pipeline decisions from these jurisdictions formed the basis of the Minnesota Court of Appeals' sensible decision in the *Scherger* case.²³⁶

Under the Minnesota rules governing indefinite rights of way, the location of Northern's easement centered on its 1932 pipe.²³⁷ Minnesota courts generally have determined the location of an indefinite way according to the practical construction of the parties.²³⁸ 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.

232. *Giles v. Luker*, 215 Minn. 256, 259-60, 9 N.W.2d 716, 718 (1943).

233. *Ingelson v. Olson*, 199 Minn. 422, 428, 272 N.W. 270, 274 (1937) (quoting *Grafton v. Moir*, 29 N.E. 974, 976 (N.Y. 1892)).

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

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

236. See *Scherger v. Northern Natural Gas Co.*, 562 N.W.2d 328, 330-31 (Minn. Ct. App. 1997), *rev'd*, 575 N.W.2d 578 (Minn. 1998).

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.²³⁹ Once located, the course of the easement remains fixed and cannot be moved without the consent of both parties.²⁴⁰ These principles clearly apply to utility and pipeline easements, and other jurisdictions have so applied them.²⁴¹ As such, Northern's placement of the 1932 pipe should be seen as a designation of the easement that "fixed" its course.²⁴²

Under Minnesota case law, the width of Northern's easement is that necessary for reasonable use of its grant.²⁴³ 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."²⁴⁴ 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."²⁴⁵ Case law from other states strongly reinforces this principle.²⁴⁶ 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.²⁴⁷ 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 300.045²⁴⁸ was "intended to

239. See *supra* note 95 and accompanying text.

240. See *supra* note 99 and accompanying text.

241. See *supra* notes 136-137 and accompanying text.

242. 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) (holding that Northern's placement of the original pipe "fixed" the course of its easement).

243. See *supra* notes 100-05 and accompanying text.

244. *Lidgerding v. Zignego*, 77 Minn. 421, 425, 80 N.W. 360, 361 (1899).

245. *Ingelson v. Olson*, 199 Minn. 422, 428, 272 N.W. 270, 274 (1937).

246. See *supra* note 105 and accompanying text.

247. *Scherger v. Northern Natural Gas Co.*, 575 N.W.2d 578, 581 (Minn. 1998). As will be discussed further here, the Minnesota Legislature amended section 300.045 in 1999 to correct the *Scherger* court's interpretation. See Act of May 21, 1999, ch. 184, 1999 Minn. Laws 790-91; Minnesota House of Representatives, House Research Bill Summary, H.F. 160, 81st Legis. Sess. (Minn. 1999) (visited Oct. 23, 1999) <<http://www.house.leg.state.mn.us/hrd.bs.81.HFO160.html>> (stating that the bill to amend section 300.045 was developed in response to the *Scherger* court's denial of retroactivity to section 300.045, which prevented application of the statute to most utility easements).

248. Now codified as subsection (c) of the statute. See MINN. STAT. § 300.045(c) (Supp. 1999).

protect landowners from marketability of title problems caused by *easements covering large tracts of land*.”²⁴⁹ This explanation is clearly incorrect. The second part of section 300.045 targeted imprecise easements, not large easements.²⁵⁰ It covered any easement where “the recorded description of the easement does not include a *definite* and *specific* description of the easement.”²⁵¹ The statute redressed such uncertainty by requiring the utility to supply a “definite and specific description” of its ill-defined easement.²⁵² Section 300.045 carefully addresses the central problem of blanket utility grants: their failure to describe the easement’s physical dimensions.²⁵³

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.²⁵⁴ Such a reduction, applied retroactively, might constitute a taking under Minnesota law or expose the statute to attack on constitutional grounds.²⁵⁵ 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.²⁵⁶ The court’s conclusion appears baffling in light of the statute’s plain language, which covered easements having a “recorded description.”²⁵⁷ 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.

250. See MINN. STAT. § 300.045 (1998).

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.

254. See MINN. STAT. § 300.045 (1998).

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 Dreosch*, 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.²⁶³

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.").

260. *See* Act of May 21, 1999, ch. 184, 1999 Minn. Laws 790-91.

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.