William Mitchell Law Review

Volume 31 | Issue 3 Article 12

January 2005

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PRESERVING AND PROMOTING MINNESOTA'S RECREATIONAL TRAILS: *STATE V. HESS*

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I. INTRODUCTION

In 2004, the Minnesota Supreme Court issued a landmark decision that preserves the state's recreational trails and promotes the multiple use and conversion of inactive rail corridors. In *State v. Hess*,[1] the court held that certain portions of the Paul Bunyan State Trail did not revert to the abutting property owners once the railroad line on which the trail was constructed ceased to be used for railroad purposes.[2] The court concluded that an 1898 deed conveying land to a railroad company "for Right of Way and for Railway purposes" conveyed a fee simple determinable rather than an easement and that the state's Marketable Title Act[3] (MTA) extinguished the reversionary right.[4] In turning back the property owners' claims, the court reaffirmed its longstanding approach that the intent of the grantor determines the nature and scope of the interest conveyed and refused to create a presumption that a conveyance to a railroad is an easement rather than a defeasible fee. *Hess* reassures the state that it has good title to other corridors previously acquired from railroads and stems the tide of property owners' claims that threaten the state's contiguous trail system. *Hess*, however, leaves for another day the question of whether recreational trail use is within the scope of an easement for railroad purposes under the shifting public use doctrine articulated in *Washington Wildlife Preservation, Inc. v. Minnesota*,[5] the nation's seminal case addressing this issue.

This article assesses the significance of *Hess* for Minnesota's recreational trail system and the conversion of rails to trails. Part II describes the legal context within which *Hess* was decided, with particular emphasis on the methodology of constructing ancient deeds to railroads and the public policy underlying the MTA.[6] Part III sets forth the facts giving rise to the *Hess* decision and details the approach adopted by the court of appeals—an approach which, if affirmed by the supreme court, would have facilitated a parcel by

1. 684 N.W.2d 414 (Minn. 2004).
2. *Id.* at 427.
3. MINN. STAT. § 541.023 (2002).
4. *Hess*, 684 N.W.2d at 426-27.
5. 329 N.W.2d 543 (Minn. 1983).
6. *See infra* Part II.

parcel attack on the state's ownership of its recreational trails and potentially limited the application of the shifting public use doctrine established in *Washington Wildlife*.[7] Part IV discusses the supreme court's analysis of the issues, its interpretative methodology, and the normative justification of its approach.[8] Part V concludes that *Hess* establishes a strong legal and policy foundation for the past and future conversion of rail corridors into recreational trails, promotes the public interest, and avoids plunging the state into a costly parcel by parcel battle to save its contiguous recreational trail system.[9]

II. THE LEGAL CONTEXT WITHIN WHICH *HESS* WAS DECIDED

The question before the Minnesota Supreme Court in *State v. Hess* was a technical question of deed construction: whether an 1898 deed to a railroad company conveyed a fee simple determinable or an easement.[10] A fee simple determinable is an ownership interest in real property subject to the limitation that the property reverts to the grantor upon the occurrence of a specified event.[11] By contrast, an easement is a right to the use or enjoyment of the land rather than an ownership interest in the property itself.[12]

In evaluating the nature of the property interest conveyed by the 1898 deed, the supreme court had the opportunity to create a rule of construction that a deed to a railroad was an easement rather than a defeasible fee. This was the course taken by the court of appeals.[13] Had the supreme court adopted such an approach, it would have opened the door to countless quiet title suits by landowners adjacent to inactive rail corridors. Such an approach also would have been in tension with the shifting public use doctrine and would have facilitated ownership challenges of the state's efforts to build a system of recreational trails on former rail corridors. Consequently, *State v. Hess* was a highly salient case with

7. *See infra* Part III.
8. *See infra* Part IV.
9. *See infra* Part V.
10. State v. Hess, 684 N.W.2d 414, 420 (Minn. 2004).
11. Consol. Sch. Dist. No. 102 v. Walter, 243 Minn. 159, 161-63, 66 N.W.2d 881, 883-84 (1954).
12. *Id.*
13. State *ex rel* Dept. of Nat'l Resources v. Hess, 665 N.W.2d 560, 566 (Minn. Ct. App. 2003).

significance extending far beyond the rights of the individual property owners involved in the dispute over the Paul Bunyan State Trail.

This section discusses the legal context within which *Hess* was decided and sets the stage for understanding what was at stake in *Hess*. Part A explains the methodology of construing ancient deeds to railroads.[14] Part B discusses the influence of the history of railroad acquisition practices on the methodology of deed construction.[15] Part C explains Minnesota's prior case law regarding the interpretation of conveyances to railroad companies.[16] Part D sets forth the provisions of the MTA, the statute's underlying public policy goals, and how those goals might inform the court's choice of interpretative methodology in *Hess*.[17]

A. The Methodology of Deed Construction

The nature and scope of the property rights granted to railroads by deeds executed in the 1800s is a recurring question in modern property jurisprudence.[18] Historically, railroads could acquire a fee simple absolute, a fee simple subject to a condition subsequent, a fee simple determinable, a perpetual or unlimited easement, a limited or conditional easement, or a license.[19] Evaluating the precise nature of the interest conveyed by a particular deed, however, is a difficult task. Ancient deeds are often ambiguous and may contain language appearing to grant both a fee estate and an easement.[20] Discerning the parties' intent is difficult because the parties are unavailable and there is limited, if any, extrinsic evidence regarding intent.[21] In addition, the nature of the land at issue may be different than it was at the time the deed was executed.[22] Further, state property laws may have different requirements governing the methodology of deed

14. *See infra* Part II.A.
15. *See infra* Part II.B.
16. *See infra* Part II.C.
17. *See infra* Part II.D.
18. *See* A.E. Korpela, Annotation, *Deed To Railroad Company as Conveying Fee or Easement*, 6 A.L.R.3d 973, § 3 (1966); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.2 (2000).
19. *See* Korpela, *supra* note 18; RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.2 (2000).
20. Korpela, *supra* note 18.
21. *Id.*
22. *Id.*

interpretation.[23] For all these reasons, there is considerable conflict in the way courts construe the nature and scope of the property interest conveyed to a railroad by deeds containing language referring to a "right-of-way" and/or the purpose of the conveyance.[24]

Despite the conflicting outcomes reached by the courts, the polestar of deed interpretation is to effectuate the intent of the parties as expressed in the deed and in light of the surrounding circumstances.[25] When a deed is ambiguous on the issue of intent, a court may consider parol evidence to determine the parties' intent.[26] The factors typically examined by the courts in evaluating the intent of the parties include: (1) the stated purpose of the grant, (2) whether the grantor reserved the right to use any of the land at issue, (3) the amount of consideration, (4) subsequent deeds identifying the nature of the original grant, and (5) the release of dower rights.[27]

When the grant is described as a "right of way," the intent of the parties is unclear regarding the nature of the grant because, as the United States Supreme Court has recognized, the term can refer to both (1) "a right of passage over any tract" or (2) the "land which railroad companies take upon which to construct their road-bed."[28] Accordingly, the use of the term "right of way" does not

23. Jeffrey M. Heftman, Note, *Railroad Right-of-Way Easements, Utility Apportionments, and Shifting Technological Realities*, 2002 U. ILL. L. REV. 1401, 1407 (2002) ("The varying histories of state property law doctrine and the absence of federal preemption in the field account, in part, for the current diversity of treatment of such cases.").

24. *Id.*

25. State v. Hess, 684 N.W.2d 414, 423 (Minn. 2004).

26. *Id.*; *see also* Farnes v. Lane, 281 Minn. 222, 225-26 & n.7, 161 N.W.2d 297, 300 & n.7 (1968); 15 DUNNELL MINN. DIGEST, *Deeds* § 1.11 (4th ed. 1992); Korpela, *supra* note 18.

27. *Hess*, 684 N.W.2d at 423-26.

28. *Id.* at 424 (citing Joy v. City of St. Louis, 138 U.S. 1, 44 (1891); Bosell v. Rannestad, 226 Minn. 413, 418, 33 N.W.2d 40, 43-44 (1948)). Other courts have recognized the two meanings of "right of way" and have concluded that the mere presence of the term "right of way" in a deed does not by itself indicate an intent to convey an easement. *See, e.g.*, King County v. Rasmussen, 299 F.3d 1077, 1085 (9th Cir. 2002); Clark v. CSX Transp., Inc., 737 N.E.2d 752, 758 (Ind. Ct. App. 2000); Brown v. State, 924 P.2d 908, 914 (Wash. 1996). In addition, the fact that the term "right of way" is used in the habendum clause does not mean that an easement was conveyed. In general, the habendum clause may explain, enlarge, or qualify, but it cannot contradict or defeat the estate granted in the granting clause. New York Indians v. United States, 170 U.S. 1, 20 (1898); *Clark*, 737 N.E.2d at 758.

necessarily mean that the conveyance is an easement.[29] When the grantor reserves the right to use any of the land at issue, such reservation is an indicator that the parties intended to convey an easement.[30] If a deed is ambiguous, the courts will look to subsequent deeds describing the conveyance at issue to discern the parties' intent.[31] Because an easement is not title to the land and can be conveyed without the relinquishment of the wife's dower rights, the release of dower rights may indicate that the parties intended to grant a fee estate.[32]

Some courts view nominal consideration as an indicator that the parties intended to convey an easement rather than a fee simple determinable. When the record does not establish the consideration typically paid for easements as opposed to fee simple estates, it cannot be ascertained whether the nominal consideration represented the value of an easement or a defeasible fee.[33] In fact, in some cases, railroads often paid significant amounts of money for both easements and fee estates.[34] In other cases, railroads sometimes paid nothing for fee estates because of the benefits to the grantor in having access to the railroad. The Minnesota Supreme Court has observed that the difference in value of an easement and a fee simple determinable is nominal[35] because railroad easements have the "substantiality of the fee," in that the railroad has exclusive possession and control of the property subject only to the owner's servient interest.[36] Accordingly, nominal consideration does not necessarily indicate that the parties intended to convey an easement rather than a defeasible fee.[37]

29. *Hess*, 684 N.W.2d at 424.

30. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.2 (2000).

31. *See, e.g.*, *Hess*, 684 N.W.2d at 424.

32. *Id.* at 425; *see also* Brewer & Taylor Co. v. Wall, 769 S.W.2d 753, 755 (Ark. 1989); Coleman v. Mo. Pac. R.R. Co., 745 S.W.2d 622, 637 (Ark. 1988); Elton Schmidt & Sons Farm Co. v. Kneib, 507 N.W.2d 305, 309 (Neb. Ct. App. 1993). *But see* Hawk v. Rice, 325 N.W.2d 97, 100 (Iowa 1982) (holding that granting clause clearly indicated conveyance of easement despite the release of dower in the deed).

33. *King County*, 299 F.3d at 1085 n.8.

34. Roeder Co. v. K & E Moving & Storage Co., 4 P.3d 839, 842-43 (Wash. Ct. App. 2000).

35. Chi. Great W. Ry. Co. v. Zahner, 145 Minn. 312, 316-17, 177 N.W. 350, 351-52 (1920).

36. *Id.*

37. *See King County*, 299 F.3d at 1084 & n.8; Brown v. State, 924 P.2d 908, 914 (Wash. 1996); *Roeder*, 4 P.3d at 842.

B. The Influence of Railroad Acquisition Practices on Deed Construction

Although the history of railroad acquisition practices is beyond the scope of this article,[38] how the courts construe the nature and scope of a railroad's property interest must be understood against the backdrop of this history. During the heyday of railroad development and expansion, the railroads received tremendous federal and state government land grants, subsidies, and eminent domain powers to establish rail corridors.[39] Landowners, eager to obtain the benefits of being connected to a rail corridor and higher land values, would often make an outright donation of land to the railroad.[40] In other cases, landowners would sell the land, or an interest in the land, to the railroad.[41] If a landowner refused to give up land necessary to complete a line, eminent domain powers were used to acquire the land.[42] Often the land was being surveyed and the corridor was being constructed before land acquisition was finalized.[43] Some rail lines were in operation years before land acquisition was finalized.[44] Occasionally, no deed conveyed the property and the railroad's interest was acquired through prescription.

The haste and recklessness of this expansion ended in the 1870s as the great rewards promised by the railroads failed to materialize, the abusive practices of the railroads were exposed, and huge land grants given to the railroads were increasingly viewed as government pork at the expense of the taxpayers.[45] The backlash against the railroads from the 1880s to the 1920s resulted in many states reducing the railroads' eminent domain powers, legislatively prohibiting railroads from acquiring land in fee simple, and legislatively mandating the abandonment of railroad

38. For further information regarding the history of railroad land acquisition, see Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 ECOLOGY L.Q. 351 (2000); Heftman, *supra* note 23; Emily Drumm, Note, *Addressing the Flaws of the Rails-to-Trails Act*, 8 KAN. J.L. & PUB. POL'Y 158 (1999); Gregg H. Hirakawa, Comment, *Preserving Transportation Corridors for the Future: Another Look at Railroad Deeds in Washington State*, 25 SEATTLE U. L. REV. 481 (2001).

39. Wright & Hester, *supra* note 38, at 366-78.

40. *Id.* at 369-70.

41. *Id.* at 370.

42. *Id.* at 370-71.

43. *Id.* at 371.

44. *Id.*

45. *Id.* at 374.

easements when a railroad did not continue to operate and maintain its corridors.[46]

The public sentiment against the railroads also affected how courts interpreted deeds to railroad companies. Many courts, reflecting this anti-railroad animus, abandoned the practice of making fine distinctions among various types of property rights the railroads could acquire.[47] Instead, courts now resolved ambiguities and presumptions in deeds in favor of grantor landowners.[48] The result, as Wright and Hester explain, was that the courts imposed a *binary structure* on railroad title disputes permitting a railroad to have either a fee simple absolute or an easement:

> The result was that many courts simply imposed a binary structure on railroad title disputes: either the railroad acquired fee simple absolute title, allowing it to do virtually anything it wanted with its land, even if it had discontinued services and abandoned certain parcels, or the railroad acquired merely an easement or a right-of-way over the original landowner's land, extinguishable under principles of abandonment.[49]

The methodology of deed construction and common law property doctrines and presumptions reflected this binary structure.

C. Minnesota's Methodology of Deed Interpretation on the Eve of Hess

On the eve of *Hess*, the Minnesota Supreme Court had clearly established that in determining the nature and scope of a conveyance, one examines the intent of the grantor, as expressed in the deed and in light of the surrounding circumstances.[50] Whether the court had established a binary structure of deed interpretation, however, was another matter. Before *Hess*, the Minnesota Supreme Court had decided three cases addressing the nature of a right-of-way conveyance to a railroad company—*Chambers v. Great Northern Power Co.*,[51] *Norton v. Duluth Transfer*

46. *Id.*
47. *Id.* at 377.
48. *Id.* at 374-75.
49. *Id.* at 377.
50. Chi. Great W. Ry. Co. v. Zahner, 145 Minn. 312, 313-14, 177 N.W. 350, 350 (1920); Norton v. Duluth Transfer Ry. Co., 129 Minn. 126, 130-31, 151 N.W. 907, 907-08 (1915).
51. 100 Minn. 214, 110 N.W. 1128 (1907).

Railway Co.,[52] and *Chicago Great Western Railway Co. v. Zahner*.[53] In these cases, the court did not distinguish between an easement and a fee simple determinable, suggesting that (1) the cases themselves failed to raise the distinction between the two property interests, (2) it was not necessary for the court to make a distinction between the two property interests, or (3) the court had impliedly adopted a binary approach to deed construction.

Decided in 1907, *Chambers* addressed the question of whether title to land acquired in condemnation proceedings for right of way purposes was an easement or a fee simple determinable and held that the conveyance was an easement rather than a fee simple absolute.[54] In explaining its decision, the *Chambers* court stated that the distinction between an easement and a fee simple determinable was immaterial to the resolution of the case because the intent of the grantor to create reversionary rights would be fulfilled regardless of whether the deed conveyed an easement or a defeasible fee.[55]

In *Norton*, decided in 1915, the railroad company charged with having abandoned an easement defended itself on the grounds that it was not bound by use limitations because it had acquired a fee simple absolute.[56] "[T]he appellants argued that the deed at issue 'conveyed an absolute fee title limited only as to use, namely, railroad right of way purposes, and that a failure to use it for that purpose or at all would not terminate the absolute title thus granted.'"[57] In *Norton*, the court held that the conveyance of a strip of land to a railroad company for a right of way conveyed an easement rather than an absolute title for which the appellants argued.[58] The *Norton* court did not address the question of whether the deed constituted a fee simple determinable.[59]

Zahner addressed the question of whether the grantors conveyed an easement or a fee estate. In that 1920 case, the railroad company argued that it had acquired the land in fee and that the successor in title to the grantor had no right of access to a

52. 129 Minn. 126, 151 N.W. 907 (1915).
53. 145 Minn. 312, 177 N.W. 350 (1920).
54. *Chambers*, 100 Minn. at 219, 110 N.W. at 1129-30.
55. *Id.*
56. *Norton*, 129 Minn. at 129, 151 N.W. at 908.
57. *Hess*, 684 N.W.2d at 420 (citing *Norton*, 129 Minn. at 129, 151 N.W. at 908).
58. *Id.* (quoting *Norton*, 129 Minn. at 129, 151 N.W. at 908).
59. *Id.*

right of way that was conveyed outright in the granting clause.[60] As in *Norton*, the *Zahner* court focused on the issue of reversionary rights in justifying its holding and stated that "[w]ithin the principles of our holdings there was no intent to grant a fee, but an intent to grant a railroad right of way easement, which would revert upon abandonment."[61]

Based on *Chambers, Zahner, and Norton*, the court in *Hess* could have endorsed a binary approach to deed construction and created a presumption that a deed to a railroad was an easement rather than a defeasible fee. Alternatively, the court could distinguish these three cases from *Hess* on the grounds that they did not address or need to address the distinction between an easement and a defeasible fee. The court's choice between these alternatives would be influenced by the Marketable Title Act.

D. The Marketable Title Act

Chambers, Norton, and Zahner were decided before Minnesota's MTA was enacted. The MTA promotes finality of conveyances and settled expectations. It also makes the distinction between an easement and a fee simple determinable material because an interest in fee simple determinable may be subject to the MTA's conclusive presumption of abandonment.[62]

The stated purpose of the MTA is to prevent restrictions on uses that have not been reasserted as a matter of record within the last forty years from "fetter[ing] the marketability of real estate."[63] It provides that no action affecting the possession or title of real estate may be commenced against a claim of title which has been of record for at least forty years unless the adverse claimant has recorded a notice of the adverse claim within that forty-year period.[64] The MTA states, in part:

> As against a claim of title based upon a source of title, which source has then been of record at least 40 years, no action affecting the possession or title of any real estate shall be commenced . . . to enforce any right, claim, interest, incumbrance, or lien founded upon any

60. Chicago Great W. Ry. Co. v. Zahner, 145 Minn. 312, 312, 177 N.W. 350, 350 (1920).

61. *Id.* at 314, 177 N.W. at 350.

62. MINN. STAT. § 541.023, subd. 5 (2002).

63. *Id.*

64. *Id.*, subd. 1.

> instrument, event or transaction which was executed or occurred more than 40 years prior to the commencement of such action, unless within 40 years after such execution or occurrence there has been recorded . . . a notice . . . setting forth the name of the claimant, a description of the real estate affected and of the instrument, event or transaction on which such claim is founded, and stating whether the right, claim, interest, incumbrance, or lien is mature or immature.[65]

III. THE FACTUAL BASIS OF THE PROPERTY OWNERS' CLAIMS IN *STATE V. HESS*

A. The 1898 Deed

On April 1, 1898, Thomas B. Walker and his wife Harriet G. Walker, and W.T. Joyce and his wife Clotilde G. Joyce, conveyed a portion of their land to the Brainerd and Northern Minnesota Railway Company.[66] The granting clause of the handwritten deed states that the grantors,

> for and in consideration of the sum of One Dollar ($1.00) to them in hand paid by the Brainerd and Northern Minnesota Railway Company . . . do hereby grant, bargain, sell and convey unto the said company, its successors and assigns, a strip, belt or piece of land, one hundred feet, wide, extending across the following lands in Cass and Hubbard Counties, State of Minnesota, described as follows to wit . . . .[67]

Following the legal description of the lands conveyed, the limiting clause of the deed states: "Provided that this Grant or Conveyance shall continue in force so long as the said strips of land shall be used for Right of Way and for Railway purposes; but to cease and terminate if the Railway is removed from the said strips."[68]

In 1901, the Burlington Northern Railroad Company (BNRC) purchased the subject property and thus became the successor in title to the Brainerd and Northern Minnesota Railway Company's

65. *Id.*

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

67. Brief of the State of Minnesota, through its Department of Natural Resources at Appendix A31, *Hess*, 684 N.W.2d 414.

68. *Hess*, 684 N.W.2d at 417.

interest.[69] BNRC used the corridor for a railroad line for the next 84 years.[70]

B. BNRC's Sale of the Corridor to the State

The Interstate Commerce Commission Act of 1920 gives the Interstate Commerce Commission (ICC) plenary authority to regulate interstate rail service.[71] In general, a railroad subject to the jurisdiction of the ICC may only abandon a line if it obtains approval of the ICC.[72] In determining whether to issue a certificate of abandonment, the ICC weighs the "public inconvenience and necessity" of the railway service against the financial cost to the railroad of operating an unprofitable corridor.[73]

In 1985, BNRC received a certificate of abandonment from the ICC allowing discontinued service on the rail line.[74] During the abandonment proceeding, the Minnesota Department of Transportation (MnDOT) petitioned the ICC for a 120-day "public use condition" in order to negotiate for the acquisition and placement of part of the rail line in the State Rail Bank Program.[75] The ICC granted the certificate of abandonment, finding that "portions of the right-of-way are suitable for other public purposes."[76] The ICC, however, denied MnDOT's petition to declare part of the rail corridor "suitable for public use for acquisition as part of the State Rail Bank Program."[77] In doing so, the ICC supported its decision with the reasoning that "a 'public use' did not include keeping the track and materials intact for future rail freight use and that MnDOT had failed to submit the required information for seeking a public use condition."[78]

After the ICC granted BNRC's request for abandonment of portions of the rail line, BNRC unsuccessfully attempted to sell its corridor for use as a tourist railway line.[79] In 1986 or 1987, BNRC

69. *Id.* at 417-18.
70. *Id.* at 418.
71. Glosemeyer v. Missouri-Kansas-Texas R.R. Co., 685 F. Supp. 1108, 1113 (E.D. Mo. 1988).
72. 49 U.S.C. §§ 10903, 10904 (Supp. 1991); 49 C.F.R. § 1152.50 (1990).
73. *Id.*; Vieux v. E. Bay Reg'l Park Dist., 906 F.2d 1330, 1339 (9th Cir. 1990).
74. *Hess*, 684 N.W.2d at 418.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

removed the tracks, bridges, and ties from the corridor.[80] In 1988, the Minnesota Legislature authorized the purchase of part of the corridor by the Department of Natural Resources (DNR) for the creation of the Paul Bunyan State Trail.[81] BNRC then conveyed the corridor by quitclaim deed to the DNR for $1.526 million.[82] In December 1991, the DNR opened the Trail for public use.[83] The Trail extends about ninety miles from Baxter to Bemidji, Minnesota, and is used by tourists for hiking, biking, horseback riding, and snowmobiling.[84]

C. The Abutting Property Owners

The land adjoining the rail corridor changed hands a number of times. In 1977, Brian and Amelia Sandberg acquired a parcel of land bordering the railroad corridor; the railroad line was still operational when the acquisition occurred.[85] In 1993 and 1995, the Sandbergs acquired two additional parcels, one of which was bisected by the Trail, while the other bordered it.[86] At the time of these acquisitions, the Trail was open for public use.[87] In 1992, approximately one year after the Trail opened, Duwayne Hess acquired a parcel that is partially adjacent to and partially bisected by the Trail.[88] Each of these landowners viewed themselves as successors-in-interest to the Walkers and the Joyces, the original grantors of the railroad right-of-way.

In 1998, the Sandbergs and Hess blockaded portions of the Trail where it crossed their individual properties.[89] The blockades prevented the public from using the Trail, forcing trail users to travel onto private property to get back onto the Trail, and necessitating a temporary re-routing of the Trail using county road embankments.[90] The DNR received numerous complaints from Trail users expressing frustration with having to go around the

80. *Id.*
81. *Id.* The Paul Bunyan State Trail purchase was authorized in Heartland and Paul Bunyan Trails Act, 1988 Minn. Laws ch. 679.
82. *Hess*, 684 N.W.2d at 418.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

blockaded portions of the Trail.[91] In 2002, the Sandbergs began to use the Trail as a private driveway to access their property even though there were alternative access routes available.[92] The Sandbergs also excavated and removed topsoil, trees, and bushes and stockpiled topsoil on the Trail.[93]

D. Quiet Title Action

In 2002, the DNR initiated a quiet title action seeking a declaration that the DNR owned the portions of the Trail being blockaded by the Sandbergs and Hess.[94] The district court issued a temporary injunction "prohibiting the Sandbergs from driving vehicles on the [T]rail, digging in the [Trail], and using the [T]rail as a driveway."[95] On cross-motions for summary judgment, the district court determined that the DNR owned a fee simple interest in the disputed property in question.[96] The district court found that the 1898 deed conveyed a fee simple determinable rather than an easement and that the state's MTA extinguished the reversionary right.[97]

E. The Court of Appeals' Approach

The court of appeals reversed, concluding that the railroad obtained an easement that had been subsequently abandoned by the railroad and that the Sandbergs and Hess owned the land in fee.[98] The court began its analysis by stating that it would determine the intent of the parties in addressing the question of what property interest the 1898 deed conveyed.[99] The court, however, did not proceed to examine the language in the deed and explain why the language indicated that the parties intended to grant an easement.[100] Instead, it examined *Zahner* and *Norton* and then reasoned that because the supreme court had never held that a conveyance to a railroad was a fee interest, the intent of the

91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. State v. Hess, 665 N.W.2d 560, 566 (Minn. Ct. App. 2003).
99. *Id.* at 563.
100. *Id.* at 564.

parties to the 1898 deed must have been to grant an easement.[101]

The court of appeals thus applied a presumption that a grant to a railroad is always an easement rather than a defeasible fee. The court supported this in the following manner: (1) "[w]e have found no Minnesota appellate cases in which right-of-way deeds to railroads have been construed to convey fee title;" (2) "[t]he primary purpose of such deeds has, rather, been determined to provide a right-of-way for use by the railroad during the period of time that the railway operated on the land subject to the conveyance;" and (3) "[w]e therefore conclude that the limiting language in the 1898 deed . . . reflects the parties' intent that the deed convey an easement, rather than a fee simple determinable . . . ."[102]

The court of appeals went on to find that the railroad abandoned the easement in 1986 or 1987 when it ceased railroad operations and removed its tracks from the corridor following receipt of the certificate of abandonment from the ICC.[103] The court determined that there were three affirmative acts by the railroad that indicated the railroad's intent to abandon its property interest: (1) the railroad sought and received a certificate of abandonment from the ICC in 1985 permitting discontinued service on the rail line between Brainerd and Bemidji; (2) the railroad tried unsuccessfully to sell the property for a tourist line; and (3) the railroad removed the tracks in 1986 or 1987.[104] The court also stated that its decision was influenced by the fact that the ICC denied MnDOT's request that the property be deemed suitable for public use for acquisition as part of the State Rail Bank Program.[105] Based on these findings, the court determined that the Sandbergs and Hess succeeded as fee owners to the property before the railroad conveyed the land to the State.[106] Although the court's analysis of the abandonment and the shifting public use issues is questionable,[107] it was never addressed by the Minnesota

101. *Id.*
102. *Id.*
103. *Id.* at 566.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* The court of appeals likely erred in its analysis of the abandonment issue. Abandonment is an intent to give up the property right and is determined by evidence of an intent to abandon. United Parking Stations, Inc. v. Calvary Temple, 257 Minn. 273, 278, 101 N.W.2d 208, 212 (1960). Mere nonuse does not

indicate an intent to abandon the property right: abandonment is shown by acts and conduct "clearly inconsistent with an intention to continue the use of the property for the purposes for which it was acquired." Norton v. Duluth Transfer Ry. Co., 129 Minn. 126, 132, 151 N.W. 907, 909 (1915).

There are three reasons why the court of appeals' analysis of the abandonment issue is flawed. First, the court misinterpreted the significance of an ICC certificate of abandonment and equated an intent to discontinue railroad service with an intent to abandon the property right. The court's confusion stems from the fact that the word "abandonment" has a different meaning in two disparate contexts. For purposes of federal regulation of railroads, "abandonment" refers to the discontinuance of rail service on a particular line, as approved by the ICC. For purposes of state law, "abandonment" refers to the relinquishment or termination of the property rights held under an easement. ICC approval of the discontinuance of rail service is not equivalent to relinquishment of the railroad's property rights in the easement. A railroad subject to the jurisdiction of the ICC may only abandon a line if it obtains the approval of the ICC. 49 U.S.C. §§ 10903, 10904 (Supp. 1991); 49 C.F.R. § 1152.50 (1990). In determining whether to issue a certificate of abandonment, the ICC weighs the "public convenience and necessity" of the railway service against the financial cost to the railroad of operating an unprofitable corridor. 49 U.S.C. § 10903 (Supp. 1991); Vieux v. E. Bay Reg'l Park Dist., 906 F.2d 1330, 1337 (9th Cir. 1990). The ICC, however, issues only *permission* to discontinue service; an ICC certificate does not *require* the railroad to discontinue service. *Vieux*, 906 F.2d at 1339. Accordingly, when the ICC grants a certificate of abandonment, it is simply determining that federal interstate commerce requirements do not necessitate current common carrier freight rail service on a line and is not evaluating the railroad's property interest in the corridor or whether a line is abandoned for purposes of state property law. Burlington N. R.R. Co. v. Kmezich, 48 F.3d 1047, 1051 (8th Cir. 1995); *Vieux*, 906 F.2d at 1339; Chevy Chase Land Co. v. United States, 733 A.2d 1055, 1085-86 (D. Md. 1999); Hennick v. Kansas City S. Ry. Co., 269 S.W.2d 646, 651 (Mont. 1954); Barney v. Burlington N. R.R. Co., 490 N.W.2d 726, 731 (S.D. 1992). Further, the ICC's action on MnDOT's request is irrelevant to the issue of state law abandonment under the facts of this case. When a party requests that a corridor be designated suitable for other public use, and the ICC grants such a request, the sole consequence under federal law is that the railroad is barred from selling or disposing of the property during the 180-day period. 49 U.S.C. § 10906 (Supp. 1982). For these reasons, the court of appeals was incorrect in viewing the certificate of abandonment and the denial of MnDOT's request as indicators of abandonment.

Second, the court of appeals considered the railroad's attempted sale for a tourist line and the removal of the tracks as indicators of abandonment in direct contravention to existing precedent. *See* Wash. Wildlife Pres., Inc. v. Minnesota, 329 N.W.2d 543, 547 (Minn. 1983) (abandonment of a corridor as a railroad right of way does not effect abandonment of the easement; removal of the tracks and termination of service are consistent with use of the railroad bed as a public recreational trail); Crolley v. Minneapolis & St. Louis Ry. Co., 30 Minn. 541, 545, 16 N.W. 422, 424 (1883) (sale of easement is not equivalent to an abandonment when the sale is for continued use of the property as a right of way).

Third, the court of appeals misapplied the shifting public use doctrine. Under Minnesota's shifting public use doctrine, recreational trail use is compatible and consistent with an easement's prior use as a rail line and imposes no additional burden on the servient estate. *Wash. Wildlife*, 329 N.W.2d at 545-46.

Supreme Court because that court determined that the grantors

In *Washington Wildlife*, thirteen of the fourteen deeds at issue conveyed fee simple absolute estates and one deed created an easement. The court analyzed whether the new use as a recreational trail was within the scope of the prior use. *Id.* at 547-48. Because the deeds contained no limiting language, the supreme court had to assume for purposes of its analysis of the abandonment question that the deeds conveyed easements and also to assume what limiting language the deeds contained. *Wash. Wildlife*, 329 N.W.2d at 546. The court framed the question based on the assumption that the deeds contained language limiting use of the land for railroad purposes based on the fact that the land had been used for railroad purposes. *Id.* at 547. The court, however, emphasized that it was only assuming that the deeds conveyed easements, and was careful to indicate that the deeds did not appear to be easements because they did not contain any limiting language. *Id.* at 546. The court stated:

> It is assumed that the deeds conveyed only an easement. Significantly, however, none of the deeds expressly limit the easement to railroad purposes, provide that the interest conveyed terminates if use for railroad purposes ceases, or provide that the easement would exist only for so long as the right-of-way was used for railroad purposes. While the grantors were undoubtedly aware that a railroad would be constructed on the land, none of the deeds limit the use to railroad purposes.

Id.

The court of appeals in *Hess*, however, seized upon the above passage in *Washington Wildlife* and used that language to distinguish the 1898 deed from the *Washington Wildlife* deeds. *Hess*, 665 N.W.2d at 565-66. The court reasoned that the 1898 deed was unlike the deeds at issue in *Washington Wildlife* because the 1898 deed contained language limiting the use of the land to railroad purposes until removal of the railway from the strips, while the *Washington Wildlife* deeds did not. *Id.* However, this passage relied on by the court of appeals in *Hess* does not indicate that the supreme court in *Washington Wildlife* was basing its conclusion regarding abandonment on the fact that the deeds did not contain limiting language. The deeds did not contain limiting language because they conveyed fee estates and the supreme court had to assume for purposes of analysis that the deeds did contain language limiting land use to railroad purposes. Accordingly, the court of appeals had no basis for distinguishing the 1898 deed from the *Washington Wildlife* deeds. The 1898 deed expressly limits use to railroad purposes and the deeds at issue in *Washington Wildlife* were assumed to contain language limiting use to railroad purposes. Indeed, there would have been no need for the court in *Washington Wildlife* to address the question whether the scope of the easements could accommodate a shift in public use unless the easements were assumed to be specifically limited to railroad use. If it were assumed that the easements were broad transportation easements, the supreme court would not have needed to resort to the shifting public use doctrine because trail use would be considered within the scope of such an easement. Thus, the 1898 deed contains the same limiting language as assumed in the *Washington Wildlife* deeds. Under *Washington Wildlife*, a railroad does not abandon a public easement if the property is transformed to meet changing needs but retains some character of the original easement. *Wash. Wildlife*, 329 N.W.2d at 547. Accordingly, the Paul Bunyan State Trail, a recreational trail, is compatible and consistent with the corridor's prior use as a rail line and the court of appeals in *Hess* erred in concluding otherwise.

conveyed a fee estate to the railroad rather than an easement.

IV. THE MINNESOTA SUPREME COURT'S ANALYSIS

The main question before the supreme court was whether the 1898 deed to the railroad company conveyed a fee simple determinable or an easement.[108] The court began its analysis by examining prior case law addressing the nature and scope of a conveyance to a railroad.[109] The court also discussed the MTA, its underlying policy objectives, and its significance for analyzing the 1898 deed.[110] Against the backdrop of previous case law and the MTA, the court then analyzed the intent of the parties in the 1898 deed. The court concluded that the language of the deed and extrinsic evidence indicated that the grantors conveyed a fee simple determinable estate to the railroad.[111] The court also concluded that the possibility of reverter was extinguished under the MTA.[112] The court therefore reversed the court of appeals and held that the district court was correct in granting summary judgment for the DNR because as a matter of law, the DNR now owned the subject property in fee simple absolute.[113]

A. *Conveyances to Railroads:* Chambers, Norton, Zahner, *and* the MTA

The court identified three cases involving the conveyance of a strip of land to a railroad company: *Chambers*,[114] *Norton*,[115] and *Zahner*.[116] Relying on *Chambers*, the court concluded that *Norton* and *Zahner* "provide[d] limited guidance . . . in determining whether the interest conveyed by the 1898 Walker/Joyce deed was an easement or a fee simple determinable."[117] This conclusion was crucial to the court's ultimate holding for several reasons. First, it swept away the foundations for the court of appeals' conclusion that there was a presumption that a conveyance to a railroad was an

108. *Hess*, 684 N.W.2d at 419-20.
109. *Id.* at 420-21.
110. *Id.* at 422-23.
111. *Id.* at 426-27.
112. *Id.* at 426-27.
113. *Id.* at 427.
114. Chambers v. Great N. Power Co., 100 Minn. 214, 110 N.W. 1128 (1907).
115. Norton v. Duluth Transfer Ry. Co., 129 Minn. 126, 151 N.W. 907 (1915).
116. Chi. Great W. Ry. Co. v. Zahner, 145 Minn. 312, 177 N.W. 350 (1920).
117. *Hess*, 684 N.W.2d at 421.

easement rather than a defeasible fee. Second, it freed the court from the binary analytical structure of the nineteenth century and its underlying anti-railroad animus in a manner consistent with the public policy objectives of the MTA. Finally, it permitted the court to evaluate the nature of the interest conveyed to the railroad company based on its longstanding approach that the intent of the grantor determines the nature and scope of the property interest conveyed.[118]

In *Chambers*, the question before the court was whether title to land acquired in condemnation proceedings for right of way purposes was an easement or a fee simple determinable. The court held that the conveyance was an easement rather than a fee simple absolute.[119] In explaining its decision, however, the *Chambers* court stated that the distinction between an easement and a fee simple determinable was immaterial to the resolution of the case because the intent of the grantor to create reversionary rights would be fulfilled regardless of whether the deed conveyed an easement or a defeasible fee.[120] The court stated:

> It . . . becomes immaterial whether the title [to a railroad right of way] amounted to a mere easement, or a qualified or terminable fee. Whatever the nature of the title, it would terminate whenever the company failed to perform the very function which it was created to perform, viz., operate a railroad over the land.[121]

The *Hess* court quoted the above passage from *Chambers* and observed that the *Chambers* court "recognized . . . that the distinction between an easement and a fee simple determinable was immaterial to the resolution of the case"[122] because "the interests at issue would have reverted to the grantors upon the termination of their use regardless of the distinction."[123] The court in *Hess* also acknowledged that courts in the nineteenth century often failed to make fine distinctions among the various property rights that the railroads could acquire because anti-railroad animus caused many courts to hold that all ambiguities in deeds were to be

118. *See id.*
119. *Chambers*, 100 Minn. at 219, 110 N.W. at 1129-30.
120. *Id.*
121. *Id.*
122. *Hess*, 684 N.W.2d at 420.
123. *Id.* at 421.

resolved in favor of the grantor landowners.[124] As a result, the courts in this period tended to impose a "binary structure on railroad title disputes," either holding that the railroad acquired a fee simple absolute and could do virtually anything it wanted with its land or that the railroad acquired an easement extinguishable under principles of abandonment.[125]

Chambers' observation that the property would revert automatically to the grantor regardless of whether the deed created an easement or a defeasible fee, coupled with the tendency of courts in this era to construe deeds to railroads as either conveying a fee simple absolute or an easement, led the *Hess* court to closely scrutinize the questions addressed in *Norton* and *Zahner*. Although the deeds at issue in *Norton* and *Zahner* appeared to be factually similar to the deed in *Hess*, the court recognized that these decisions would have limited precedential value in determining the nature of the property interest conveyed to the railroad company by the 1898 deed if the decisions followed the binary approach typical of nineteenth century courts or failed to address whether the deed at issue conveyed a defeasible fee or an easement.[126]

The court in *Hess* determined that the question in both *Zahner* and *Norton* was whether the deed to the railroad company granted a fee simple absolute or an easement.[127] In *Norton*, the railroad company charged with having abandoned an easement defended itself on the grounds that it was not bound by use limitations because it had acquired a fee simple absolute.[128] "[T]he appellants argued that the deed at issue 'conveyed an absolute fee title limited only as to use, namely, railroad right of way purposes, and that a failure to use it for that purpose or at all would not terminate the absolute title thus granted.'"[129] In *Norton*, the court held that the conveyance of a strip of land to a railroad company for a right of way conveyed an easement rather than an absolute title for which the appellants argued.[130] The *Norton* court did not address whether

124. *Id.* at 421 n.6.
125. *Id.*
126. *Id.* at 420-21 & n.6.
127. *Id.* at 420-21 (citing *Norton*, 129 Minn. at 129-31, 151 N.W. at 908; *Zahner*, 145 Minn. at 313, 177 N.W. at 350).
128. *Norton*, 129 Minn. at 129, 151 N.W. at 908.
129. *Hess*, 684 N.W.2d at 420 (citing *Norton*, 129 Minn. at 129, 151 N.W. at 908).
130. *Id.* (quoting *Norton*, 129 Minn. at 129, 151 N.W. at 908).

the deed constituted a fee simple determinable.[131] The court stated that its holding meant that "intentional abandonment of the property operates to extinguish all rights of the grantee without affirmative action on the part of the grantor."[132] The *Hess* court explained, based on *Chambers*, that the distinction between an easement and a fee simple determinable was not material to the case since under both scenarios, abandonment would extinguish the grantee's interest in the right-of-way.[133]

Similarly, *Zahner* addressed the question of whether the grantors conveyed an easement or a fee estate. The railroad company argued that it had acquired the land in fee and that the successor in title to the grantor had no right of access to a right of way that was conveyed outright in the granting clause.[134] As in *Norton*, the *Zahner* court focused on the issue of reversionary rights in justifying its holding and stated that "[w]ithin the principles of our holdings there was no intent to grant a fee, but an intent to grant a railroad right of way easement, which would revert upon abandonment."[135] The court in *Hess* explained that *Zahner* addressed the question of whether the deed conveyed an easement or a fee simple absolute and that the determinable fee option was not addressed.[136] Furthermore, the court explained, based on *Chambers*, that the distinction between an easement and a fee simple determinable was not material to the resolution of the case.[137]

After discussing the precedential value of *Norton* and *Zahner*, the *Hess* court went on to discuss the implications of the MTA for its methodology of deed construction.[138] The MTA provides that no action affecting the possession or title of real estate may be commenced against a claim of title that has been of record for at least forty years unless the adverse claimant has recorded a notice

131. *Id.*
132. *Norton*, 129 Minn. at 131, 151 N.W. at 908.
133. *Hess*, 684 N.W.2d at 421 ("As we had recognized in *Chambers*, the interests at issue would have reverted to the grantors upon the termination of their use regardless of the distinction.").
134. Chicago Great W. Ry. Co. v. Zahner, 145 Minn. 312, 312, 177 N.W. 350, 350 (1920).
135. *Id.* at 314, 177 N.W. at 350.
136. *Hess*, 684 N.W.2d at 420-21 & n.6.
137. *Id.*
138. *Id.* at 422.

of the adverse claim within that forty-year period.[139] In *Hess*, the court recognized that the stated purpose of the MTA is "to prevent restrictions on uses that have not been reasserted as a matter of record within the last 40 years from 'fetter[ing] the marketability of title.'"[140] The court also stated that two of its previous decisions recognized that the passage of the MTA was "'a marked departure from the policy and operation underlying our land transfer system'"[141] and represented "'a new point of departure for the process of judicial reasoning' in real estate law."[142]

The court in *Hess* then explained that there were two reasons why the MTA was significant for its analysis of the nature of the interest conveyed by the 1898 deed.[143] First, the MTA now makes the distinction between an easement and a fee simple determinable material because an interest in fee simple determinable may be subject to the MTA's conclusive presumption of abandonment.[144] Second, the court stated that "public policy reasons behind the [MTA], such as finality of conveyances and enforcing settled expectations, should be considered in our framework for analyzing the intent of the parties in a conveyance of land for right of way purposes in a deed."[145] In a footnote, the court further elaborated on the public policy interests that underlie the MTA by quoting extensively from a law review article by Wright and Hestor.[146] In those passages, Wright and Hestor explain that the pubic has an interest in settled expectations and an interest in preserving corridors for trails and utilities.[147] Both of those interests are served by finding fee title in the railroad and by abandoning common law doctrines that narrow the scope of interests in railroad corridors.[148] According to Wright and Hestor, such an approach would further the pubic policy of quieting title that underlies various property doctrines and would be consistent with the expectation of

139. *Id.* (citing MINN. STAT. § 541.023, subd. 1 (2002)).
140. *Id.* (quoting MINN. STAT. § 541.023, subd. 5 (2002)).
141. *Id.* (quoting Hersh Props., LLC v. McDonald's Corp., 588 N.W.2d 728, 734 (Minn. 1999)).
142. *Id.* (quoting Wichelman v. Messner, 250 Minn. 88, 99, 83 N.W.2d 800, 812 (1957)).
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at n.7 (quoting Wright & Hester, *supra* note 38, at 384-85).
147. *Id.* at 422.
148. *Id.*

adjoining property owners that they not receive the windfall of a rail corridor.[149] In short, it is in the public interest to abandon the century-old anti-railroad animus.[150]

The *Hess* court's conclusion that *Norton* and *Zahner* provided limited guidance in evaluating the 1898 deed was crucial to its ultimate holding for three reasons. First, it swept away the foundations for the court of appeals' conclusion that there was a presumption that a conveyance to a railroad was an easement rather than a defeasible fee.[151] The court of appeals had reviewed *Norton* and *Zahner* and concluded that because the Minnesota courts had never held that a conveyance to a railroad company was a fee estate, the parties to the 1898 deed intended to convey an easement.[152] This presumption, however, conflicted with the supreme court's longstanding rule that the intent of the grantor determines that nature of the interest conveyed.[153] The supreme court, by recognizing that the courts in *Norton* and *Zahner* were evaluating whether the estate conveyed was an easement or a fee simple absolute and that the distinction between a fee simple determinable and an easement was not material to the outcome of these cases, effectively distinguished *Norton* and *Zahner* from *Hess* and, at the same time, exposed the court's binary approach to deed construction.

Second, the *Hess* court concluded that *Norton* and *Zahner* were of limited precedential value in evaluating the nature of the interest conveyed by the 1898 deed, which freed the court from the binary analytical structure of the nineteenth century and its underlying anti-railroad animus in a manner consistent with the public policy objectives of the MTA. The binary approach to deed construction reflected not only an anti-railroad animus, but the doctrinal reality that the distinction between an easement and a fee simple determinable was immaterial in giving effect to reversionary rights.[154] Once the MTA had been enacted, however, the *Hess* court recognized that the distinction between an easement and a fee simple determinable was now legally significant and that the stated public policy objectives underlying the MTA were not served by

149. *Id.*
150. *Id.*
151. *Id.* at 424 & n.8.
152. State v. Hess, 665 N.W.2d 560, 566 (Minn. Ct. App. 2003).
153. *Hess*, 684 N.W.2d at 428-29.
154. *See* Wright & Hester, *supra* note 38, at 384-85.

continuing to interpret deeds in a manner that reflected the nineteenth century's anti-railroad animus.[155] Indeed, the court understood that finding fee title in the railroad would further the MTA's public policy of quieting title when there was little "expectation on the part of the adjoining landowners to receive the windfall of a rail corridor."[156] The court also understood that there was no reason to continue the anti-railroad animus because finding fee title in the railroad furthers the public interest in preserving corridors for trails and utilities when landowners do not have title to the corridor land, heirs of the grantor are long gone, and the corridor can continue to "provide vital public utility, recreational, environmental, and transportation services."[157] By exposing the doctrinal and historical underpinnings of *Norton* and *Zahner* and contrasting them with the modern doctrinal and policy objectives of the MTA, the court provided a compelling normative justification for jettisoning *Norton* and *Zahner*'s binary structure and fully restoring its longstanding methodology for interpreting deeds based on the grantor's intent.

Third, the *Hess* court's conclusion that *Norton* and *Zahner* were of limited precedent permitted the court to evaluate the nature of the interest conveyed to the railroad company based on its longstanding approach that the intent of the grantors determines the nature and scope of the property interest conveyed. Indeed, on numerous occasions the supreme court has stated that one examines "the intent of the grantor, as expressed in the deed and in light of the surrounding circumstances" in determining the nature and scope of a conveyance.[158] In both *Norton* and *Zahner*, the court stated that it would examine the intent of the parties as expressed in the deed to evaluate whether the grantor conveyed a fee interest or an easement.[159] Based on *Hess*, however, it is apparent that the court believed that the intent of the grantor was being evaluated under the confines of a legal doctrine and historical animus towards railroads. Thus, the court in *Hess* established an approach to deed construction that removed the

155. *Hess*, 684 N.W.2d at 422.

156. *Id.* at 422 n.7 (quoting Wright & Hester, *supra* note 38, at 385-86).

157. *Id.* (quoting Wright & Hester, *supra* note 38, at 385-86).

158. *Id.* at 423 (citing Consol. School Dist. No. 102 v. Walter, 243 Minn. 159, 162, 66 N.W.2d 881, 883 (1954)).

159. Chi. Great W. Ry. Co. v. Zahner, 145 Minn. 312, 313-14, 177 N.W. 350, 350 (1920); Norton v. Duluth Transfer Ry. Co., 129 Minn. 126, 130-31, 151 N.W. 907, 908 (1915).

constraints of the ancient legal doctrine and historical animus.

B. The Parties' Intent

Against the backdrop of the MTA and its prior cases, the court evaluated the nature of the interest conveyed to the railroad company by examining the language of the deed to discern the intent of the parties.[160] The court noted that its construction would be based on the entire deed rather than disjointed parts and that if the deed's language were ambiguous, it could consider evidence of the surrounding circumstances and the situation of the parties to shed light on the intent of the parties.[161]

To determine the intent of the parties, the court then examined the language of the granting clause, the use of the terms "so long as" and "right of way" in the habendum clause, the provision granting the railroad company permission to erect snow fences, and the release of dower rights.[162] Because the deed was ambiguous on the intent of the parties, the court also examined extrinsic evidence.[163] Based on all of these factors, the court concluded that the parties intended to convey a fee simple determinable rather than an easement.[164]

In doing so, the court first turned to the language of the granting clause, which states that the grantors "hereby grant, bargain, sell and convey unto the said company, its successors and assigns, a strip, belt or piece of land."[165] The court determined that the granting clause "expressly conveys land rather than mere use of the land."[166]

The court then turned to the language of the habendum clause, which states: "Provided that this Grant or Conveyance shall continue in force, so long as the said strips of land shall be used for Right of Way and for Railway purposes; but to cease and terminate if the Railway is removed from the said strips."[167] The court

160. *Hess*, 684 N.W.2d at 423.
161. *Id.*
162. *Id.* at 424.
163. *Id.* at 425-26.
164. *Id.* at 426.
165. *Id.* at 423.
166. *Id.* The granting clause of the 1898 deed expressly transfers an interest in land and does not include the term "right of way." The granting clause generally controls the determination of whether a fee title or easement is granted. *See* Korpela, *supra* note 18, § 5(c) at 973.
167. *Hess*, 684 N.W.2d at 423.

determined "that the use of the phrase 'so long as' in the clause provides clear evidence of the grantors' intent to convey a determinable fee because this phrase is typically used in a conveyance of a fee simple determinable."[168]

The court also determined that the use of the term "right of way" in the habendum clause did not provide evidence of the parties' intent as to the nature of the conveyance because the term "right of way" has a dual meaning and because Minnesota law does not presume that a conveyance of land to a railroad company for "right of way" purposes is an easement.[169] The court first observed that courts have long recognized that the term "right of way" is ambiguous because it may be used to describe (1) "a right of passage over any tract," suggesting an easement, or (2) the "land which railroad companies take upon which to construct their road-bed, suggesting conveyance of a fee interest."[170] Accordingly, the use of the term "right of way" does not necessarily mean that the conveyance is an easement.[171] The court then concluded that this understanding of the dual nature of the term "right of way" is consistent with Minnesota law, particularly the MTA, which disfavors encumbrances on title.[172] In light of the MTA, the court

168. *Id.* at 424. Construction of the deed as a fee would give effect to the defeasance clause in the habendum clause. If the deed intended to convey an easement, no reversionary clause would be necessary because the abandonment of the easement would automatically extinguish the easement even if the deed contained no reversionary clause.

169. *Id.*

170. *Id.* (citing Bosell v. Rannestad, 226 Minn. 413, 418, 33 N.W.2d 40, 43-44 (1948)). Other courts have recognized the two meanings of "right of way" and have concluded that the mere presence of the term "right of way" in a deed does not by itself indicate an intent to convey an easement. *See, e.g.*, King County v. Rasmussen, 299 F.3d 1077, 1085 (9th Cir. 2002); Clark v. CSX Transp., Inc., 737 N.E.2d 752, 758 (Ind. Ct. App. 2000); Brown v. State, 924 P.2d 908, 914 (Wash. 1996) (en banc). In addition, the fact that the term "right of way" is used in the habendum clause does not mean that an easement was conveyed. In general, the habendum clause "may explain, enlarge, or qualify, but cannot contradict or defeat, the estate granted" in the granting clause. N.Y. Indians v. United States, 170 U.S. 1, 20 (1898).

171. *Hess*, 684 N.W.2d at 424.

172. *Id.* Such a construction of the term "right of way" carries out the underlying purpose of the MTA that outmoded restrictions on use that have not been reasserted as a matter of record within the last forty years "not fetter the marketability of real estate." MINN. STAT. § 541.023, subd. 5 (2002). The Minnesota Supreme Court has stated that this express legislative policy "should be accepted as a new point of departure for the process of judicial reasoning." Wichelman v. Messner, 250 Minn. 88, 98, 83 N.W.2d 800, 812 (1957).

then stated that "[t]o the extent that *Norton* and *Zahner* could be read to suggest that *any* conveyance of a right of way to a railroad is an easement, they are no longer good law."[173] For all these reasons, the court concluded that the use of the term "right of way" in the habendum clause did not necessarily make the conveyance an easement.[174]

Next, the court described additional language in the 1898 deed that indicated the grantors' intent to convey a fee simple determinable.[175] The court highlighted language in the deed conveying the 100-foot-wide corridor and separate language describing the conveyance of four additional strips of land that increase the width of the corridor up to 200 feet.[176] The court observed that the deed uses different language for the grant of the corridor and the grant of an easement to the railroad company to erect snow fences up to 100 feet beyond the edges of the corridor.[177] The language regarding the snow fences used the term "right" as opposed to the phrase "grant, bargain, sell and convey."[178] Based on this different language used by the parties for the grant of the corridor and the grant of the easement for snow fences, the court concluded that the parties were aware of the distinction between the conveyance of an easement and a fee simple determinable and intended to convey an ownership interest in the land rather than mere use of the land.[179]

The court then pointed to additional language in the 1898 deed that shed light on the intent of the parties to convey a fee estate: the deed contained a release of dower rights.[180] "'Dower rights' are an interest that a wife has in the real estate of her husband."[181] The release provides: "And the said Harriet G. Walker and Hattie F. Akeley hereby relinquish their right of dower in the tracts hereby conveyed."[182]

An easement is not title to the land and can be conveyed

173. *Hess*, 684 N.W.2d at 424 n.8.
174. *Id.* at 425.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* (citing Stitt v. Smith, 102 Minn. 253, 254, 113 N.W. 632, 633 (1907)).
182. *Id.* at 417. According to the court, the words "Hattie F. Akeley" and "relinquish" were illegible. *Id.* n.2.

without the relinquishment of the wife's dower rights.[183] The court noted that the presence in a deed to a railroad of language releasing dower rights, while not dispositive, provides evidence of an intent to convey a fee interest rather than an easement.[184]

Finally, the court noted that because the 1898 deed was ambiguous about the intent of the parties regarding the nature of the interest conveyed, it could look to extrinsic evidence of the surrounding circumstances of the parties in relation to the conveyance, such as the subsequent conduct of the parties.[185] On June 17, 1901, W.T. Joyce and Clotilde G. Joyce, grantors of the 1898 deed, conveyed by deed their interest in certain land adjacent to the railway corridor created by the 1898 deed.[186] The 1901 deed to Akeley described the land conveyed and then provided: "Excepting and reserving there from the land heretobefore conveyed to the Park Rapids and Leech Lake Railway and to the Brainerd and Northern Minnesota Railway for right-of-way."[187]

When the term "excepting" is used in a deed, it typically indicates that nothing passes.[188] A conveyance referring to a preexisting easement typically indicates that the conveyance is "subject to" the easement.[189] Accordingly, the court concluded that the 1901 deed provided additional support that the parties to the 1898 deed intended to convey a fee simple determinable rather than an easement.[190]

In sum, the court concluded that the language of the granting clause, the use of the terms "so long as" in the habendum clause, the provision granting the railroad company permission to erect snow fences, the release of dower rights, and the language of the

183. *Id.* at 425 (citing Chicago & S.W. R.R. Co. v. Swinney, 38 Iowa 182, 182 (1874); 28 C.J.S. *Dower and Curtesy* § 12 (1996)).

184. *Id.*; *see also* Brewer & Taylor Co. v. Wall, 769 S.W.2d 753, 755 (Ark. 1989); Coleman v. Mo. Pac. R.R. Co., 745 S.W.2d 622, 624 (Ark. 1988); Elton Schmidt & Sons Farm Co. v. Kneib, 507 N.W.2d 305, 309 (Neb. Ct. App. 1993). *But see* Hawk v. Rice, 325 N.W.2d 97, 100 (Iowa 1982) (holding that granting clause indicated conveyance of easement despite the release of dower in the deed).

185. *Hess*, 684 N.W.2d at 425-26.

186. *Id.* at 426.

187. *Id.*

188. *Id.* (citing Carlson v. Duluth Short Line Ry. Co., 38 Minn. 305, 306, 37 N.W. 341, 341 (1888)); *see also* King County v. Rasmussen, 299 F.3d 1077, 1087 (9th Cir. 2002) ("By excepting the right of way . . . the [subsequent] conveyances betray an understanding that the Railway owned the strip of land and did not merely have a right to enter the strip.").

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

190. *Id.*

1901 deed all indicated that the parties intended to convey a fee simple determinable.[191] The court noted that this conclusion "best serves many of the policy reasons underlying the [MTA]."[192] Because the railroad acquired a fee simple determinable in the 1898 deed, the grantors retained only the possibility of a reverter.[193] The court went on to hold, however, that this future interest was extinguished under the MTA because it was not periodically recorded by the grantors' successors.[194] Accordingly, the railroad's defeasible fee interest had long ago ripened into a fee simple absolute and the state owned the land in fee simple absolute.[195]

V. CONCLUSION

In *Hess*, the Minnesota Supreme Court followed the public policy objectives of the legislature in the MTA and (1) refused to create a presumption that a conveyance of a right of way to a railroad company is an easement rather than a defeasible fee and (2) extricated itself from prior case law that reflected an anti-railroad animus and a binary structure of deed interpretation.[196] In doing so, the court fully embraced its longstanding methodology of deed interpretation that the intent of the parties determines the nature of the conveyance and established a strong legal and policy foundation protecting the past and future conversion of rail corridors into recreational trails.[197] The court's decision in *Hess* means that future challenges to recreational trails owned by the state cannot rely on a presumption that the original conveyance was an easement. Rather, abutting property owners will have to demonstrate that the parties to an ancient deed intended to convey an easement in order to challenge a rails-to-trails conversion. *Hess* is a clear signal to trail opponents that Minnesota's public interest supports interpreting deeds to railroads as conveying fee estates rather than easements. For all these reasons, *Hess* reassures the state that it owns its recreational trails, promotes the public interest, and avoids plunging the state into a costly parcel by parcel battle to save its recreational trails.

191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 427.
195. *Id.*
196. *Id.* at 424.
197. *Id.*