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Case No. A10-1002

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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Glenn R. Britney and Charlotte Britney,  
*Plaintiffs-Respondents,*

vs.

Swan Lake Cabin Corporation, a Minnesota corporation,  
*Defendant-Appellant.*

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APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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**LEGAL ISSUES**

- I. DID THE DISTRICT COURT ERR IN CONCLUDING IT WAS DEFENDANT SWAN LAKE'S RESPONSIBILITY TO FOLLOW THE PROCEDURES REQUIRED BY MINN. STAT. §508.671 WHEN PLAINTIFF BRITNEYS COMMENCED THE ACTION TO DETERMINE THE BOUNDARY LINE BETWEEN THE PARTIES.

The District Court ruled it was the Defendant Swan Lake's responsibility to follow the procedure of Minn. Stat. §508.671.

*Apposite Cases:* In Re Hauge, 766 N.W. 2d 50 (Minn. App. 2009)

- II. DID THE DISTRICT COURT ERR BY CONCLUDING THAT SWAN LAKE HAD NOT PROVED BY CLEAR AND CONVINCING EVIDENCE ITS BOUNDARY LINE WITH THE BRITNEYS BY ACQUIESCENCE.

The District Court ruled that Swan Lake had not proved its boundary line by practical location by acquiescence.

*Apposite Cases:* Allred v. Reed, 362 N.W.2d 374 (Minn. App. 1985)

Engquist v. Wirtjes, 68 N.W.2d 412  
(Minn. 1955)

Fishman v. Nielsen, 53 N.W.2d 553  
(Minn. 1952)

Fredericksen v. Henke, 209 N.W. 257  
(Minn. 1926)

**STATEMENT OF THE CASE**

This matter was decided by The Honorable Lois J. Lang, Judge of District Court, Itasca County, Ninth Judicial District.

This case was commenced to determine the boundary line between registered property lots owned by Plaintiffs Glenn Britney and Charlotte Britney ("Britneys") and Defendant Swan Lake Cabin Corporation ("Swan Lake"). Britneys served a Summons and Complaint on Swan Lake on or about November 5, 2008. Britneys alleged that Swan Lake refused to remove certain improvements from Lot 5, Block 2, SWAN LAKE, that Britneys' claim to own based on a survey Britneys had Northern Lights Survey prepare in 2007. Britneys allege they are entitled to the whole of Lot 5, Block 2, SWAN LAKE.

Swan Lake served an Answer and Counter-claim on Britneys on or about January 6, 2009. Swan Lake alleges it owns Lot 4, Block 2, SWAN LAKE, and part of Lot 5, Block 2, SWAN LAKE, and that the boundary line described in a survey prepared by Les Hartman in 1977 established the boundary line between the parties' lots and also that Britneys acquiesced in said boundary line for the requisite statutory period to establish boundary line by practical location.

Britneys served an Answer to Counterclaim on Swan Lake on or about April 2, 2009. Britneys deny Swan Lake's claim to determine the boundary line between the parties by practical location and assert that Minn. Stat. §508.67 is not retroactive.

The matter came on for trial before the Honorably Lois J. Lang on November 23, 2009. The case was deemed submitted on December 14, 2009, the date the parties submitted final written arguments and proposed Findings of Fact.

The Court issued Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and a Memorandum on January 14, 2010, in favor of Britneys.

Swan Lake filed a Notice of Motion and Motion for a new Trial or Amended Findings and an Affidavit of David Peterson on February 9, 2010. The Court heard Swan Lake's Motion on March 8, 2010. The Court issued an Order and Judgment denying Swan Lake's Motion on April 27, 2010.

Swan Lake served and filed its Notice of Appeal and Statement of the Case on June 4, 2010. A transcript was requested. The Court Reporter mailed the completed transcript to counsel on July 6, 2010. When adding three days for mailing, Swan Lake's brief is due August 8, 2010.

### STATEMENT OF FACTS

Britneys are the owners of real property in Itasca County, Minnesota, legally described as Lot 5, Block 2, SWAN LAKE, which is registered property evidenced by Certificate of Title No. 16,169. (Tr. Ex. 2) Britneys acquired title to Lot 5, Block 2, SWAN LAKE, from Mrs. Britney's parents George W. Hill and Esther C. Hill on or about May 30, 1990. (Tr. Ex. 2 and 3) George W. Hill and Esther C. Hill had acquired title to Lot 5, Block 2, SWAN LAKE, on or about September 23, 1950, as evidenced by Certificate of Title No. 4924. (Tr. Ex. 3)

Swan Lake is the owner of real property in Itasca County, Minnesota, legally described as Lot 4, Block 2, SWAN LAKE, which is registered property evidenced by Certificate of Title No. 16,031. (Tr. Ex. 17) Swan Lake acquired title to Lot 4, Block 2, SWAN LAKE, from five children of Oscar Johnston on or about November 3, 1989. (Tr. 125) The five children of Oscar Johnston acquired title to Lot 4, Block 2, SWAN LAKE, on or about February 17, 1955, as evidenced by Certificate of Title No. 6946. (Tr. Ex. 18) Oscar Johnston acquired title to Lot 4, Block 2, SWAN LAKE, around 1909 and the real property has been continuously owned by members of the Johnston family from 1909 up to the present time. (Tr. 127)

David L. Peterson, whose date of birth is May 18, 1933, (Tr. 122) is a grandson of Oscar Johnston (Tr. 127) and a shareholder of Swan Lake (Tr. 124). David L. Peterson has visited the property several times each year from 1938 when he was 5 years old. (Tr. 127) David L. Peterson recalled that from the early 1940s there existed in the northeast corner of Swan Lake's parcel a shed near Jefferson Boulevard and that a sauna existed on the easterly side of Swan Lake's parcel. (Tr. 129) (Tr. Ex. 4) Also a wire mesh fence with 6 inch squares and about three feet high attached to iron posts and trees existed on the parcel from Jefferson Boulevard down to the sauna. (Tr. 131 and 132) (Tr. Ex. 4) David Peterson can remember the fence being present from his earliest recollection of going to the cabin at age 5. (Tr. 131) The fence was approximately 3 feet high and is located on the eastern edge of the lot and a little bit inside of the property line. (Tr. 131 and 132) The fence, which was a metal wire fence with roughly six inch spacing between the wires both horizontally and vertically, starts at the south end of the shed and ends at the north of the sauna. (Tr. 131-132)

Dorothy Haataja, whose date of birth is July 30, 1934, (Tr. 167) and who is a granddaughter of Oscar Johnston and a shareholder of Swan Lake, (Tr. 168) lived in Nashwauk from the

time she was a child up to the time she moved to the Twin Cities to work around 1950. (Tr. 169) As a child, Dorothy Haataja spent a good part of her summers at the Swan Lake property and thereafter up to the present time has visited the property several times a year. (Tr. 170, 171) Dorothy Haataja recalled that from the mid-1940's there existed in the northeast corner of the Swan Lake parcel a shed near Jefferson Boulevard, that a sauna existed on the easterly side of the Swan Lake parcel and that a wire fence existed on the premises from Jefferson Boulevard down to the sauna which provided a barrier to prevent going to the property to the east and vice versa. (Tr. 171, 172, 173)

Plaintiff Charlotte Britney, whose date of birth is September 27, 1946, lived on the Britney property as her residence from the time her parents George W. Hill and Esther C. Hill purchased the property in 1950 until she left home in the early 1960s. (Tr. 10) Charlotte Britney recalls in the early 1950s the existence of the shed between the Swan Lake cabin and the Britney house, which belonged to the neighbor to the west (Swan Lake). (Tr. 12) Charlotte Britney also recalled the existence of a sauna between the Swan Lake cabin and the Britney house which belonged to the neighbors to the west. (Tr. 12) Charlotte Britney also recalled the

existence of a wire mesh fence attached to iron posts from Jefferson Boulevard down to the sauna which was clearly visible and separated the Britney property from the Swan Lake property. (Tr. 15)

Charlotte Britney recalled the fence as being in existence in the 1950's. (Tr. 15)

Charlotte Britney, with the assistance of her father, had planted some trees she obtained from her elementary school in the mid-1950's on the westerly side of the Britney parcel which were planted in a zig-zag manner and which were not intended to be the boundary between the Britney and Swan Lake parcels. (Tr. 26)

In 1977, at the request of Swan Lake's predecessors in interest, a survey was prepared by L. M. Hartman, a registered land surveyor, Reg. No. 5848, to determine the easterly and westerly boundary lines of the Swan Lake property hereinafter the "Hartman survey". (Tr. Ex. 4) The Hartman survey placed 3 iron pins on the easterly boundary of the Swan Lake parcel being the boundary with the Britney parcel and placed 4 iron pins on the westerly boundary of the Swan Lake parcel. (Tr. Ex. 4) The Hartman Survey also located on the survey the shed near Jefferson Boulevard, the sauna, and the fence, all on the Swan Lake parcel. (Tr. Ex. 4) The said easterly line of the

Swan Lake parcel on the Hartman survey is a straight line that goes from Jefferson Boulevard to the shore of Swan Lake. (Tr. Ex. 4)

Shortly after the Hartman survey was completed in 1977, Dorothy Haataja was given some trees from a church located a few lots down the lake to the west of the Swan Lake parcel which she and her aunt planted a few feet in from the easterly line of the Swan Lake property by measuring 75 feet from one of the Hartman pins establishing the westerly boundary line of the Swan Lake parcel because the third iron pin on the easterly boundary of the Swan Lake property could not be located. (T. 177, 180, 182.) The trees planted by Dorothy Haataja were planted in a straight line and were intended by Dorothy Haataja to be a buffer on the easterly boundary line of the Swan Lake property allowing some room for future growth of these trees. (Tr. 181, 182)

Britneys had a survey prepared in 2007 by Northern Lights Surveying and Mapping, Inc., which shows 2 of the 3 iron pins locating the easterly line of the Swan Lake property on the Hartman Survey as well as the shed, the sauna, and the remnants of the fence. (Tr. Ex. 5) The Northern Lights survey confirms the location of the boundary line between the Swan Lake and Britney parcels. (Tr. Ex. 5)

All parties agree that over the ensuing years, after the 1950s, brush grew up on the fence line and the fence line deteriorated so that now only remnants of the old fence line appear and that the brush which grew up and the planted trees serve as a buffer and boundary line between the respective parcels. (Tr. 22, 26, 79, 142)

Britneys purchased the Britney parcel from Mrs. Britney's parents around 1990 and shortly thereafter demolished the old structure on the premises and proceeded to construct a new home on the premises. (Tr. 11)

Britneys constructed a roadway access to the lake to the west of their home in the early 1990s the westerly boundary of said roadway surface being built up with logs so as to be entirely easterly of the boundary line established by the Hartman survey. (Tr. 74)

Britneys and their predecessors have used no part of the Swan Lake property westerly of the boundary line as established in the Hartman survey except for a slope encroachment for the roadway access to the lake and temporarily storing some lumber partially across the Hartman survey line. (Tr. 91)

The Northern Lights Surveying and Mapping survey shows the northerly line of Lot 4, the Swan Lake parcel, along

Jefferson Boulevard to be 75 feet (Tr. Ex. 5); the Hartman survey shows the easterly line of the Swan Lake parcel to be just to the east of the boundary fence and the total width of the lot to be 75 feet. (Tr. Ex. 4)

Predecessors of Swan Lake established the easterly boundary of its property by practical location by the early 1960s said property line being just easterly of the fence which then existed on the property which line was easterly of Swan Lake's predecessors' shed and sauna and which boundary was confirmed by the Hartman survey in 1977 and the trees planted on the easterly boundary line by Dorothy Haataja around 1980. (Tr. Ex. 4 and 5)

Britneys and their predecessors acquiesced with the Hartman survey and have made no permanent use whatsoever of the property westerly of the common boundary with Swan Lake as shown in the Hartman survey. (Tr. 91)

The location of the platted line between Swan Lake's Lot 4, SWAN LAKE, and Britney's Lot 5, SWAN LAKE, was unknown until the 2007 survey by Northern Lights Surveying and Mapping, Inc. (Tr. 16)

## ARGUMENT

**I. THE DISTRICT COURT ERRED IN CONCLUDING IT WAS DEFENDANT SWAN LAKE'S RESPONSIBILITY TO FOLLOW THE PROCEDURES REQUIRED BY MINN. STAT. §508.671 WHEN PLAINTIFFS BRITNEY COMMENCED THE ACTION TO DETERMINE THE BOUNDARY LINE BETWEEN THE PARTIES.**

The district court erred in concluding it was the duty of Swan Lake to join the Britneys' mortgagee in this action. Matters related to Torrens properties are governed by Chapter 508 of the Minnesota Statutes (the Torrens Act). In re Geis, 576 N.W.2d 747, 749-50 (Minn.App.1998).

The issue in this case is the determination of the boundary line between Lot 4, Block 2, SWAN LAKE (the Swan Lake Parcel) and Lot 5, Block 2, SWAN LAKE (the Britney parcel). Both lots are registered (Torrens) property.

Effective August 1, 2008, the common law doctrine of practical location of boundaries applies to registered land whenever registered. Laws of 2008, c. 341, Art. 3, Section 2, which amended Minn. Stat. 508.02. The amended statute is retroactive. The amended statute applies to the Swan Lake/Britney boundary line.

When the Torrens Act specifies the procedure necessary to take some action regarding registered land, parties and district courts must follow this procedure. See In re Brainerd

Nat'l Bank, 383 N.W.2d 284, 286-87 (Minn.1986) (holding that the district court had no authority to vacate a decree of title of registered land for excusable neglect under Minn. R. Civ. P. 60.02, because rule 60.02 is inconsistent with certain provisions of the Torrens Act); Park Elm Homeowner's Ass'n v. Mooney, 398 N.W.2d 643, 646-47 (Minn.App.1987) (holding that the district court lacked authority to issue an order that adversely affected title to registered land because the district court did not comply with the Torrens Act). Phillips v. Dolphin, 776 N.W.2d 755, 758 (Minn.App.2009).

The procedure for judicially determining the boundary line between Torrens' properties, in a proceeding following registration, is set forth in Minn. Stat. § 508.671: "Section 508.671 shall apply in a proceedings subsequent to establish a boundary ... for registered land." Minn. Stat. § 508.02; In re Hauge, 766 N.W.2d 50, 57 (Minn. App. 2009); see Minn. Stat. §645.44, subd. 16 (2008) (stating that "[s]hall is mandatory"). A proceeding under section 508.671 must follow several steps, including: (1) applying by a verified petition to have the district court determine the boundary lines in question; (2) filing the petition with the county recorder; (3) filing a certified copy of the petition with the registrar of titles if any adjoining lands are registered; (4) surveying

the premises by a licensed surveyor; (5) filing the resulting survey that shows the correct location of the boundary lines; (6) referring the petition to the examiner of titles for examination and report to the district court; (7) providing notice to all interested parties; (8) fixing the boundaries and establishing judicial landmarks by court order; and (9) filing a copy of the final order with the registrar of titles by the court administrator.

In this case, the Britneys began this action for a determination of the boundary between their property and the property of Swan Lake pursuant to a survey the Britneys had Northern Lights Surveying prepare in 2007. Britneys, the parties who commenced this action, did not follow the steps laid out in Minn. Stat. § 508.671. Neither did the district court ensure these procedures were followed. The Britneys agreed at the beginning of the trial that the issue in this case was the determination of the boundary line between the parties' parcels and that the recently revised Minn. Stat. §508.02 applied to actions to determine boundary by practical location on Torrens property.

Pursuant to Minn. Stat. § 508.671, either the moving party, Britneys, or the court should have ensured that a proper application by verified petition was made to the

district court to determine the boundary lines, that the petition was filed with the County Recorder, that a certified copy of the petition was filed with the Registrar of Titles, that the survey showing the alleged correct boundary lines was filed, that the petition was referred to the Examiner of Titles for examination and report to the district court and providing notice to all interested parties. Minn. Stat. §508.671 (2009).

The Court erroneously imposed these duties on the Defendant Swan Lake. This determination was a significant factor in the Court ruling against Swan Lake. The Court had no authority to issue an order affecting registered property because the Court failed to assure compliance with the Torrens Act.

**II. THE DISTRICT COURT ERRED BY CONCLUDING THAT SWAN LAKE HAD NOT PROVED BY CLEAR AND CONVINCING EVIDENCE ITS BOUNDARY LINE WITH THE BRITNEYS BY ACQUIESCENCE.**

**i. Standard of Review.**

In boundary-line cases, the findings of the district court will not be disturbed unless "the evidence taken as a whole furnishes no substantial support for them or where it is manifestly or palpably contrary to the findings." Engquist v. Wirtjes, 68 N.W.2d 412, 416 (Minn. 1955) (quotation omitted).

But whether the findings of fact support a district court's conclusions of law and judgment is a question of law, which we [Appellate Court] review de novo. Donovan v. Dixon, 113 N.W.2d 432, 435 (Minn. 1962) (noting that "it is for this court to determine whether the findings support the conclusions of law and the judgment"). Ebenhoh v. Hodgman, 642 N.W.2d 104, 108 (Minn.App.2002).

Once it is established that the use is actual, notorious, exclusive, and continuous, a presumption is established that the use was hostile, and it is the burden of the party opposing the prescriptive right to show that the use was permissive. Ebenhoh v. Hodgman, 642 N.W.2d 104, 112 (Minn.App. 2002).

It is clear that "(a) boundary clearly and convincingly established by practical location may still prevail over the contrary result of a survey. Phillips v. Blowers, 161 N.W.2d 524, 529 (Minn. 1968); Wojahn v. Johnson, 297 N.W.2d 298, 304 (Minn. 1980). It is common that adverse possession and practical location cases start when someone decides to get a survey and discovers that the surveyed line is other than the line everyone thought was the boundary.

**ii. Acquiescence**

Swan Lake argues that the boundary line between the Swan Lake and Britney parcels was established by practical location many years ago.

The Supreme Court in Romanchuk v. Plotkin, 9 N.W.2d 421, 427 (Minn. 1943) recited the three ways to establish a boundary by practical location:

"Ordinarily, in order to establish a practical location of a boundary line it must appear (1) the location relied on was acquiesced in for the full period of the statute of limitations; or (2) the line was expressly agreed upon by the parties and afterwards acquiesced in; or (3) the party barred acquiesced in the encroachment by the other, who subjected himself to expense which he would not have done if there had been a dispute as to the line."

Swan Lake claims to have acquired title to part of Lot 5, Block 2, SWAN LAKE by acquiescence of Britneys and their predecessors. To acquire land by practical location of boundaries by acquiescence, a person must show by evidence that is clear, positive, and unequivocal that the alleged property line was "acquiesced in for a sufficient length of time to bar right of entry under the statute of limitations."

Theros v. Phillips, 256 N.W.2d 852, 858 (Minn. 1977). The statute of limitations is 15 years. Minn. Stat. §541.02.

What is acquiescence? While case law does not say that "possession" is an element of establishing a boundary by practical location, "[a]cquiescence entails affirmative or tacit consent to an action by the alleged disseisor, such as construction of a physical boundary or other use . . . ." LeeJoice v. Harris, 404 N.W.2d 4, 7 (Minn. App. 1987) Implicit in the case law is the notion that the disseisor has claimed, by way of some action, that a boundary has existed for the statutory period, and the disseised has acquiesced to that boundary. Pratt Investment Co. v. Kennedy, 636 N.W.2d 844 (Minn. App. 2001).

Swan Lake's predecessors in interest, sometime prior to the mid-1940's, erected a shed near the northerly boundary being Jefferson Boulevard a part of which, as determined by Britney's survey done by Northern Lights Surveying and Mapping, Inc. in 2007 and by the Hartman Survey, is on Lot 5, Block 2, SWAN LAKE. Swan Lake's predecessors in interest, also prior to the mid-1940's, constructed a sauna on the easterly side of their parcel a part of which, as determined by the 2007 survey and the Hartman Survey, is on Lot 5, Block 2, SWAN LAKE. Swan Lake's predecessors in interest,

also prior to the mid-1940's, constructed a wire mesh fence with 6 inch squares and about 3 feet high attached to metal posts and planted trees from Jefferson Boulevard in a southerly direction down to the sauna building which was clearly to establish the boundary line between the Swan Lake parcel and the Britney parcel. This fence, as determined by the 2007 survey and the Hartman Survey, is on Lot 5, Block 2, SWAN LAKE. Even though said fence has now deteriorated and brush has grown and established a buffer between the parcels, all parties agreed that in the 1950's the fence was clearly visible and defined the boundary between the parcels. It was necessary to walk around the fence to get from one parcel to the other. Also, all parties agree the shed and sauna which extend nearly to the fence line existed from at least the 1950's up to the present time and have remained at their same locations throughout this time. Britneys make no claim that they or their predecessors used any part of the land west of the fence for any permanent purpose, whatsoever. Evidence of the boundary line between the Swan Lake parcel and the Britney parcel is clear, positive and unequivocal. The acquiescence required is not merely passive consent, but conduct from which assent may be reasonably inferred. Engquist v. Wirtjes, 68 N.W.2d 412, 417 (Minn. 1955)

Swan Lake's possession was appropriate to the area. The original owners acquired title in about 1909. The living owners/shareholders of Swan Lake have utilized the property in question since the 1940's. The testimony of all parties substantiates that the sauna and shed have existed on the property owned by Swan Lake since the 1940's and that the fence running between the shed and sauna has been present since the 1940's.

"To the same effect is Fredericksen v. Henke, 209 N.W. 257, 258 (Minn. 1926) where the court held: "To constitute adverse possession, it is not essential that the adverse possessor actually live upon the land which he claims. It is enough that it is occupied and applied to the uses for which it is fit." Mellenthin v. Brantman, 1 N.W.2d 141, 143 (Minn. 1941).

In Fife v. Andersen-Nielsen, 2004 WL 2094541 (Minn. App.) unpublished, the Court found respondents use was actual and open when respondent's affirmative and intentional act of leaving the shorefront woods unmaintained for the specific purposes of shielding a cabin from view and controlling pollution constituted actual possession. The court states "we do not believe that an individual affirmative choice to leave land in its natural state, per se, precludes actual possession when, as here, choice is motivated by a desire to further the lands intended purpose and to comply with land-use policies."

In Ebenhoh, supra, the court found that "brief and insubstantial entries" onto the disputed property by respondent did not defeat Appellant's claim of exclusivity. Ebenhoh, at 109.

The precise possessory acts required to prove adverse possession depend on the character of the property, its location, and the purposes for which it is used. Skala v. Lindbeck, 214 N.W. 271 (Minn. 1927), Sage v. Morosick, 71 N.W. 930 (Minn. 1897).

The case of Allred v. Reed, 362 N.W.2d 374 (Minn. App. 1985) is very much on point. The Allred case deals with lakeshore property and a fence which did not go all of the way to the lake. Allred states one of the most important factors is whether the parties attempted and intended to place the fence as near as possible to the boundary line. The Allred case did establish the boundary between the parcels based on practical location. The Swan Lake/Britney boundary line is very much the same. Swan Lake's predecessors obviously constructed the fence as a boundary line between the parcels. This is evidenced by Swan Lake and its predecessors' use of the property on the westerly side of the fence and non-use of the property westerly of the fence by the owners to the east.

The predecessors also constructed, prior to the mid-1940's, a shed and a sauna parts of which are on the disputed property westerly of the fence line.

### **iii. Survey**

Swan Lake's predecessors had their whole property surveyed by Registered Land Surveyor Les Hartman in 1977. The survey established the westerly boundary of the parcel and the surveyor located 4 iron pins on the westerly line. The survey also established the easterly boundary of the parcel and located 3 iron pins on the easterly boundary. The easterly boundary on the Hartman survey is a foot or two easterly of the fence line which is reasonable as the boundary line as a person constructing a boundary fence would put the entire fence and fence posts on his own property and would leave room for construction and maintenance of the fence on the "other side" of the fence. The Hartman survey also shows the width of the parcel to be 75 feet which is the exact same width as Lot 4, Block 2, on the Plat of Swan Lake. The 1977 Hartman survey confirms the practical location of the boundary line between the parties which had been established many years prior to that date.

Between 1977, when the Hartman survey was done, and 1980 one of the current shareholders of Swan Lake, namely Dorothy

Haataja, who is also a daughter and granddaughter of the predecessors in interest, planted trees along the easterly boundary of the Swan Lake parcel. She assisted her aunt, now deceased, in planting the trees. They planted the trees in a straight line parallel to the westerly line of the parcel. They measured 75 feet from the westerly line as they could not locate the most southerly pin on the easterly line of their parcel as shown by the Hartman survey. They planted the trees within a few feet of the actual boundary to allow room for growth. They planted the trees with the intent of confirming the easterly boundary from the sauna down to the lake. This line of trees confirms the practical location of the boundary line between the parties which had been established many years prior.

The fence, as the boundary, was confirmed by a survey prepared by Les Hartman in 1977 and by Dorothy Haataja's planting of trees to confirm the boundary line between the sauna and the lake shortly thereafter. Swan Lake and its predecessors have had open, hostile, actual, continuous and exclusive possession since before the mid-1940's and the Britneys and their predecessors acquiesced in the fence as the boundary, never asserting ownership to the questioned land. The evidence is clear, positive and unequivocal.

The easterly boundary line of the Swan Lake parcel was established by practical location since at least 1960 and is shown on the 1977 Hartman survey. This line is drawn by Benchmark Engineering, Inc., Nick C. Stewart, Reg. No. 43816, as Exhibit 27 using both the Hartman survey and the Northern Lights' survey. Nick C. Stewart also prepared a narrative description for said boundary line also part of Exhibit 27.

Presumably the true platted boundary line between the parcels was unknown to either party until the Northern Lights' survey was done in 2007. In response to a potential argument that no practical boundary line can be established if there is nothing to show that either party had knowledge of the true boundary line, I quote from the case of Fishman v. Nielsen, 53 N.W.2d 553 (Minn. 1952):

"We can find no reason for this requirement of knowledge of the true boundary line in our review of decisions in other states, and we can see no practical reason here why it should be a prerequisite to establishing a practical boundary line by acquiescence. If it is true that knowledge of the true boundary line would be a prerequisite to establishing a practical boundary by acquiescence, we can see little or no reason why there should be

an occasion for establishing a practical boundary by acquiescence, inasmuch as it seems logical that a fence such as the one in question would have been placed on the true boundary line if all the parties concerned knew exactly where such a line was at the time the fence was constructed."

Even though there is no testimony of the Britney's use of any part of the parcel westerly of the boundary line between the parties' parcels as shown on the Hartman survey, I am compelled to cite a case for the proposition that once a boundary line has been established it continues and the burden of proof that the line is thereafter changed is on the party alleging the change - here Britneys. To maintain a title, acquired by adverse possession, it is not necessary to continue the adverse possession beyond the time when title is acquired. The title once acquired is a new title; a legal title though not a record title is not lost by a cessation of possession, and continued possession is not necessary to maintain it. Fredericksen v. Henke, 209 N.W. 257 (Minn. 1926) The Court made this statement to confirm in that case that title was perfected by adverse possession many years before being bought.

The boundary line established by practical location by Swan Lake's predecessors many, many years ago cannot be changed unless evidence is put forth to show the disseised persons have reacquired title by adverse possession or by reestablishing such a new line by practical location for the requisite time, fifteen (15) years.

The burden of proof to establish a boundary line between the parties other than the Hartman survey as restated by the Benchmark exhibit is on Britneys. Britneys have provided no such evidence of use to alter the Hartman survey.

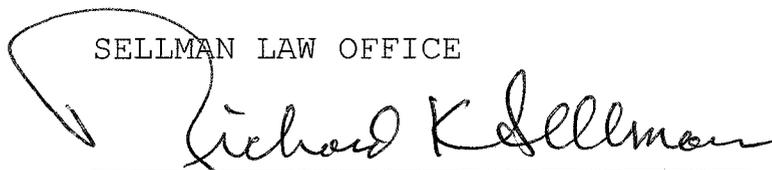
**CONCLUSION**

The boundary line between the parties parcels has been established and acquiesced in by all of the parties. This boundary line was first shown on the Hartman Survey and is confirmed by the Northern Light's Survey and is finally now shown and described in the Benchmark Survey and description.

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Respectfully submitted,

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