

NO. A10-1339

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State of Minnesota
In Court of Appeals

In the Matter of the Verified Petition of
Robert L. Ruikkie and Karen Ann Ruikkie for Certain Relief
Pursuant to Minnesota Statutes Section 508.671, petitioners,
Appellants,

v.

George P. Nall; Leslie S. Nall; Mitchell Shores Homeowners'
Association, Inc.; Anthony Stolfe; Penny Stolfe; Charles W. Carroll;
Lois J. Geist; Gary E. Peterson; Susan L. Peterson; James P. Ritchart;
Judith R. Ritchart; and all other persons or parties unknown claiming
any right, title, estate, lien or interest in the real estate described in the
Petition therein,

Respondents,

v.

Mark Monacellie, as St. Louis County Registrar of Titles;
Thomas J. O'Malley, as St. Louis County Surveyor; Mike Forsman, as
Chairman of the Board of Commissioners for St. Louis County;
Tom Hansen, as Custodian of the State Torrens Assurance Fund; and
each of their successors, third party defendants,

Respondents.

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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 trial court err in concluding that the boundary line between the Ruikkie's Government lot 6 and the Nall's Government lot 1 was established by practical location?

This issue was raised before the district court in written "Petitioners Closing Arguments dated 12/15/2009 pages, 5 (3) thru 8 and Reply brief dated 1/5/2010 pages, 2, thru 5 and Petitioners Motion for Amended Findings and Conclusion of law dated 5/5/2010 pages, 5, 6 and Memorandum of Law dated 5/5/2010 pages, 2 thru 6 and Reply brief dated 6/3/2010 pages, 2 thru 6, and oral arguments at motion hearing.

The trial court held: *Both parties were shown the Chernak Certificate of Survey Sketch and they expressly agreed to it. The land swap between the Ruikkie's and the Nall's was an express agreement and that the parties have acquiesced in this boundary even prior to the transaction and that the acquiesced boundary is the true boundary between the Ruikkie's and the Nall's property.*

This issue was litigated at trial and motion to amend and was ruled on by the trial court for the same. The Ruikkie's appeal to this court was timely.

Apposite cases:

Kane v. State, 237 Minn. 261, 268, 55 N.W. 2d 333, 338 (Minn. 1952).

Petition of McGinnis, 536 NW 2d 33 - Minn: Court of Appeals (1995).

Benz v City of St. Paul 89 Minn.31, 93 N.W. 1038 (1903).

Beardsley v. Crane, 52 Minn 537, 546, 54 N.W. 740, 742 (1893).

II. Can the courts correct a certificate of title to registered property that erroneously includes property that was not included in the original decree of registration or determined in a proceeding subsequent to registration?

This issue was raised before the district court in written "Petitioners Reply brief dated 1/5/2010 page, 2, and Petitioners Motion for Amended Findings and Conclusion of law dated 5/5/2010 page, 5 and Reply brief dated 6/3/2010 pages, 5, 6.

The trial court held: Courts cannot determine boundary lines in a proceeding subsequent where that determination alters the legal description of the land stated in the certificate of title. The certificate of title issued after the transaction set forth an exact and precise boundary line and the parties have acquiesces in this boundary even prior to the transaction.

This issue was litigated at trial and motion to amend and was ruled on by the trial court for the same. The Ruikkie's appeal to this court was timely.

Apposite cases:

Howe v Hauge, (2009) 766 NW 2d

Estate of Koester v. Hale, 297 Minn. 387, 394, 211 N.W.2d 778, 782 (1973)

Minnesota Office Plaza, LLC, v. Target Stores, Inc, et al, (Minn. App 2007, WL23638875).

Nolan v. Stuebner, 429 N.W.2d 918, 924 (Minn. App. 1988).

STATEMENT OF THE CASE

This case involves the Verified Petition of Robert and Karen Ruikkie, (hereafter the Ruikkie's), Pursuant to Minnesota Statutes Section 508.671, filed March 29, 2007 with the Examiner of Titles office in St. Louis County, Minnesota to have the boundaries of their part of Government Lot 6, Section 18, Township 62 North, Range 12 West, St. Louis County, Minnesota judicially determined. The Ruikkie's ownership title to this property is as described on Certificate of Title No. 301384.0

George P. Nall and Leslie S. Nall, (hereafter the Nall's), as the creators and principal owners of Mitchell Shores Common Interest Community No. 76, St. Louis County, Minnesota filed an answer along with, Mitchell Shores Homeowners' Association, Inc, Anthony Stolfe; Penny Stolfe, Charles W. Carroll; Lois J. Geist, Gary E. Peterson, Susan L. Peterson; James P. Ritchart, and Judith R. Ritchart. In the Nall's answer they objected to the Ruikkie's petition.

The Nall's were allowed to bring into this action as Third party defendants namely; Mark Monacellie, as St. Louis County Registrar of Titles; Thomas J. O'Malley, as St. Louis County Surveyor; Mike Forsman, as Chairman of the Board of Commissioners for St. Louis County; Tom Hanson, as Custodian of the State Torrens Assurance Fund.

On October 23, 2008 the Nall's filed a motion for Summary Judgment. The Nall's motion for Summary Judgment hearing was held before the Honorable Eric L. Hylden, District Court Judge of the Sixth Judicial District, on January 26, 2009. Judge Hylden ruled that there were issues that involved a trial and the motion was denied on March 2, 2009.

Prior to the Ruikkie's Petition Trial, the Ruikkie's and Defendants Anthony and Penny Stolfe, who own property in Homers Lots Government Lot 5 reached an agreement where by the Stolfe's agreed to withdraw their opposition to the Ruikkie's Petition.

A three day trial was held on November 12, 13, and 16, 2009, to decide the matter of the Ruikkie's Petition, the Honorable Eric L. Hylden, presided. On April 6, 2010 Judge Hylden issued his Finding of Fact, Conclusion of Law, and Order for Judgment. Judge Hylden ruled that an express agreement to determine a boundary was made between the Ruikkie's and the Nall's and that the Ruikkies had acquiesced in that boundary, and that the true an accurate boundary between Government Lot 6 and 1 was as depicted on the Nall's CIC 76 plat. In Judge Hylden Order for Judgment he denied the Ruikkie's Petition, and ruled the Third Party actions were moot.

On May 5, 2010 the Ruikkie's filed a motion for amended Finding, Conclusion of Law, and Order for Judgment and Judgment. Specifically, the Ruikkie's motion asked the court to amend its Findings, Order and Judgment, and to rule instead that the true boundary between Government Lot 6 and 1 is as depicted on the Leuelling Survey. The Ruikkie's did not dispute the Trial Courts ruling regarding the boundary line between Government Lot 5 and 6. On June 10, 2010 the Ruikkie's motion hearing was held before Judge Hylden. On June 23, 2010 Judge Hylden filed his Courts Order on Petitioners Motion for Amended Findings and a one page Memorandum of Law. Judge Hylden's order denied the Ruikkie's motion for amend findings. And issued the Courts order on Taxation of Costs in favor Defendants and Third-Party Plaintiffs in the amount of \$5,278.81, Dated June 22, 2010.

The Ruikkie's then brought this appeal on July 31, 2010, seeking a reversal of the trial court's Orders and Judgments and request that this Court, instead, order that the boundary between Government Lot 1 and 6 be determined based on the Leuelling survey,

STATEMENT OF FACTS

The properties that are in question in this appeal are the Ruikkie's Government lot 6 and the Nall's Government Lot 1. Specifically, the question with these properties is the proper legal boundary between them. Both of these properties are located in Section 18, Township 62 North, Range 12 West, St. Louis County, Minnesota, and were originally surveyed and created as set forth in a Government Land Survey dated March 3, 1885, (Trial Exhibit 1), hereafter (Tr.Ex.). That Government Land Survey created both of the

Government Lots in question as riparian lots, with actual lakeshore frontage on Mitchell Lake, (Trial Testimony, (hereafter (TT.)) 331 (13)).

In 1929 all of the Government Lots in question were under the common ownership of Frank H. Crassweller, (Tr.Ex. 8). Mr. Crassweller registered all of the properties through the office of the St. Louis County Registrar of Titles. The original Order and Decree of Registration was filed on March 26th 1929 for both the Ruikkie's Lot 6 and the Nall's lot 1, (Tr.Ex. 8). The original Order of Decree for both properties states the legal description was issued "according to the United States Government Survey thereof". There is no evidence that there has ever been a survey of Government lot 6's boundaries or a Certificate of Survey that depicted more than one of its corners after the 1885 Government Survey until the Leuelling Survey which was completed in 2007 for the Ruikkie's, (TT. 345, (13-18)), (TT. 201, (13)) (Tr. Ex 7).

Robert and Karen Ruikkie acquired fee title to "Government Lot 6 on June 4, 1992 and were issued Certificate of Title No. 257849, (Tr.Ex. 21). George and Leslie Nall, acquired fee title to "Lot 1, on August 7, 2003 and were issued Certificate of Title No. 295994, (Tr.Ex. 27).

The Ruikkie's purchased Government Lot 6 based on the representation made by the seller Winston (Harry) Homer that government Lot 6 had frontage on Mitchell Lake,(TT. 195, (21 thru 196, (16) & (Addendum, (Addendum hereafter (A-)), A-9, (10) & A-10, (16)). The Ruikkie's signed a purchase agreement with Mr. Homer during a weekend vacation trip to Ely, MN in February 1992. A realtor first showed the Ruikkie's the property and described the property as he understood it to the Ruikkie's but he was

later corrected by Mr. Homer during a meeting with the Ruikkie's, (TT. 197, (19)). In February of 1992 there was deep snow on the ground so the actual property the Ruikkie's were able to view of Government Lot 6 was limited to the property in and around the road that runs through the property, (TT. 266 (14)). The Ruikkie's met with Mr. Homer at the real estate office later to discuss the property. Mr. Homer, who in 1992 owned several parcels of land around Mitchell Lake, told the Ruikkie's that Government Lot 6 had lake frontage on Mitchell Lake. Mr. Homer depicted on a drawing to the Ruikkie's that the NW corner of Government 6 was at Mitchell Lake, (TT. 196, (4)). The Ruikkie's purchased this property as recreational property and as they lived in the Minneapolis area and with small children it was limited how often they were on this property, (TT. 198, (13)).

After the Ruikkie's purchase of Government lot 6 they discovered an old cabin that they believed was on their property, (TT.198 (23 thru 199, 20)), (A-9 (12)). The date of that discovery is believed by the Ruikkie's to be Memorial Day weekend 1993; this is based on the dates listed on the invoice from their attorney William Defenbaugh, (trail Ex. 58 and 59), (TT. 269, (18)). After discovering the old cabin Robert Ruikkie talked to Mr. Fitzgerald the owner at that time of Government Lot 1 and Northern Air Resort. Fitzgerald told Ruikkie that the cabin was not on Government Lot 6 and that Government Lot 6 does not have lake frontage, (TT. 200, (7 thru 201, 5)). Mr. Fitzgerald then brought out a survey created by surveyor Cal Lindbeck for the previous owner of Northern Air Resort that showed that the SW corner of Government Lot 1 was 85 feet south of Mitchell Lake, (TT. 201, (7)), (A-9, (14)). The Ruikkie's later met with surveyor

Cal Lindbeck in his office in Ely, MN who confirmed that his survey showed that the Ruikkie's Government Lot 6's NW corner was 85 feet south of Mitchell Lake, (TT. 202, (3-22)), (A-9 (14)).

The Ruikkie's with this information and went back to the seller Mr. Homer. Homer was still adamant that lot 6 had lake frontage on Mitchell Lake. Mr. Homer later called the Ruikkie's and told them it appeared that he made a mistake and that Lot 6 does not have lake frontage,(TT.202, (25 thru 203, 18)), (A-10 (16)). Homer offered to grant the Ruikkie's a deeded access easement in Government Lot 4. However, Homer had transferred ownership of his Lot 4 to his children, and at least one of them would not agree to sign the access easement papers for the Ruikkie's, (TT. 204, (15)), (Tr.Ex. 59),(A-10 (17)).

With the mistaken belief that their Government Lot 6 had no Lake frontage the Ruikkie's acquired a back lot in Homer's Lots which is part of Government Lot 5 that included a lake access easement from Paul Kindamo, (TT. 205, (14)), (A-9 (18)). Following that, in two separate transactions they purchased a total of 90 feet of property in Homer's Lots directly west of their Government Lot 6 that included Mitchell Lake frontage,(TT. 208, (10 thru 211, (4), (A-9 (18))).

The Homer's Lots lake frontage property included a steep rock ledge that made it difficult for the Ruikkie's to walk down to the lake. They ended up creating a walking trail directly east of the ledge. At one point the owner of Lot 1 and Northern Air Resort, which was Grant Young at that time, told the Ruikkie's that their trail was on his

property. The Ruikkie's shortly after that offered to buy that part of the property from the Young's but they declined, (TT. 213, (4) thru 214, (16)).

In 2003 the Nall's purchased Government Lot 1 from the Young's. As part of that purchase the Nall's hired Surveyor Bruce Chernak to perform an ALTA survey of Government Lot 1, (TT. 488, (11-14)) (A-10 (19)). During that survey Chernak determined the location of the boundary line between Government lot 1 and 6, (TT. 488, (15-25)), (TT. 490, (6-12)), (TT. 409, (20 thru 410, (1))). There was no evidence or testimony presented that the Ruikkie's had any involvement or input with any of Chernak's decisions on any assumed boundary line. Also as part of that survey Chernak set a survey monument 85 feet south of Mitchell Lake to depict the SW corner of Government Lot 1, (Tr.Ex.73, (see survey key)). Chernak testified there was no monument depicting that point when he made his survey, and that the spot was difficult to place a monument into as it was on the ledge of a rock, (TT. 461, (14-24)), TT. 466, (9-14), (TT. 467, (18-21)). Also, no evidence or testimony was presented at trial to show that there has ever been a visible boundary line between Government lot 1 and 6, (TT. 48, (21 thru 49, 14)).

Chernak did not use the Government Land Survey that created Government Lot 1 and 6 as authority when he determined and set the SW corner of Government Lot 1 for the Nall's, (TT. 350, (11 thru 352, 21)), (TT.413, (23 thru 414, 10)), (TT. 517, (17 thru 521, (7-22)), (TT. 521, (7-20)). Chernak did not follow Minnesota Statute 389.04 when he determined that Government lot 6 did not have frontage on Mitchell lake, (AP-46), (TT. 321, (19 thru 322, (16)), (Tr.Ex. 56), (Tr.Ex 60). Chernak testified he used a Standard

Section breakdown method to survey Government Lot 1, which allowed him to ignore Government Lots 6 Riparian Rights,(411, (1-6)), (TT. 412, (7-17)), (TT. 468, (2-15)). Chernak offered no authority in the field of surveying for this reasoning. Chernak ignored the fact that both of these properties were created by the Government Land Survey with Riparian Rights, that both of these properties were created as abutting Mitchell Lake, and that both of these properties abut a meandered lake with a legally recorded meander line (Tr.Ex. 1). In placing that monument, Chernak without any other legal authority, authorization or approval, expanded the Nall's Government Lot 1 by extending its boundary in a straight line beyond the legally recorded meander line as recorded in the original Government Land Survey, (TT. 20, (6-23)), (TT. 66, (18 thru 67, 6)), (TT. 73, (17 thru 74, 5)), (Tr. EX. 56, (3), (Tr. Ex. 60), (Tr.Ex. 1), (Tr. Ex. 73). In so doing Mr. Chernak inserted what he determined as part Government lot 1 between Mitchell Lake and the Ruikkie's Government Lot 6, that act had the effect to completely eliminate Lot 6's riparian rights, (TT. 490, (6)), (Tr.Ex. 56), (Tr.Ex 60). Chernak's reasoning for his surveying methods were he did not believe that it was his job to determine the riparian boundaries of the Ruikkie's property, and that to do so would increase the cost to his client the Nall's, (TT. 399, (4 thru 400, 3)), (TT. 448, (20 thru 449, 6)).

In the fall of 2003 after Chernak had determined and set the SW corner of Lot 1 as part of his ALTA survey for the Nall's and the Nall's had completed their purchase of Lot 1, the Ruikkie's and the Nall's began to discuss a land exchange, (TT. 544, (17-23)), (TT. 433, (13)). The Ruikkie's were hoping to obtain the parcel which included the land that their trail was on and George Nall was interested in adding property to his CIC which

was in the planning stage. Mr. Nall proposed that the Ruikkie's give to the Nall's 10 acres of land in their Lot 6 for the small parcel that the Ruikkie's trail was on and that was believed to be in Lot 1. Nall contacted Chernak to draw up a sketch depicting these parcels. The Ruikkie's told the Nall's that they would not agree to give up 10 acres of their property for the small parcel and the issue of a land swap was dropped, (TT. 214, (19 thru 216, 3)), (TT. 546, (1 thru 552, 3)), (TT. 433, 15)).

Then in February of 2004 George Nall called Robert Ruikkie and asked if the Ruikkie's would agree to a quick land trade. Nall told Ruikkie that St. Louis County was requiring him to have additional acreage. He proposed that the Ruikkie's convey 3.7 acres of land in Government Lot 6, which amounted to all the land in lot 6 north of the road and east of the power line that runs northwest from the road into the Ruikkie's property. For that the Nall's would convey to the Ruikkie's a .09 acre parcel that the Ruikkie's trail was on. The Ruikkie's did agree to the Nall's land exchange proposal at that time, (TT. 235, (3 thru 236, 11)), (TT. 552, (4 thru 553, 22)), (A-10 (20)). There were no discussions at any time between the Ruikkie's and the Nall's regarding setting a boundary line. Mr. Ruikkie testified that the boundary line was not an issue and was not even mentioned in the land swap conversations, (TT. 240, (15 thru 242, 7)). The only discussions or negotiations involved in the land swap were the amount of property to be exchanged. The only testimony or evidence presented at trial by the Nall's regarding a boundary line discussion was when Mr. Nall testified that the parties walked the property and looked over to see what Mr. Ruikkie had in mind for a land swap, (TT. 547, (13 thru 548, 14)). As part of the land swap the Ruikkie's and the Nall's shared the cost to have

Surveyor Bruce Chernak prepare the Legal descriptions for the deeds, (TT. 554, (5)).

- Chernak used the same position for the SW corner of Government Lot 1 as he had set in his 2003 ALTA survey in determining that the small parcel the Nall's would convey was part of Government Lot 1, (Tr.Ex. 73), (Tr.Ex. 4), (TT. 409, (20 thru 410, 1)), (TT. 433, (8 thru 438, 7)). The Nall's Attorney William Defenbaugh handled the legal paper work for both of the quit claim deeds. The land swap deeds were filed on December 10, 2004, (Tr.Ex. 14&15), (TT. 554, (5)).

On May 27, 2005 after the Nall's had commenced a plan to convert Government Lot 1 and that part of Government Lot 6 that they obtained from the Ruikkie's into a Common Interest Community, St. Louis County Surveyor Thomas O'Malley sent a letter to the Nall's surveyor, Bruce Chernak regarding the Nall's CIC Plat that Chernak had submitted for approval, (TT. 20, (19 thru 21, 14)), (Tr.Ex. 60,), (A-11 (22)). Thomas O'Malley stated in his letter to Chernak, "I have a major concern about the location of the common boundary line between Government Lots 1 and 6". O'Malley further stated that Chernak's "method of locating the line between Lots 1 and 6 by projecting it westerly beyond the original meander line has completely cut off Lot 6 from any shoreline. This would result in the complete elimination of riparian rights for Lot 6." O'Malley went on to state "The record meander line is located approximately 1060 feet westerly of the southeast corner of Lot 1. (This is about where the most westerly corner of Unit 5 is shown on the CIC Plat.) It is my opinion that the boundary between Lots 1 and 6 deflects at this point and goes in a northwesterly direction, perpendicular to the shoreline, to the shore of the lake. This would be somewhere through Unit 6 on the CIC Plat.", (Tr.Ex.

60). After O'Malley's letter was received, George Nall had his Attorney William Defenbaugh write a Waiver and Release document that they hoped the Ruikkie's would sign, (TT. 449, (11 thru 451, 3)), (Tr.Ex. 54). The Waiver and Release was designed to remove the Ruikkie's Riparian Rights for their Government Lot 6, (TT. 110, (20-25)), (Tr.Ex. 54 (2),(3)). The Ruikkie's after contacting an attorney for advice were told that their property has lake frontage on Mitchell Lake, pursuant to the law of riparian rights, (TT. 226, (6)). The Ruikkie's refused to give up their rights and refused to sign the Nall's Waiver and Release, (TT. 226, 11-16)), (TT. 41, (22-23)), (A-11 (24)). Shortly after the Ruikkie's refused to sign the Waiver and Release for the Nall's, George Nall told the Ruikkie's that his CIC project was on hold and could not be approved without the Ruikkie's signing the Waiver and Release and that he was going to sue the Ruikkie's in a preceding subsequent, (TT. 226, (18)), (TT. 302, (23 thru 303, 13)).

On July 20, 2005 the Nall's arranged a meeting with his surveyor Bruce Chernak, his attorney William Defenbaugh and St. Louis County Officials including County Surveyor, Thomas O'Malley and the Examiner of Titles David Adams to discuss the Ruikkie's refusal to sign the Waiver and Release. The Ruikkie's were not invited to this meeting nor were they notified, (TT. 604, (2-15)). While several different versions of this meeting were given to the Court, the main point taken from this meeting was that for the CIC to be approved the Ruikkie's would need to sign the Nall's Waiver and Release, (TT. 469, (22 thru 475, (3))).

Following the July 20th, meeting Chernak revised his Survey to Plat for the Nall's CIC 76. Chernak used a metes and bounds description, and removed all references to the

boundary line between Government Lots 1 and 6, (TT. 475, (4-11)), (TT. 504, (5 thru 505, 11)). Chernak then resubmitted this revised Survey to Plat to Thomas O'Malley for his approval, (TT. 578, (17)), (Tr.Ex. 6), (A-11 (25), (A-13 (34)). O'Malley testified that he believed that the Nall's were going to commence a proceeding subsequent to determine title prior to the CIC being approved, (TT. 51, (1-24)). There was no review or notice to the Ruikkie's or to the public in any way that a revised Survey to Plat was submitted by the Nall's for approval. The revised plat was submitted on September 7th 2005, and was approved the next day by Thomas O'Malley on September 8th 2005, (Tr.Ex. 6), (A-12 (26)).

The Nall's then on September 22, 2005 submitted an EXAMINERS PETITION SUBSEQUENT EX PARTE, to the office of the Examiner of Titles, St. Louis County, Minnesota. In the Nall's petition they stated and included a signed affidavit to the Examiner of Titles stating that there were no gaps or overlaps with neighboring property, (Tr.Ex. 17), (TT. 590, (8-11)), (TT. 119, (12 thru 120, 8)). At the time the Nall's submitted this petition and affidavit to the Examiner of Titles, the Nall's fully knew that the Ruikkie's had not signed their Waiver and Release and that the Ruikkie's had a competing claim to some of the property the Nall's were including in their CIC 76, (TT. 599, (5-14)), (Tr.Ex. 54), (A-11 (25), (A-13 (34)). The Nall's knew that a Proceeding Subsequent to Determine Boundaries was the legal way for title to the property in question to be determined; however Mr. Nall testified he could not wait the time required for a Proceeding Subsequent because of financial reasons,(TT. 562, (9 thru 563 16)). There was no notice in any way to the Ruikkie's that the Examiner of Titles had received the

Nall's Ex Parte Examiner's Petition Subsequent, (TT. 218, (1)). On November 3, 2005 the St. Louis County Registrar of Titles recorded the Nall's CIC 76 St. Louis County, Minnesota.

After learning of the recording of CIC 76, the Ruikkie's contacted the Office of the Examiner of Titles to complain that some of their property was included in the Nall's CIC, (TT. 249, 21 thru 250 15)), (TT. 165, (9-14)). Following that the Ruikkie's and their attorney Mr. Andresen made an office visit to Mike Dean Assistant County Attorney for St. Louis County in January, of 2006 to complain and ask St. Louis County to investigate, (TT. 250, (24 thru 251, 9)). Robert Ruikkie wrote seven letters starting in April of 2006 to St. Louis County Attorney Alan Mitchell, requesting that the County fix the problem with their property being included in the Nall's CIC 76. (TT. 251, (23 thru 253, 18)), (Tr.Ex. 70), (response letters from St. Louis County, (Tr.Ex. 74).

The Ruikkie's hired two surveyors one in 2005 and another in 2006 to determine the true legal boundaries for their Government lot 6. In 2005 they hired Norm Livgard (former St. Louis County Surveyor), (TT. 406, (3)), of Livgard Surveying to complete a Preliminary Survey of the Ruikkie's Government lot 6, (part of Tr.Ex. 70) ,(TT. 231, (13 thru 233, 20)). Livgard's survey depicted the same surveying method as Thomas O'Malley described in his letter to Chernak, (Trial Ex. 60) and also matches the final and detailed Leuelling riparian Certificate of Survey submitted with the Ruikkie's Petition to the St. Louis County Examiner of Titles, (Tr.Ex. 7).

The Ruikkie's in 2006, in preparation for filing their Petition hired Surveyor LaVerne Leuelling, owner of Northern Lights Surveying, (TT. 256, (1-24)), (TT. 329,

(16-20)). Mr. Leuelling has extensive training and experience in Riparian Rights surveying, (TT. 310, (20 thru 317, 21)). They asked Leuelling to complete a survey of their Government Lot 6, which was the only riparian Certificate of Survey of the properties in question that was presented to the court during the 3 day trial. LaVerne Leuelling, found that the boundary lines of said Government Lot 6, based on the original Government Survey and the law of Riparian Rights, extended to Mitchell Lake, (TT. 331, (13), (Tr.Ex. 7)). Leuelling, following Bureau of Land Management Manual of Instruction methodologies, used a modified apportionment method that apportions the amount of shoreline each lot gets along the adjusted 1885 Government Land Survey meander line and also apportions the centerline of Mitchell Lake by the same percentages. In the Leuelling survey, partition lines connect the point on the apportioned meander line to the apportioned centerline, (TT. 325, (23 thru 353, 12)). This is known as the Long Lake Method. Leuelling stated solution #4, set forth in his Certificate of Survey, (Trial Ex. 68), based on the original Government Land Survey as authority, was the fairest and most equitable apportionment of riparian rights to Lots 1, 5 and 6, (TT. 352, (25 thru 353, 3)). According to the Leuelling Survey, the description of the Nall's CIC 76 overlaps into the Ruikkie's property in Government Lot 6, (Tr.Ex. 7), (Tr.Ex. 6). Following the completion of the Leuelling survey the Ruikkie's filed this Torrens Verified Petition to have the boundaries for their Government lot 6 determined with the St. Louis County Examiner of Titles on March 29th 2007, (Appendix, (1-6)).

THE TRIAL COURT MADE NUMEROUS CLEAR ERRORS IN ITS FINDINGS OF FACTS.

These errors were brought to the courts attention in the Ruikkie's Motion for Amended Findings, and oral arguments for the same, (Appendix, (AP-22), (TT. 627, (22 thru 633, 7), (TT. 640, 22 thru 641, 9)). These findings have the effect to give a distorted view of the true record of this case.

1. Trial Courts Finding No. 4, (A-8 (4)), states in relevant part; the "*...In truth, the shoreline is between 500 and 1,000 feet north of its depiction in the GLS*".

No survey of record in this case depicted those values and no testimony from the expert witnesses discusses those values. The true values as it relates to the Ruikkie's lot 6 are several hundred feet less than what this finding states. Trial Exhibit 7 depicts the true variation of the shoreline of Mitchell Lake today and the meander line according to the GLS.

2. Trial Courts Finding No. 10, (A-9 (10)), states in relevant part; "*While there is a dispute as to what the Ruikkie's were told about Government Lot 6's water access...*"

The record does not show a dispute about what the Ruikkie's were told about Government Lot 6's water access. Robert Ruikkie was the only one to testify about this issue and no evidence was presented to dispute anything regarding his testimony.

3. Trial Courts Finding No. 15, (A-9 (15)) states in relevant part; "*...The Ruikkies then met with Lindbeck, who confirmed his survey found government Lot 6 did not have access to the lake or riparian rights*"...

Robert Ruikkie was the only one who testified about that meeting and there is nothing in the record that Mr. Lindbeck ever mentioned the words riparian rights” to the Ruikkie’s, (TT. 202, (3)).

4. Trial Courts Finding No. 21, states in relevant part; “...*Ex. 4 The Sketch was shown to both parties and attached to the Nall’s Certificate of Title..*”

The Survey Sketch was not attached to the Nall’s Certificate of Title. The Nall’s were issued Certificate of Title No. 301383.0, (Tr.Ex. 30) which was for that part of Government Lot 6 that the Ruikkie’s conveyed to the Nall’s and they were issued Certificate of Title No. 301382.0, (Tr.Ex. 29), for the residual of Government Lot 1. The Survey Sketch is not attached to either of these certificates. In fact the Quit claim deeds for the land swap are also not attached to the Nall’s Certificate of Title. The only Quit claim deed on the Nall’s Certificates are the deeds that the Nall’s created to deed their property rights to CIC 76 dated 10/7/2005.

5. Trial Courts Finding No. 31, (A-12 (31)), states in relevant part; “*The doctrine of boundary by practical location applies to registered land by virtue of Minn. Stat. 508.176*”.

This is incorrect; it is in fact Minn. Stat. 508.02 (2008) that grants the right to apply the doctrine of boundary by practical location to registered land, not 508.176 which is not even a statute. Also, as was argued in the Ruikkie’s closing arguments dated 12/15/2009, pg 8 and will be argued in detail later in this brief, Minn. Stat. 508.02 (2008), does not apply in the instant action as it was amended after this action began in 2007.

6. Trial Courts Finding No. 33, (A-13 (33)), states in relevant part; “*Neither the Ruikkies nor the Nalls have acted diligently and nether*

couple is without fault...neither sits in a "compellingly sympathetic equitable position.

Based on the record and evidence presented at trial it is not equitable for the Court to make this conclusion. The Ruikkie's were led to believe by surveyor Lindbeck and Chernak that their property had no lake frontage. The Ruikkie's only fault was acting on that mistaken information, (TT. 202, (3-22), (TT. 222, (10-20)). Yet the Trial Court erroneously equates that mistaken belief and related actions as equal with the equitable position of the Nall's.

The Nall's submitted a revised Survey to Plat for the purpose of creating a CIC and selling property that purposely removed information that is vital to ownership of that same property. That revised Survey to Plat included the same property as the rejected plat, but it eliminated any reference to the boundary line between the Ruikkie's and Nall's property, (Tr.Ex. 5 & 6). Nall testified that because of financial reasons he believed they could not spend the time required to complete a Proceeding Subsequent to properly determine ownership, (TT. 562, (9 thru 563, 16)), (A-11 (25), A-13 (34)). By submitting this revised plat the Nall's were clearly attempting to take the Ruikkie's property without conveyance. It was a deliberate act to harm the very property rights that the Nall's requested that the Ruikkie's waive and release to them in their Waiver and Release document, (TT. 591, (24 thru 596, 2)), (Tr.Ex. 54).

Trial EX 54, (2), (Wavier and Release)

(2.) The undersigned understands that the original Government Survey of Government Lot Six (6)...indicates that Government Lot Six (6) has Riparian Rights on Mitchell Lake. Further, the undersigned acknowledges that, based on said survey, it is possible or likely Government Lot 6 has riparian rights that will be cut off by Common Interest Community No. 76., St. Louis County Minnesota.

Equally important to the Nall's lack of any equitable position is that on September 22, 2005 the Nall's submitted to the Examiner of Titles an EXAMINERS PETITION SUBSEQUENT EX PARTE that stated and included a signed affidavit stating that there were no gaps or overlaps with neighboring property, (Tr.Ex. 17).

To the Honorable David Adams, Examiner of Titles:
Your Petitioners, George P. Nall and Leslie S. Nall, respectfully alleges the following fact, to-wit....

"That the property described in the plat of Common Interest Community No. 76, Planned Community, Mitchell Shores is all of the property contained in said Certificates of Titles. That there are no gaps or overlaps with neighboring properties... (Tr.Ex.17, Affidavit of Surveyor, (3)).

When the Nall's submitted this petition to the Examiner of Titles they had full knowledge that the Ruikkie's had a competing claim to some of the property they were attempting to include in their CIC 76, (TT. 591, (21-24), (TT.599, (5-14)). Had the Nall's not submitted these two very questionable documents, they would arguably have not been successful in obtaining approval of their CIC 76 plat and issuance of the certificates of titles (TT. 119, (16 thru 120, 8)), (TT.164, (3-24)). This evidence proves that the Nall's lack any equitable position in this Court of equity. It also proves the Nall's had actual notice of the Ruikkie's claim of interest to some of the property included in their CIC Plat. A purchaser of Torrens property who has actual knowledge of a prior interest in the property is not a good faith purchaser. While the legal validity of the Nall's CIC 76 is not necessarily part of the Ruikkie's petition, as it relates to proper boundaries or Certificate's of Title it must be determined.

7. Trial Courts Finding No. 34, (A-13 (34)), states in relevant part; *"On the other hand, the Nall's made material omissions in their second CIC plat*

submitted for approval. The land exchange evidences the intent to grant the Ruikkie's water access".

There is no evidence that Nall's intent was to grant the Ruikkie's water access; if this fact were true it would mean that Mr. Nall committed perjury as he clearly testified he did not know the Ruikkie's property had Riparian Rights when the land swap took place, (TT. 559, (9-11)), (TT.601, (5-25)).

8. Trial Courts Finding No. 35, (A-13 (35)), states in relevant part; "*Chernak, the Nall's surveyor, prepared a sketch during the land swap, which was duly filed with the Registrar. This was an express agreement between the parties as to the boundary line between Government Lots 1 and 6.*"

The only place the survey sketch is part of any record with the Registrar or otherwise is that it was attached to the Ruikkie's quit claim deed to the Nall's as part of the deed's "Schedule A Legal Description," (Tr.Ex. 15). The Schedule A, lists the legal description of the actual property being conveyed. After that description it follows with the Statement "All as shown on attached sketch". Obviously the only purpose of the sketch was to illustrate the property previously described. There is no evidence this was an express agreement to set a boundary line.

STANDARD OF REVIEW

Boundary by practical location, like adverse possession, transfers title between deed holders. *Gabler v. Fedoruk*, 756 N.W.2d. 725, 728–29 (Minn. App. 2008). A boundary determination involves a fact issue, a reviewing court gives the district court's determination the same deference extended to other factual determinations, reviewing the boundary determination for clear error. *Wojahn v. Johnson*, 297 N.W.2d 298, 303 (Minn.

1980). But, because the effect of a practical location is to divest one party of property that is clearly and concededly his by deed, the evidence establishing the practical location must be clear, positive, and unequivocal. *Wojahn v. Johnson*, 297 N.W. 2d 298, 306 (Minn. 1980). Findings are clearly erroneous if they are manifestly contrary to the weight of the evidence or are not reasonably supported by the evidence as a whole, or were induced by an erroneous view of the law. See *Ortendahl v. Bergmann*, 343 N.W. 2d 309, 311 (Minn. Ct. App. 1984); *Olson v. Blue Cross & Blue Shield*, 269 N.W. 2d 697, 700 (Minn. 1987). Determining whether these factual determinations support the district court's legal conclusion is a question of law, which is subject to de novo review, *Gabler*, 756 N.W.2d at 730.

Here the trial courts findings are not reasonably supported by the evidence, or are clearly erroneous and the findings do not support its conclusions of Law.

ARGUMENTS

- I. **THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT THE BOUNDARY LINE BETWEEN THE RUIKKIE'S GOVERNMENT LOT 6 AND THE NALL'S GOVERNMENT LOT 1 WAS ESTABLISHED BY PRACTICAL LOCATION.**
 - A. **The change to Minn. stat. § 508.02 (2008) allowing the adverse claim of practical location was not a retroactive statute, and the trial court erred in ruling that the Nall's adverse claim of practical location was a valid claim in this action.**
 - 1) **Minnesota statute § 508.02 (2008), was not a retroactive statute and cannot be used by the Nall's in this action.**

The Minnesota legislature in 2008, made a change to Minn. Stat. § 508.02 allowing the adverse claim of Practical Location against Torrens registered property. The change to Minn. Stat. 508.02, (A-45), states in relevant part:

No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession, but the common law doctrine of practical location of boundaries applies to registered land whenever registered. Section 508.671 shall apply in a proceeding subsequent to establish a boundary by practical location for registered land.

Although the amended statute states that it “applies to registered land whenever registered”, it does not apply to the present action, because the Ruikkie’s Petition Subsequent was commenced before the amended law took effect on August 1, 2008. This amended statute was not available to the Nall’s in 2005, when the question of title to the disputed property arose, and was not available to the Nall’s when the Ruikkie’s started this action in 2007.

Minn. Stat. § 645.21: Presumption Against Retroactive Effect: No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.

“Section 645.21 requires that there be much clearer evidence of retroactive intent in the statutes language -such as mention of the word “retroactive- before we determine that a statute was intended to be applied retroactively.” *Duluth Fireman’s Relief Assoc. v. City of Duluth*, 361 N.W. 381, 385 (Minn.1985), see also *K.E. v. Hoffman*, 452 N.W. 2d 509, 512 (Minn. App. 1990). A statute can be applied retroactively only if the text of the statute clearly and manifestly indicates the legislature’s retroactive intent. *Sletto v. Wesley Construction, Inc.*, 733 N.W.2d 838 (Minn. Ct. App. 2007).

As Minn. Stat. § 508.02 (2008), is not retroactive to the instant case it cannot be used by the Nall's as authority for their claim of practical location against the Ruikkie's Torrens registered property.

2) The Trial Court erred in allowing the adverse claim of Practical Location against the Ruikkie's Torrens Registered property where no boundary dispute existed prior to registration.

The Ruikkie Government lot 6 was registered in 1929, to Frank H. Crassweller, (Tr.Ex. 8). At the time of registration Mr. Crassweller was the common owner of all the property in question and Mr. Crassweller registered them all at the same time. There were obviously no boundary disputes regarding property lines between Government Lot 1 and 6, at the time of registration.

This Court has ruled in *Petition of McGinnis*, 536 NW 2d 33 - Minn: Court of Appeals (1995), that practical location, is a type of adverse possession. In that ruling the court determined:

Minn. Stat. § 508.02 and the case law interpreting it explicitly prohibit adverse claims against registered property unless the dispute existed before registration or unless there is an ambiguous property description, neither of which exist here. (also see Petition of Building D, Inc., 502 NW 2d 406 - Minn: Court of Appeals 1993).

Minnesota's State Statutes, Chapter 508, (The Torrens Act), sets up a registered land ownership system where a "purchaser may accept [a certificate of title to registered land] as truly stating the title, and may disregard any claim not so appearing." *Kane v. State*, 237 Minn. 261, 268-69, 55 N.W.2d 333, 338 (Minn. 1952) (quotation omitted).

Minnesota Stat. § 508.25 states in relevant part: *Every person receiving a certificate of title shall hold it free from all encumbrances and adverse claims.*

In *Konantz v. Stein*, 283 Minn. 33, 36, 167 N.W.2d 1, 4 (1969), the Supreme Court indicated that once title is registered, it is impossible to thereafter acquire title to the registered land by holding adversely to the registered owner. “The purpose of the Torrens system of land registration is to ensure that a person dealing with registered property ‘need look no further than the certificate of title for any transactions that might affect the land.’” In re Petition of Willmus, 568 N.W.2d at 725 (quoting *Mill City Heating & Air Cond. v. Nelson*, 351 N.W.2d 362, 364-65 (Minn. 1984)). The Supreme Court held in *Moore v. Henricksen*, “[s]ince, by [Minn. Stat. §] 508.02, possession may not ripen into title against the holder of a registration certificate, a purchaser has no reason to assume that possession is adverse to the registered title.” 282 Minn. 509, 520, 165 N.W.2d 209, 218 (1968).

The Ruikkie’s are the holders of a Torrens Certificate of Title No. 301384.0, (Tr.Ex. 31). Minn. Stat. § 508.36 provides that it is conclusive evidence of all matters and things contained in it. The Certificate states that the Ruikkie’s are now the owners of an estate IN Fee SIMPLE, and lists the following described land:

Government Lot 6 SECTION 18 TOWNSHIP 62 North of Range 12
West of the Fourth Principle Meridian, EXCEPT...

The Certificate then lists the legal description of the 3.7 acres of Government lot 6 that the Ruikkie’s conveyed to the Nall’s in 2004. The legal descriptions and the assumed line listed on the certificate are correct as the property so described and conveyed was east of the recorded adjusted meander line, (Tr.Ex. 1 & 7). The Memorial for the Ruikkie’s Certificate lists two road easements, one running in favor of Winston Homer

and the other running in favor of Timothy Sands. Neither of these parties is involved in the instant action and the property for the road easement is not part of the property in question.

A central purpose of the Torrens Act is conclusiveness and indefeasibility of title once adjudicated. *Murphy v. Borgen*, 148 Minn. 375, 377, 182 N.W. 449, 450 (1921).

Minn.Stat. § 508.22 (2006), states in relevant part that: Except as herein otherwise provided, every decree of registration shall bind the land described in it, forever quiet the title to it and be forever binding and conclusive upon all persons,.... The decree shall not be opened, vacated, or set aside by reason of the absence, infancy, or other disability of any person affected by it, nor by any proceeding at law or in equity for opening, vacating, setting aside, or reversing judgments and decrees, except as herein especially provided. The decree shall forever determine, bind, and conclude all the right, title, interest, estate, or lien in the land described in....(emphasis added)

The Nall's are now claiming title to part of the Ruikkie's property by way of practical location. Specifically, they state that there was an express agreement to determine the boundary line between the Nall's Government Lot 1 and the Ruikkie's Government lot 6. Yet, there is clearly no recorded agreement listed, neither on the Certificate of Title, nor included in the Certificate's Memorial. The Nall's have no interest in any of part Government lot 6 that is not included on the Certificate of Title they were issued as part of the conveyance by the Ruikkie's to the Nall's, (Tr.Ex. 30). The Ruikkie's property was registered through a Torrens Decree entered in 1929. Their title may not be set aside except as provided under the Torrens Act. The Trial Court's Orders and Judgments constituted an impermissible collateral attack on a Torrens judgment. See *Northwest Holding Co. v. Evanson*, 265 Minn. 562, 568, 122 N.W.2d 596, 600 (1963) ("a decree of registration [is] a final adjudication of title which may not be attacked except

under the limited circumstances set out in the law"). Because it did not comply with the Torrens Act, the Trial Court lacked the authority to render judgment that was adverse to the Ruikkie's title and it must be overturned, *Park Elm Homeowner's Ass'n v. Mooney*, 398 NW 2d 643 - Minn: Court of Appeals 1987.

B. The trial court erred in ruling that the Ruikkie's and the Nall's entered into an express agreement.

1) No evidence was presented at trial that the Ruikkie's and the Nall's entered into an agreement to change the legal boundary between their properties.

The trial court ruled that because the Ruikkie's and the Nall's agreed to a land swap that was based on a Certificate of Survey, prepared by a Minnesota licensed Surveyor, that regardless of its accuracy, they expressly agreed to the surveyors boundary line even though it was contrary to the properties true legal titled boundary. In December of 2004 the Ruikkie's and the Nall's exchanged quit claim deeds to property that each believed the other had legal title to. The quit claim deeds referenced the legal descriptions for the properties as developed by Mr. Chernak the surveyor. The Nall's now claim that a boundary line was established by practical location by an express agreement based on the land swap agreement.

In Minnesota a boundary by Practical location may be established in only one of three ways:

- (1) **Acquiescence:** The location relied upon must have been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations.
- (2) **Agreement:** The line must have been expressly agreed upon by the interested parties and afterwards acquiesced in.
- (3) **Estoppel:** The party whose rights are to be barred must have silently looked on with knowledge of the true line while the other party encroached

thereon or subjected himself to expense which he would not have incurred had the line been in dispute.

Theros v. Phillips, 256 N.W.2d 852, 858 (Minn. 1977).

The burden of proof in boundary cases is on the party asserting the practical boundary, *Bjerketvedt v. Jacobson*, 232 Minn. 152, 156, 44 N.W.2d 775, 777 (1950), *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn. App. 1987). “Because the effect of a practical location is to divest one party of property that is clearly and concededly his by deed, the evidence establishing the practical location must be clear, positive, and unequivocal.” *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977). Also, a trial court must strictly construe the evidence “without resort to any inference or presumption in favor of the disseizor, but with the indulgence of every presumption against him.” *Phillips v. Blowers*, 281 Minn. 267, 269-70, 161 N.W.2d 524, 527 (1968). Only if this heavy burden is met can a boundary by practical location by acquiescence prevail over a contrary survey result. *See id.* at 274-75, 161 N.W.2d at 529-30.

In the present case the only Findings of Facts discussing an express agreement are Findings No. 21 and 35 (A-11 (21), A-13 (35), which state in relevant part:

Finding No. 21: “As part of the land transfer, Chernak prepared a sketch depicting the land to be given to the Ruikkies...this sketch specifically depicted the boundary line between Government lots 1 and 6 and the parties expressly agreed to it”. Finding No. 35: “Chernak the Nall’s surveyor prepared a sketch during the land swap, which was duly filed with the Registrar. This was an express agreement between the parties as to the boundary line between Government lot 1 and 6.”

Contrary to the lower courts findings there was no evidence or testimony presented at trial that the Ruikkie’s and the Nall’s expressly agreed to set a boundary line. Mr. Ruikkie testified that there were no discussions regarding the boundary line,

(TT. 240, (2 thru 242, 7)) and that the land swap was only a conveyance of property that each believe the other owned,(TT. 237, 6-18)), (TT. 239, (12-16)), (TT. 240, (24 thru 241, 3)). Mr. Nall did not testify that or produce evidence that the parties ever talked about or were agreeing to set a boundary line, (TT. 544, (17 thru 556, 12)). The record shows the Ruikkie's and the Nall's shared the cost to have Surveyor Chernak survey the property to be exchanged, (TT. 554, (5)). The record shows that both parties believed they knew the true boundary line based on the Survey work of Chernak and that each believed the other had legal title to the property being exchanged, (TT. 202, (15-22)), (TT. 241, (23 thru 242, 15)), (TT. 550, 17-19)), (TT. 592, 13-25)). The very fact that the Ruikkie's and the Nall's hired a licensed Surveyor is evidence that they intended to have their property correctly surveyed to reflect the true legal descriptions for the land swap. The record does not show any dispute between the Ruikkie's and the Nall's regarding the true boundary between them or that they did not believe that they knew the true boundary based on the survey work performed by Chernak. No evidence or testimony exists that either the Ruikkie's or the Nall's directed Mr. Chernak to create legal descriptions or to survey the properties in a way that would alter or be contrary to the properties true legal boundaries. Unfortunately the record shows Mr. Chernak's survey work for the land swap was erroneous. The record shows the only agreement that occurred as part of the land swap transaction was how much property the Ruikkie's were going to have to give to the Nall's for the small parcel of land they were hoping to obtain.

As the Chernak Certificate of Survey Sketch (Tr.Ex. 4, which is part of Tr.Ex. 15), is the only piece of evidence that the Nall's have for a claim of an express agreement to

create a boundary line, it fails on its face value to prove the parties were expressly agreeing to set a boundary line. On its face value this survey would require this court to make an impermissible presumption of the evidence if it rules that the purpose of the Survey Sketch was to set a boundary line. The title of the survey clearly states the intention of the author. The author makes no mention that it is a boundary agreement survey or that it was intended to set or settle a boundary line issue. The Title reads:

**CERTIFICATE OF SURVEY LEGAL DESCRIPTION SKETCH IN
G.L.'S 1 & 6 SECTION 18, T62N. R12W, 4TH P.M. ST. LOUIS COUNTY,
MN**

On its face this Survey Sketch clearly attempts to perform exactly what its title states, to draw any other conclusion requires pure speculation. If the intention of the parties was to set, settle, change or create a boundary between Government Lot 1 and 6 why would only one corner of Government lot 6 be identified on the Survey? Why would the title of the survey not identify the very important purpose such as an agreement to change a legal boundary line between two Government Lots? These facts are evidence that the intent of the author was to perform what he believed to be a correct survey and only to illustrate and describe the property that was actually to be conveyed. Without making several presumptions of this evidence in the Nall's favor, this survey cannot prove that the Ruikkie's and the Nall's clearly and unmistakably communicated, or definitely and explicitly stated, that they were agreeing to set or settle a boundary line.

“We hold that an “express agreement” requires more than unilaterally assumed, unspoken and unwritten “mutual agreements” corroborated by neither word nor act. See Blacks Law Dictionary 601 (7th ed. 1999) (defining “express” as “[c]learly and unmistakably communicated,” as well as directly stated); see also The American Heritage Dictionary 646 (3d ed. 1992) (defining “express” as definitely and explicitly stated, as well as

particular and specific). If mere silent understanding and tacit acceptance could support a finding of an express agreement, an additional period of acquiescence to the agreement would be unnecessary. See *Theros*, 256 N.W.2d at 858 (restating requirement of both an express agreement and period of acquiescence)... *Slindee v. Fritch Investments, LLC*, 760 N.W. 2d 903, 910 (Minn. App. 2009).

Minnesota case law requires that there must be a deliberate act to create an express agreement and that deliberate act must be that the intent was to set or settle a boundary line issue. An erroneous belief regarding the location of a boundary line cannot constitute an express agreement for the purpose of establishing a boundary line by practical location. A mere belief regarding a location of a boundary line followed by some action upon that belief, does not constitute an express agreement without a deliberate agreement stating the intent of the parties to set or settle a boundary line. If that were not true, nearly every belief of an erroneous boundary line could be made into a claim of an express agreement. A simple mistake regarding a boundary line does not create a case for the doctrine of boundary by practical location. See *Roy v. Dannehr*, 124 Minn. 233, 237-38, 144 N.W. 758, 760 (1914) (stating that "one is not to be deprived of his land because he through mistake or ignorance placed a fence on what he thought was the division line, when it was not such in fact, unless the evidence of practical location, or acquiescence for at least 15 years, is clear, positive, and unequivocal"). The Minnesota Supreme Court in *Beardsley v. Crane* (1893), clearly set the requirements for a claim of Practical location of a Boundary line by express agreement:

"To establish a practical location... the evidence establishing such location should be clear, positive, and unequivocal. There should be and express agreement made between the owners of the lands, deliberately settling the exact, precise line between them, and acquiescence for a considerable

time", (emphasis added) *Beardsley v. Crane*, 52 Minn. 546, 54 N.W. 742 (1893).

An express agreement must be held to a high standard, the parties must have deliberately, and unmistakably communicated and explicitly stated their intent to set or settle a boundary line. It simply is not possible to enter into an express agreement when what is claimed to be expressly agreed to was never discussed in any way, was never mentioned in any conversation, nor was it documented in any document between the parties. Simply agreeing to a land swap that was based on what was thought to be a correct survey is not deliberately and explicitly stating a desire to set a boundary. Equity does not permit one to profit from another's mistake, *Roy v. Dannehr*, 124 Minn. 233, 234, 144 N.W.758 (1914).

There is simply no evidence, let alone clear, positive, and unequivocal evidence that the Ruikkie's agreed to a set any boundary line, especially one that was contrary to their legal titled boundary.

2). The trial court erred in ruling that the land swap between the Ruikkie's and the Nall's was an express agreement after the Nall's admitted in June of 2005 that no express agreement existed.

The Nall's acknowledged and admitted six months after the land swap that no express agreement existed. In June of 2005, only six months after the land swap the Nall's had their attorney William Defenbaugh write a Wavier and Release document which the Nall's then sent to the Ruikkie's asking them to release their titled property rights to the disputed property, (Tr.Ex. 54). When read in whole it is obvious that this was a comprehensive and well thought out document to completely remove the Ruikkie's

titled property rights to the disputed area. Yet the Nall's conspicuously make no mention of any claimed express agreement, The Nall's acknowledged the Ruikkie's property rights to property they intended to add to their CIC No. 76. The Nall's knew and admitted no express agreement was made in 2005, and are now precluded from claiming it now. 103 N.W. 335, 94 Minn. 456, *Olson v. Burk*, (Minn. 1905).

3). The land swap which was based upon a mutual mistaken belief of ownership by both parties, and which was derived from an erroneous survey performed by a licensed surveyor does not satisfy the element of an express agreement.

The Ruikkie's and the Nall's believed that the Chernak Certificate of Survey Sketch was correct and true. If this court sustains the lower court's ruling that a property transaction based on a Certificate of Survey even if it is in error satisfies the element of an express agreement it will be setting a precedent that will have the potential to allow mischief and fraud. In *Skelton v. Doble* 347 N.W.2d 81, 83 (Minn. App. 1984), this court ruled regarding Practical location "[t]he doctrine is intended to resolve boundary line disputes, not to establish ownership of substantial parcels of land. Expanding the doctrine....would undermine the statute of frauds and the recording act. Id. at 83.

The 2004 land swap was not an agreement to determine a boundary, it was a conveyance based upon a mistaken survey performed by Chernak. As in *Benz v City of St. Paul* 89 Minn.31, 93 N.W. 1038 (1903), the Minnesota Supreme Court ruled that a transaction based upon a mistaken survey was not binding upon the parties and a mistaken survey is not an express agreement between the parties.

"The strip of land conveyed to him by McMillan was in fact his own. He bought and paid for his own property. But the transaction was founded

wholly on a mistake, and on the supposition that the true boundary line was fixed by the survey upon which the parties then acted. Both relied upon the survey made at that time as correct, and they acted on it accordingly....**The authorities are very uniform that under such circumstances parties are not bound by an agreement fixing a boundary line between their lands”, *Benz v City of St. Paul* 89 Minn.31, 93 N.W. 1038 (1903).** (emphasis added)

In the instant case the lower court ruled that the parties agreed to the Chernak Certificate of Survey Sketch and so created an express agreement. That survey depicts what is now proven to be an erroneous position of the SW corner of Government lot 1. The St. Louis County Surveyor’s Office determined that Chernak’s Survey “misrepresented the boundary” between Government lot 1 and 6 and misrepresented the riparian rights for Government Lot 6, (Tr.Ex. 56, (3)) (Tr.Ex. 60). The government land survey creates, not merely identifies sections of land. The general rule is that the government plats and field notes are conclusive in the location of boundaries. “When a resurvey is made of section, quarter-sections, etc., originally established by the United States Government Survey, the aim of the resurvey must be to retrace and relocate the lines and corners of the original survey. Even when an original section corner is erroneously placed by an original government surveyor, it cannot be corrected by the courts or a subsequent surveyor. See Goroski v. Tawney, 121 Minn. 189, 141 N.W. 102 (1913); Anderson v. Johanesen, 155 Minn. 485, 193 N.W. 730 (1923); Minn. Stat. § 389.04 (1978)”. Wojahn v. Johnson, 297 N.W.2d 298, 303 (Minn. 1980).

The Ruikkie’s Government lot 6 was created as a riparian lot by the original Government Survey (Tr.Ex. 1), and is Torrens, registered property that was registered in 1929 as Government lot 6...according to the United States Government Survey, (Tr.Ex.

8). If a government survey was made in good faith, though negligently and with many errors, it will nevertheless control, and title to the property extends to the meandered lake. *Everson V. City of Waseca*, 44 Minn. 247, 46 N.W. 405 (1890). Where the government survey shows a meander line far back from the lakeshore, the intervening dry land, though never a part of the lakebed was divided between adjacent upland owners by extending lines from the intersection of the meander line with the government lot lines, out to the center of the lake. *Hanson v. Rice*, 88 Minn. 273, 279, 92 N.W. 982, 983 (Minn. 1903) citing *Lamprey v. Metcalf*, 52 Minn. 181, 53 N.W. 1139 (Minn. 1893). The general rule concerning the rights of a riparian landowner in this state is well settled. "The riparian owner's title extends to the low-water mark." *State v. Slotness*, 289 Minn. 485, 486, 185 N.W.2d 530, 532 (1971). Chernak admitted under oath he did not survey the Ruikkie's Government lot 6 as a Riparian Lot, (TT. 399, (4 thru 400, 3)). Chernak clearly erred in his surveying methods. Minnesota case law is clear that the Ruikkie's riparian Government lot must extend to Mitchell Lake.

"When a government lot abuts upon a lake, the shifting water line, and not the meander line, is the boundary of the lot". *Sherwin v. Bitzer*, 97 Minn. 252, 106 N.W. 1046 (Minn.1906). The transfer of such a lot by number according to a government survey, without words of restriction, conveys all the land which has become a part of the lot by the recession of the lake" *Sherwin v. Bitzer*, supra.

"Where the meander line of an inland, meandered, navigable lake is not a boundary line of the fractional lots or tracts of land abutting thereon, the title of the contiguous owners extends to all land between such a line and the shore of the lake, precisely as though it were the results of accretions or relictions; and the boundaries of adjoining tracts, as to land beyond the meander line, are fixed by extending their side lines on a deflected course from their intersection with the meander line toward a point in the center of the lake". *Hanson v. Rice*, 88 Minn.273, 92 N.W. 982 (Minn.1903).

County Surveyor Thomas O'Malley stated regarding the boundary between Government Lot 1 and 6.

"It is my opinion that the boundary between Lots 1 and 6 deflects at (meander line) this point and goes in a northwesterly direction, perpendicular to the shoreline, to the shore of the lake. This would be somewhere through Unit 6 on the CIC Plat" (Tr.Ex. 60).

Two other Minnesota Registered Surveyors have produced trial evidence showing that Chernak's position of the SW corner of Nall's Government lot 1 is erroneous. Northern Lights Surveying, completed a detailed and accurate riparian survey for the property in question and it was presented as evidence at trial during the testimony of Surveyor LaVerne Leuelling, (Tr.Ex. 7). Mr. Leuelling testified that he followed proper surveying methods for surveying riparian property in Minnesota. He tested six methods to determine the method that would be fair and equitable to all the affected Government lots (Tr.Ex. 68), (TT. 349, (15 thru 350, 4)), (TT. 353, (3)), (See, Scheifert v. Briegel, 90 Minn. 125, 133, 96 N.W. 44, 48 (1903)).

Also Norm Livgard (Former St. Louis County Surveyor), of Livgard Surveying in 2005 completed an Aerial Survey of the Ruikkie's Government lot 6, which depicts the same correct method of surveying this property as the Leuelling survey, and followed the guideline set by County Surveyor, Thomas O'Malley, (part of Tr.Ex. 70), (Tr.Ex. 66), (TT. 233, (3-20)).

The legal position of the Nall's Government lot cannot be changed, and did not change because of the Chernak Survey Sketch. The sketch is incorrect, and its information is erroneous. Because the Certificate of Survey Sketch was flawed, and incorrectly depicts the legal position of the SW corner of Government Lot 1 and that the

triangle parcel quit claimed by the Nall's was in Government lot 1, what ever alleged express agreement that the Nall's claim that the Ruikkie expressly agreed to would have been based on false and mistaken information that misrepresented the true legal positions of the properties. Because the alleged express agreement is claimed to have derived from, or based on this mistaken, impossible and non legal assumption it must be ruled null and void. Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake. Restatement (Second) of Contracts § 152(1) (1981), quoted in *Winter v. Skoglund*, 404 N.W.2d 786, 793 (Minn. 1987).

4). The trial court erred in ruling that the land swap between the Ruikkie's and the Nall's was an express agreement when the Quit Claim deeds for the land swap are unambiguous and make no mention of a boundary line agreement or that a purpose of the deeds was to set, settle or create a boundary line.

The trial court erred in making conclusion of Law No. 1, (A-13 (1)):
"The 2004 land swap transaction was an agreement between the Nalls and the Ruikkies as to the boundary line between their properties".

Nether of the deeds exchanged during the land swap make any mention of an agreement to set a boundary line, (Tr.Ex. 14 &15). The deeds from the land swap are clear and unambiguous. The deeds clearly show that the only purpose was to convey property that each party believed they had legal title to. Dave Adams the Examiner of Titles testified the deeds do not state that the parties were agreeing to set a boundary line, (TT. 128, (24 thru 129, 3)). Even though the deeds were exchanged based on an erroneous survey and a mistaken assumption of ownership, they are still clear in that the

only intent of the parties was to convey property. There is simply no wording in the deeds that the parties intended to set or agree on a boundary line. Read in context the Ruikkie's deed to the Nall's and the attached Schedule "A" legal description and Survey Sketch apply only to the property being conveyed in the deed, (Tr.Ex. 15). A contract is ambiguous if its terms are reasonably susceptible to more than one interpretation.

Blattner v. Forster, 322 N.W.2d 319, 321 (Minn. 1982). Only if a contract is ambiguous may the finder of fact consider extrinsic evidence in order to determine the intent of the parties to the contract. *City of Virginia v. Northland Office Props. Ltd. P'ship*, 465 N.W.2d 424, 427 (Minn. App. 1991).

5). The trial court erred in ruling the Ruikkie's acquiesced to the claimed express agreement.

The trial court erred in fact and law when it ruled the Ruikkie's acquiesced to the claimed express agreement in its Conclusion of Law No. 1, (A-13 (1)):

"The 2004 land swap transaction was an agreement between the Nalls and the Ruikkies as to the boundary line between their properties". The Certificate of Title issued after the transaction set forth an exact and precise boundary line and the parties have acquiesced in this boundary even prior to the transaction".

The Trial Court failed to make any Findings of Facts to show how the Ruikkie's could have acquiesced to the claimed agreement before the claimed agreement was even made. Not only are there no Findings to support this Conclusion of Law there is no statute or case law to support the conclusion. The elements and precedents for a claim of practical location in Minnesota are well established, there is no case law precedent allowing the requirement of acquiescence "after" the claimed express agreement to occur prior to the agreement. The legal requirement in Minnesota regarding a claim of Practical

Location by express agreement has always been that the acquiescence must follow after the agreement.

Boundary line by express Agreement: **"The line must have been expressly agreed upon by the interested parties and afterwards acquiesced in"**, *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977). (emphasis added).

A boundary by practical location based on express agreement requires two elements: that there be an agreement setting an "exact, precise line" **and that the agreement be acquiesced to "for a considerable time."** *Slindee v. Fritch Inv., LLC.*, 760 N.W.2d 903, 907 (Minn. App. 2009) (emphasis added).

To remove the requirement of acquiescence after the claimed agreement and for the "considerable time" as directed by the Minnesota Supreme court in *Beardsley v. Crane*, 52 Minn. 546, 54 N.W. 742 (1893), would be contrary to case law and would be inequitable. The obvious intent of such a requirement is to protect the parties from the possibility of a mistake as in the instant case. Such was the case in *Phillips v. Blowers*, 161 NW 2d 524 Minn: Supreme Court (1968). The evidence in the case shows that sometime around 1951 the owners of the two parcels began to plant trees as a fence line to separate their property starting at the new monument set by the parties in 1946 and working toward the lake. They continued setting trees until 1959 when the County Surveyor indicated that such a line was actually on lot 7 not the boundary. Following that information in 1959 they abandoned their agreement. The court ruled that the parties' years of planting the tree fence were not enough for it to be clearly acquiescence to the agreement to create a boundary.

Also in *Blanchard v. Rasmussen*, 2005 WL 2495991 (Minn. Ct. App.2005), (previously copied to all parties during motion to amend findings and Judgment), this court ruled that even 5 years after the two parties agreed to a boundary between their property by placing a stake near a large rock and stating that it marked the boundary, it was not enough for it to demonstrate acquiescence in of a boundary.

The Ruikkie's and Nall's land swap deeds were recorded in December of 2004 and 6 months later the Nall's asked, and the Ruikkie's refused to agree to sign the Nall's Release and Waiver document and would not agree to give up the riparian rights that they had legal title to. At that point any claimed agreement was clearly abandoned. Six months cannot qualify as the considerable time required for acquiescence after a claim of an express agreement in Minnesota. Also as will be discussed in detail following, there is not now, nor has there ever been a visible line to show a boundary of any kind which is required to demonstrate clear and unequivocal acquiescence in a boundary.

6). The trial court erred in fact and law when it ruled in its Conclusion of Law No. 2 (A-13 (2)), that the Ruikkie's have acquiesced to the claimed boundary since their initial purchase in 1992.

The Trial Court failed to make any Findings of Facts as to the existence of the claimed boundary line that the Ruikkie's are said to have acquiesced to, or how they could have acquiesced to any claimed line for the 15 years required by the statute of limitations.

The Nall's were required to prove that the Ruikkie's acquiesced to a boundary line. To prove acquiescence, the Nall's must provide evidence that is clear, positive, and unequivocal"... *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977). "the location

relied upon must have been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations." *Phillips*, 281 Minn. at 269 n.2, 161 N.W.2d at 526 n.2. Although possession of the land is not a prerequisite to establishing acquiescence in a boundary, the disseizor must take some action to demarcate an actual boundary by erecting a barrier or making some use of the land; otherwise there is no identifiable boundary in which the disseized can acquiesce. *Pratt Inv. Co. v. Kennedy*, 636 N.W.2d at 849-50. There must be a line that is "certain, visible, and well-known." *Beardsley v. Crane*, 52 Minn. 537, 546, 54 N.W. 740, 742 (1893). But when the boundary line is unclear, ambiguous, or contradictory, acquiescence in a particular boundary has not been demonstrated. *Theros*, 256 N.W.2d at 859; see *Phillips*, 281 Minn. at 271, 161 N.W.2d at 528. "There can hardly be an acquiescence in a boundary line that is claimed to be located in several different places." *Theros*, 256 N.W.2d at 859. And equally important, the acquiescence required is not merely passive consent, but conduct from which assent may be reasonably inferred. *Engquist v. Wirtjes*, 243 Minn. at 508-09, 68 N.W.2d at 417.

The Nall's have failed on each one of those requirements. The Trial Court failed to make Finding regarding the claimed line and the court erred in ruling that the Ruikkie's acquiesced to any line, (TT. 638, 2 thru 639, 6)). The Nall's provided no evidence or testimony at trial that any boundary line has ever existed between Government lot 1 and 6. The Nall's provided no evidence of a sight line, tree line, fence, wall, footpath or any other physical or visual indication of a boundary line between government lot 1 and 6, (TT. 48, (21 thru 49, 14)), (TT. 643, (5-18)). The record shows that the only physical marker of any type to show a boundary line in the SW area of Government lot 1 and the

NW area of Government lot 6 would be the monument Surveyor Chernak set for the Nall's in 2003, as part of his ALTA survey, (TT. 48, (21 thru 49, 14)), (Tr.Ex. 73). With out a physical demarcation of some type, a boundary line by practical location cannot be established, as there is no line for ether party to acquiesce to. At best the Nall's proved that the Ruikkie's were led to believe that their NW corner was 85 feet back from Mitchell Lake. Prior to Chernak's ALTA survey in 2003, that point was only a theoretical point and was not demarcated in any way. There was absolutely no evidence or testimony presented at trial that anyone ever knew exactly where that spot was. The complete area of the claimed line is covered in trees and brush, (TT. 547, (15 thru 548, 14)). Also, the lakeshore angles sharply in that area, (Tr.Ex. 7). That angling, along with the trees, brush, and topographical lay of the land would make it impossible to continue any type of measurement even if the 85 foot theoretical point was demarcated.

The Nall's failed to provide evidence that the Ruikkie's or their predecessor in title acquiesced to any claimed line for 15 years. The evidence of record shows unequivocally that by Homer's and the Ruikkie's conduct they were not acquiescing to or agreeing with the Nall's as to a boundary line. This is evidenced by the following items of record:

- i. The record shows that the Ruikkie's predecessor in title Mr. Homer believed and represented to the Ruikkie's in February of 1992 that Government Lot 6's property line went down to Mitchell Lake. Homer was not acquiescing to the boundary line the Nall's now claim, (A-9 (10) (A-10 (16 & 17))).

- ii. The record shows the Ruikkie's purchased Government Lot 6 on May 22, 1992 with the belief that that it's property line went down to Mitchell Lake. When the Ruikkie's purchased Lot 6 they were not acquiescing to the boundary line the Nall's now claim (TT. 198, (19 thru 199, 20)).
- iii. The record shows that the Ruikkie's in July of 2005 refused to sign the Nall's requested Wavier and Release document releasing their property rights for the property in question and agreeing to the Nall's CIC. That fact was known by all parties involved. (A-11 (22, 23, 24, 25)),(A-12 (26, 27)).
- iv. The record shows that after the Ruikkie's learned that the Nall's included property in their Mitchell Shores CIC 76 that Ruikkie's believed was their own they contacted the Office of the Examiner of Titles to complain that some of their property was included in the Nall's CIC 76, (TT. 249, 21 thru 250 15)), (TT. 165, (9-14)).
- v. The record shows that after the Ruikkie's learned that the Nall's included property in Mitchell Shores CIC 76 that Ruikkie's believed was their own, they and their attorney Charles Andresen made and office visit to Mike Dean Assistant County Attorney for St. Louis County in January, of 2006 to complain and ask St. Louis County to investigate, (TT. 250, (24 thru 251, 9)).
- vi. The record shows that the Ruikkie's hired two surveyors one in 2005 and another in 2006 to determine the true legal boundaries for their Government lot 6, ,(TT. 231, (13 thru 233, 20)), (TT. 329, 16-20)).

- vii. The record shows that Robert Ruikkie wrote seven letters starting in April of 2006 to St. Louis County Attorney Alan Mitchell requesting that St. Louis County fix the problem with their property being included in the Nall's CIC 76, (Tr.Ex. 70), (Response letters from St. Louis County, (Tr.Ex 74).
- viii. The record shows that the Ruikkie's sent this Torrens Verified Petition to have the boundaries for their Government lot 6 determined to the St. Louis County Examiner of Titles on March 29th 2007, (A-?).

The Nall's have also argued that when Mr. Homer granted a road easement through Government Lot 6 that the easement document somehow set a boundary line between Government Lot 1 and 6, or that he somehow acquiesced to the Nall's claimed boundary line, (Tr.Ex. 12 & 3). Surveyor Leuelling testified that the dashed lines in this drawing were not surveying lines and are not relevant to determining a boundary line, (TT. 344, (3 thru 345, 3)). The road easement document is clear and unambiguous, it's only an easement document and only for the purpose to create a road easement. No evidence was presented at trial that proved Homer also intended to set a boundary line for Government Lot 6. Trial Exhibit 3, entitled "Roadway Easement" has distances and directions for the road in Government Lot 6, Section 18, Township 62 North, Range 12 West. The only other information on this document is a reference to the "East Line of Gov. Lot 6" with a direction and distance and a reference to the "N.E. Cor. G.L. 6". The dashed lines in that document have no labels, measurements, descriptions or any indication of a purpose or intention to set a boundary line. Neither the drawing, (Tr.Ex.

3), nor the deed (Tr.Ex. 12) it was attached to, identify or set forth a legal description for a boundary of Government Lot's 6 and 1 which is the subject of the instant matter. Also, the owners of Government Lot 1 were not part of that road easement, a necessary element to establish boundary by practical location. To argue that this document is clear, positive and unequivocal evidence of Homer's intent to establish a boundary line is pure speculation. The record shows that Homer believed, both when he sold the Ruikkie's Lot 6 and even after the Ruikkie's discovered the old cabin that Government Lot 6 had Mitchell Lake frontage, (A-9 (10),(A-10 (16)). It is inconsistent with this fact to speculate that before Homer sold the Ruikkie's Government Lot 6, representing that lot 6 had lake frontage, he established a boundary line that eliminated any frontage or that he was acquiescing to a line that was contrary to what he believed and described to the Ruikkie's.

There was no testimony or evidence presented at trial that any owner of Government Lot 1 or anyone else for that matter had ever even met Mr. Homer or had ever even talked to Mr. Homer, other than the Ruikkie's and his then attorney Bill Defenbaugh (Tr.Ex. 58 & 59). There is nothing in the record that anyone had ever even seen Mr. Homer on the any of the property in question outside the Ruikkie's. There is no evidence in the record that Mr. Homer ever knew who the owners of Government Lot 1 were, or that they were claiming any boundary line. There is simply no clear, positive, and unequivocal evidence that Mr. Homer acquiesced to any line the Nall's are claiming.

II. THE COURTS MAY CORRECT A CERTIFICATE OF TITLE TO REGISTERED PROPERTY THAT ERRONEOUSLY INCLUDES PROPERTY THAT WAS NOT INCLUDED IN THE ORIGINAL DECREE OF REGISTRATION OR A PROCEEDING SUBSEQUENT TO REGISTRATION.

The Nall's have argued that because they were issued Certificates Of Title for their CIC 76, that even if they did not have legal title to all of the property included in those certificates that the Minnesota Torrens Act prevents the error from being fixed, and that those certificates now grant them irrefutable title ownership of that property. The Nall's argument is clearly contrary to Minnesota Case law. This court in *Howe v Hauge* (2009) 766 NW 2d 50, spoke directly to this issue and clearly ruled that even if a survey, including a Registered Land Survey was attached to a certificate of title it can still be challenged unless it was included in the initial registration decree or a in a proceeding subsequent to determine boundaries. "Chapter 508 establishes no limitation of actions to challenge registered land surveys or to determine legal descriptions or boundary lines not judicially determined in a Torrens proceeding", "Because the legal description of the peninsula and boundary lines now in dispute were not determined in the 1960 Torrens proceeding nor in any subsequent Torrens proceeding, neither Hagues nor Howes petitions or actions to determine the same constitute collateral attacks on the 1960 decree of registration or original certificate of title issued in that proceeding. *See Petition of Geis*, 576 N.W.2d at 750; *Minneapolis & St. Louis Ry. Co. v. Ellsworth*, 237 Minn. at 445, 54 N.W.2d at 804 (stating that the finding of the location of a property line between Torrens-registered property and another property does not constitute "an attack upon the Torrens decree"); *cf. Estate of Koester v. Hale*, 297 Minn. 387, 394, 211 N.W.2d 778, 782 (1973)

(ruling that issuance of a new certificate excluding land erroneously included in a prior certificate “does not offend the prohibition against opening the original decree of registration”)”. *Howe v Hauge* (2009) 766 NW 2d 50. “An erroneous COT does not create and interest in land”, *Minnesota Office Plaza, LLC, v. Target Stores, Inc, et al*, (Minn. App 2007, WL23638875).

Also as disused earlier the Nall’s were not good faith purchasers when they submitted their Ex Parte Examiner’s Petition Subsequent which was used to convert their held certificates of title to reflect their CIC 76 plat, (TT. 599, (5-14)). That act cannot remove title, or property rights from the Ruikkie’s Certificate of title.

CONCLUSION

The trial court erred in finding that the Ruikkie’s Torrens property in the instant matter was subject to a claim of practical location. The Trial Court erred in finding and ruling that the 2004 land swap was an express agreement to determine the boundary line between Government Lot 1 and 6. The Trial Court erred ruling that the Ruikkie’s acquiesced in or to any alleged line and that there ever was a clear visible line that could have been acquiesced to. The Trial Court erred in ruling that the boundary line between Government Lot 1 and 6 is as depicted in the Nall’s CIC 76.

Accordingly, the Ruikkie’s respectfully request that this Court reverse and remand this matter to the Trial Court ordering it to Judicially determine the boundary line between the Ruikkie’s Government Lot 6 and the Nall’s Government Lot 1 as depicted in the Leuelling Survey (Tr.Ex. 7), which was the only riparian Certificate of Survey of the

properties in question presented to the court as evidence during the three day trial. The Ruikkie's also request that this court reverse the Trial Courts Judgment on taxation that was in favor of the Nall's, dated June 23,th 2010.

Respectfully submitted,
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Signed Robert Ruikkie 10-11-10

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