74703-7

No. 747037

APPELLANT RESPONSE

COURT OF APPEALS DIVISION 1

OF THE STATE OF WASHINGTON

STEVE SWINGER,

PLAINTIFF – APPELLANT

V.

DOUGLAS J. VANDERPOL,

DEFENDANT - APPELLEE

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 JUN -1 AM 10: 15

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NO. 747037

COURT OF APPEALS DIVISION 1
OF THE STATE OF WASHINGTON

APPELLANT REPLY BRIEF

STEVE SWINGER,
Appellant

V.

APPEAL DEFENDANT SUMMARY JUDGMENT TO DISMISS ALL CLAIMS AND DAMAGES. AND APPELLANT'S CROSS MOTION FOR UNJUST ENRICHMENT, TOURTUOUS INTERFERENCE WITH A CONTRACT AND ABUSE OF PROCESS

DOUGLAS J. VANDERPOL,
Defendant

INTRODUCTION

Swinger encourages the Appellate Court to review the evidence and not rely on the comments made by the state trial court Judge Charles Snyder during a partial summary judgment in another case with other causes of action (Swinger v. First American Title Insurance Co). That partial

summary judgment was not a final decision. The final outcome of that case was a settlement and not a trial.

Additionally, the actions and comments of Federal Court Judge Pechman concerning a real estate action filed in the wrong jurisdiction, the Federal Court, should be viewed along with her other denials to understand the underlying intent of the court actions. It appears that the Federal Trial Court made the following decision in an effort to assure the complaint progressed to the Federal Appellate Court.

1. Denied a jury trial.
2. Denied the affirmative defense of the statute of limitation.
3. Denied subpoenas and subpoena duces tacum for county employee to provide evidence.
4. Denied Swinger's request to take leave of the court.
5. Denied Swinger's cross complaints.

Neither of these prior court's comments have any relevance to the decisions this court will make based on the documentary evidence, the law and in the interest of justice.

Note that V's attorney does not deny or refute any of Swinger's specific evidence for unjust enrichment, the request for restitution, and the amounts requested for restitution. Also, V's attorney does not refute or deny the specific evidence provide for the tortuous interference with Swinger's contract. V's attorney only make the general statement that the

trial court did not make errors. But, the error by the trial court in this state case was contrary to the following Supreme Court statement:

The Supreme Court has said: "We hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question.....In actions at law otherwise with the purview of the Seventh Amendment, this question is for the jury". Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720-721 (1999).

V's dispute regarding property ownership is a fact that should have been determined by a jury and not decided by the trial judge.

Washington State law "RCW 7.28.070 **Adverse possession under claim and color of title—Payment of taxes.** "Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for **seven successive** years continue in possession, and shall also during said time **PAY ALL TAXES LEGALLY ASSESSED** on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements,....." .

This RCW evidences the legislature's intent to establish the payment of property tax as the primary indicator of property ownership.

DISPUTED FACTS

Swinger would like to dispel the inaccurate, misleading and incomplete statements provide by V in his answer to the appeal. This will be done on a page by page basis of V's reply.

Page 1: V's attorney Mark Lee's (Lee) states that there never was a motion made by Swinger. This is not true.

Swinger's complaint dated December 11, 2015 (CP 1) for unjust enrichment, abuse of process, and interference with a contract plus the Swinger's assignment of errors pages 2 and 3 of the brief detail his claims and counter claims for this appeal. CP 12 and 13 are the cross motion for unjust enrichment, abuse of process and tort interference with a contract and declaration for to support the motion.

A maxim of law is (roughly) that substance governs over form and in the interest of justice V's argument regarding a motion is moot.

Page 2: Contrary to V's statement Swinger and V do not own government lots on opposite side of the Nooksack River in 1986.

First, V did not purchase his property until three years after 1986.

Secondly, on the map on V's page 3, we can see that V's parcel number 400235 512/088 is south of the "yellow" area. V's deed description does not include the "yellow" area. The yellow area is the property V tried unsuccessfully to obtain in his adverse possession in his Federal complaint and is the subject property of the Swinger unjust enrichment complaint.

True copies of the Swinger property are contained in (CP #13) as provided by the Whatcom County Department of River and Floods (exh 1), Whatcom County CREP Program map, County Assessor's map (exh 2), and all evidence provided on pages 7-9 of Swinger's appeal. (Attached

are color copies of the government maps because it is easier to read Swinger's property tax number on both of his parcels and the boundary lines identified by the CREP survey on color maps. The originals were in color.) It should also be noted that these maps were independently created by government agencies. Swinger did not purchase these opinions.

Page 4: V's attorney states, V "advised the CREP program that he owned the disputed area."

Then V goes on to say in the next sentence: "In each and every communication, he (V) **merely** asserted that he had a claim on the title of the Disputed Area."

The terms "owned" and "merely asserted he had a claim" appear contradictory. It appears that V's story is changing to cover up false allegations.

Page 6: Avulsion comments: Swinger claimed avulsion only in response to FATCO assertion of accretion. This was not Swinger's only argument as V appears to allege by his statement. Because the "yellow" area was only a minor portion, one of three easements, of Swinger's complaint against FATCO, Swinger did not appeal any further complaints regarding the yellow area. A summary judgment was not the final decision of the court and the complaint was settled. That makes any reference to the FATCO litigation irrelevant.

Page 7: Regarding the partial summary judgment with FATCO, Judge Charles Snyder's statement was: "You **may** own the subject property" but, you have not proven it for a summary judgment order. The lack of sufficient evidence in a partial summary judgment motion does not mean Swinger does not own the subject property. It means the evidence must go to the jury.

V filed a quiet title for adverse possession in federal court evidencing the lack of V's ownership of the subject property.

Page 8: andi-SLAPP issues. V did not flag third party wrongdoing by Swinger. V complained to CREP about wrongdoing by CREP (CP 13 exh 10-1). The anti-SLAPP statute only applies to a notice to a government agency of a third party wrongdoer. Swinger merely applied for the program and had no further activity in the process. CREP surveyed, staked out the boundary, created the map, and contracted with the workmen for brush clearing and planting of the vegetation

Page 9: Federal Judge Pechman dismissed all counterclaims to move the claims to the Federal Appellate Court."

Swinger believes that was done because she was aware of the lack of jurisdiction of a quiet title action in Federal Court.

Page 14: Lee states "The order of dismissal was preceded by the actual litigation of Swinger's ownership rights."

That statement is false and no evidence has been provided to support that statement. The title company, FATCO, never tried to claim ownership of the Swinger property and there was no final decision in that case. Without a final decision no ownership rights were decided.

Page 17: V's attorney states "Indeed the evidence ..... is **essentially the same** as that produced in the State Action".

That statement is totally wrong. In this appeal substantially more government agencies and professional appraiser documents were provided then were provided in the state partial summary judgment.

Page 17: V's attorney states "Swinger contends an injustice .....because he could not have foreseen that V would claim ownership". (reference from this statement to the end of the page.)

Swinger could not have foreseen V would claim an interest in the subject property because he possessed all of the following documents showing his ownership prior to the FATCO settlement.

1 Swinger had obtained the Department of River and Flood map showing Swinger's ownership via the property tax parcel on the subject property. (exh 1 attached)

2. The CREP map indicating the boundaries of Swinger's property (exh 2 attached).
3. The Whatcom County parcel map shows Swinger's ownership.
4. The County Assessor's appraisal shows Swinger's ownership.
5. The County Tax Collector's payment of property tax record shows ownership history.
6. Swinger's property tax bill shows ownership.
7. Easement 790220 recorded on Swinger's property stating there was an easement on the north and south side of the river of his property. The only property Swinger owns on the south side of the river is the property V is trying to claim. (All documents were included with the Swinger CPs) Because there is a fishing easement #790220 ("south of the river") on the subject property and one of the elements of adverse possession is "exclusive" use, V can't meet this and other elements for adverse possession.

Page 19: (abuse of process issue) "Swinger failed to allege or present .....any **misuse of the legal process**."

Swinger contends that for a partner in a legal firm to file a case in the wrong jurisdiction is a misuse of the legal process and damaged Swinger financially and emotionally. (V's attorney provided evidence of the federal court litigation.) One of the first requirements of an attorney is to know

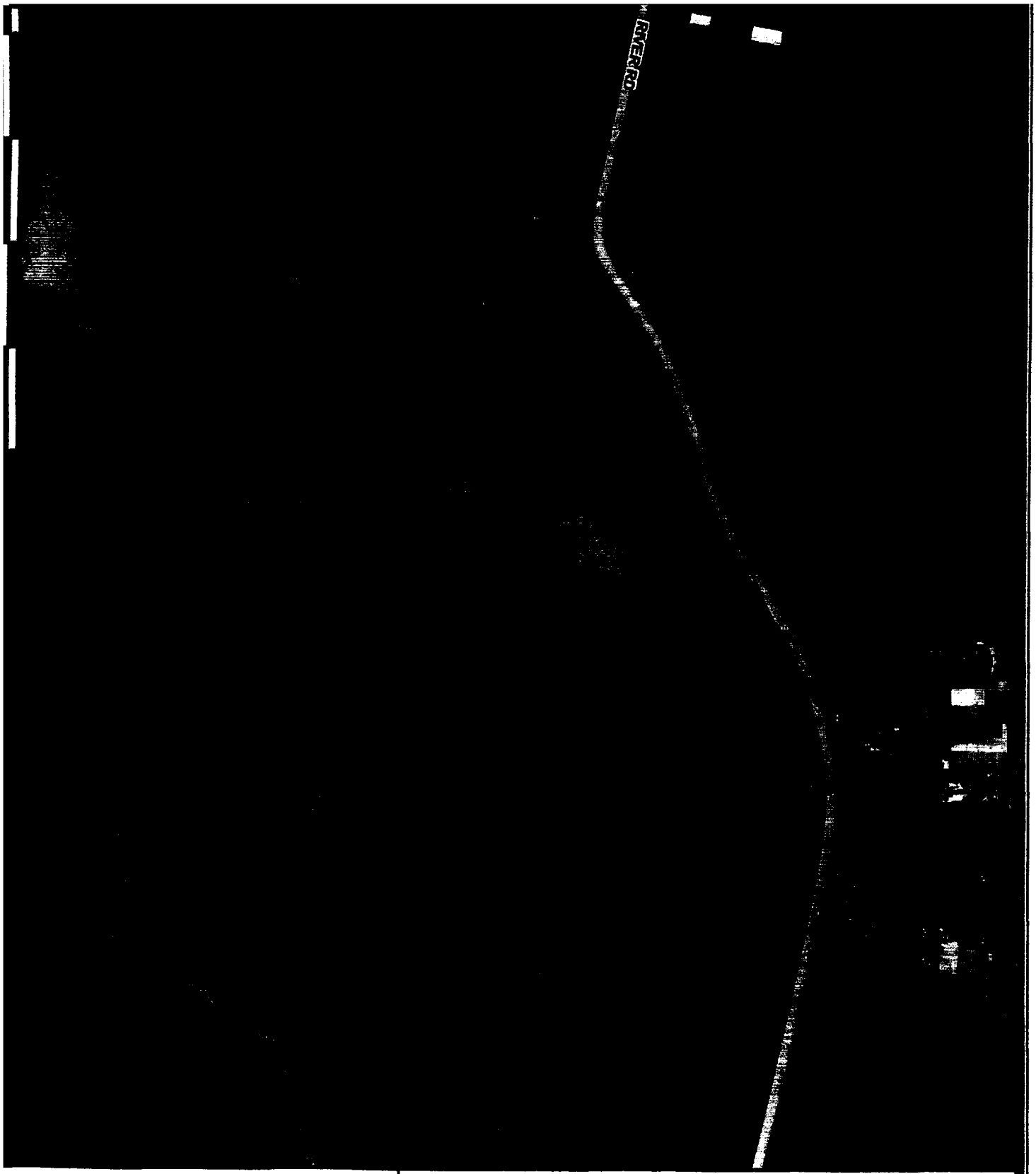
and demonstrate to any court that it has jurisdiction to review the complaint. Filing a complaint in the wrong jurisdiction is a misuse of the legal process. Swinger requests restitution of all his cost incurred during that litigation.

CONCLUSION

1. Swinger owns the subject property and V used it without payment. Based on public policy that trespassers do not use others owner's property on a long term basis without payment qualifies for an unjust enrichment order. Restitution is based on the defendant's length of time of defendants use and the payment of fair compensation. The amount of undisputed restitution is requested.
2. V's attorney abused the legal process by filing a complaint in the wrong jurisdiction with a questionable scheme. Restitution is requested.
3. V's complaint for an anti-SLAPP violation does not meet the required elements. The anti-SLAPP penalty and fees should be denied.
4. Swinger requests reimbursement for all filing fees and costs of the federal litigation and appeal.

Dated this 26th day of May 2016.

Steve Swinger (360)303-8129
583 River Rd Lynden, Wa 98264



Aerial Photo - 2008

FIRMP#:	DATE:	By: TBouma

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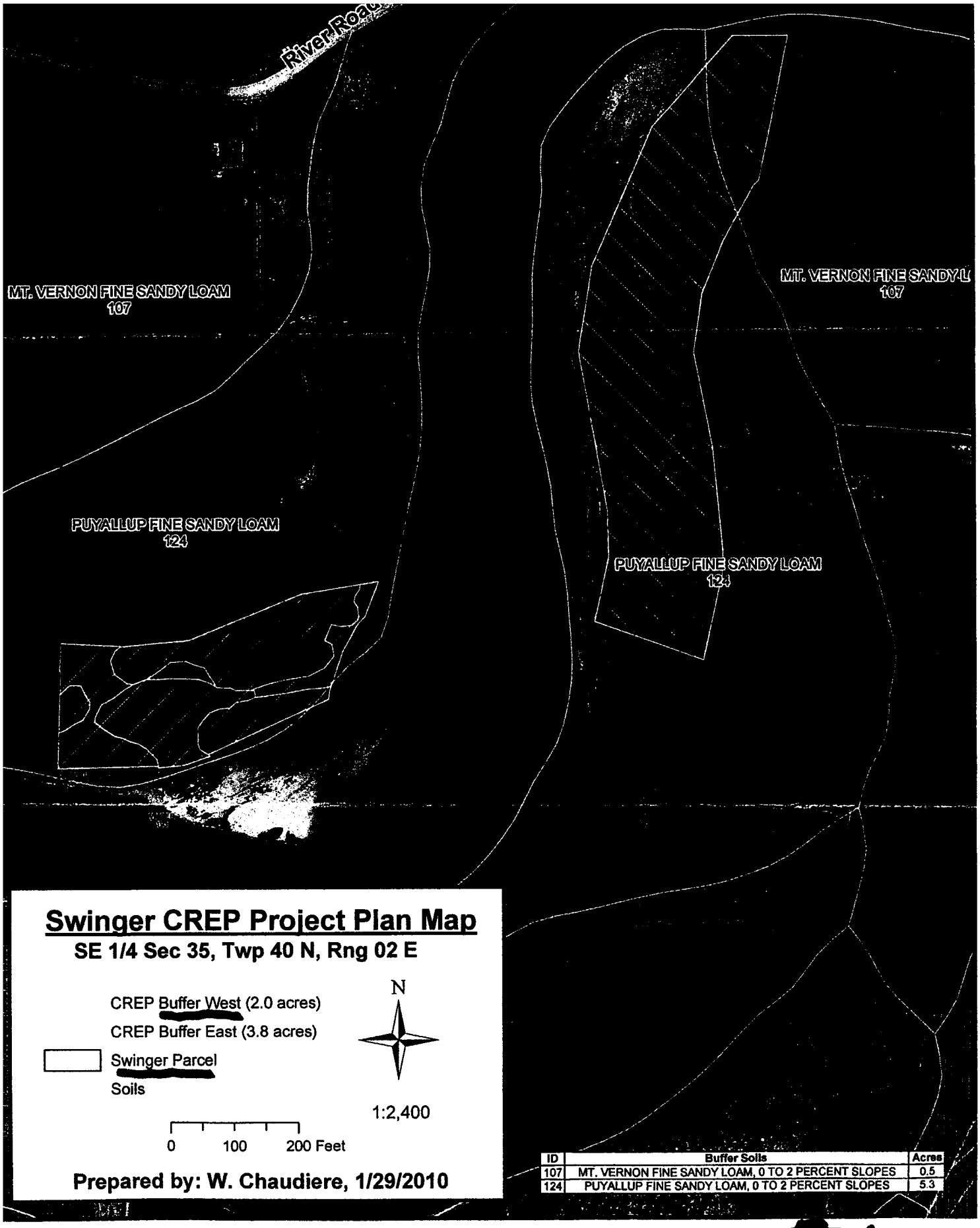
6.1



ID	Buffer Soils	Acres
107	MT. VERNON FINE SANDY LOAM, 0 TO 2 PERCENT SLOPES	0.5
124	PUYALLUP FINE SANDY LOAM, 0 TO 2 PERCENT SLOPES	5.3

7.1

CERTIFICATION OF SERVICE

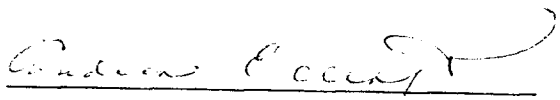
I certify that I am over the age of 18 and

on May 27th 2016 I served Steve Swinger's Appellant Response to Respondent's response on the following:

Mark Lee

Brownlie, Evans Wolf & Lee
230 E. Champion Street
Bellingham, Wa 98225

Via U.S. Mail dated this 26th day of May 2016 in Bellingham, Washington.



ANDREA ELLIOTT