

NO. 35227-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SAFE HARBOR FAMILY PRESERVATION TRUST,
Washington trust,

Appellant,

v.

FRED NOBLE and FAITH NOBLE, husband and wife,
and
TILlicum BEACH, et al.,

Respondents.

STATE OF WASHINGTON
BY
DEPUTY
07 MAR 14 PM 1:44
COURT OF APPEALS
DIVISION II

BRIEF OF RESPONDENTS NOBLE

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I. ISSUE AS TO RESPONDENT NOBLE

Did the trial court abuse its discretion in determining that reasonable attorneys fees payable by Nobles to Safe Harbor should not include any amount allocable to Safe Harbor establishing or defending its assertion that Nobles way of necessity should be over property owned by Respondent Tillicum Beach?

II. COUNTER STATEMENT OF THE CASE

A. FACTS

Since Appellant did not assign error to any Findings of Fact, they are the best source for the factual background of the Case. For purposes of assisting the Court to visualize the property involved, there is both a survey map and an aerial photo attached as exhibits to the Petition for Condemnation of Private Way of Necessity. (CP 181-189). Additional copies of that map and photo are attached as exhibits to this brief.

The properties of all the parties are bounded on the east by Hood Canal, and on the west by Highway 101. The Safe Harbor property is north of Nobles' property and the Tillicum Beach property is south of Nobles' property. The

Safe Harbor property and the Tillicum Beach property each have a dock extending into Hood Canal.

B. PLEADINGS

The original Petition for Condemnation of Private Way of Necessity (CP181-189) named only Safe Harbor as Respondent. Safe Harbor's immediate response to that Petition was "Opposition to Petitioner's Petition and Request for Order Establishing Immediate Usage" (CP Sub #4), and the Declaration of Paul Stokes (CP Sub #5). In both documents Safe Harbor made the claim that Nobles' way of necessity should not be across the Safe Harbor Property, but should be across either Tillicum Beach common property or the property of Fred Nobles' parents which was just south of the Fred Noble property and west of the Tillicum Beach common property. Based on those allegations, Petitioners Noble prepared an Amended Petition for Condemnation of Private Way of Necessity. (CP 141-150). In that Amended Petition, Nobles alleged that Tillicum Beach was being added because of the claims by Safe Harbor, but that Nobles did not believe that a route across Tillicum Beach property was

appropriate. Safe Harbor did not reply to or answer the Amended Petition. Safe Harbor did not file any pleading which specified the location of an alternate route over Tillicum Beach property.

III. ARGUMENT

A. The Trial Court Did Not Abuse its Discretion in Awarding Fees to Safe Harbor.

Safe Harbor did not prevail on any issue. Safe Harbor did not prevail on the amount of fair compensation payable to it. In fact, the Court held that it failed to present any testimony that complies with existing law about how such compensation is to be determined. (COL Damages, 2; CP 118). Safe Harbor also did not prevail on the determination of the route. The Court nevertheless awarded Safe Harbor attorney's fees of \$6,596.25 against Nobles. In doing so, the Court followed the rule set forth in Sorenson v. Czinger 70 Wn. App. 270, 852 P.2d 1124 (Div. III, 1993). By allowing an award of attorney's fees to the condemnee even though the condemnee did not prevail.

The Trial Court clearly exercised its discretion in determining the amount of fees to be awarded to Safe Harbor from Nobles. In the Memorandum Decision re Attorneys Fees, the Court sets out in some detail the reasons why the amount of fees awarded to Safe Harbor from Nobles is reasonable. (CP 18-20). Safe Harbor has the burden of persuading the Court of Appeals that the Court either abused its discretion or exercised its discretion under an error of law. Kennedy v. Martin, 115 Wn.App. 866 (Div II 2003) at 872. No error of law is indicated by Appellant. No facts or law indicate that the Court abused its discretion.

B. Safe Harbor is Responsible for Tillicum Beach Being a Party.

From the very beginning, Safe Harbor raised the issue of an alternate route across Tillicum Beach property. See Declaration of Paul Stokes (CP Sub#5) and the initial response to the Petition (CP 177-180). As set forth in the Amended Petition (CP 141-150), Nobles only joined Tillicum Beach after the claim of an alternate route was made, and did so while alleging that it did not believe that such an alternate

route was proper, but was required to do so once the claim had been made.

Sorenson, *supra*, may allow a condemnee to urge an alternative route even if the owners of the property involved are not parties. CR 19 (a) however, appears to be to the contrary. That rule requires the joinder of an indispensable party, defining such a party as one in whose absence "complete relief cannot be accorded among those already parties." Tillicum Beach had to be a party in order for complete relief to be available to Nobles. If Tillicum Beach was not a party, then the Court could have found that the appropriate route was over Tillicum Beach property, and not over Safe Harbor's property. That finding would not have been binding on Tillicum Beach, but would have been binding in favor of Safe Harbor. The very real risk then would be that in a subsequent action against Tillicum Beach, the court would have concluded that the route over Safe Harbor's property was the proper one. As soon as Safe Harbor invoked the possibility that the route for Nobles' was across property owned by Tillicum Beach, then Tillicum Beach

became an indispensable party, which Nobles had to join. Failure to join Tillicum Beach would have been malpractice. It is disingenuous for Safe Harbor to seek refuge from not only the reduction of its attorney's fees, but also the responsibility for attorney's fees in favor of Tillicum Beach by claiming that solely because it did not join Tillicum Beach, it is not responsible for fees claimed by Tillicum Beach's attorney, and that its fees should not be reduced. The Trial Court properly found that 70% of the attorney's fees incurred by Safe Harbor were related to its failed attempt to establish an alternative route across Tillicum Beach property. (CP 18-20). That attempt not only failed, but failed miserably. Not only did Safe Harbor fail indicate a specific alternate route, but also, the issue was not even close. (FOF re Determination of Route, paragraphs 14-23) (CP 127-129).

The statute, RCW 8.24.030, authorizes the Court to award "reasonable" attorney's fees. Here, where Safe Harbor elected to raise the issue of an alternate route, and then encountered fierce resistance from the owner of the property,

it would not be reasonable to require Nobles to pay Safe Harbor for fighting a battle that it started.

IV. CONCLUSION

The Trial Court's award of attorney's fees against Nobles should be affirmed. In making that award the Court did not act under any error of law and did exercise its discretion. The amount awarded was reasonable. There was not abuse of discretion.

In the event that this Court should reverse the award of attorney's fees in favor of Tillicum Beach, the matter should not be remanded for an award of fees in favor of Tillicum Beach and against Nobles. While that issue may have been raised in the pleadings, the Trial Court did not make any ruling which would authorize such an award. Tillicum Beach did not appeal from the Trial Court not having entered any Findings, Conclusions, or Judgment which would support such an

award. The Judgment of the Trial Court is final as to that issue.

Respectfully submitted this 13th day of March, 2007.

McGAVICK, GRAVES, P.S.

By:

A handwritten signature in black ink, appearing to read "Robert L. Beale", written over a horizontal line.

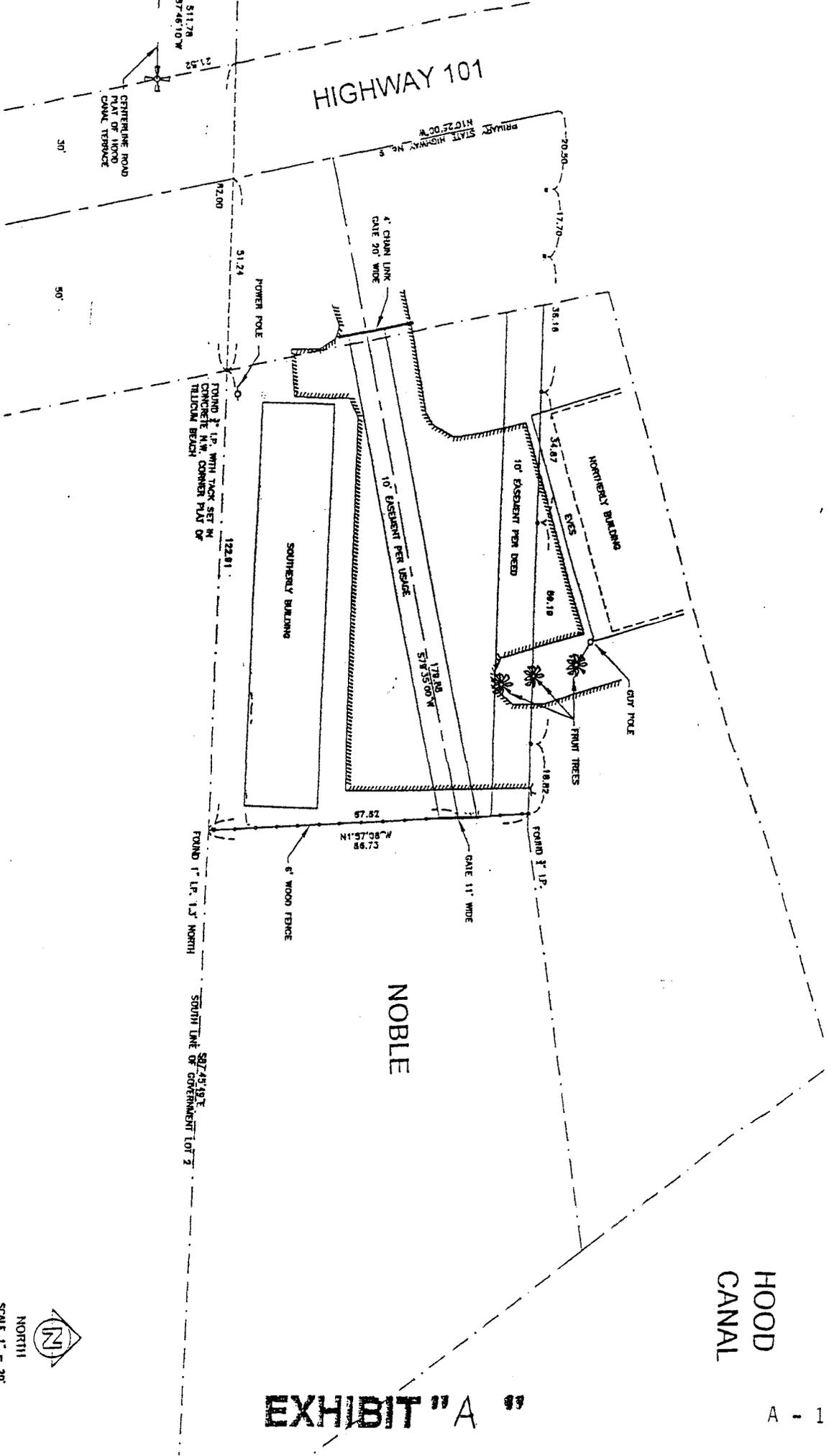
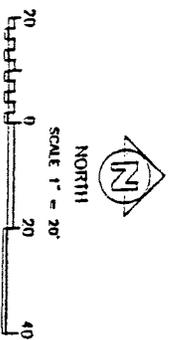
ROBERT L. BEALE, WSBA #1887
of Attorneys for Respondent Noble

V. APPENDIX

1. Survey Map.....A-1
2. Copy of Aerial Photo.....A-2

HOOD
CANAL

EXHIBIT "A"



METHOD OF SURVEY

A SURVEY WAS PERFORMED BY FIELD TRAVERSE WITH THE
 ALL RESULTS MEETING OR EXCEEDING THE CURRENT
 REVERSE STANDARDS CONTAINED IN W.A.C. 532-150-090.
 MEASUREMENTS WERE MADE WITH A WILD T-2000 AND

LEGAL DESCRIPTION

A PORTION OF THE SOUTH 86.50 FEET OF
 GOVERNMENT LOT 2, SECTION 28, T14P, 22
 N, RANGE 4 W, W.M., LYING EASTERLY OF
 PRIMARY STATE HIGHWAY No. 8.

LEGEND

- FOUND 2" BRASS CAP @ SURFACE
- SET 2 x 2 HUB

REFERENCES

R.O.S. IN VOL. 15 PAGE 42

BASIS OF BEARING

NORTH LINE OF PLAT OF HOOD CANAL TERRACE
 PAGE 185

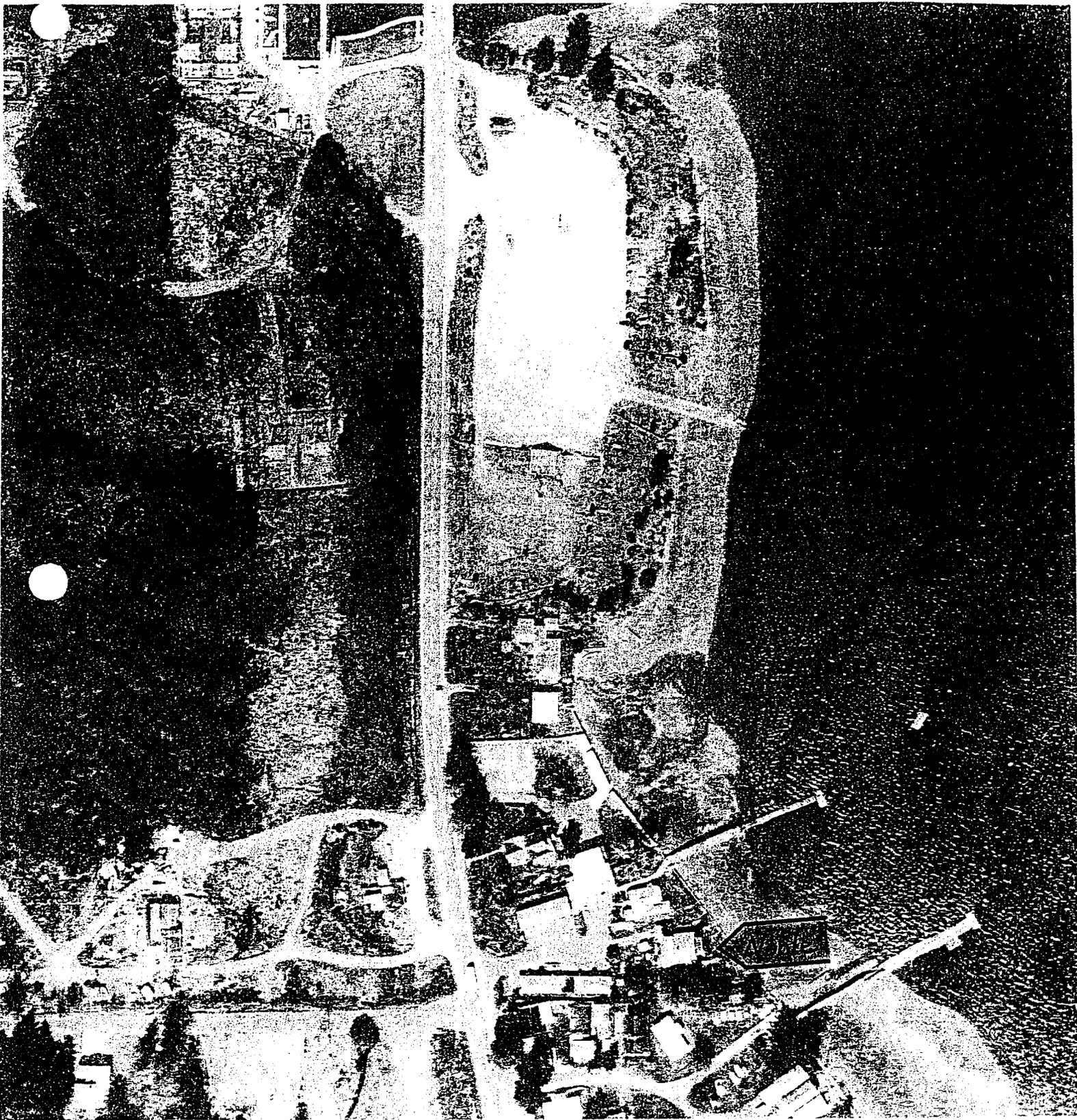


EXHIBIT ¹⁰ B ³⁸

FILED
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DECLARATION OF SERVICE

I, RAMONA KLIPSTAS, hereby declare: That I am over the age of 18 years, a citizen of the United States and of the State of Washington, and not a party to the above-captioned case; and

That on the 14th day of March, 2007, a true and correct copy of the Brief of Respondents Noble was delivered to:

Michael W. Johns
Davis Roberts & Johns, PLLC
7525 Pioneer Way, Suite 202
Gig Harbor, WA 98335

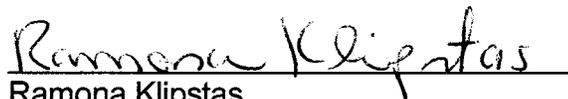
Robert D. Wilson-Hoss
Hoss and Wilson-Hoss
236 Birch Street
Shelton, WA 98584

VIA U.S. MAIL
 VIA FACSIMILE
 VIA MESSENGER

VIA U.S. MAIL
 VIA FACSIMILE
 VIA MESSENGER

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

This Declaration was completed at Tacoma, Washington on this 14th day of March, 2007.



Ramona Klipstas
Legal Assistant for Robert L. Beale