No. 94357-5

THE SUPREME COURT
OF THE STATE OF WASHINGTON

COALITION OF CHILIWIST RESIDENTS AND FRIENDS, an Association of multiple concerned residents of the Chiliwist Valley, RUTH HALL, ROGER CLARK, JASON BUTLER, WILLIAM INGRAM and LOREN DOLGE, Residents and property owners in the Chiliwist Valley,
Appellants,

v.

OKANOGAN COUNTY, a Municipal Corporation, and Political Subdivision of the State of Washington; RAYMOND CAMPBELL, SHEILAH KENNEDY, and JAMES DETRO, Okanogan County Commissioners; DANIEL BEARDSLEE, Okanogan County Hearing Examiner; JOSHUA THOMPSON, Okanogan County Engineer; Respondents; and GAMBLE LAND & TIMBER Ltd., a Washington Limited Partnership,
Respondent and Cross Appellant.

Respondent Gamble Land's Answer to Petition for Review and Request To Review Standing Issue.

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I. NATURE OF THE CASE

Okanogan County commenced proceedings per RCW Ch. 36.87 to consider vacating a three (3) mile portion of Three Devils Road, pursuant to a Road Vacation Petition filed by Gamble Land & Timber ("Gamble"), the owner of property adjoining Three Devils Road.

After considering the County engineer's opinion (per RCW 36.87.040), and the recommendation of the County Hearing Examiner (per RCW 36.87.060(2)), the County Commissioners decided to vacate Three Devils Road. (CP 1132-1133) See Appendix attached with photos of the road.

Individuals with no property abutting the vacated road, but with an interest in keeping the road open to access Forest Service land (see CP 1394-95, 1442, 1452, 1475), filed a petition/complaint seeking to overturn the road vacation decision. After initially granting the writ and allowing discovery, the Trial Court ultimately entered an order granting Gamble's motion for summary judgment, and upheld the County Commissioner's road vacation decision. (CP 62-64, 78-83). On appeal, the Appellate Court unanimously upheld the lower court in an unpublished decision (No. 34585 - III, 2017 WL1032774). In their petition for review, Appellants

now ask this Court to re-write case law precedent for vacation of roads. Gamble asks this Court to deny the Petition for Review.

Only if the Petition for Review is granted, Gamble then asks this Court to review Appellant's standing to pursue this action, which issue the Court of Appeals elected not to address.

II. REASONS TO DENY PETITION FOR REVIEW

A. None of the Appellants' property abuts Three Devils Road, nor do they use the road to access their property.

B. The unpublished decision is consistent with published appellate decisions in Washington.

C. The record is devoid of any competent evidence of collusion or fraud.

D. The Appearance of fairness Doctrine does not apply to legislative action.

III. STATEMENT OF THE CASE

A. Factual Background

Three Devils Road was privately built sometime after 1950 as a logging road by the Otto Wagner family. (CP 768). In 1955 the County unilaterally added Three Devils Road to the County Road system. (CP 245).

Gamble purchased all property on both sides of Three Devils Road in 1995 from Omak Wood Products (CP 376), except a small portion that is DNR land - DNR does not oppose this road vacation. (CP 245, 434, 467).

After purchasing the adjacent property, Gamble rebuilt Three Devils Road to make it passable for logging equipment (CP 376-377, 773), and thereafter has regularly maintained it. (CP 353-354, 376-378, 422-427, 429). In fact, every time the road has been blocked (by rocks or downed trees) or washed out, it has been cleared or reconstructed at Gamble's expense. (CP 301, 353-54, 376-378, 422-427, 429; 773). See photo's of Gamble equipment rebuilding road in Appendix (CP 425-426). Three Devils Road also is not plowed and thus is closed during the winter (CP 1398, 1432, 1445-46, 1468-69). The only Okanogan County record of maintenance expenditures on Three Devils Road is in 2013 ($3,183.54), and 2014 ($2,346.14). (CP 411-413).

The vacated portion of Three Devils Road is approximately three miles long (CP 245), in rugged mountainous country, and is in rough condition (See appendix attached). It is designated as a primitive road. (CP 356, 491). At the west end of Three Devils Road (where it abuts Forest

Service land), the Forest Service installed a gate which it intermittently closes. (CP 352, 385-86).

Three Devils Road does not meet the minimum width standards for a county road. Three Devils has an established maximum road width of 14 feet. (CP 337-338). For primitive roads, Okanogan County's Road and Street Standards (Section 6.2.6) requires a finished roadway width of 16 feet, + 2 feet on either side. (CP 123-124).

In accordance with RCW 36.87.040, Okanogan County Commissioners directed the County Engineer to report upon the proposed vacation of the road. (CP 300). The County Engineer personally examined Three Devils Road (CP 356, 433), determined that the county performs little to no maintenance on it, and that the road is minimally used (evidenced by vegetation between two narrow wheel tracks) (CP 352, 356, 854-857, 859); see also County Traffic Study (CP 410). The County Engineer concluded that this "portion of the road is useless as a part of the general road system and that the public would "not be benefitted or inconvenienced" by the road's vacation (meaning that the public would not be "affected".) (CP 356)

All Appellants testified (on deposition) that they have never lived adjacent to Three Devils Road (CP 1416, 1427, 1447, 1462, 1476-78), have never personally used the road as an escape route (and know of no one who has) (CP 1387-88, 1431, 1443, 1451, 1467), and want Three Devils Road to remain open to access Forest Service land (CP 1394-95, 1442, 1452, 1475).

IV. LEGAL AUTHORITY AND ARGUMENT

A. The Court reviews summary judgment determinations de novo.

A summary judgment decision is reviewed de novo. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510 (1987). Summary judgment is appropriate when the pleadings, affidavits and other records show no genuine issue as to material facts exist and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). To respond to a summary judgment motion, affidavits "must be based on personal knowledge admissible at trial and not merely on conclusory allegations, speculative statements or argumentative assertions". *Las v. Yellow Front Stores*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992).

Unsupported facts are no more than bare allegations and conclusions, and are not true evidence. *Roger Crane & Associates, Inc., v. Felice*, 74 Wn. App. 769, 779, 875 P.2d 705 (1994).

1. Unsworn Letters submitted to Hearing Examiner.

Appellant did not submit any sworn testimony (by affidavit or declaration) to oppose Respondent's motion for summary judgment, and unsworn letters submitted to the Hearing Examiner cannot be considered. See *Orland and Tegland*, Wash. Prac.: CR 56, at P. 538 (1992).

B. Respondents seek review of the Appellate Court's refusal to address Appellant's lack of standing.

Only if discretionary review is granted, then the Supreme Court should review whether Appellants have standing to pursue this action. On March 16, 2017, Division III of the Court of Appeals, at P. 8 of its unpublished opinion, stated:

> "Because we reject Coalition's arguments, we deem it unnecessary to reach the standing issue raised by the cross petition."

1. The Court should continue to follow the Abutting Landowner Rule on standing to challenge a road vacation.

In Washington, challenges to road vacation orders can be pursued by (a) abutting property owners, or (b) those whose reasonable means of access is obstructed, and who suffer a special damage, different in kind and not merely degree, from that sustained by the general public. See *Capitol Hill Methodist Church of Seattle v. The City of Seattle*, 52 Wn.2d 359, 365, 324 P.2d 1113 (1958) (vacation of city road); *Olsen v. Jacobs*, 193 Wash 506, 510, 76 P.2d 607 (1938) (vacation of county road). In *Capitol Hill*, the plaintiffs seeking to enjoin a road vacation were owners of property in the vicinity of the road. They alleged that the street was their means of access, and that its closing would deprive them of convenient access to their properties. *Id.* at 364, 324 P.2d 1113. The defendants moved for summary judgment, which the trial court granted. On appeal, the Supreme Court concluded that appellants were not in a position to question the street vacation:

> "Their argument is solely that ... there has been a substantial impairment of their access. This is insufficient to warrant the court's interference with a legislative function."

Id. at 365, 367, 324 P.2d 1113.

This rule is longstanding. In *Taft v. Wash. Mutual Sav. Bank*, 127 Wash. 503, 509-510, 221 P. 604 (1923), the court stated:

> "... we conclude that the correct rule is that only those directly abutting on the portion of the street or alley vacated, or alleged to be obstructed, or those whose rights of access are substantially affected, have such a special interest as to enable them to maintain an action."

Here, the Appellants do not rely on Three Devils Road for access, claim no special damage unique to them, and do not even claim that the road's closure will deny them convenient access to their properties.

The court in *DeWeese v. Port Townsend*, 39 Wn. App. 369, 693 P.2d 726 (1984), citing *Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash. 303, 83 P. 316 (1906), affirmatively recognized municipal authorities' broad discretion as to roadway vacations. The *DeWeese* court restated the substantive principle that "those who are not dependent on a street for access are not injured when it is vacated," and "To enlarge the rights of the general traveling public would be to restrict unduly the discretion granted to municipalities for the management of streets." *DeWeese,* 39 Wn.App. 369, 373-374, 693 P.2d 726 (1984) (citing *Hoskins v. Kirkland*, 7 Wn.App. 957, 960-61, 503 P.2d 1117 (1972)).

Here, Appellants' have no protected interest (i.e, standing), when their only claimed interest is access to public lands across a little-used, primitive road.

i. Zone of interest claim is inapplicable.

Appellants concede that they do not own property adjacent to the vacated portion of Three Devils Road, and do not claim that the road is necessary to access their properties. Appellants' previously argued they had standing because they fall within an amorphous "zone of interest". (See PP. 40-44 of Appellants' Opening Brief dated March 14, 2016).

The term "zone of interest" was mentioned by the Court in *DeWeese v. Port Townsend*, 39 Wn. App. 369, 693 P.2d 726 (1984), but that case involved the vacation of a road abutting a body of water, which is controlled by a different statute. Because the roadway in *DeWeese* provided access to water, the court held that all members of the public have standing if they have (or will) suffer an injury which is arguably within the "zone of interest", which the court defined as:

> "... standing must be based on injury to an interest which is functionally related to public access to the water."

DeWeese v. Port Townsend, 39 Wn. App. 369, 375-376 (1984). Here, it is undisputed that Three Devils Road does not abut a body of water, so the "zone of interest" analysis is inapplicable.

ii. Unsupported claims of "actual peril" do not confer standing.

Because Three Devils Road is located in a rural area, Appellants allege that closure of the road poses a threat to their health and safety, which alone they argue should confer standing.

Appellants cite no case law or statute to support this theory, and admit that they have never used Three Devils Road to escape a fire. (CP 1387-88, 1431, 1443, 1451, 1467). Instead, Appellants now want to rely on unsworn conclusory allegations by non-parties (in the form of letters and public comments), which are not admissible to oppose a summary judgment motion. If anything, the record demonstrates that using Three Devils Road, which constantly needs repair and is intermittently gated at the west end, could put persons in danger if used as a fire escape.

Realistically, fire danger exists in all locals, but if a mere allegation of fire danger automatically created standing, then a "fire escape exception" would completely swallow the general rule, and everyone

would have standing. In *Capitol Hill Methodist Church*, the Supreme Court denied a challenge to a road vacation despite similar allegations of fire hazard. *Id.* at 366-67.

iii. The Legislature does not confer standing.

The Standing Doctrine prohibits a litigant from raising another's legal rights. *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994). It prevents a litigant who is not adversely affected by a public act or statute from asserting the legal rights of another. See *Greater Harbor 2000 v. Seattle*, 132 Wn.2d 267, 280-281, 937 P.2d 1082 (1997).

Appellants now allege for the first time that the statute governing road vacations itself grant standing to anyone who objects to the vacation. (See P. 2 of Petition for Review). Appellants fail to cite any authority for this proposition. In addition, while Appellants refer to the fact over two hundred people signed a petition opposing the road vacation (See P. 5 of Petition for Review), they fail to mention that forty (40) signors do not even live in Okanogan County, and over 50% do not live within 15 miles of Three Devils Road (CP 547-569).

Decades before the 1937 enactment of the County Road Vacation Statute (RCW Ch. 36.87), Washington cases followed the same

Abutting Landowner rule as they do today. See *Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash 303, 306-08, 83 P. 316 (1906); *Mottman v. Olympia*, 45 Wash 361, 88 P. 579 (1907); *Freeman v. Centralia*, 67 Wash. 142, 143, 120 P. 886 (1912). None of these cases, or any since, have ever indicated that public participation in the legislative process alone creates standing. If it did, people with no connection to Okanogan County would suddenly have standing just because they signed a petition!

C. Division III's decision is consistent with prior Appellate cases regarding review of legislative acts.

Appellants cite the following cases for the proposition that the decision below conflicts with other published decisions. Said claim is without merit.

In *Bay Industry, Inc. v. Jefferson County*, 33 Wn. App. 239, 653 P.2d 1355 (1982), the county vacated a road, and an abutting landowner sought review by writ. The ruling is unclear why the trial court accepted review. However, the petitioner did allege that the applicant failed to procedurally comply with RCW 36.87.020 because the application lacked sufficient signatures, and per RCW 7.16.040, a writ of review can be granted "to correct any erroneous or void proceedings, ..."

In *DeWeese v. Port Townsend*, 39 Wn. App. 369, 639 P.2d 726 (1984), the issue was whether the challenger to the road vacation had standing, when the road abutted a body of water. The trial court dismissed the petition. The Court of Appeals reversed and remanded on whether petitioners had standing. The Court never addressed whether the writ of certiorari itself was proper.

In *Federal Way v. King County*, 62 Wn. App. 530, 815 P.2d 790 (1991), the city filed a complaint for declaratory relief rather than a writ of certiorari, claiming an emergency county ordinance which vacated a county road was invalid. The Appellate Court held the case was properly brought as a declaratory judgment action, as the city only challenged the facial validity of the emergency provision of the ordinance.

In *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 821 P.2d 1204 (1992), the Supreme Court upheld the superior court's denial of a writ of review (to the city council's adoption of a zoning code) on the grounds that the proceedings were legislative, rather than quasi-judicial in nature. The Supreme Court also held that the appearance of fairness doctrine did not apply because the proceedings were legislative. *Id.*, at 249. Finally, the Court in *Raynes* noted that while two identifiable competing interest

groups were involved, the fact they may be particularly affected by a legislative decision does not transform the decision into a quasi-judicial one. *Id.*, citing *Harris v. Hornbaker*, 98 Wn.2d 650, 658-59, 658 P.2d 1219 (1983).

In the present case, Division III below noted that in a few cases a writ of review to challenge a road vacation has been considered, but in none of those cases has a court held that the municipality in reviewing a road vacation petition, was acting in a quasi-judicial capacity. Accordingly, there is no conflict with a published decision.

D. Appellants' allegation that they have no remedy is false.

As far back as the early 1900's, Washington courts have held that the vacation of roads is an exercise of a legislative or political function, and cannot be reviewed by the courts in the absence of collusion or fraud. See *Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash 303, 306, 83 P. 316 (1906); *Mottman v. Olympia*, 45 Wash 361, 88P. 579 (1907).

Appellants argue that since a road vacation must be reviewed by writ of certiorari (Per RCW 7.16.040 and RCW 36.70C.020(2)(a)) this must mean a road vacation decision is quasi-judicial. RCW 7.16.040 provides:

> A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law. (Emphasis ours)

Appellants' argument essentially is that it makes no sense to direct them to pursue a writ of certiorari if a road vacation decision is purely legislative. What Appellants fail to recognize is a writ of certiorari is still available (even of purely legislative acts) if a party proves collusion, fraud or the interference with a vested right. See *Thayer v. King County*, 46 Wn.App. 734, 738, 731 P.2d 1167 (1987); *Capitol Hill Methodist Church of Seattle v. The City of Seattle*, 52 Wn.2d 359, 368, 693 P.2d 726 (1958).

1. No competent evidence of collusion or fraud has been presented.

Appellants' "evidence" is:

- A newspaper article that indicated County Commissioner Campbell gave a eulogy at Danny Gebbers' funeral (Danny Gebbers was the father of one of Gamble's principals). Danny Gebbers died four (4) months before the Petition to Vacate was filed. (CP 237, 1201)

- That Jon Wyss (an employee of Gebbers Farm Inc.), was hired as a consultant by Okanogan County in August 2013 to analyze financials related to current operations and to propose methods to improve efficiency. (See CP 613-621).

- That Gamble lobbied county official regarding its road vacation petition four (4) months prior to the county commissioners' hearing (which lobbying Gamble formally disclosed in writing on March 18, 2015) (CP 392).

Other than the foregoing, all named Appellants testified under oath that they had no personal knowledge or evidence to substantiate any of Appellants' collusion claims. (CP 1380-1417; CP 1421-1478). In fact, no evidence of any kind was put into the record to show any economic interest, business connection or other entangling alliance which would be grounds for seeking the Commissioner's disqualification. Further, lobbying is clearly allowed in the legislative arena, and nothing prevented Appellants from lobbying in opposition to the vacation petition.

Even the trial court expressly found that "There is no direct or circumstantial evidence" of collusion or conspiracy. (CP 82, lines 5-8).

2. The Appearance of Fairness Claim is barred.

Under this doctrine, codified in 1982 under RCW Chapter 42.36, the legislative carefully limited the application of the doctrine to cases in which a "quasi-judicial" function was undertaken:

> Application of the appearance of fairness doctrine to local land use decisions shall be *limited to the quasi-judicial actions of local decision-making bodies* as defined in this section ...

RCW 42.36.010 (Emphasis supplied)

In *Raynes v. City of Leavenworth*, supra, this Court concluded that the legislature precluded application of the appearance of fairness doctrine to legislative functions:

> No legislative action taken by a local legislative body, its members, or local executive officials shall be invalidated by an application of the appearance of fairness doctrine. RCW 42.36.030.

Raynes at 247. Thus, the applicability of the appearance of fairness doctrine is barred in this case.

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RESPECTFULLY SUBMITTED this 11TH day of May, 2017.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of eighteen (18) years, not a party to the above-entitled action, competent to be a witness, and on the day set forth below, I served the document(s) to which this is attached, in the manner noted on the following person(s):

☑ ☐ ☐ ☑	First Class U.S. Mail Facsimile Overnight Delivery Email: barnett@kalikowlaw.com	Barnett N. Kalikow Kalikow Law Office 1405 Harrison Ave. NW, Suite 207 Olympia, WA 98502
☐ ☐ ☐ ☑	First Class U.S. Mail Facsimile Overnight Delivery Email: alin@co.okanogan.wa.us	Albert Lin Okanogan County Prosecutor's Office PO Box 1130 Okanogan, WA 98840-1130
☑ ☐ ☐ ☑	First Class U.S. Mail Facsimile Overnight Delivery Email: amackie@6404@gmail.com	Alexander W. Mackie P. O. BOX 607 Winthrop, WA 98862
☐ ☐ ☐ ☑	First Class U.S. Mail Facsimile Overnight Delivery Email: mjohnsen@karrtuttle.com	Mark R. Johnsen KARR TUTTLE CAMPBELL 701 Fifth Avenue, Suite 3300 Seattle, WA 98104

DATED this 1st day of May, 2017, at Wenatchee, Washington.

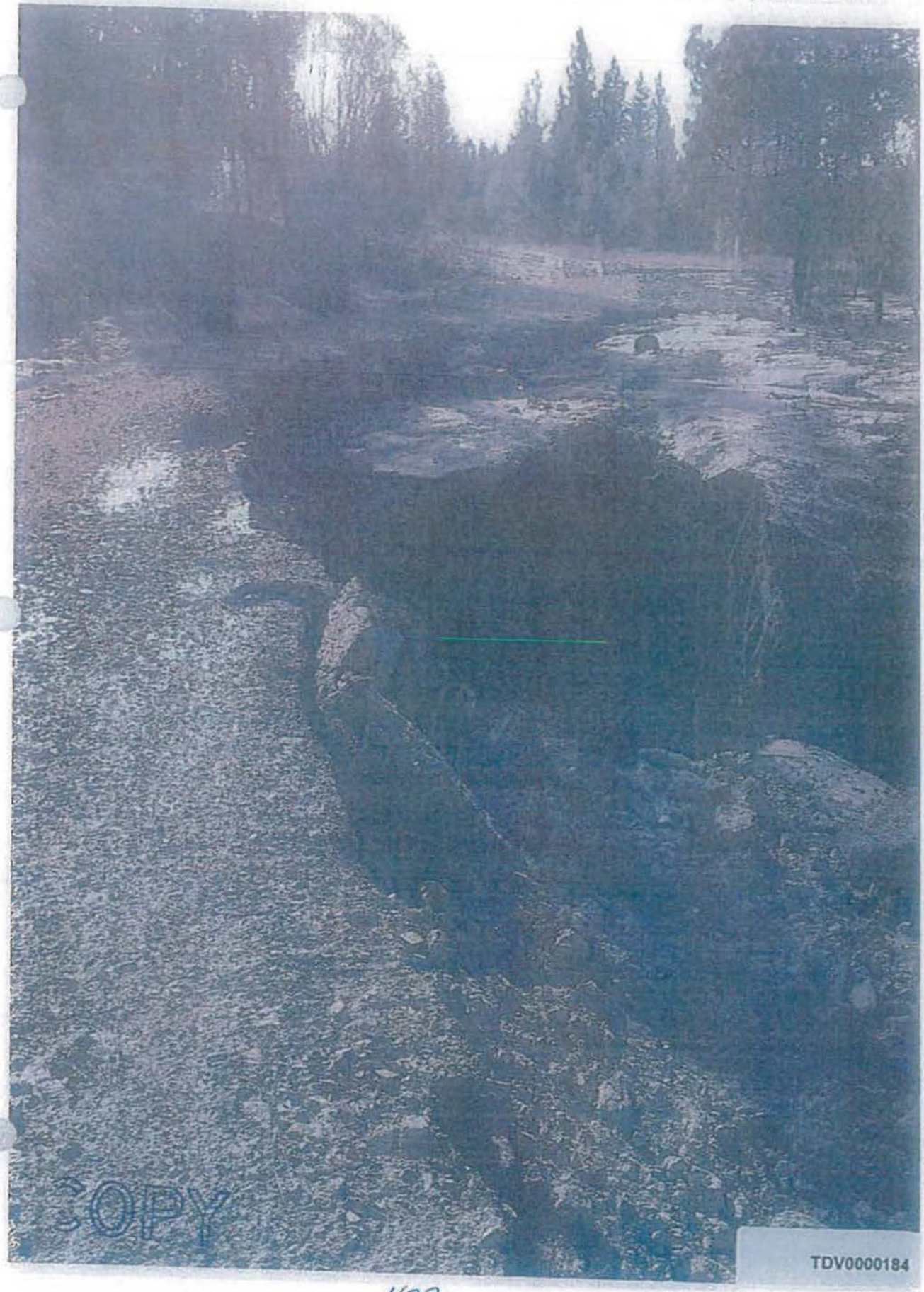
Patty Gillin

Patty Gillin

Appendices of Gamble

Gamble appends the attached photos to provide the Court better quality photographs showing the condition of the road. Gamble has also mailed an electronic copy of this Appendix on compact disc to the Clerk. These photos were previously attached to the joint Appendices submitted to the Court of Appeals in Gamble's Opening Brief.

Appendix: CP 422-426, 854-857, 859



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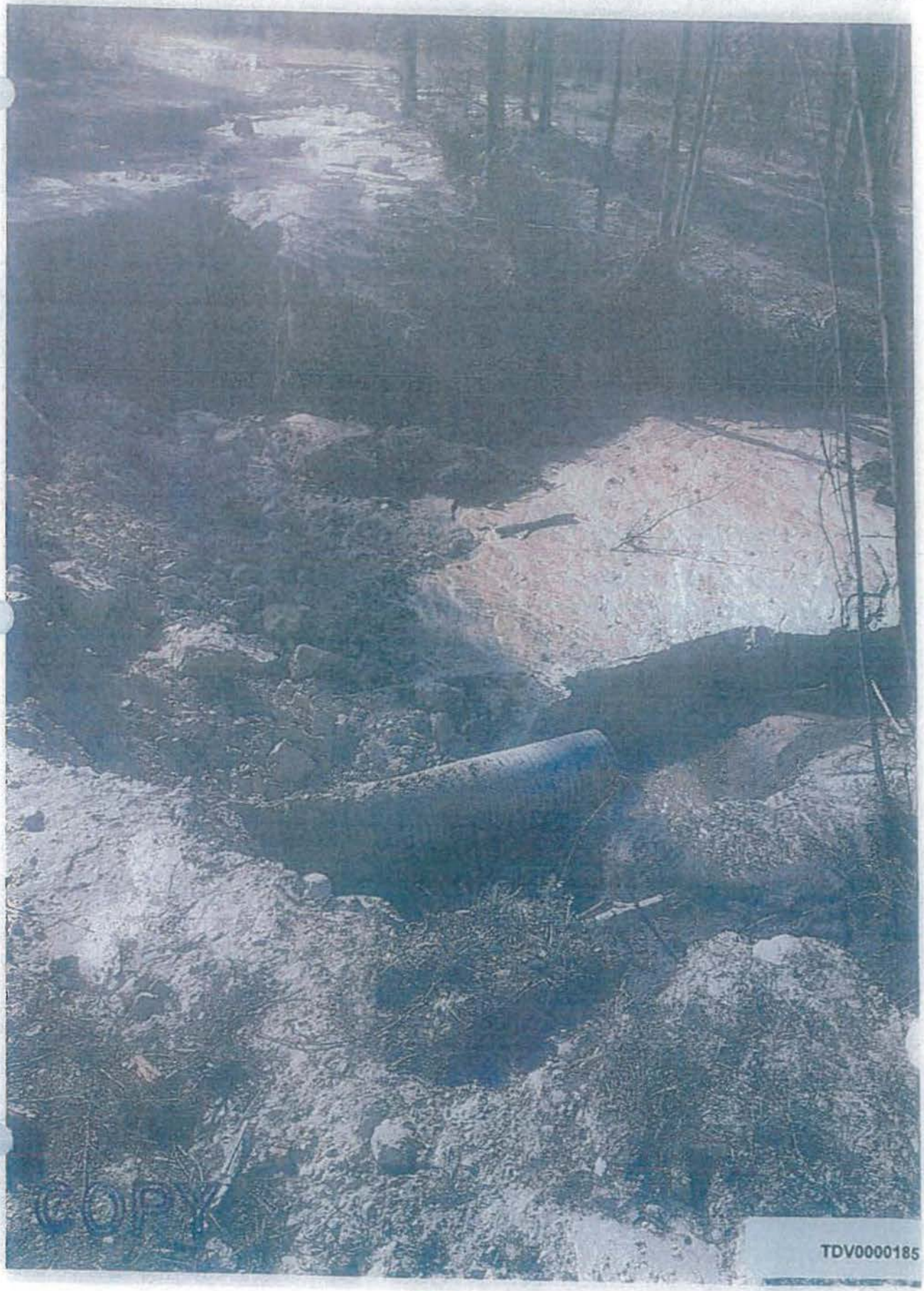
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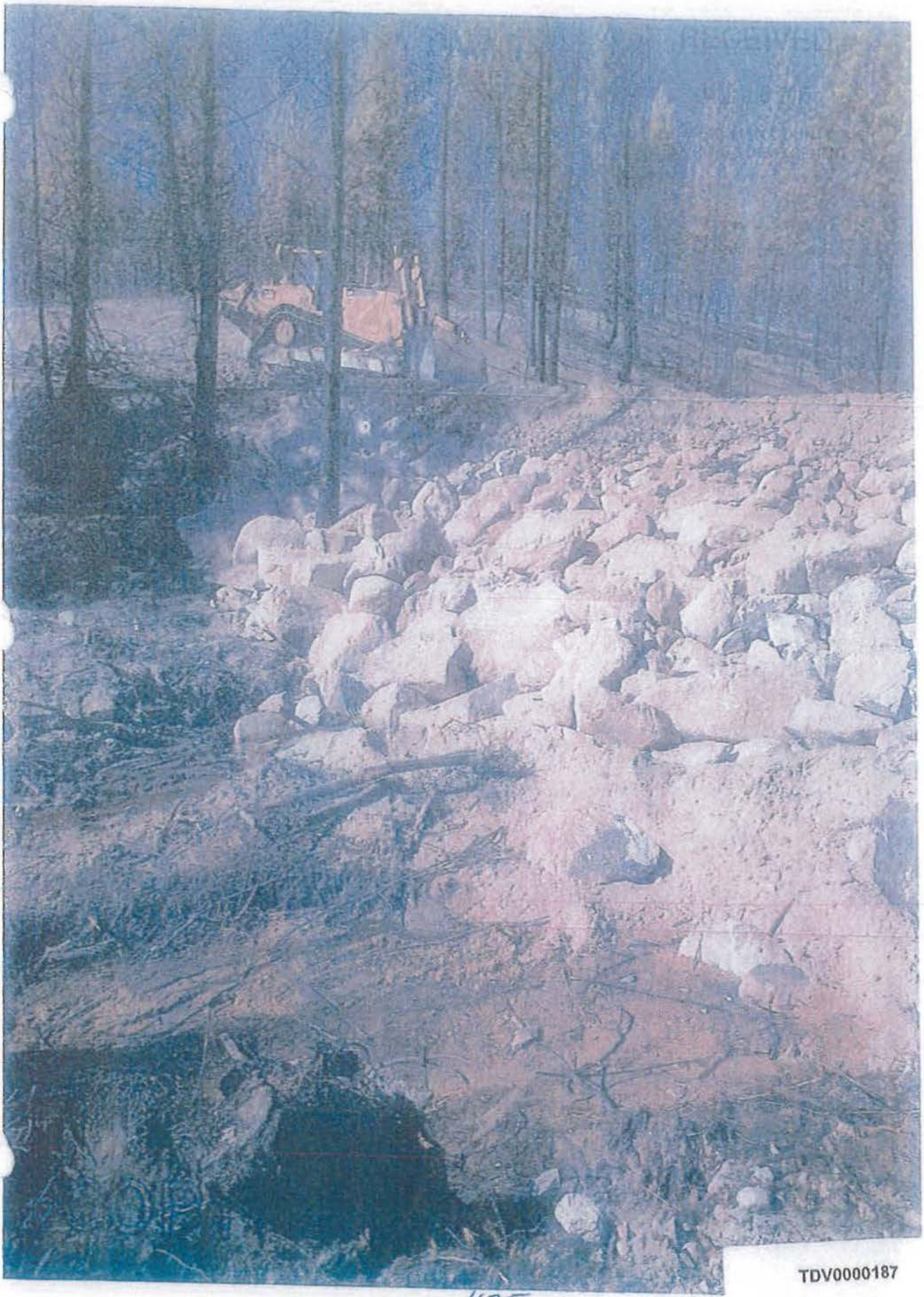

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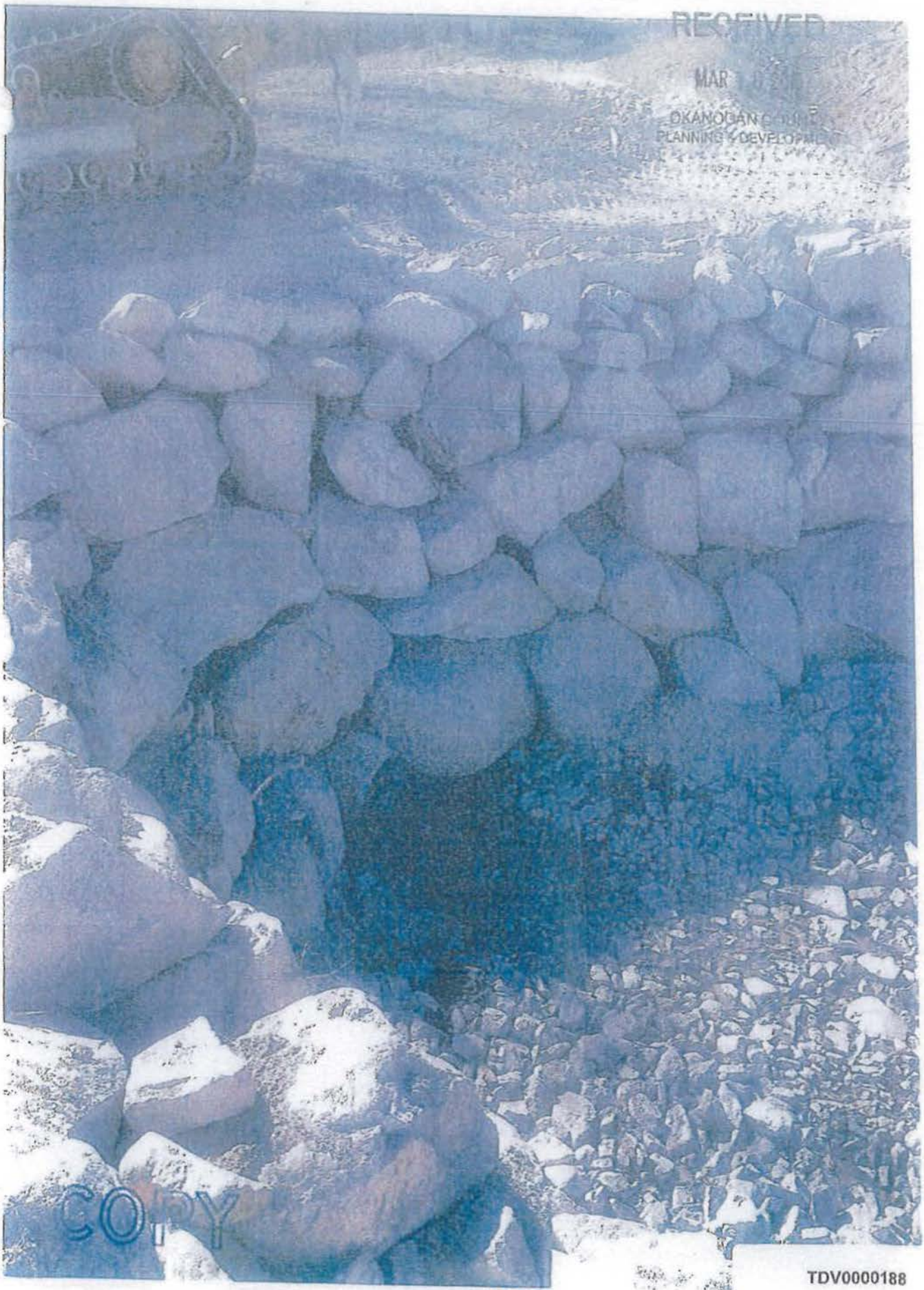
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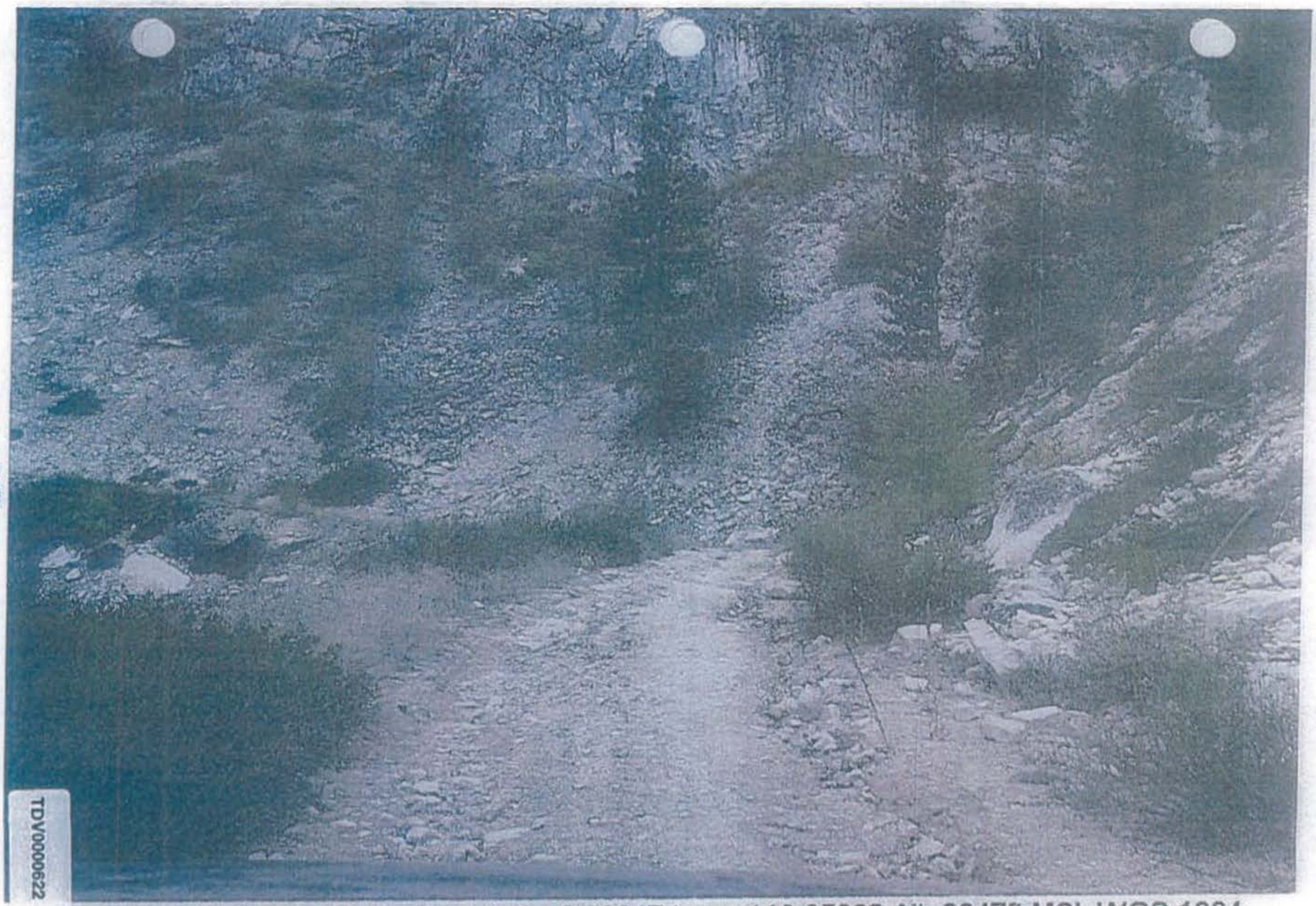

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