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DIV III # 345858

No. 92423-6

THE SUPREME COURT
OF THE STATE OF WASHINGTON

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WASHINGTON STATE
SUPREME COURT

COALITION OF CHILIWIST RESIDENTS
AND FRIENDS, ET AL

Appellants,

vs.

OKANOGAN COUNTY, ET AL,

Respondent.

OKANOGAN COUNTY RESPONSE BRIEF

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EXAMINER BEARDSLEE

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I. NATURE OF THE CASE

This case comes before the Court on a petition for direct review by Appellants, from a decision of Judge John Hotchkiss affirming the right of the Okanogan County Commissioners to vacate a little used primitive road as a legislative matter and that in so doing, the County did not violate the statutory or constitutional rights of Appellants.

Okanogan County believes the decision was correctly decided. More importantly for purposes of the present proceedings, the County moves the appeal be dismissed for lack standing due to the lack of any legally protected interest claimed by Appellants below. The motion is included at this time as authorized by RAP10.4 (d) as it terminates all review proceedings.

II. ISSUES ON REVIEW

A. Appellants' statement of issues on appeal

Appellants put forth eight issues for review by this court which are connected and can be summarized as follows:

1. Does the fact of a public hearing make a decision of the local legislative body a quasi-judicial proceeding subject to the appearance of fairness doctrine and subject to review by writ of review? (Issues 1, 2, 3)

2. Does the failure of the Legislative Body to follow the recommendation of the Hearing Examiner make the decision arbitrary and capricious? (Issues 3 and 4)
3. Does the fact that the road is a rural road give Appellants a broader ground for standing or alter the standard of review? (Issues 5, 6, and 7)
4. Were Appellants' due process rights violated? (Issue 8)

B. Respondents' Counter statement of issues on review and assignments of error

1. **Assignment of Error**

Did the trial court err in granting standing in this case when no Appellant asserted any property or legally recognized special interest in the roadway in question?

2. **Issue with respect to the county's assignment of error**

Do rural residents with no property interest abutting a County road to be vacated or property for which that road is used to access their property have standing to challenge the vacation of that road, and if not, should this case be dismissed now for want of standing?

III. COUNTER STATEMENT OF CASE

This is a case involving the vacation of a road included in the

County network as part of a 1955 resolution opening certain roads as County roads. (CP 315). The County portion of the road to be vacated is about 3 miles long leading from mile post 1.752 to mile post 4.862 at the United States Forest Service lands to the west. (CP 78)

A petition was filed with the County legislative authority to vacate the road by the abutting owners under RCW 36.87.020. (CP 237). Upon receiving the petition, the Commissioners adopted a resolution of intent to vacate the road under RCW 36.87.010 and instructed the County Engineer to file a report as required by RCW 36.87.030/040. (CP 238) (CP 237-238 attached as joint appendices 1)

The Engineer's report described the road as a primitive road with very little use subject to frequent washouts and other obstructions due to lack of regular maintenance. (CP 262). Contrary to the assertions of Appellants, the staff recommendation was not neutral but rather:

> "RECOMMENDATIONS: Recommending Commissioners approve vacation
> (See CP 249, 262 attached at joint appendices 2)

County records show that average cost to the County of maintaining this primitive road was about $3,000 per year and

revenues attributed to the road were about $420 per mile, per year. (CP 187, 411-413)

State law does require a public hearing before a county road may be vacated (RCW 36.87.060) and the hearing can be held by either the Legislative authority or the Hearing Examiner as authorized by RCW 36.87.060(2). In this case the Commissioners did send the matter to the Hearing Examiner to conduct the public hearing and make his recommendation. After the hearing, the Examiner's recommendation and findings in support of keeping the road open was included in a written report dated May 2, 2015. (CP 737-743)

The Engineer's reports and the Hearing Examiner's report were given to the County Commissioners at their June 3, 2015 meeting to consider the matter. The Commissioners commented on the differing recommendations before them --the Engineer's recommendation to vacate the road and the Examiner's to keep it open. (See the Commissioner's colloquy at CP 910-914, attached at joint appendices 3). By a vote of 2-1 the Commissioners elected to follow the recommendation of the County Engineer and vacate the road. Among the reasons for vacating the road were the conclusions that the road was "impassible at times due to slides,

washouts, trees and logs", and that "alternate routes existed" to exit the valley and specifically to the requirements of the road vacation statute the road, "is useless as part of the general road system". (CP 1132-1133)[1]

After the resolution was adopted, the Appellants secured a Writ of Prohibition. (CP 1340-42). Okanogan County challenged the Writ and in preliminary proceedings the parties agreed to the preparation of a record as if the case was to be heard under a Writ of Review. Contrary to the assertion in Appellants' brief that the parties consented to jurisdiction of the court under a Writ of Review, however, the stipulation contained a specific recognition that the Declaratory Judgment proceedings were to proceed in parallel with the return of the record and that:

> 8. This order is without prejudice to any claim or defense that any party wishes to address on the merits
>
> *July 30, 2015 stipulation* (CP 217-219)

At the hearing on the merits, Judge Hotchkiss concluded, that the decision to vacate the road was a legislative decision and that Appellants had failed to prove any special circumstances

[1] Examples of the impassible situations which can occur on the road are in the record at (CP 168-175 copies attached at joint appendices 4 as further described in the March 12 letter. (CP 376-378)

warranting judicial action and dismissed the challenge to the road vacation under state statutes. (See written decision CP 22-25)

In a subsequent proceeding, the County filed a Motion for Summary Judgment to dismiss the federal claims which was granted by the Court, leading to this appeal. (Final decision CP 1-3)

An uncontested material fact in the present case is that at no time did any Appellant claim to own property on the road to be vacated or that said road was necessary to access that Appellant's property. (See Munson declaration and map CP 1377-1379 attached at joint appendices 5)

IV. ARGUMENT

Okanogan County believes the case can be decided on three basic issues: (1) Non abutting parties whose right of access to their property has not been affected have no standing to challenge a road vacation; (2) Legislative matters, such as road vacations, are not subject to review by Writ of Review; (3) In the absence of any proprietary interest in the road to be vacated, Appellants suffered no justiciable issues under USC 1983 et seq.

As a threshold matter, the Court needs to decide if persons with no property interest in a road to be vacated and whose access to their properties is not jeopardized, have standing to challenge a

road vacation. Such interest has historically been required before courts will entertain a challenge to a road vacation and no such interest exists here.

A. Petitioners have demonstrated no protected interest warranting standing to challenge the vacation of the Three Devils Road.

The trial court below denied the County's Motion to Dismiss on standing grounds based on allegations of special injury and interest which were not established as the case proceeded to conclusion. Before this Court rules on the merits of this case or refers it to Division Three, it should answer the question posed:

> Do Washington Courts allow members of the public who claim an interest in using a particular roadway, but have no ownership interest abutting the roadway and do not use the roadway as the principle access to their property have sufficient "special interest" in the roadway to be vacated, to challenge the legality of a road vacation?

The universal answer is no!

> The general rule supported by this court is that only abutting property owners or those whose reasonable means of access has been obstructed, can question the vacation by the proper authorities. To warrant such interference with proceedings relative to street or road vacations, it must appear that the complaining parties suffered a special damage different in kind and not merely in degree from that sustained by the general public.

Olsen v. Jacobs, 193 Wash. 506, 76 P.2d 607 (1938)(Emphasis

supplied)[2]

In road vacation cases the courts have noted:

> However, standing is a substantive, not jurisdictional, question. *Hoskins v. Kirkland*, 7 Wash.App. 957, 961, 503 P.2d 1117 (1972). Nevertheless, it is desirable in the interests of an orderly proceeding that it be determined, as here, as if it were jurisdictional, before other substantive issues are considered

DeWeese v. City of Port Townsend, 39 Wn. App. 369, 372, 693 P.2d 726, 729 (1984).

The *DeWeese* Court characterized the necessary interest to determine before proceeding on the merits as one of a "legally protected interest" (*Id.* at 374 Fn 6). What is missing in the record is any evidence of a legally protected interest allowing Appellants to proceed to the merits before this Court.

The only interest claimed by Appellants to justify proceeding to the merits in this case is not one of interference to access for their property, but rather the ability to access public lands across a primitive, unmaintained road through private lands, some miles from their residence and property. (See Munson Declaration and

[2] See also *Capitol Hill Methodist Church of Seattle v. City of Seattle,* 52 Wn.2d 359, 365, 324 P.2d 20, 21 1113, 1117-18 (1958). The further rule deducible from our owncases and the authorities generally is that owners of property abutting on a street or alley have no vested right in such street or alley except to the extent that their access may not be unreasonably restricted or substantially affected. Owners who do not abut, such as respondents here, and whose access is not destroyed or substantially affected, have no vested rights which are substantially affected.

attached map *supra*).

But such interest is legally insufficient to seek relief from the courts. As stated clearly by the Court in in *DeWeese,* summarizing the requirements of a protected interest in road vacation cases:

> These cases announced the substantive principle that only persons dependent on a street for direct access to their properties have any legally recognized interest in keeping it open. More simply stated, those who are not dependent on a street are not injured when it is vacated. *Hoskins v. Kirkland, supra*. This principle is not only reasonable but obviously necessary with reference to the vacation of streets as ordinary routes of travel. To enlarge the rights of the general travelling public would be to restrict unduly the discretion granted to municipalities for the management of streets

39 Wn. App at 373-74.

The record in this case is clear: not one of the Appellants in the present case claimed that their property abutted the Three Devils Road, or that the access to their homes was dependent on access to Three Devils Road, or that closing Three Devils Road would materially interfere with the lawful access to their property.

Escape from fire was suggested as a benefit of retaining the road. But the acknowledged unmaintained condition of the road as evidenced by the Engineer's report and photos (CP 168-175) show that the prospect of a reliable escape route is illusory. In times of an emergency there is no way of knowing whether the road

is open or closed by a gate at the far end, or cut off by downed trees or storm damage. In such circumstances, an unsuspecting member of the public seeking to use the road as a escape from fire, could equally find the road a dead end trap.

The County's duty with respect to the County road network is to the public as a whole, and not to a small group of residents who had no legally recognizable interest in the Three Devils Road separate and apart from the public as a whole. Appellants have failed to allege any legally protected interest in the road to be vacated that warrants interference by the Courts.

For the reasons noted, Okanogan County asks this Court to dismiss the appeal for failure of Appellants to demonstrate a justiciable personal interest in property affected by the road closure, and thereby terminate all further review as required by the terms of RAP 10.4(d).

B. A legislative decision cannot be challenged by a Writ of Review.

On the merits, Appellants' case rests on three assumptions/conclusions not supported by the laws of this state:

1. That the decision of a County to vacate a road is a quasi-judicial decision and not a legislative decision because the County

is required to make findings as a prerequisite to enacting a vacation resolution;

2. That a road vacation proceeding is quasi-judicial because the County is required to hold a public hearing and allow the public to testify on the proposed action; and

3. That by referring a case to the Hearing Examiner, the Examiner is exercising a quasi-judicial function and the resulting recommendation is a "final decision" subject to judicial review by this Court through a Writ of Review.

Appellants' claims are at odds with both the legislation authorizing counties to administer road networks, and the clear distinction between legislative and judicial or quasi-judicial activities articulated by this Court on numerous occasions. Appellants' arguments before the Court on these points are wholly without merit under the facts of this case. We will deal with each in turn.

C. A decision to locate or close a public road is a uniquely legislative function and not one adjudicating individual rights.

The actions of the Board of County Commissioners in managing the county road system is a "legislative decision" because both the Legislature and the Courts say it is.

The *board of county commissioners* of each county, in

> relation to roads and bridges, shall have the power and it shall be its duty to:
>
> (4) Perform all acts necessary and proper for the Administration of the county roads of such county as by law provided

RCW 36.75.040.

> All of the county roads in each of the several counties shall be established, laid out, constructed, altered, repaired, improved, and maintained by the *legislative authority of the respective counties* as agents of the state.

RCW 36.75.020 (emphasis supplied).

> Owners of the majority of the frontage on any county road or portion thereof may petition the county *legislative authority* to vacate and abandon the same or any portion thereof.

RCW 36.87.020

> On the day fixed for the hearing, the *county legislative authority* shall proceed to consider the report of the engineer, together with any evidence for or objection against such vacation and abandonment.

RCW 36.87.060(1)

While the State Legislature did authorize the "legislative authority" of the County to have a hearing examiner hold the required public hearing, RCW 36.87.060, that change did not make the Hearing Examiner's action an appealable decision. The statute clearly spells out that the Examiner is to make a "recommendation"

to the "legislative authority" for its decision.[3]

At no time, in any of the legislation governing the management, opening or vacation of county roads does the legislature require the Commissioners to adjudicate the interests of specific individuals who wish to use a road. All of the statutes dealing with the topic of road vacation speak to the "legislative" nature of the decision to be made.

Courts have similarly concluded the activity of a city or county in managing the public road network systems is a legislative function.

> The essential principle to be kept in mind is that the **legislature**, within constitutional limitations, has absolute control over the highways of the state, both rural and urban.

State ex rel. York v. Bd. of Cty. Comm'rs, 28 Wn.2d 891, 898, 184 P.2d 577, 582 (1947).

> The **legislature** or, in this case, the city council is the proper body to weigh the benefit to the public.

Banchero v. City Council, 2 Wn. App. 519, 523, 468 P.2d 724, 728 (1970)

Scholarly Commentators agree:

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[3] ...the hearing officer shall prepare a record of the proceedings and a recommendation to the county legislative authority concerning the proposed vacation. Their decision shall be made at a regular or special public meeting of the county legislative authority. RCW 36.87.060(2)

> Ordinarily,the proper municipal authorities wield the full and complete authority as to when streets shall be opened and closed by due observance of all applicable legal provisions. *The propriety or wisdom of such a delegation of legislative power, as well as its exercise in particular cases by municipal authorities are legislative questions not ordinarily subject to review.*

Eugene McQuillin, *The Law of Municipal Corporations § 30:185 (3d ed. 2011). Emphasis supplied*

The legislative nature of the decision to vacate a public street has not been questioned in any case. But as will be seen below, the legislative nature of the road vacation proceedings is determinative on the preclusion of a Writ of Review as the proper means to secure review of the Commissioner's decision.

D. This Court has rejected a Writ of Review under Chapter 7.16 RCW as a means of reviewing legislative decisions

The core of Appellants' argument is that because the Hearing Examiner made a recommendation supporting the neighborhood, the Court below was bound to review the decision of the Board of County Commissioners under the provisions of the Writ of Review, Chapter 7.16 RCW. Appellants cite to three appellate cases which did follow the writ of review process. *DeWeese v. Port Townsend,* 39 Wn. App. 369, 693 P.2d 726 *(1984); Bay Industry Inc. v. Jefferson County,* 33 Wn. App. 239, 653 P.2d 1355 (1982); *Federal Way V. King County,* 62 Wn. App.

530, 534, 815 P.2d 790 *(1991)* (Appellants' brief p.10.)

A review of those decisions however, and the decisions of this Court, demonstrate the error of Appellants' analysis.

In *DeWeese,* the plaintiffs filed a Writ of Review challenging the vacation of a street leading to water, which was prohibited by the terms of RCW 35.79.030. In that case, none of the Plaintiffs abutted the road vacated, but were members of the public interested in accessing water. The trial court dismissed their claims for want of standing as not being abutting owners. As noted above, in reversing the trial court, the Court of Appeals first affirmed the holdings of previous cases limiting challenges to road vacations to abutting owners, summarizing the decisions as follows:

> These cases announced the substantive principle that only persons dependent on a street for direct access to their properties have any legally recognized interest in keeping it open. More simply stated, those who are not dependent on a street are not injured when it is vacated.

DeWeese at 729-30.

The Court of Appeals distinguished the fact pattern in *DeWeese* from traditional road vacation cases, and allowed non abutting owners to challenge the proceeding due to the fact that the State Legislature had limited "legislative" discretion with respect to road vacations abutting water by adopting the prohibition against

vacating such roads. The Court was not asked to review the exercise of legislative discretion, but rather the authority of the legislative body to act in the first place.

The *DeWeese* fact pattern involved a very different situation than the present case which does not challenge the authority of the legislative body to exercise discretion but rather the discretion with which the action was exercised.

In the second case cited, *Bay Industries, supra*, the trial court addressed the challenge to the road vacation in that case under a Writ of Review. The Court of Appeals did not address the difference between challenging the authority to act as opposed to the merits of the action itself. The Court simply noted that the Writ proceeding below limited its review of the merits to the record. In upholding the road vacation, the Court did not speak to the merits of the jurisdictional call.

In the third case relied on, *Federal Way, supra,* the Court assumed jurisdiction over a road vacation decision as though a Writ was appropriate, citing *DeWeese,* without noting the distinctions in that case or addressing the legislative vs quasi-judicial nature of the question being reviewed.

The counter point to Appellants' argument is to recognize the

distinction drawn by this Court between the standard for reviewing an administrative decision, where a writ is appropriate, and reviewing a legislative decision, where it is not. This distinction was discussed in detail in *Raynes v. City of Leavenworth,* 118 Wn.2d 237, 821 P.2d 1204 (1992).

The *Raynes* decision is instructive in the present case, as it involved both a legislative determination, the legality of a particular zone area wide change, together with a corollary claim of appearance of fairness violation-- both issues in the case presently before the Court.

The first question before the *Raynes* court was whether the county decision to adopt a particular zoning provision was legislative or quasi-judicial in nature. To conclude an action is quasi-judicial, a court must find:

> (1) that an inferior tribunal
> (2) exercising judicial functions
> (3) exceeded its jurisdiction or acted illegally, and
> (4) there is no adequate remedy at law

Raynes, 118 Wn. 2d at 244-45 citations omitted (formatted for clarity)

The *Raynes* Court then reiterated the standard four-part test for evaluating a decision, to determine whether it is quasi-judicial or legislative,

> (1) whether the court could have been charged with the duty at issue in the first instance;
> (2) whether the courts have historically performed such duties;
> (3) whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability, rather than a response to changing conditions through the enactment of a new general law of prospective application; and
> (4) whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators.

Raynes, 118 Wn. 2d at 245-46.

Viewed under that criteria, the *Raynes* Court concluded that the City, in choosing to adopt a particular zoning ordinance, was acting in a legislative, not a quasi-judicial capacity, and as such was not subject to review by Writ. As noted by the Court:

> Here, the court could not have adopted the amendments to the Leavenworth zoning ordinance, and courts generally do not perform such duties. Adopting the amendment did not involve the application of current law to a factual circumstance, but instead required the policymaking role of a legislative body. A series of public hearings was held, and a survey of public opinion was conducted. Policymaking decisions which are based on careful consideration of public opinion are clearly within the purview of legislative bodies and do not resemble the ordinary business of the courts.

Raynes, 118 Wn. 2d at 245.[4]

A similar result concerning the legislative nature of

[4] Concluding the adoption of an area wide amendment to a zoning code was necessarily legislative and not a judicial type function also precluded the application of the appearance of fairness. See *Id.* at 250.

transportation related questions was reached in *Harris v. Pierce Cty.*, 84 Wn. App. 222, 928 P.2d 1111, (1996). *Harris* involved the action of Pierce County in determining the location of a public trail. In dismissing a Writ of Review challenging the local decision, the court noted:

> Clearly a court could not adopt a recreational trail plan for a county. Such policymaking decisions which are based on the consideration of public opinion are within the purview of legislative bodies, not courts of law. Second, courts have not historically established recreational trail plans. *In an analogous situation, our Supreme Court has recognized that "[t]he determination of where to place a road has traditionally been a distinctly legislative decision."* Third, the council's adoption of the Master Trail Plan did not involve the judicial function of applying law to past or present facts to determine liability. Rather, it was its decision to adopt a trail plan to be implemented by the County. *Finally, the consideration of public opinion and the use of public comment and debate are legislative functions, not judicial ones.*

Id. at 229, 928 P.2d at 1115. (Citations omitted. Emphasis supplied)

The analysis by the Court in *Harris* is analogous to the facts in the present case:

- The legislative body listens to public opinion whether to keep a given section of road open to the public or not
- The legislative body weighs the relative merits in terms of benefit or utility to the overall County road network

- After receiving public input, the legislative body makes a decision based on its view of the public interest to be served in keeping the road open or closing it.

Whether deciding to open or close a trail or a road, the legislative authority making the decision is not bound by the number of speakers for or against a proposal, or the fact that competing views may be expressed. The uniquely legislative nature of the decision, with respect to opening or closing public roads, is the overall public interest involved. In approving the dismissal of the proposed Writ of Review to challenge the legislative decision in *Harris*, the Court summarized the consistent holdings of the courts of this state on the inappropriate nature of a writ to challenge legislative decisions:

> Our courts have held the following actions to be legislative in nature and therefore inappropriate for a statutory writ of certiorari: amendments to a zoning ordinance and the dismissal of the related SEPA appeal, the determination of where to locate a highway interchange, ...adoption of county-wide planning policy and related SEPA determinations ...adoption of county zoning code

Harris, 84 Wn. App at 228-9 (citations omitted, emphasis supplied).

The decision to open or close a road has been given to the "legislative authority" of Counties. RCW 36.87.010. The

legislative hearings allowing the public to give voice to the choices to be made (RCW 36.87.060) does not convert that decision into a "judicial function". The question to be resolved is whether the road proposed to be vacated is useful or not to the overall public road network—a uniquely legislative function, "*.... not ordinarily subject to review.*" McQuillin *supra, § 30*:185 (Emphasis supplied).

E. The reference to the Hearing Examiner to hold a public hearing authorized by RCW 36.87.060(2) did not change the legislative nature of the proceeding.

The core of the Appellants' argument is that because the Hearing Examiner held a public hearing and then made recommendations to the County Commissioners, the road vacation became a quasi-judicial proceeding subject to review by the Writ of Review and the County Commissioners were bound to follow the facts found by the Examiner. The analysis is fatally flawed on a number of grounds.

A public hearing is at the core of a legislative process. The trail in *Harris* and the zoning ordinance in *Raynes* were both subject to extensive public hearing processes, but in furtherance of a legislative (public interest) test rather than the rights of specific individuals.

In legislative cases, such as the development and adoption of a comprehensive plan, the controversial nature of the decision, or the numbers of parties for or against a particular proposal, does not change the nature of the decision just because a public hearing is required before the decision is to be made. Once the legislative authority has heard the opinion of the public and the recommendation of advisory bodies the legislative authority must make its own decision.

Under the road vacation statutes, the County is authorized to hold a public hearing to determine the public interest in keeping the road open or closed. There is no requirement that those offering testimony have any specific interest in the road at issue other than as members of the general public. Further, there is no requirement that the legislative authority is bound by the testimony they hear. Rather, the legislative authority is merely required to allow the public to have input before making a final decision. Allowing a hearing by a Hearing Examiner as authorized by RCW 36.87.060(2) does not change the nature of the rights of members of the public with respect to the decision nor grant them special status to sue regardless of context.

The county road vacation statute specifically makes reference to the Hearing Examiner's "recommendation" to the legislative authority. At no time does the statute say the Hearing Examiner's recommendation is a "decision" tied to a specific record or that Commissioners have to take the Examiner's recommendation without some specific finding of error in the Examiner's decision.

Appellants' argument, that allowing the Examiner to hold a public hearing creates a quasi-judicial proceeding, is without any support in the statutes or cases of this state. Judges do not determine the rights of the public as a whole in the utility of a given segment of road to the overall road network. That is a uniquely legislative function. The fact that a public hearing was held and a recommendation was made, does not change the nature of the proceeding.

F. The decision of the County to vacate the road was not arbitrary and capricious.

Appellants' argument on the merits rests principally on the proposition that by failing to follow the findings and conclusions of the Hearing Examiner, the decision of the County Commissioners to vacate the road was "willful and unreasoning"

and therefore "arbitrary and capricious." (Appellants' Brief at 27-29).

A review of the record before the County however, shows that the Commissioners had good reason to vacate the road on safety grounds as well as minimal use. As noted in the report of the County Engineer:

- the portion of right-of-way being petitioned for vacation is currently used minimally by the adjoining property owners.
- there is currently a locked gate at the United States Forest Service boundary line.
- the county performs very little, to no maintenance on this road.
- very little traffic as evidenced by its two narrow wheel tracks with vegetation between.

Engineers' report (CP 262).

In addition, the specific recommendation of the Engineering Department is found in its March 12, 2015 report, "Recommending Commissioners approve the Vacation". (CP 249) Further, during the course of the proceedings, the County received uncontradicted evidence that the costs of road maintenance far exceeded any revenues attributed to the road. Further, it was uncontested that the road was subject to blockage by washout, downed trees and

other obstructions, including a potentially locked gate at the Forest Service end of the road. (See letter CP 376-378, photos at CP 168-175).

Based on the complete record before them, and after considering the recommendations of the staff and Hearing Examiner, the "legislative authority" determined that for the reasons stated, the road was, "useless" to the county road network as required by RCW 36.87.010 for the vacation of a County road. (Final Order of Vacation CP 1132-33)

The basis of Appellants' case was that some members of the community desired to keep the road open, and that the road provided some members of the public access to public lands and an alternate route out of the valley, particularly in the event of an emergency.[5]

But even those facts claimed by the Appellants and "found" by the Examiner's review of public opinion were not determinative of the question before the County Commissioners. In concluding that the road should be vacated, the Commissioners' decision was supported by the Engineer's recommendation for closure, the

[5] In deposition it became clear that the emergency access claims made to the examiner were not supported by any testimony but rather subject of opinion and speculation. (See more detail in the Gamble Brief).

evidence in the record was that the road was little used, that the road had been subject to serious blockages, and that the costs of the road well exceeded any revenues to be derived from keeping the road open.

Under the facts of this case, the record demonstrates that there was certainly room for two opinions on the overall merits of keeping the road open, and the mere presence of two supportable positions in the record is sufficient in this case to preclude a finding that the decision was arbitrary and capricious, as claimed by Appellants.

> "Under the arbitrary and capricious standard, this court only reverses willful and unreasoning action in disregard of facts and circumstances. (citation omitted). Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous."

Snider v. Bd. of Cty. Comm'rs of Walla Walla Cty., Wash., 85 Wn. App. 371, 375, 932 P.2d 704, 707 (1997).

The fact that some people claimed the road was useful was not material. In *Bay Indus., Inc. supra*, the Court of Appeals specifically rejected a claim of error in the vacation of a road, noting that the test is not whether the road was useful to one or more people, but whether it served a purpose in the overall road network. As stated by that court:

> The statutory test is not whether the road is of use to anyone, but whether it is useful as part of the county system. The public to be benefited included all taxpayers of the county, who deserve to be relieved of the burden of maintaining a road of such limited utility. Under the circumstances, we cannot say that the Board's determination to vacate this road was arbitrary and capricious.

Id. at 242.

Under the facts of this case, Appellants claim that the County's decision to close the road was arbitrary and capricious because it did not keep the road open to serve the personal desires of their small group of people. That argument is simply inadequate to warrant reversal and is certainly not arbitrary and capricious under the tests and record cited.

G. The appearance of fairness claim is barred by statute and unsupported by the evidence.

Appellants claim that because one of the County Commissioners knew Mr. Daniel Gebbers (and approximately eight months prior was a speaker at a family funeral), the Commissioners' decision was subject to attack under the appearance of fairness doctrine. The doctrine, which originating in a series of zoning cases was codified in 1982 under Chapter 42.36 RCW. In the statutory language the Legislature was careful to limit 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 pointed to the following language in concluding 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.

While the Complaint below alleged a close relationship between Commissioner Campbell and the Gebbers family, no act, other Commissioner Campbell's speech at the funeral services of Mr. Daniel Gebbers was identified to support a claim for legal disqualification. No evidence of any kind was put into the record to show economic interest, business connections or other entangling alliance which would be grounds for seeking the Commissioner's disqualification. (See more details in the Brief of Respondent Gamble who deposed Appellants on this point).

Once the Court concludes that the actions of the jurisdiction under review are legislative rather than judicial in nature, the applicability of the appearance of fairness doctrine is barred by statute, RCW 42.36.030.

H. Urban and rural distinctions and city vs county distinctions claimed by Appellants in this case do not change the result reached below.

Appellants' claim that there are differences between the road vacation statutes for cities and counties and that urban standards should not be applied to rural roads is without merit to the result in this case and the cases cited to the point are easily distinguished. Appellants' sole citation for this point is *Elsensohn v. Garfield County*, 132 Wash. 229, 231 P. 799 (1925) in which a rural property owner, not abutting the roadway being vacated, was allowed to complain. But in a subsequent decision distinguishing *Elsensohn*, *Olsen v. Jacobs, supra,* this Court reaffirmed the rule that mere proximity to a road, without more, was not justification to claim standing to challenge a road vacation. In commenting on the *Elsensohn* decision, this Court in *Olsen* reaffirmed the basic principle of adjacency or other recognized special interest as a prerequisite to standing in road vacation cases.

The language of the Court is instructive in refuting

Appellants' efforts to use *Elsensohn* to expand the class to people able to protest a vacation to the local residents generally. As stated by the court:

> Another case cited by Appellants, concerning the rights of parties injured by road vacation to maintain an action to set aside such vacation, is that of *Elsensohn v. Garfield County*, 132 Wash. 229, 231 P. 799, 800. In that case we find that the plaintiffs were not the owners of property abutting on the road vacated, but were owners of property in the vicinity of the proposed road vacation and their property was in such a location that a vacation of the road would 'require said plaintiffs or some of them to travel some six or more miles farther in reaching their lands, then is required by the road proposed to be closed.' While the right of the owner of property in that action to question the action of the board of county commissioners was not discussed, it is plain that *their injury was different* in kind than that suffered by the general public.

Olsen, supra, at 610 emphasis supplied [6]

Appellants also overstate the lower court's ruling in arguing that standing in the present case could be based on a reasonable fear of danger or injury due to the risk of fire. At the beginning of the case, such a claim could under the right circumstances create a "special circumstance". But on presentation of the case below, no such evidence arose.

---

[6] The fact of a more circuitous route does not per se create a claim of special injury. See e.g. *Bay Industries v. Jefferson County, supra*, where closing a lightly used road was allowed even though an abutting owner had to travel a more circuitous route.

The determinative decision refuting Appellants' contention that fire danger per se is sufficient to create a special circumstance is *Capitol Hill Methodist Church v. Seattle, supra,* in which this Court denied a claim for relief against a claim of excess fire hazard noting that reasonable alternate access to the property existed. More to the point by reason of the alternate access, Plaintiffs lacked the requisite "special circumstances" giving them a legally protected interest to challenge a road vacation. Relying on *Olsen v. Jacobs, supra,* the *Capitol Hill* Court noted:

> The general rule supported by this court is that *only abutting property owners, or those whose reasonable means of access has been obstructed,* can question the vacation by the proper authorities. To warrant such interference with proceedings relative to street or road vacations, *it must appear that the complaining parties suffered a special damage different in kind and not merely in degree from that sustained by the general public.*

Capitol Hill Methodist Church, 52 Wn. 2d at 364, 365 (*emphasis supplied*).

In the *Capitol Hill* case the Court specifically rejected the claim that the vacation of the right of way exposed the non-abutting property to increased risk of fire hazard:

> The asserted fire hazard, like all other matters complained of, was called to the attention of the city authorities prior to the passage of the vacation ordinance. The furnishing of fire protection by the city of Seattle is a governmental function (see *Benefiel v. Eagle Brass Foundry, 1929, 154 Wash. 330,*

> *282 P. 213; RCW 35.22.280(23))*, and this court will not inquire or interfere therewith in the absence of arbitrary or capricious conduct on its part.

Id.

In short, the *Capitol Hill* Court concluded that the allegation of a generic fire risk was insufficient to warrant a justiciable claim or demonstrate the type of special interest required to secure standing and relief from the courts.

Appellants' second argument was that the difference in language in the city and county road vacation statutes mandated a different standard in county as opposed to city cases. That claim is readily disposed of simply by looking at the language of in *Thayer v. King Cty.*, 46 Wn. App. 734, 731 P.2d 1167 (1987). In that case, this Court specifically recognized the legislative nature of a road vacation proceeding whether in the City or the County. The *Thayer* Court, operating under County statutes, cited to this Court's decision in *Capitol Hill Methodist Church, supra* (a case in Seattle under municipal statutes adopting the same standard for reviewing a County road vacation challenge). As stated by the Court in *Thayer:*

> This issue can be decided by referring to the present statutory scheme for the vacation of roads. That procedure was followed in the present case. *Moreover, the power to*

> *vacate streets is a political function;* in the absence of collusion, fraud, or the interference with a vested right, this function will not be judicially reviewed. *Capitol Hill Methodist Church v. Seattle,* 52 Wash.2d 359, 324 P.2d 1113 (1958). Appellants have failed to make this showing.

Thayer v. King County, supra at 738.

The issue in *Thayer* was not standing, as the plaintiffs lived on the road to be vacated, but the legislative nature of the County decision. The same principles were applied and the limited scope of review was clearly upheld whether the road being vacated was in the city or a county.

We have previously dealt with the Appellants' claim that the *Elsensohn* decision supports a different approach, an argument rejected completely in *Olsen*, supra. The argument is without merit and must be rejected.

I. Appellants' pleading fails to state a case for further consideration or action on this matter under state law.

As noted above, Appellants identified three overall grounds under Washington state law, for this Court to take jurisdiction and act on the case. As noted above, none of the claims survive even cursory review.

> The fact of a public hearing does not make a decision of the local legislative body a quasi-judicial proceeding subject to the appearance of fairness doctrine and subject to review by writ of review. (Issues 1, 2, and 3)

Many actions in which public hearings are held are legislative actions, where the public is allowed to participate through a hearing process, but where the decision is distinctly legislative, not quasi-judicial. Where the decision is to locate a highway or trail, to adopt a comprehensive plan or open or close a public road, the considerations are to the interests of the public as a whole.

In a road vacation case, the County Commissioners are not called upon to adjudicate the rights of particular individuals, but rather to consider the merits of the road segment when viewed in light of the road network as a whole. Writs of Review and the corollary Appearance of Fairness Doctrine are limited to activities in which the tribunal in question is engaging in a judicial type function—and the Courts have made it clear that the vacating of a road is a legislative function and review by Writ and the application of the Appearance of Fairness Doctrine are not applicable to the present case.

> The failure of the Legislative Body to follow the recommendation of the Hearings Examiner does not make the decision arbitrary and capricious. (Issues 3 and 4)

The record shows in the present case, that there was a real risk to the public of washout; that the costs greatly exceeded any

benefit and that the claim of emergency exit was one of convenience not necessity and the County engineer made a specific recommendation to vacate to the road. Given room for two opinions in a legislative proceeding, the actions of the County were not arbitrary and capricious under the cases cited above.

The fact that the road is a rural road does not give Plaintiffs a broader ground for standing or alter the standard of review. (Issues 5, 6, and 7)

The Court of Appeals' decision in *Bay Industries,* this Court's decision in *Olsen* reaffirming the need for special injury and the reference in *Thayer*, of the city decision in *Capitol Hill Methodist Church,* all speak to the fact that the standards for standing and review for both city and county road vacation challenges are the same for purposes of the case before this Court. There are no legally protected interests identified in any of the materials presented in the Court below which warrant review by this Court or by the Court of Appeals.

The decision of the trial court below was correct in dismissing the claim on the merits. The decision of the Court below was incorrect in granting standing and for that reason, this Court should not remand the case to the Court of Appeals, but dismiss the appeal outright as a matter of law terminating all proceedings.

J. The Court Correctly Dismissed the Federal Claims for Attorney's Fees Under 42 U.S.C. §§1983 and 1988.

1. Section 1983 Does Not Create Any Substantive Rights.

In addition to seeking reversal of the County's road vacation order, the Appellants also asserted federal claims seeking recovery of attorney's fees. They contend that their constitutional rights to due process and equal protection were violated by the vacation of Three Devils Road, and argue that these constitutional violations entitle them to recovery of attorney's fees under 42 U.S.C. Sections 1983 and 1988.

Section 1983 was enacted shortly after the Civil War to provide for protection of civil rights. It was originally known as the "Ku Klux Klan Act of 1871." The statute does not create any substantive rights. Rather, it provides a potential remedy where a plaintiff can show infringement of a right created by federal or state law. *Clark v. Boscher*, 514 F.3d 107, 112 (1st Cir. 2008). A party who prevails in proving a constitutional violation under 42 U.S.C. §1983 may be entitled to recover fees and costs under 42 U.S.C. §1988.

Section 1983 is sometimes invoked by attorneys for landowners as a potential basis for damages recovery arising from

a governmental land use decision. Although it is theoretically available in that setting, there are only a very few cases in which recovery has actually been allowed under Section 1983 in the context of a local government's land use decision. This is because of the strict standing requirements and elements which must be established to qualify for recovery under the statute. In general, the courts have declined to allow recovery under Section 1983 in the land use/permitting context. As the federal appellate courts have aptly stated:

> Every appeal by a disappointed developer from an adverse ruling of the local planning board involves some claim of abuse of legal authority. But it is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under Section 1983.

United Artists Theater Circuit, Inc. v. Township of Warrenton, 316 F.3d 392, 402 (3rd Cir. 2003), quoting *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982).

In the land use context, Section 1983 is most frequently invoked in connection with an allegation of violation of a landowner's "due process" rights, or in connection with a "takings"

claim. Less commonly, some landowners allege that a land use decision constituted a violation of their "equal protection" rights. The Appellants herein seek to base their federal claims on alleged violations of the Due Process Clause and the Equal Protection Clause. (CP 1358-1359). As explained below, Section 1983 does not apply under the undisputed facts of this case for a variety of reasons. Therefore, the attorney's fee provisions of Section 1988 are not applicable. The federal claims against Okanogan County were properly dismissed by the trial court.

2. Appellants Possess No Constitutionally Protected Property or Liberty Interest Which Could Support a Due Process Claim Under Section 1983.

a. A Cognizable "Property Interest" is a Prerequisite to a Due Process Claim.

The due process claims asserted by the Appellants in this case are unsupportable, because they could not establish one of the critical elements of a claim for deprivation of due process, i.e., the loss of a constitutionally protected "property interest." *Durland v. San Juan County*, 182 Wn.2d 55, 70, 240 P.3d 191 (2014). Absent deprivation of a cognizable property or liberty interest, a due process claim under Section 1983 must be dismissed. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972). A

constitutionally protected property interest exists only where the plaintiff demonstrates that he possessed (and was deprived of) a "reasonable expectation of entitlement created and defined by an independent source" such as federal or state law. *Id.* A mere subjective expectation on the part of the plaintiff that a benefit would be provided or continued does not create a property interest protected by the Constitution. *Clear Channel v. Seattle Monorail*, 136 Wn. App. 781, 784-86, 150 P.3d 249 (2007); *Media Group V. City of Beaumont*, 506 F.3d 895, 903 (9th Cir. 2002).

Appellants in this case did not claim a fee interest, an easement, or any other property interest in Three Devils Road. The only "property interest" they cite is a history of using the road to access federal lands for recreation and hunting, and the hypothetical potential future use of the road in the event of a need to evacuate their properties. (CP 1352-1353). At most, their allegations constitute a subjective "expectation" of future use, and not a genuine "entitlement" to future use. This is insufficient.

In *King County v. Rasmussen*, 299 F.3d 1077 (9th Cir. [WA.] 2002), *cert. denied*, 538 U.S. 1057, King County sought to quiet title to an abandoned railroad right-of-way which bisected Rasmussen's property. Rasmussen objected that his due process rights had

been violated by the County's action which converted the right-of-way to a public trail. The Ninth Circuit Court of Appeals rejected the claim, because Rasmussen did not have a reversionary ownership right in the right-of-way. Therefore, the court held, he had no cognizable property interest to support a due process claim when the right-of-way was converted to a public trail. 299 F.3d at 1090. The same principle applies to Appellants' due process claims in this case. Indeed, the absence of a "property interest" is even clearer in this case, because none of the Appellants resides closer than a mile from the vacated road. (CP 1446-47; 1462; 1476-77).

In the context of road vacations, the Washington courts have consistently held that only abutting property owners, or those whose reasonable means of access has been obstructed, have a cognizable interest in keeping the road open. The Washington Supreme Court confirmed this principle in *Capital Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359 (1958):

> The general rule supported by this court is that only abutting property owners, or those whose reasonable means of access has been obstructed, can question the vacation by the proper authorities.

Id. at 365. *In accord, Taft v. Washington Mutual Savings Bank*, 127 Wash. 503 (1923) ("owners who do not abut, such as respondents here, and whose access is not destroyed or substantially affected, have no vested rights which are substantially affected.. ."). The rule was also applied by the Court of Appeals in *DeWeese v. Port Townsend*, 39 Wn. App. 369, 693 P.2d 726 (1984). The Court in *DeWeese* cited longstanding Washington case law on the issue and then went on to state:

> These cases announced the substantive principle that only persons dependent on a street for direct access to their properties have any legally recognized interest in keeping it open.
> 39 Wn. App. at 373.

Thus, based on settled case law, persons who do not depend on a road to access their properties have no constitutionally protected "property interest," and therefore no standing to bring a due process claim against a local government under Section 1983 arising from vacation of the road.

Nor may Appellants base their due process claim under Section 1983 on an expectation of use of the old road for fire evacuation. In *Carter v. Lamb*, 872 F. Supp. 784 (D.C. Nev. 1995) the plaintiffs sought damages under Section 1983 based on their

claim that the county's failure to maintain a remote road imperiled their expectation of fire protection. The court rejected this argument, finding that a mere expectation that a public road will be maintained or remain open does not rise to the level of a "property interest" protectable by the Due Process Clause:

> It has long been recognized that there generally exists no constitutional right to basic governmental services, such as fire and police protection... As a general matter, a state is under no constitutional duty to provide substantive services to those within its border.
>
> * * *
>
> Plaintiff's claim of entitlement to snow removal services is precisely the type of basic service which the federal courts have refused to bring within the purview of the 14th Amendment.

872 F. Supp. At 789-90.

The Washington courts have similarly rejected the notion that a citizen has a cognizable property interest in keeping a road open based on an assertion that the road might be useful for fire protection. *Capitol Hill Methodist Church, supra*, 52 Wn.2d at 366-67. Because Appellants possess no constitutionally protected

property interest in Three Devils Road, or the land on which it rests, their due process claim under Section 1983 could not be sustained.

3. Appellants Possess No "Liberty Interest" that was Infringed.

Apparently recognizing that they cannot establish the element of a constitutionally protected "property interest" in keeping Three Devils Road public, Appellants made the strained argument that the road vacation deprived them of a "liberty interest" protected by the Constitution. Not surprisingly, they point to no relevant authority that a person's constitutional right to "liberty" can be destroyed by vacation of a remote, unimproved road across another landowner's property. Indeed, the argument suggests a fundamental misunderstanding of the contours of "liberty interests" protectable under the Due Process Clause. Deprivation of a party's "liberty" typically arises in the context of arrest and incarceration. Thus, an individual may claim that he was unlawfully detained and/or imprisoned without being afforded due process protections. *Personal Restraint of Cashaw*, 123 Wn. 2d 138, 144, 866 P. 2d 8 (1994).

The courts have recognized that an individual's "liberty interest" may extend beyond mere avoidance of imprisonment.

However, the courts have made clear that the contours of the "liberty interest" protected by the Constitution are narrowly circumscribed. *In re Meyer*, 142 Wn.2d 608, 614-15, 16 P.3d 563 (2001). In general, liberty interests include the right to marry, to have children, to direct the upbringing of one's children, and to bodily integrity and privacy. *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258 (1997) (concurring opinion).

In support of their "liberty interest" argument, Appellants in this case rely on *Kent v. Dulles*, 357 U.S. 116, 78 S. Ct. 1113 (1958), a case which is clearly not on point. In *Dulles,* the Supreme Court held that it was a denial of due process for the State Department to deny passports to American citizens merely because they refused to submit affidavits stating whether they had been members of the Communist Party. The Court held that citizens have a "liberty interest" in freedom of movement, which gives them standing to challenge seizure of their passports. The suggestion that *Dulles* has anything to do with a local government's vacation of a remote, unimproved road is, in a word, preposterous.

No court anywhere in the country has ever held that a citizen possesses a constitutionally protected "liberty interest" in having access to a primitive road in the backcountry. Simply stated,

Appellants in this case have no constitutionally protected property or liberty interest which would support a due process claim under Section 1983.

4. The Absence of Conduct which is "Shocking to the Conscience" Provides Further Grounds for Dismissal of the Damages Claims.

Even if the Appellants could establish a property interest allowing them to pursue a due process claim under Section 1983, such a claim would still be subject to dismissal, based on the extraordinary standard of proof which would have to be met for such a claim to go forward.

To the extent that Appellants' federal claims are cognizable at all, they would fall within the rubric of "substantive due process" claims. Appellants cannot reasonably argue that *procedural* due process was denied, because there were in fact multiple hearings, live testimony from citizens (including many of the Appellants herein), and an extensive written record; and Appellants had the opportunity to challenge the vacation order in court. This is surely sufficient to satisfy procedural due process. As the courts have frequently stated, if a party has his day in court, and an opportunity to appeal, he has been afforded procedural due process. *Systems*

Adjustments, Inc. v. State, 7 Wn. App. 516, 518, 500 P.2d 1053 (1972).

Appellants do not allege that there were no hearings or opportunity to challenge the vacation of Three Devils Road. Rather, they allege that the hearings were substantively unfair because of perceived bias, conflict of interest or erroneous decision-making. Thus, their Section 1983 claims are in the nature of *substantive* due process claims.

But a claim for violation of substantive due process under Section 1983 requires an extraordinary showing of egregious behavior. The United States Supreme Court has made clear that the standard for liability under a substantive due process analysis is arbitrary government conduct that "shocks the contemporary conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708 (1998). As the Supreme Court has stressed, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Id.* at 846 (citation omitted). The Ninth Circuit Court of Appeals, in explaining the extraordinary standard which must be satisfied for a substantive due process claim, characterized the standard as conduct which "interferes with rights

implicit in the concept of ordered liberty." *Nunez v. City of Los Angeles*, 174 F.3d 867, 871 (9th Cir. 1998).

Appellants argue that they only need to establish "arbitrary and capricious conduct" by the Board of County Commissioners, citing *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 829 P.2d 746 (1992), cert. den. 506 U.S. 1079 (1983). But to the extent *Lutheran Day Care* would allow plaintiffs to establish a substantive due process violation on a lesser showing than that required by *County of Sacramento v. Lewis*, the opinion in that case must yield to the United States Supreme Court. "When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's ruling." *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008). At least since the *Lewis* decision was handed down in 1998, the standard for substantive due process liability under Section 1983 is government conduct which "shocks the conscience."

Even if it could be shown that the Board of County Commissioners decision on road vacation was flawed, no reasonable person could conclude that the vacation of an unimproved, little-used primitive road was "shocking to the contemporary conscience." No case in the country has ever found

a substantive due process violation under similar or comparable facts. The absence of conduct by the Okanogan County Board of County Commissioners which is "shocking to the contemporary conscience" is yet another reason why the claims under Section 1983 and Section 1988 were subject to dismissal. The trial court correctly dismissed such claims by way of summary judgment. This Court should affirm.

5. The Vacation of Three Devils Road Does Not Implicate the Equal Protection Clause.

Paragraph 3.1.5 in the Complaint asserts that Appellants were entitled to recover fees under Section 1983 and Section 1988 based on a violation of their "equal protection" rights. (CP 1358). But here again, the argument suggests a misunderstanding of the nature and scope of the Equal Protection Clause. In order to state an equal protection claim under Section 1983, a plaintiff must show that he was treated differently by the government because he belongs to a protected class. *Duffy v. State Dept. of Social and Health Services*, 90 Wn. 2d 673, 677, 585 P. 2d 470 (1978). A statute, ordinance or ruling that does not create a class distinction does not implicate the constitutional principle of equal protection.

Habitat Watch v. Skagit County, 155 Wn.2d 397, 416, 120 P.3d 56 (2000).

Here, Okanogan County's order vacating Three Devils Road did not vacate it as to only a certain class of individuals, much less a "suspect" class. The vacation applies to everyone who may wish to use the road. Where previously the road was considered a public road, its vacation means that it reverts to the private owner of the land through which it passes, i.e., Gamble Land and Timber, Ltd. Because the vacation order does not create a class distinction, the Equal Protection Clause is not implicated. *Habitat Watch, Id.* Therefore, Appellants' Section 1983 claim based on equal protection is groundless, and the request for attorney's fees under Section 1988 was properly dismissed.

V. SUMMARY AND CONCLUSION

Appellants have failed to demonstrate a lawful basis to claim standing, to have the decision of the County Commissioners reviewed and pursuant to RAP 10.4(d) respondent Okanogan County move this Court to have this matter dismissed.

Alternatively, the case makes no claim of statewide importance or interest, warranting further review by this Court and the matter should be sent to the Court of Appeals for action.

Upon review on the merits should the case reach that state, the decision of the trial court is supported by the facts and law of this case and the appeal must be denied.

Respectfully submitted:

Dated: April 14, 2016

By: _____

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Joint Appendices of Gamble and County

Appendix 1: CP 237-238

Appendix 2: CP 249, 262

Appendix 3: CP 910-914

Appendix 4: CP 168-175, 352-354, 422-429, 786, 806, 854-857, 859

Appendix 5: CP 1377-1379

APPENDIX 1

Petition for Vacation of a County Road

To the Board of County Commissioners of Okanogan County, Washington .

We, the undersigned freeholders of Okanogan County, State of Washington, do petition that the following described County Road be vacated: Three Devils Road OCR 1876 Commencing at: the East property line of parcel number 3224171000 at approximately Mile Post 1.752 and franchise agreement #30-98. Thence running South West to just inside the North property line of parcel number 3224200000 and then running North through parcel number 3224172003 continuing north through parcel number 3224171000. The road continues North to approximately mile post 3 where the road turns and runs west to the West property line of parcel 3224180000 which abuts the Okanogan National Forest Parcel at approximately mile post 4.816. The attached map shows the intended area of vacation.

The portions of the road being requested in the vacation are completely contained within private property and have no value to the general public. The Department of Natural Resources does have a recorded easement on file with the county to access parcel 3224172003 granted on 10-21-1982.

Second, the Forest Service has posted a road closed sign, see attached, notifying the public that access to the road from the west to the east stops at the Forest Service Boundary to parcel 322418000 which is owned by the petitioners.

Third, this summer after the Carlton Complex Fires a rainstorm damaged portions of the County Road. The county was notified of the damage and the private landowners whose resources were present then fixed the damage. Costs for the road improvements were not reimbursed by the County and further leads to the fact the road is qualified to be vacated, as it is of no value to the general public.

Last, the section west of the intersection of the former Hooker Creek Road, which has been vacated, has never been a county road. We attach a copy of the Road maps from the county Road Atlas page 78 showing the county road does not pass this intersection and does not connect to the forest service parcel. The dashed green lines represent the county road.

Your petitioners respectfully represent and allege that based on the facts above, the road is useless as part of the general road system and the public will be benefited by its vacation. All of your petitioners are freeholders residing in said County in the vicinity of said road; wherefore your petitioners pray for the vacation of said road, as provided by law.

Petitioners	Township	Range	Section
Gamble Land and Timber LTD By: Sec. Com. V. Pres.	32	24	16 17
Gamble Land and Timber LTD By:	32	24	27
Gamble Land and Timber LTD By:	32	24	20
Gamble Land and Timber LTD By:	32	24	18

2/19/15
Pr. don Wyss

Petition must be signed by the majority of the owners of the frontage on any county road. (Ref. RCW 36.87.030)

RECEIVED

MAR 18 2015

OKANOGAN COUNTY

Three Devils Vacation 2015
Exhibit 2

OKANOGAN COUNTY COMMISSIONERS

RESOLUTION 25-2015

WHEREAS, a petition to vacate a portion of OCR 1876, Three Devils Road has been received; and,

WHEREAS, it appears that the following described portion is no longer necessary as part of the general County Road System, to wit:

All that portion of OCR 1876, Three Devils Road, Okanogan County, Washington. Beginning at the easterly boundary line of NE ¼, SE ¼, Section 17, Township 32 N, Range 24 EWM, MP 1.75 running in a southerly direction to the NW ¼, NE ¼, Section 20 continuing northwest direction to the SE ¼, SE ¼, Section 18 thence running in a northwest direction to the USFS boundary line to a terminus point SW ¼, NW ¼, Section 18, Township 32 N, Range 24 EWM at MP 4.81.
This portion of road is useless as a part of the general road system, and

EXCEPTING THEREFROM, an easement for existing utilities, if any, including access for maintenance thereof;

WHEREAS it appears that the public will be benefited by this vacation,

BE IT THEREFORE RESOLVED by the Board of County Commissioners of Okanogan County that it is the intention of the Board to vacate and abandon said road,

AND BE IT FURTHER RESOLVED that the County Road Engineer is hereby directed to report upon such vacation and abandonment at a public hearing to be held at 3:00 P.M., March 17, 2015.

PASSED AND ADOPTED at Okanogan, Washington, this 24th day of February, 2015.

BOARD OF COUNTY COMMISSIONERS
OKANOGAN COUNTY, WASHINGTON

Jim DeTro, Chairman

Ray Campbell, Vice Chairman

Sheilah Kennedy, Member

COUNTY COMMISSIONERS SEAL OKANOGAN CO., WASHINGTON

ATTEST:

Lalena Johns, Clerk of the Board

APPENDIX 2

Business of the
Board of County Commissioners
County of Okanogan, Washington

Date: Thursday, March 12, 2015

Agenda Title: Vacate OCR 1876,

Three Devils Road

Proposed Commission Action:

Move to approve the Vacation

PROPOSED MOTION: Motion from the floor and vote of the County Commissioners

Agenda Item No:

Agenda Bill No:

Exhibits: Final Order of Vacation

- Staff Report
- Engineer's Report
- Maps

Approvals:

Agenda Bill Author: V. Hughes
Public Works; Josh Thomson, County Engineer
Clerk / Board: Lalena Johns

REQUEST/DISCUSSION: request to approve vacation of Three Devils Road.

BACKGROUND INFORMATION: Resolution 25-2015, directed County Engineer to report upon such vacation.

RECOMMENDATIONS: Recommending Commissioners approve vacation.

SUGGESTED FUNDING SOURCE:

FISCAL IMPACT:

Year One _____
Year Two _____
Year Three _____
Year Four _____
Year Five _____

OPTIONS:

Approve vacation or deny.

_____ 3/12/15
Signature of Elected Official/Department Head — Date

TDV0000013

OKANOGAN COUNTY DEPARTMENT OF PUBLIC WORKS
OKANOGAN, WA 98840

ENGINEER'S REPORT

IN THE MATTER OF THE VACATION OF RIGHT-OF-WAY:

To the HONORABLE BOARD OF COUNTY COMMISSIONERS, STATE OF WASHINGTON:

On this 6th day of March 2015, I proceeded to make an examination of the following described portion of right-of-way:

All that portion of OCR 1876, Three Devils Road, Okanogan County, Washington. Beginning at the easterly boundary line of NE ¼, SE ¼, Section 17, Township 32 N, Range 24 EWM, ±MP 1.75 running in a southerly direction to the NW ¼, NE ¼, Section 20 continuing northwest direction to the SE ¼, SE ¼, Section 18 thence running in a northwest direction to the USFS boundary line to a terminus point SW ¼, NW ¼, Section 18, Township 32 N, Range 24 EWM at ±MP 4.81. This portion of road is useless as a part of the general road system, and

EXCEPTING THEREFROM an easement for existing utilities, if any including access for the maintence thereof;

And make the following report in accordance with the said RCW 36.87.040:

1. As to whether the county road should be vacated and abandoned.

   It appears that the portion of right-of-way being petitioned for vacation is currently used minimally by the adjoining property owners. There is currently a locked gate at the USFS boundary line. The county performs very little to no maintenance on this road. Whereas the adjoining property owners have performed all maintenance and improvements to the road since the last summer, it may be advisable to vacate the road and allow them the control the are requesting.

2. As to whether the county road is in use or has been in use.

   The road is currently in use to transport timber salvaged from the Carlton Complex Fire area. Prior to the fire and accociated traffic, the road saw very little traffic as evidenced by it's two narrow wheel tracks with vegetation between. Use was low enough that the road was not on the County's rotation for regular vehicle counts. The most recent recorded traffic data is an estimated ADT of 3 in 2005.

3. As to the condition of the road.

   That portion of roadway petitioned to be vacated is currently classified as unimproved and its status is primitive.

4. As to whether it will be advisable to preserve the county road for the county road system in the future.

   As the road is currently used and gated at the western terminus, it serves only the adjoining property owners who have signed the petition.

5. As to whether the public will be benefitted by the vacation and abandonment.

   The public will be neither benefitted nor inconvenienced by the vacation and abandonment of this road and right of way.

6. Such other facts as may be important for the Board's consideration.

   This road does not abut a body of water.

DATED THIS 12th day of March, 2015.

Josh Thomson, PE, Okanogan County Engineer

APPENDIX 3

hearing.

MR. PERRY HUSTON: So with that, Commissioners, that is my recitation, if you will, of the process and the decision that lies before you. This is not a public hearing. This is a special meeting for the Commissioners to deliberate on the matter.

So at that point, unless there's specific questions, it'd be your opportunity to discuss the issue.

COMMISSIONER DeTRO: Nothing further from staff, I'll open it up to the board.

COMMISSIONER CAMPBELL: Well, I spent a great deal of time reviewing the application for the vacation, the -- all the information gathered by the -- our County Engineer and staff there and, therefore, review of the -- of the notes from the hearing and the Hearing Examiner's final recommendation. And it's been a long process here.

I think there's things that I have looked at in reviewing all the information -- the history as presented by staff there and reviewing the RCW's there -- that allow us flexibility to review and make a decision based on -- well, here we have two -- two recommendations. Here we have one --

opposing recommendations: one from our -- of course, our Hearing Examiner and one from our County Engineer. And to look at all this information and then try to weigh out what the -- what the results are in my perspective on that. And so I've come to gather my thoughts on it pretty well.

COMMISSIONER KENNEDY: So I -- I, too, have spent a lot of time going through all the information, and I agree. Because right now, I feel like we're -- we're -- you know, we've got one recommendation and we've got another recommendation, so it's back to us right smack in the middle to do our job and to, you know, review that information.

According to the RCW's, they establish a process for the Engineer to do the -- the official report and report back to us. And I believe that the Engineer has -- has done that. And so it's -- it's difficult for me to, you know -- to waiver from that -- that professional recommendation. You know, I -- some of the -- some of the questions or some of the things that I looked at is -- that brings me back to the point is there's a process that we have to follow and there's a process that -- whether a road's being put on or not. And some of this

information that was provided by staff, you know, really raises some of those questions. But then when you look at the decision that we have to make, it kind of pulls it all back together. So this is difficult, but I believe I -- I believe I can feel comfortable with the decision.

COMMISSIONER DeTRO: I had the same feelings, a lot of decision-making processes to weigh, a lot of information to go over, a lot of arbitrary comments, some which are pertinent, some which are not. So I'm prepared to move on.

COMMISSIONER CAMPBELL: Okay. In that case there, based on the review -- my review of the petition and all the facts that have been presented and considering the recommendations from the Hearing Examiner and the office's recommendations from our County Engineer, based on the history that's been presented of the road, the facts laid out in law there as -- that we are to follow there -- that he followed -- There was -- there was testimony on the fact that this was a necessary road for the public there that they needed for IAP.

Escape route there, the facts show that there are four to five other escape routes there that get 'em out of that area. That's -- that's what I saw

in the reports there. There's at least four. And there are better routes, alternative routes, there. That this road has been used by some of the public there, the history of the use is minimal. Is it necessary? The cost of the -- of the construction work on that has been beared {sic} -- beared by the -- the petitioner on this for the most part.

And so in the recommendations from our County Engineer based on the fact that -- that this road -- I do not feel it is of benefit to the public there and it is useless.

And, therefore, I move that we move forward with the vacation of this road that was requested by the petitioner.

COMMISSIONER KENNEDY: I'll second that motion.

COMMISSIONER DeTRO: Okay. We have a motion and a second to proceed with vacation. Any further discussion?

Under further discussion, I would like to say thank you to all of you who were patient enough to follow the legal process and watch the process play out, although it was long and arduous -- Well, hold on. And for those of you who were ignorant, arrogant, and inappropriate and were throwing around

false accusations, I find that utterly disgusting. And that's as politely as I can say it.

So we'll call for the vote. All in favor say "aye."

(COLLECTIVE "AYE.")

COMMISSIONER DeTRO: Opposed, same sign. And that will be me. I'm going to vote for the decision of the Hearing Examiner.

So motion carried two to one.

MR. PERRY HUSTON: Commissioners, at this point, I'll defer to the Public Works staff to see if they have any questions in terms of the generation of the appropriate enabling documents.

HEARING OFFICER DAN BEARDSLEE: I have no questions.

COMMISSIONER DeTRO: Okay.

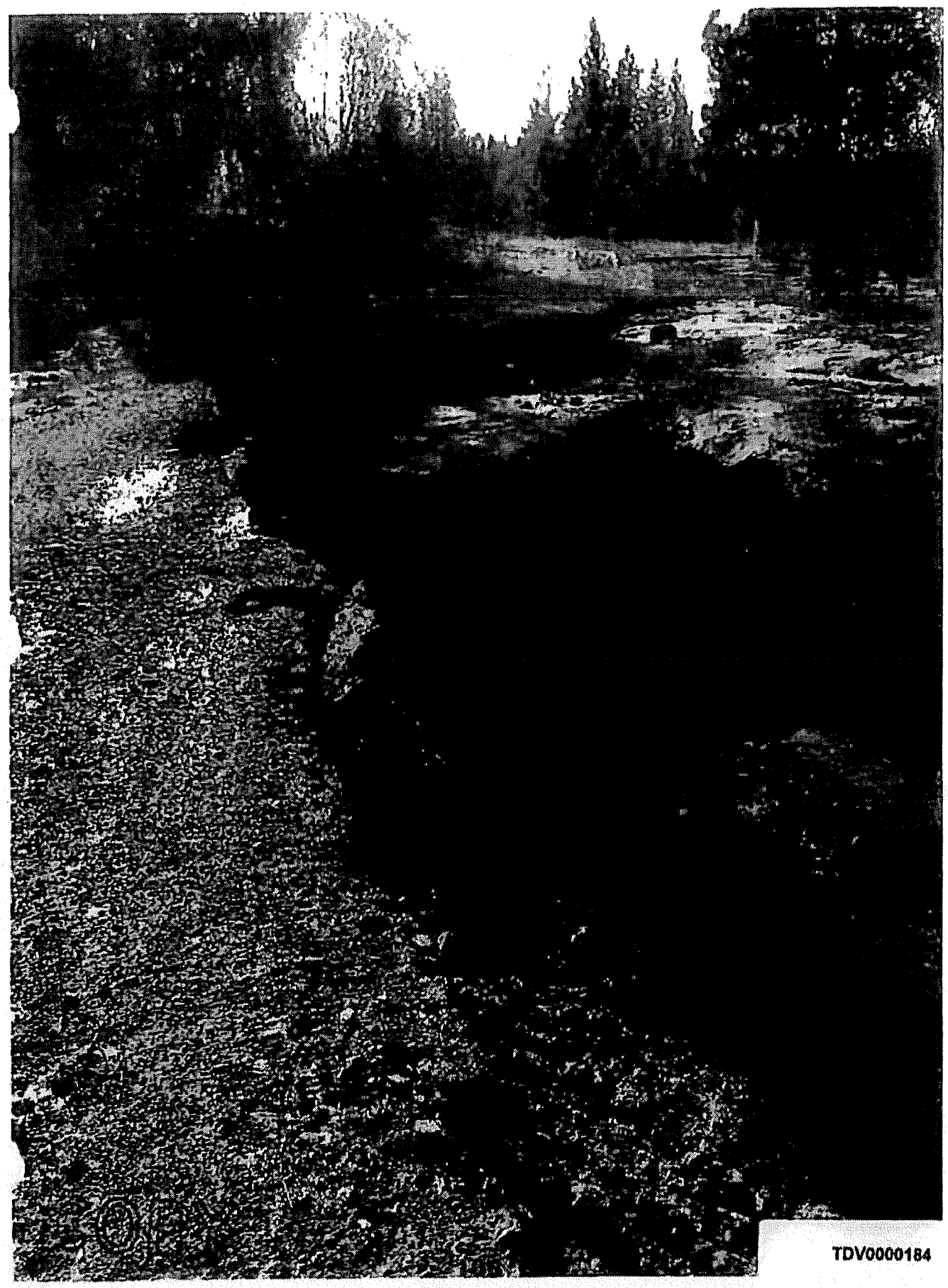
MS. VERLENE HUGHES: I will get the document to you soon.

MR. PERRY HUSTON: Very good.

COMMISSIONER DeTRO: Okay. Very good.

(THE PROCEEDINGS CONCLUDED AT 2:17 P.M.)

APPENDIX 4



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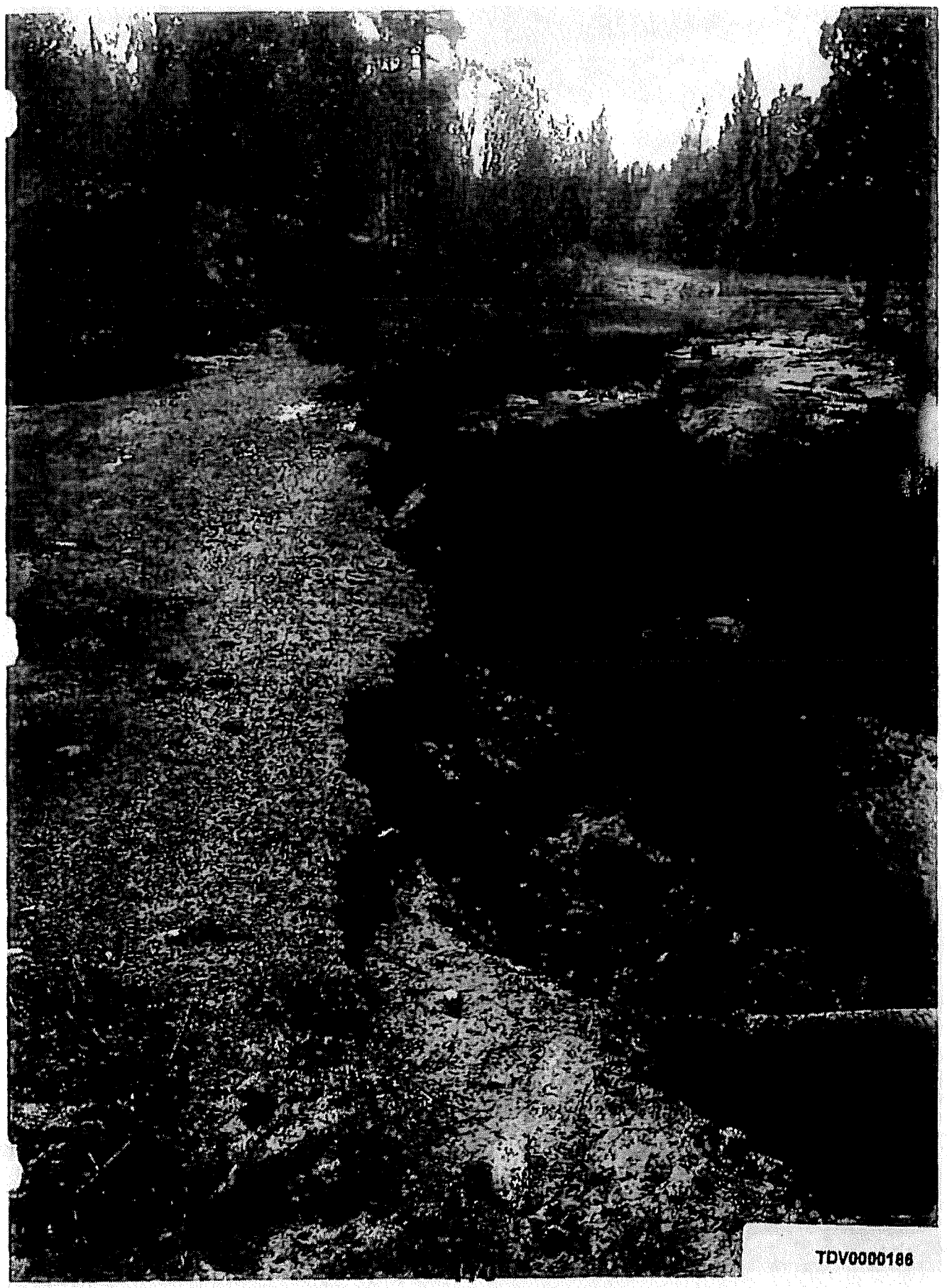

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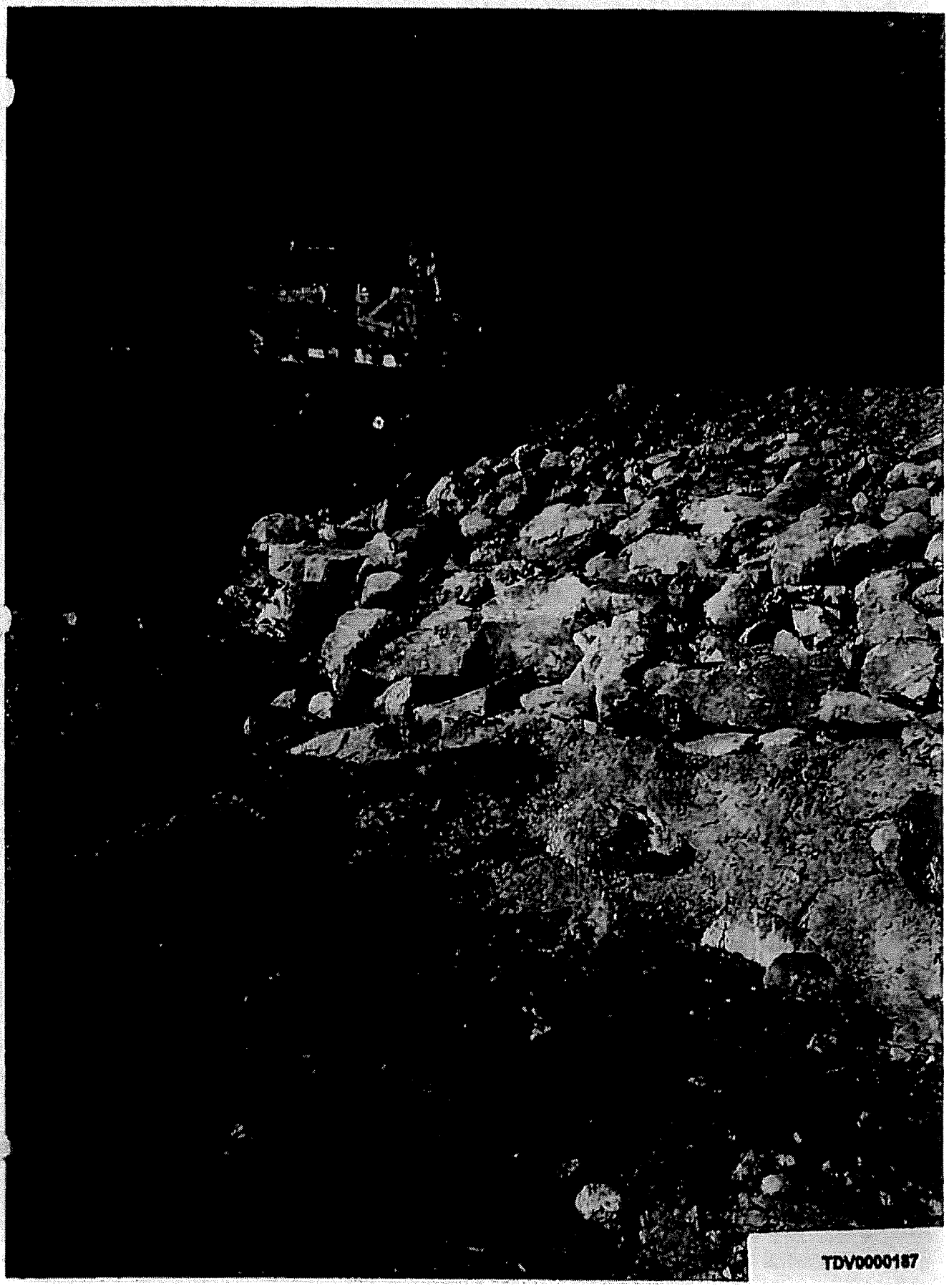
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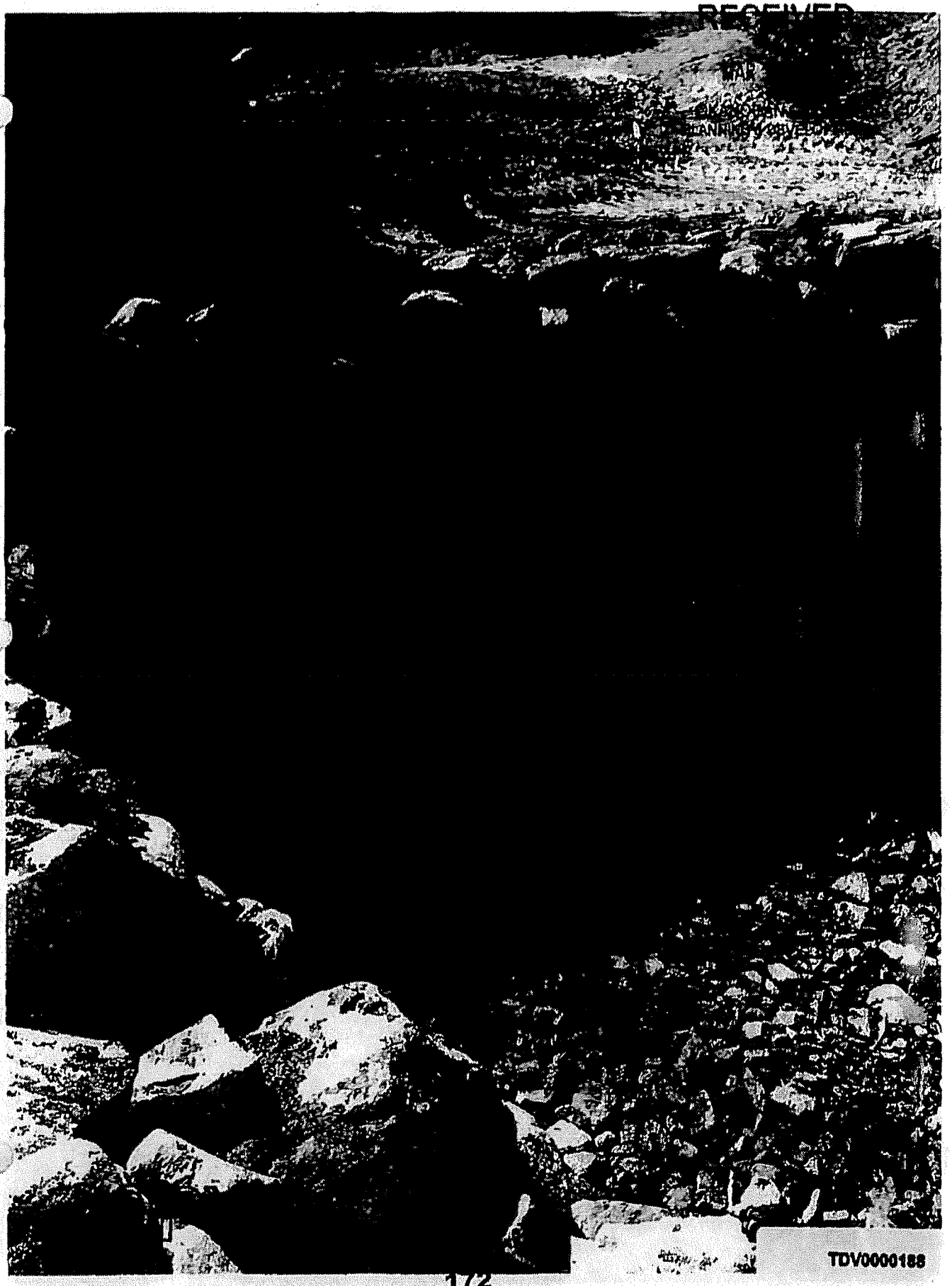

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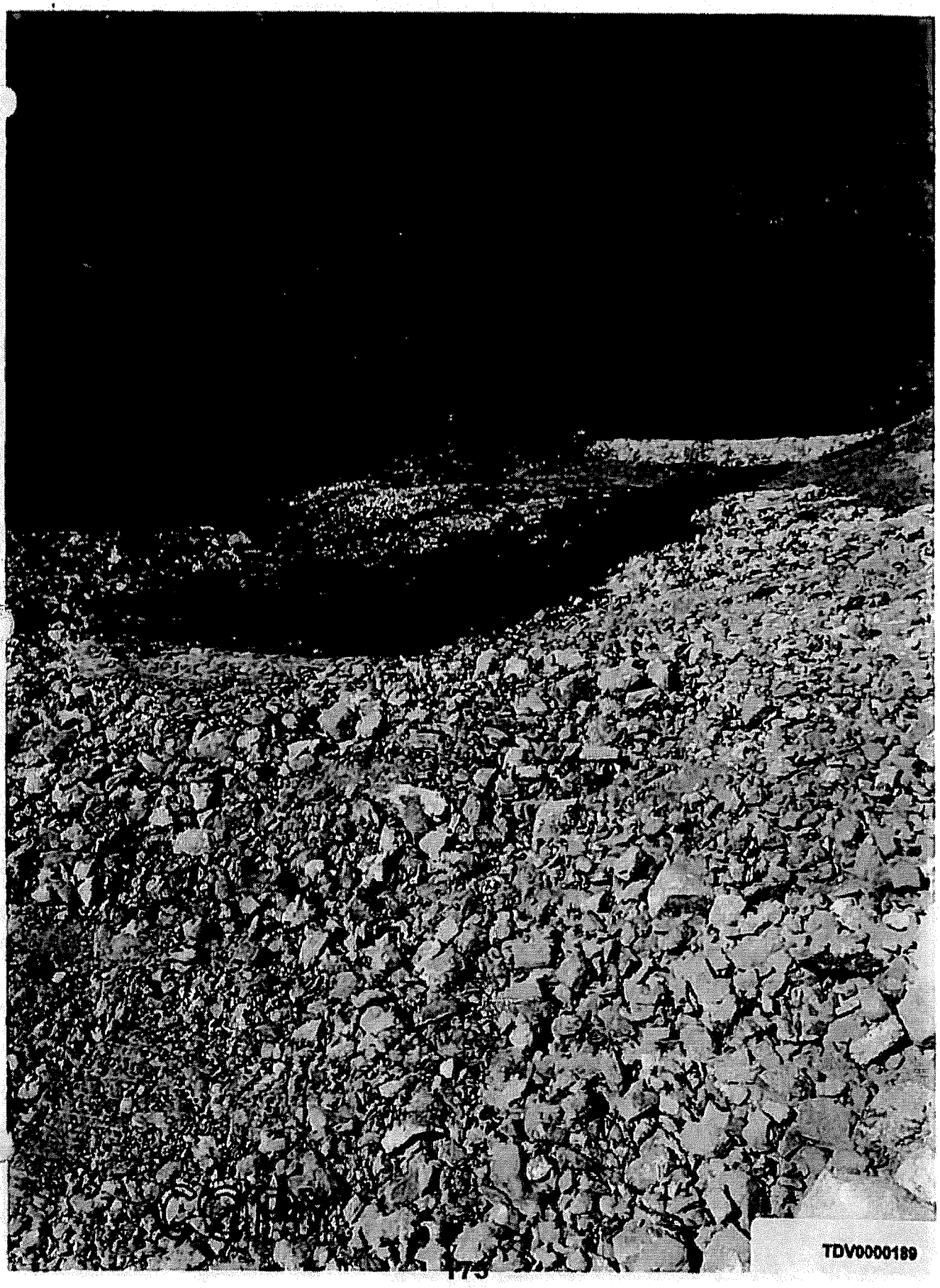

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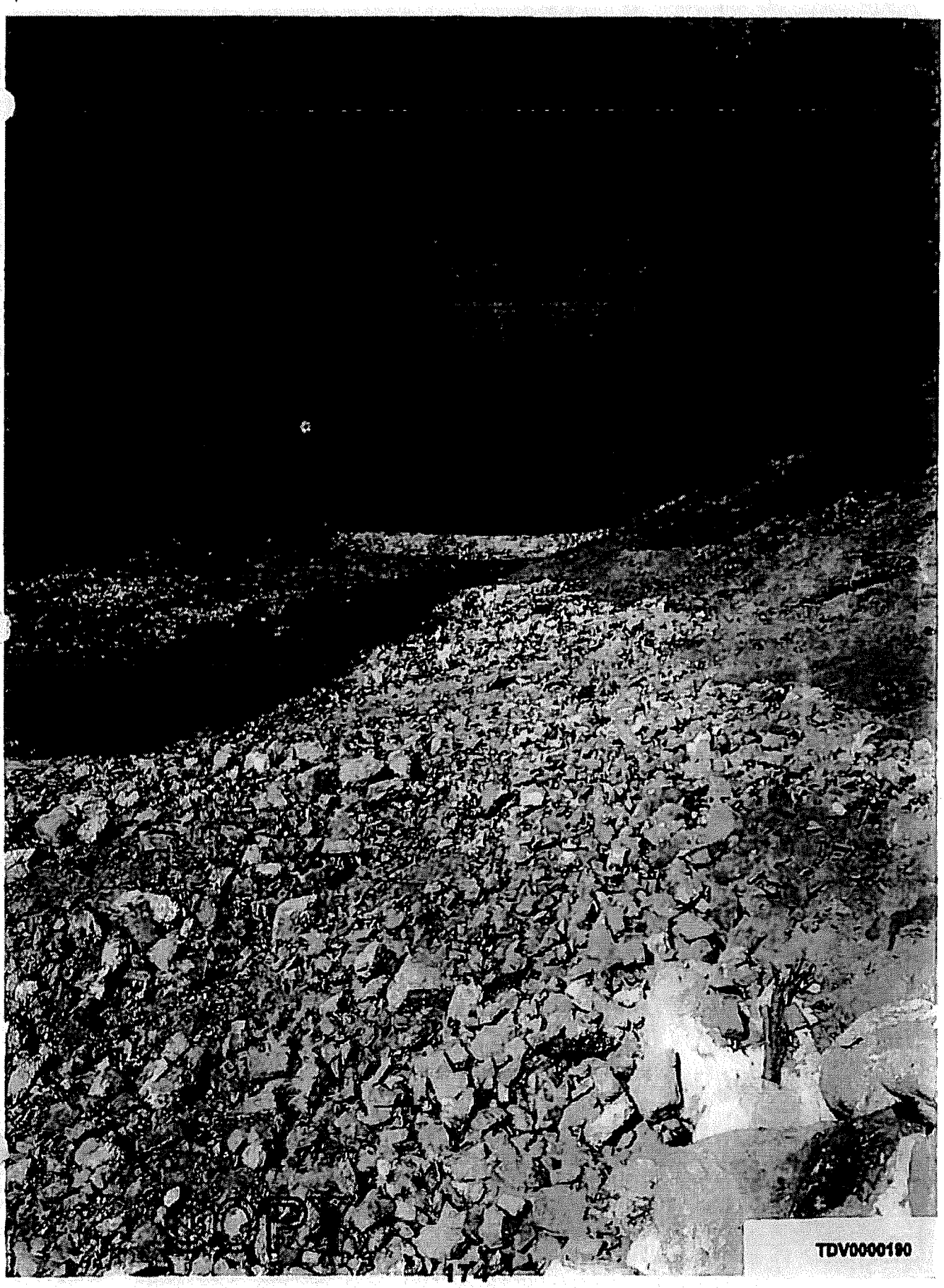

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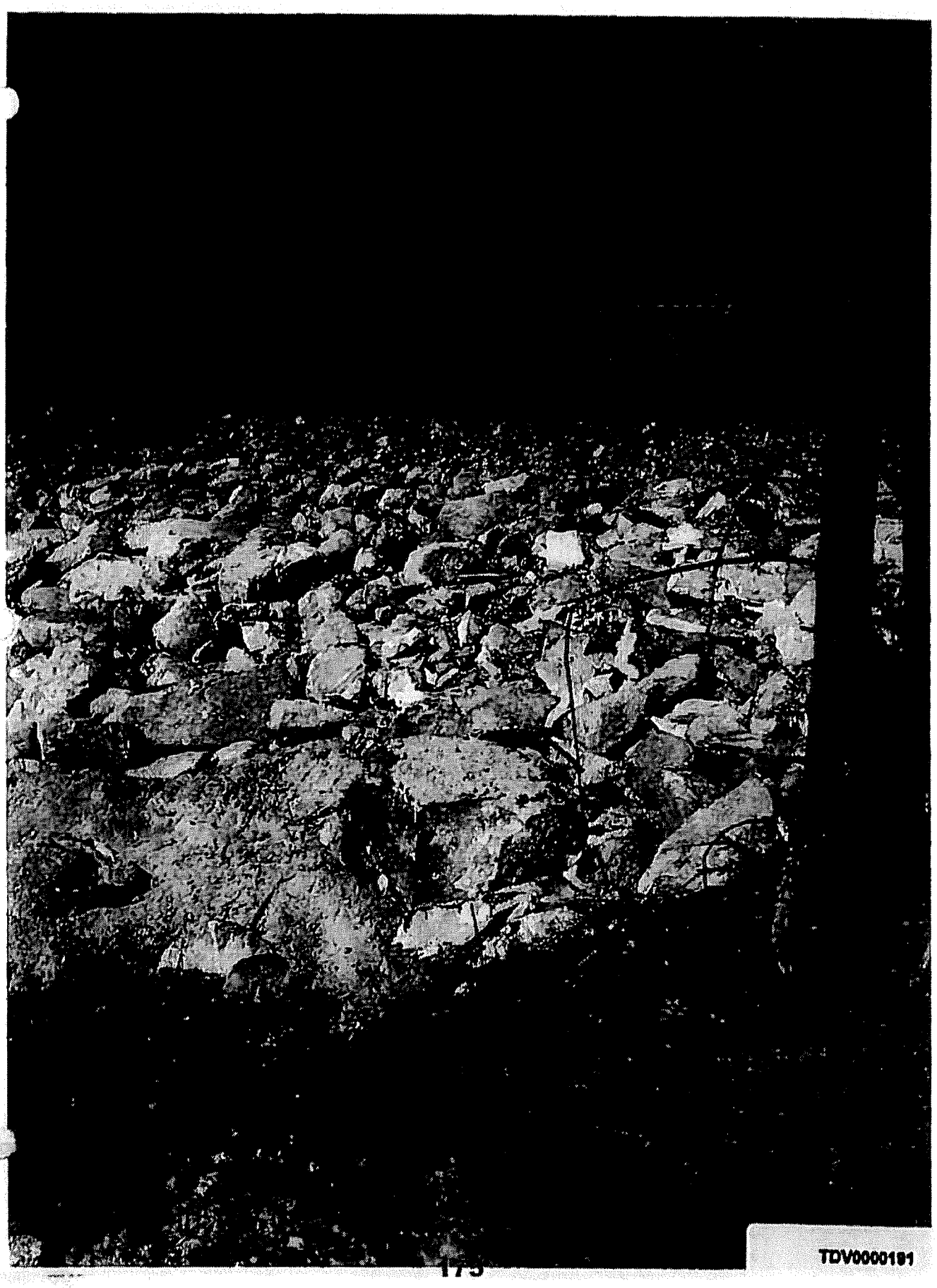

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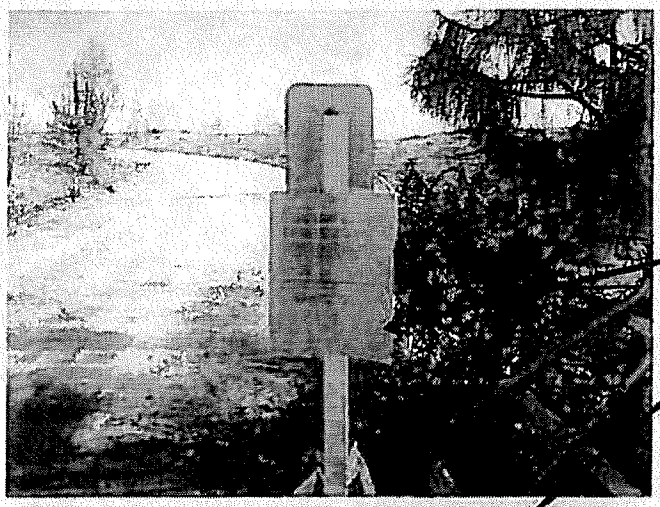

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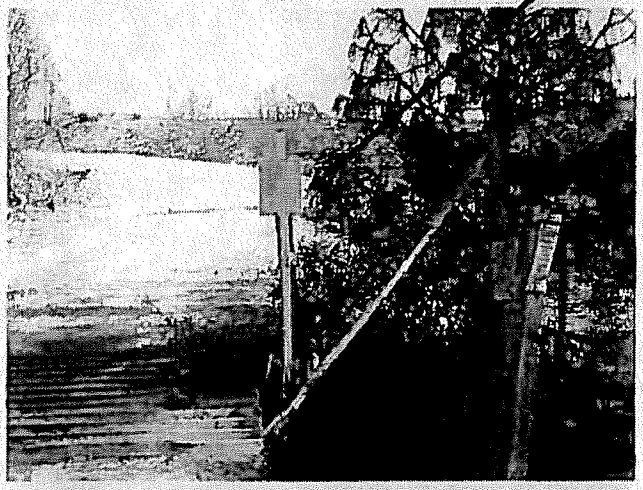
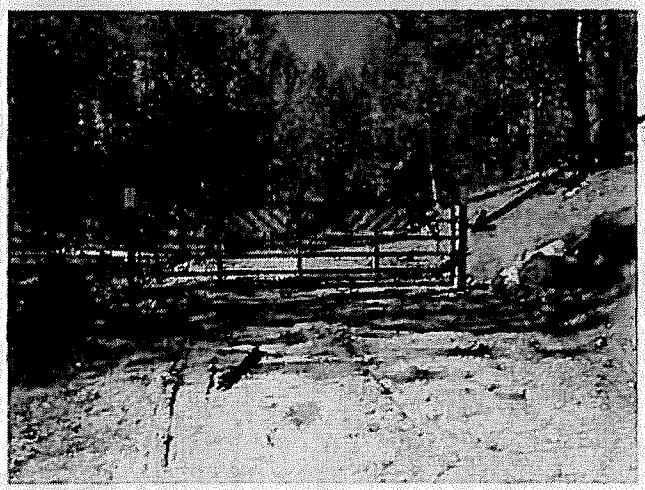
4/9/2015 @ 10:00
OCR 1876, Three Devils Road at MP 4.81
Photo taken March 18, 2015

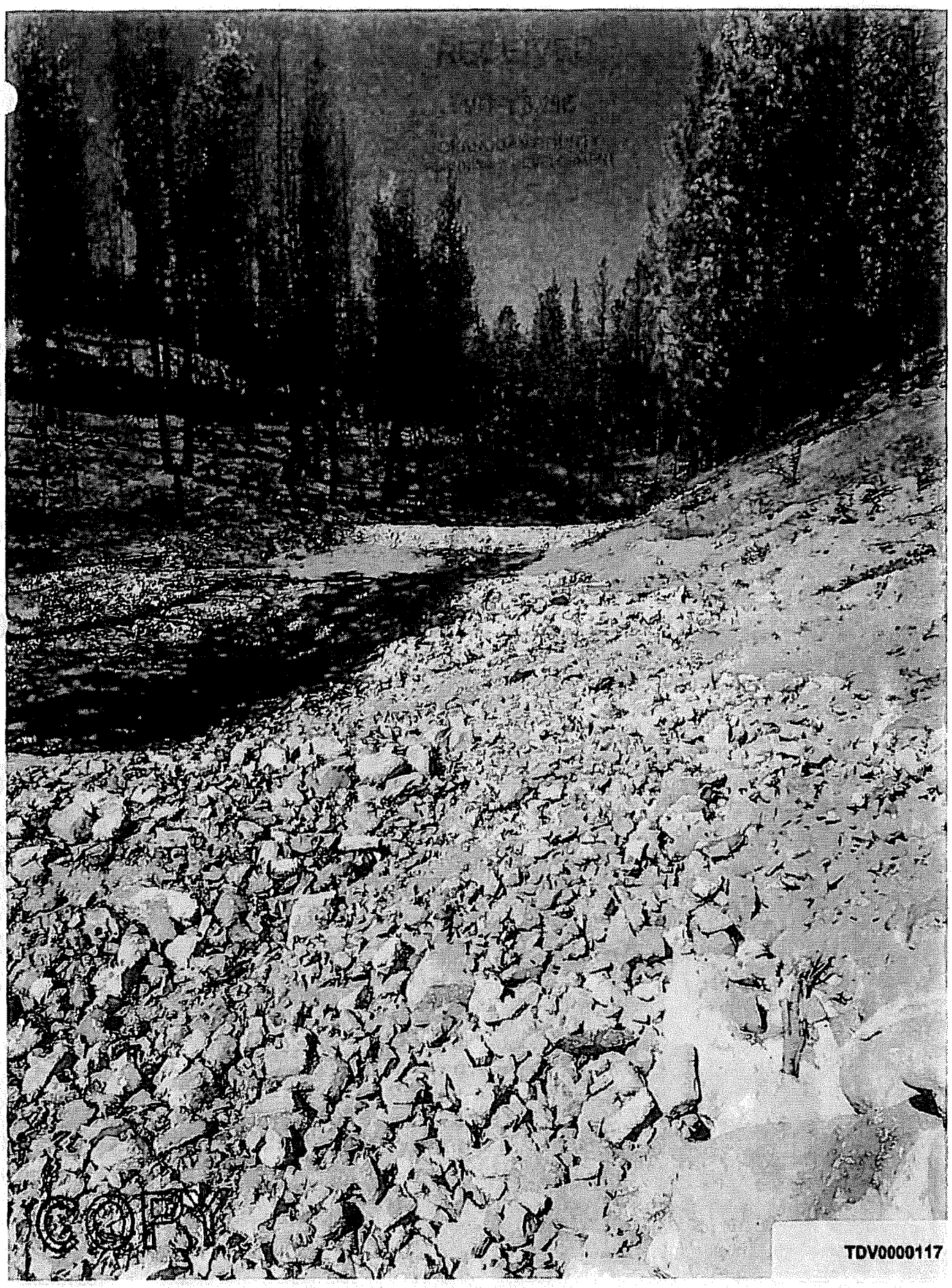




USFS Gate
Photo taken March 18, 2015

RECEIVED
MAR 18 2015
PLUMAS COUNTY
DEVELOPMENT

TDV0000116



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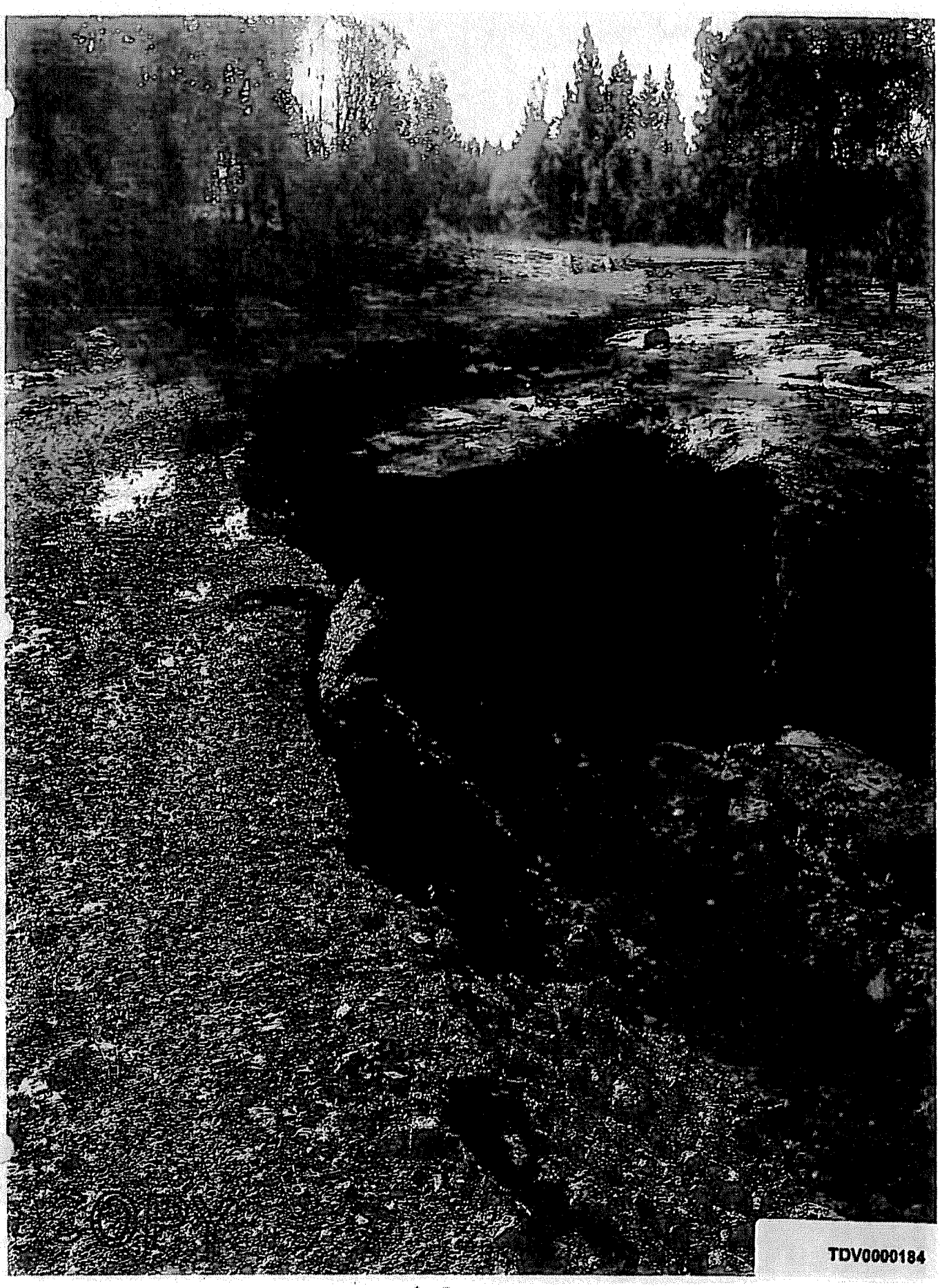

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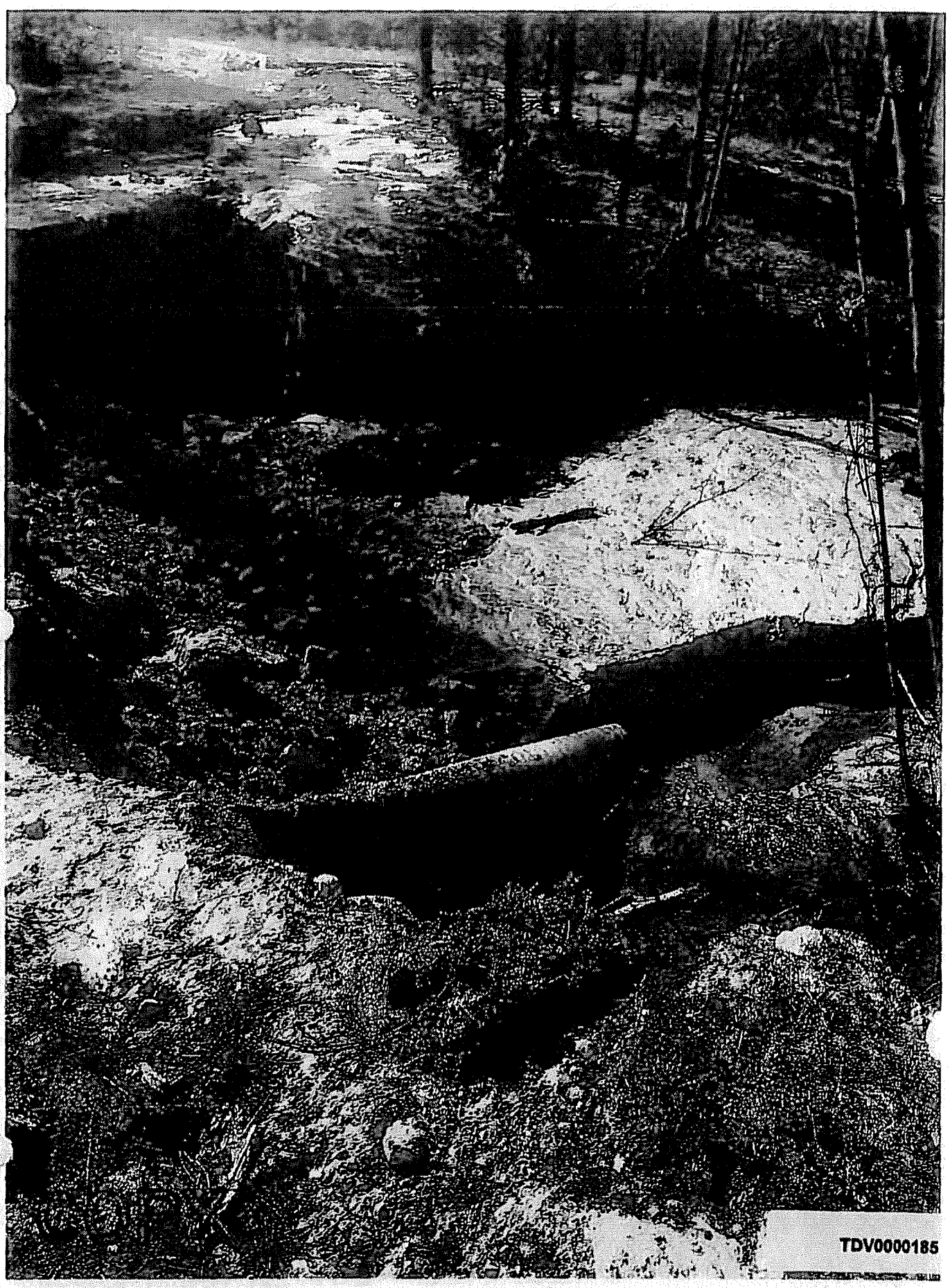

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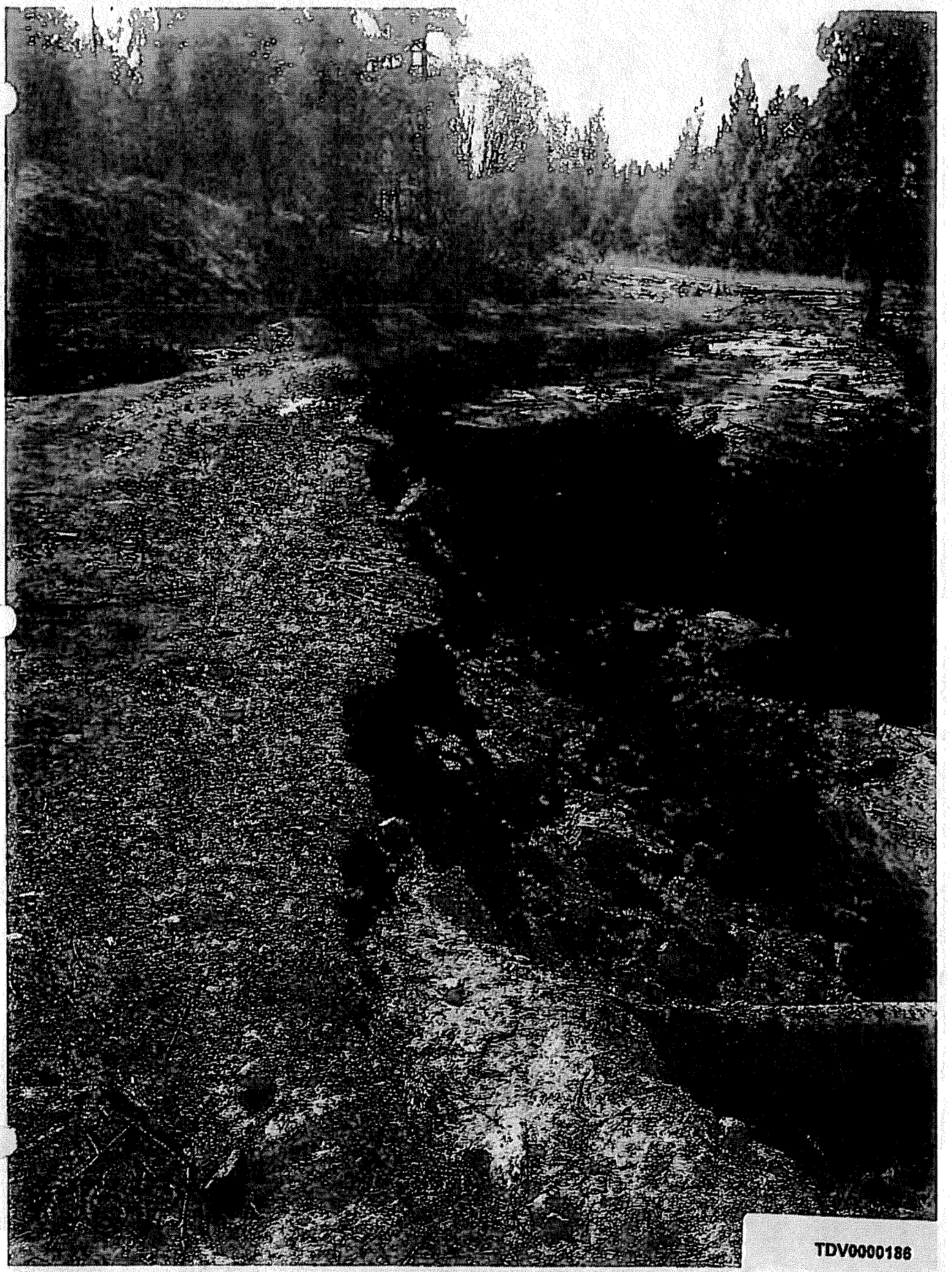

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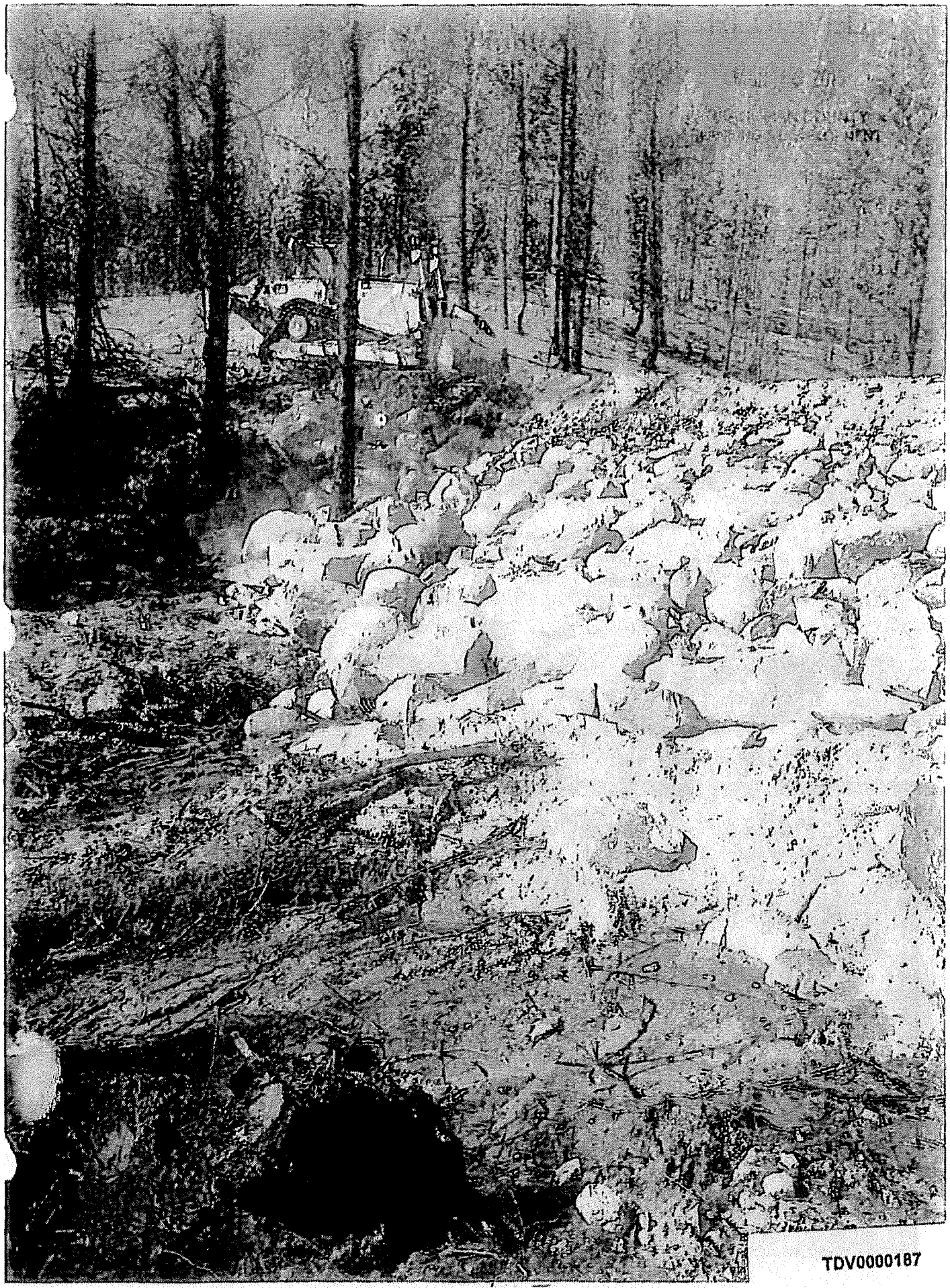

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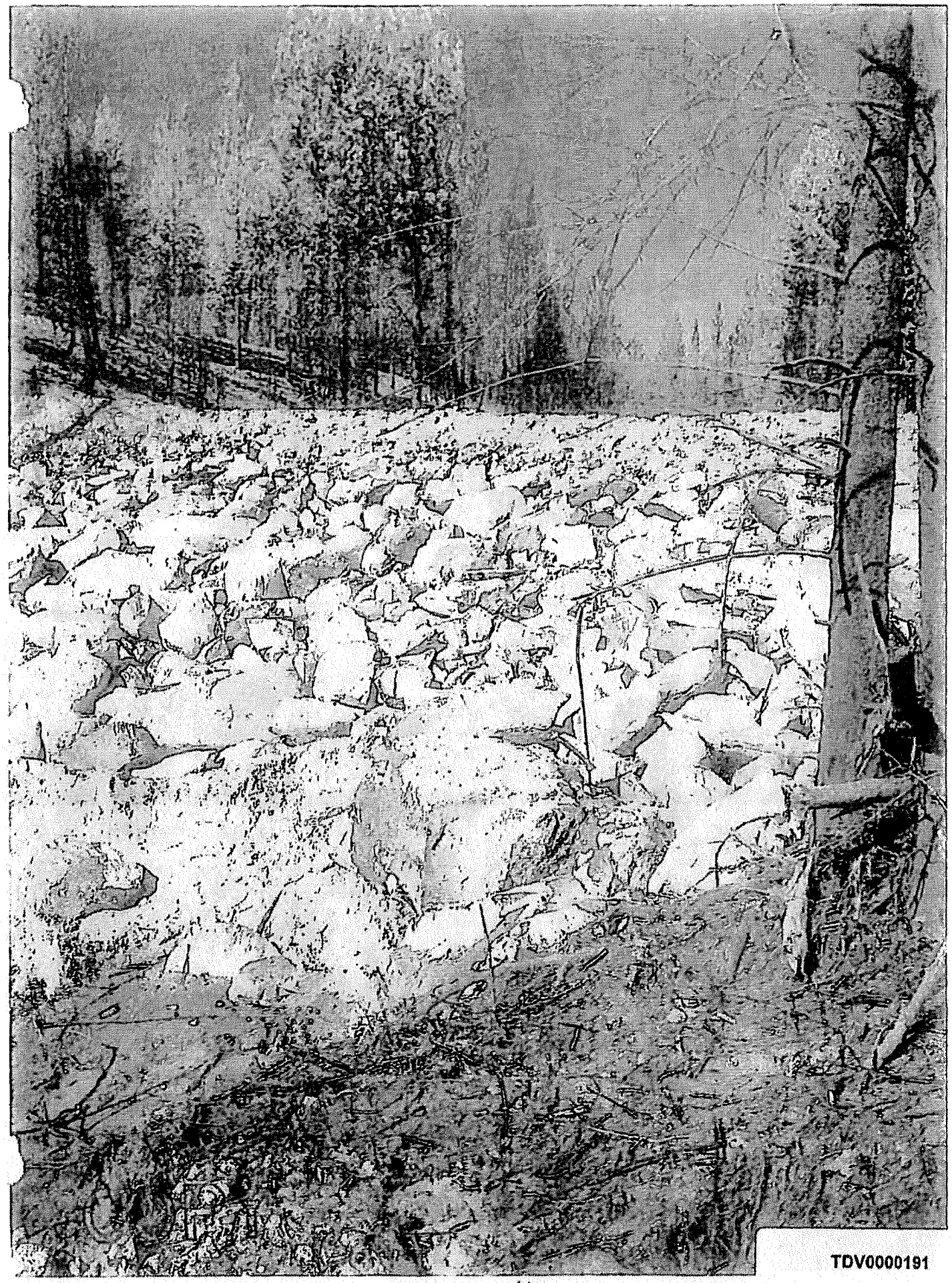

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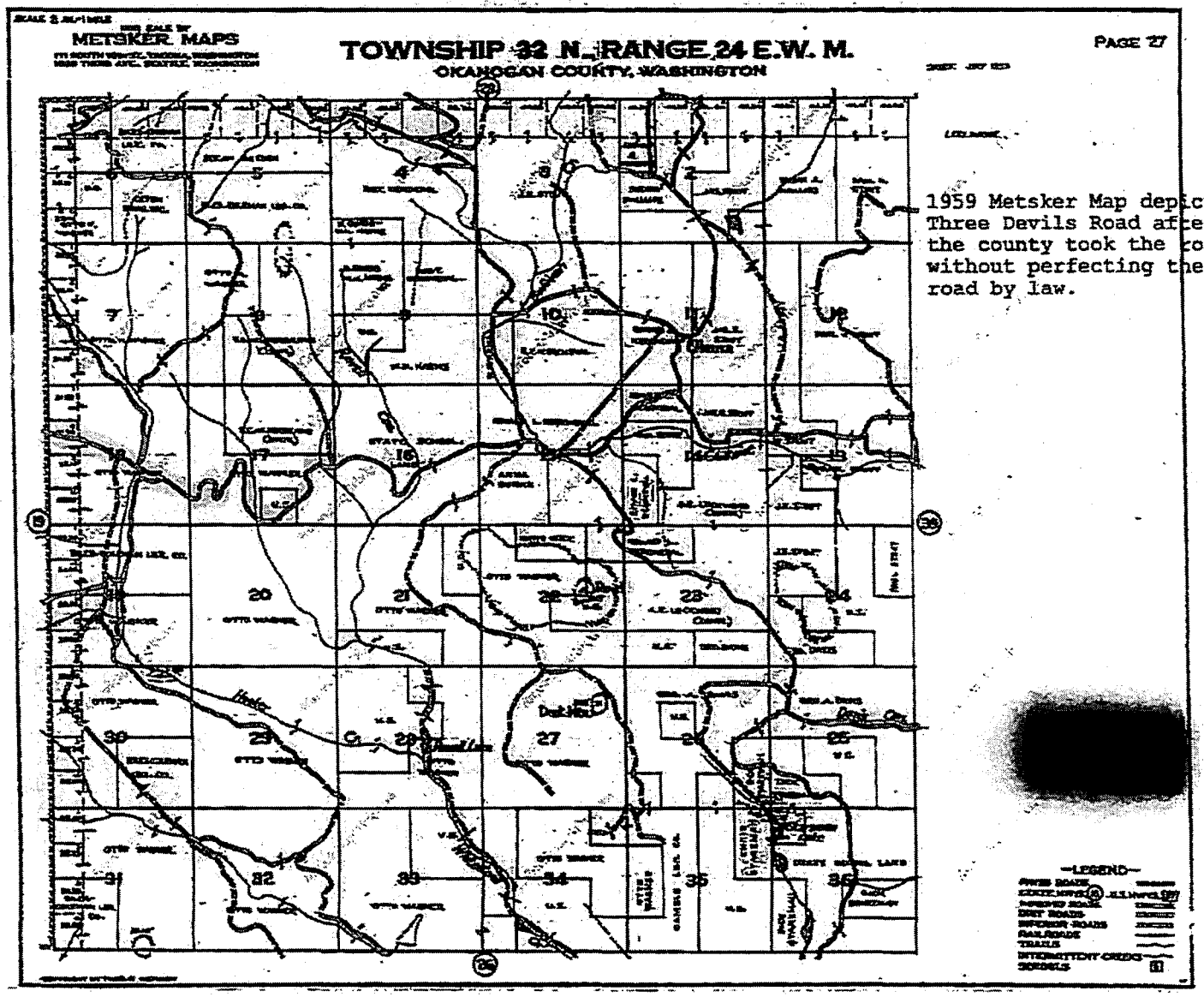
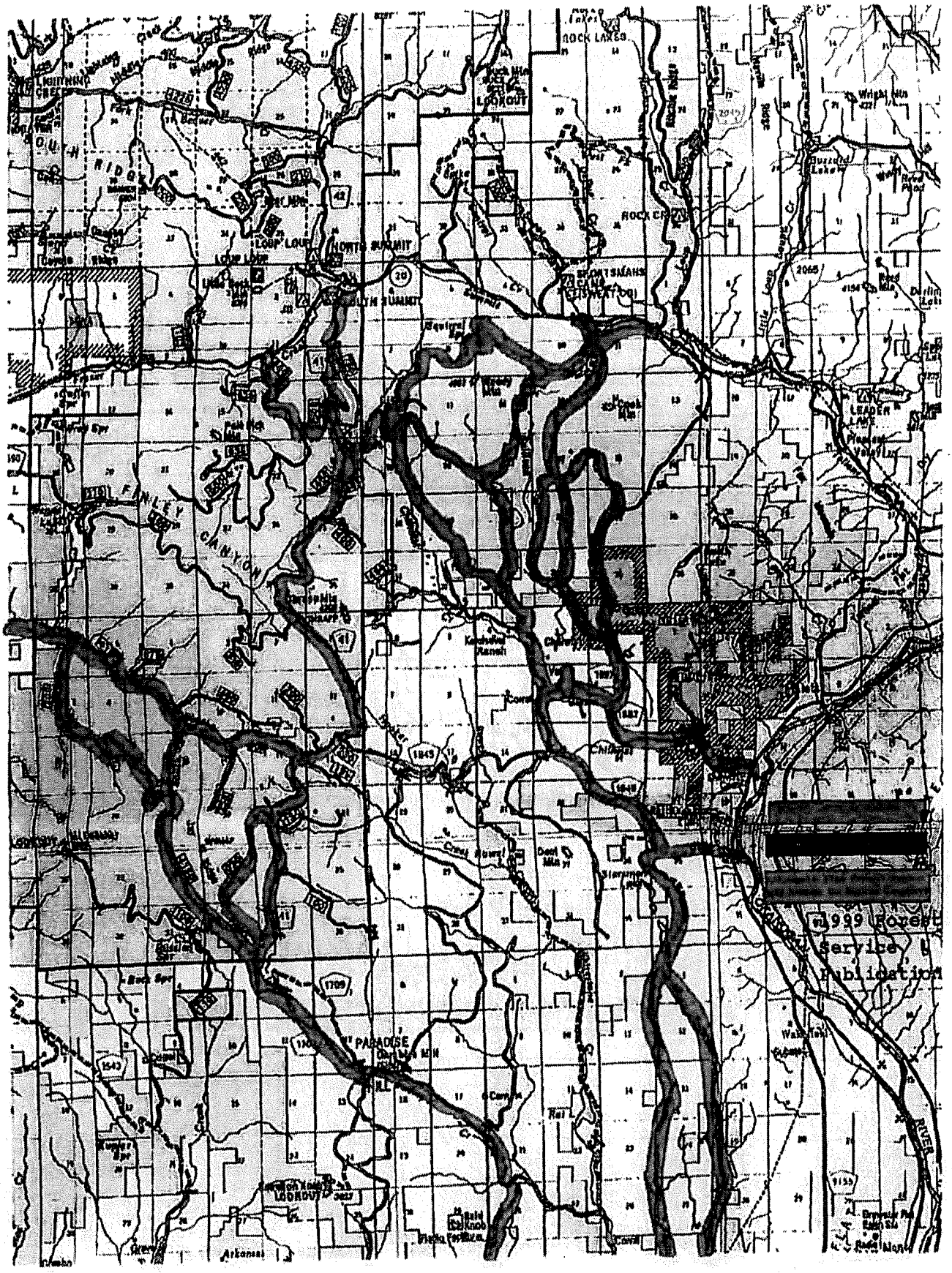


1959 Metsker Map depicting Three Devils Road after the county took the road without perfecting the road by law.


ROCK LAKES
LOOKOUT
LOOP LOOP
LOOP SUMMIT
SOUTH SUMMIT
ROCK CREEK
LEADER LAKE
FINLEY CANYON
PARADISE
LOOKOUT
1999 Forest
Service
Publication

TDV0000569

TDV00008117

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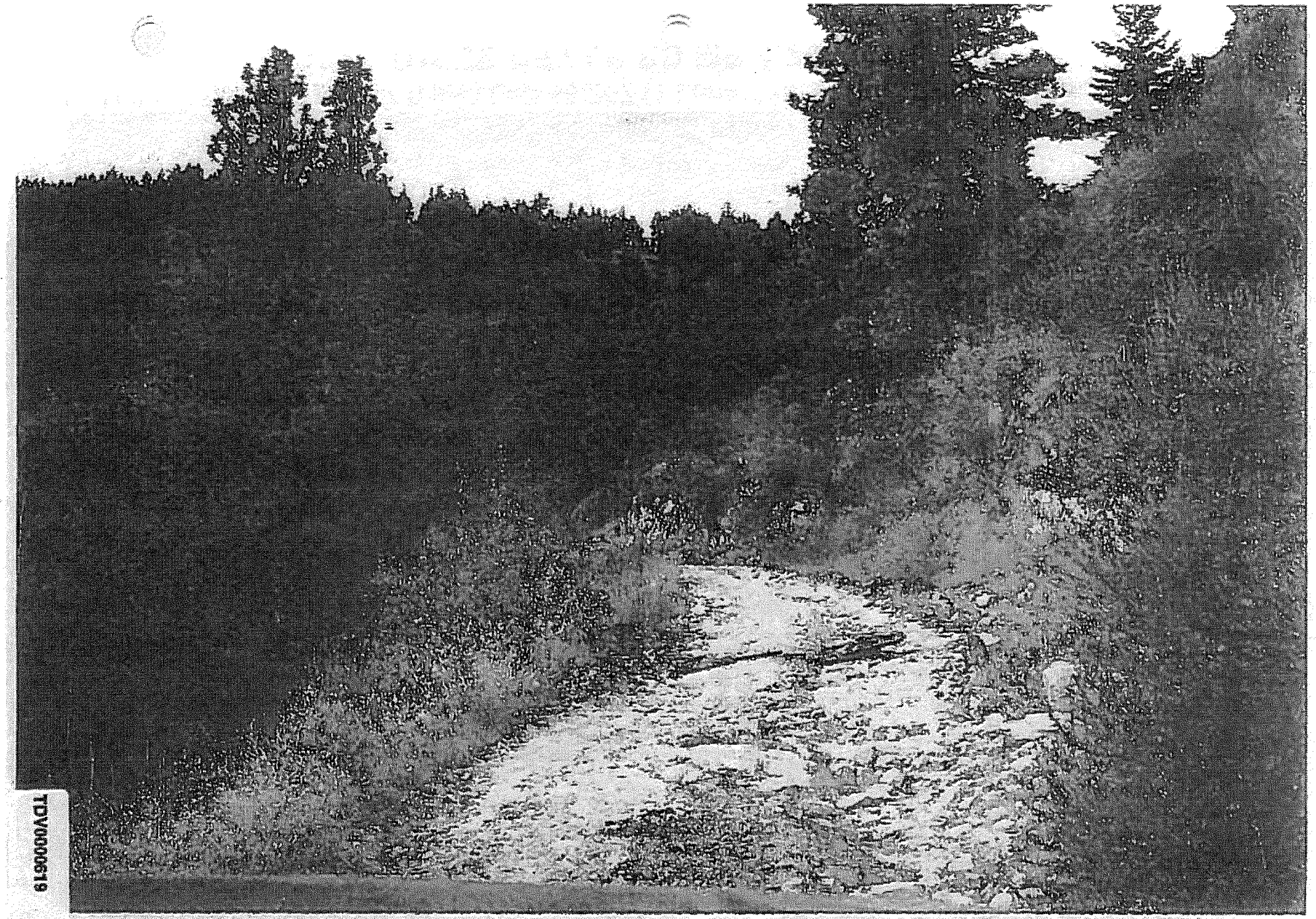

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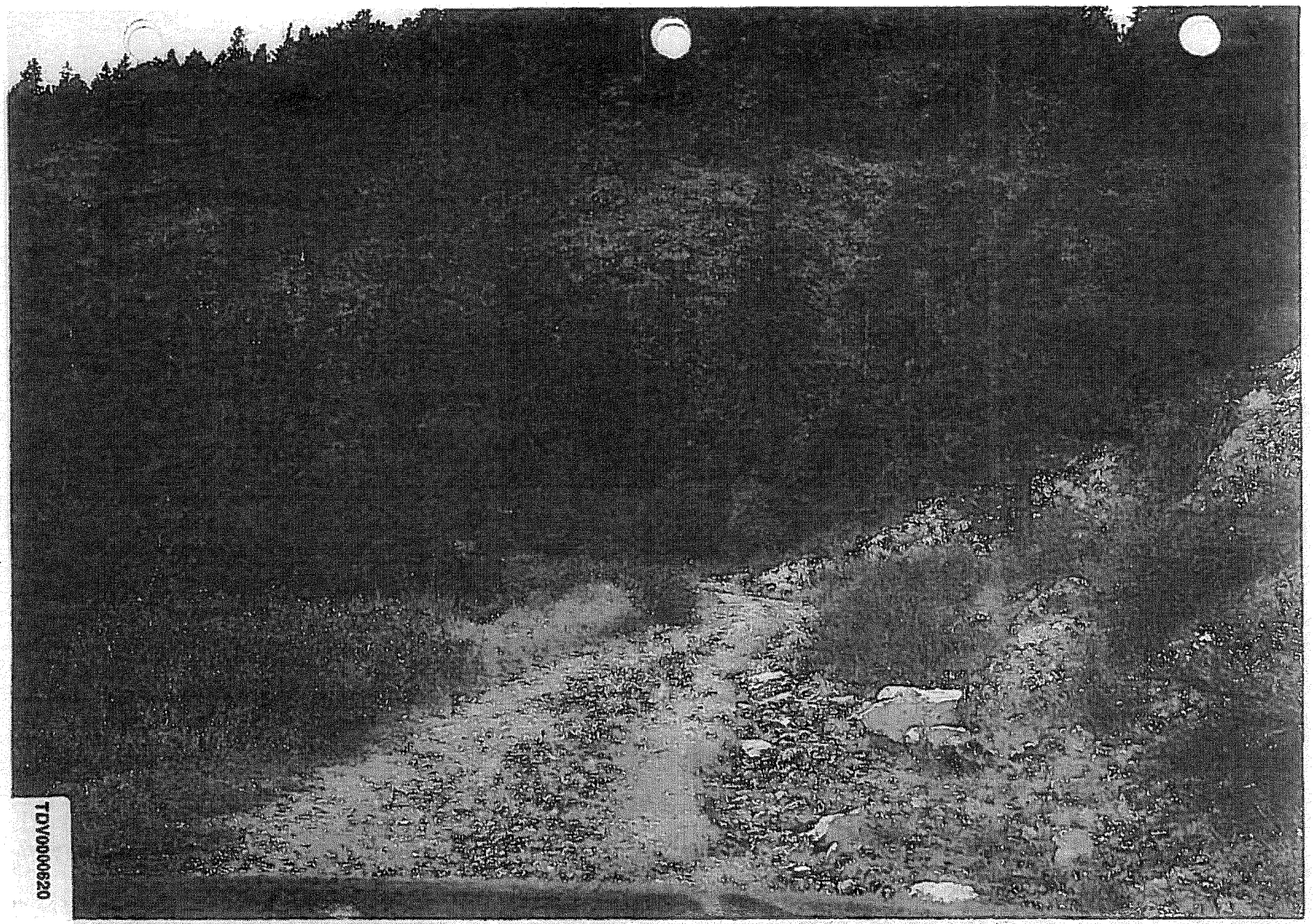

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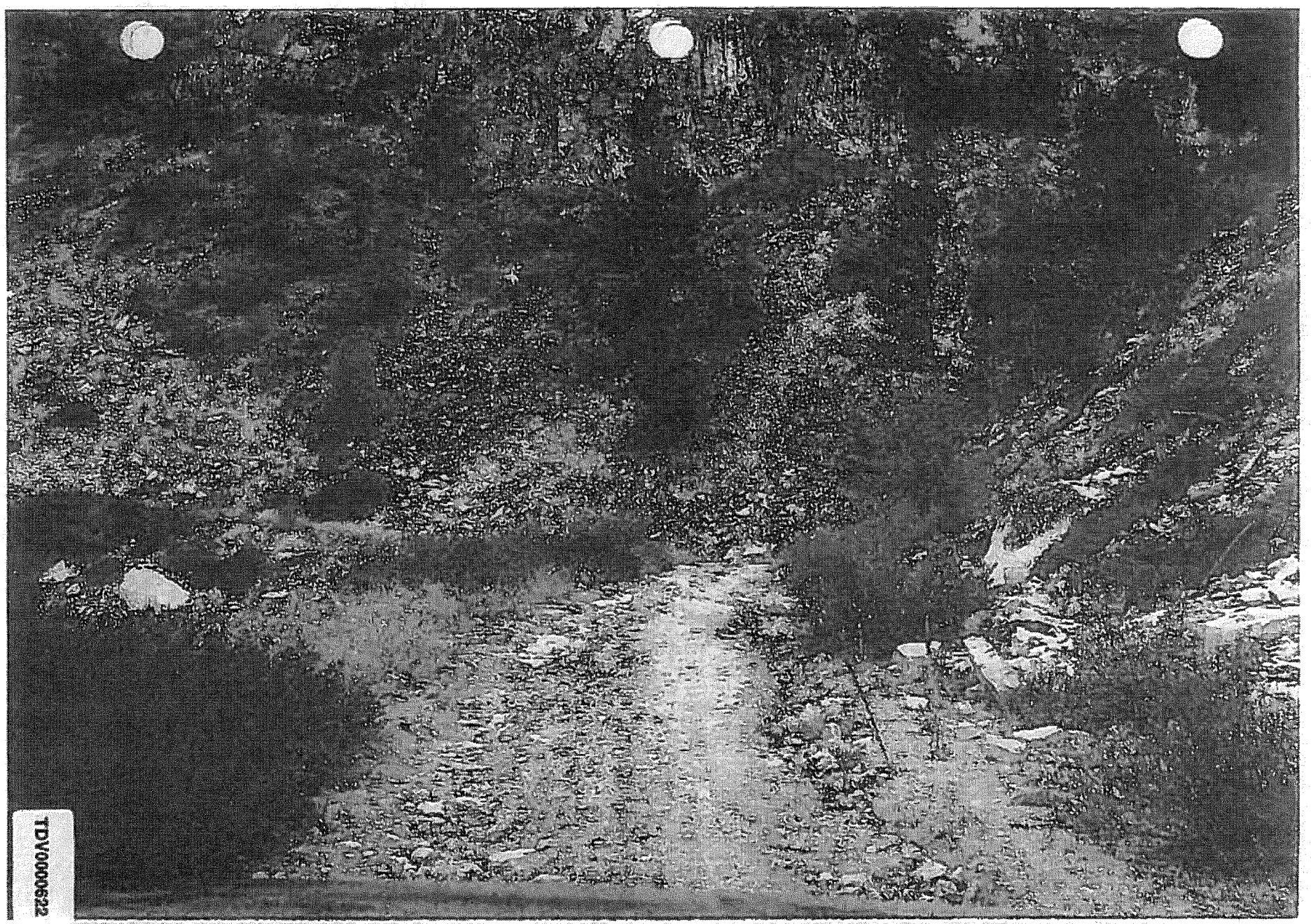

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1876 THREE DEVILS RD MP 3.488 (Rt Lane)

APPENDIX 5

(3)

FILED

2015 AUG 31 PM 2:21

CHARLEEN GROUMES
OKANOGAN COUNTY CLERK

THE HONORABLE JOHN HOTCHKISS

Hearing Special Set: September 18, 2015
10:00 a.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR OKANOGAN COUNTY

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, Chiliwist Valley residents or property owners,

Plaintiffs / Petitioners,

v.

OKANOGAN COUNTY, a municipal corporation and political subdivision of the State of Washington, RAYMOND CAMPBELL, SHEILAH KENNEDY, JAMES DETRO, Okanogan County Commissioners, DANIEL BEARDSLEE, Okanogan County Hearings Examiner, JOSHUA THOMPSON, Okanogan County Engineer, JOHN CASCADE GEBBERS, JOHN WYSS, and GAMBLE LAND & TIMBER Ltd., a Washington Corporation,

Defendants / Respondents.

No. 15-2-00220-3

DECLARATION OF BRAD MUNSON IN SUPPORT OF OKANOGAN COUNTY'S MEMORANDUM IN OPPOSITION TO THE WRIT OF REVIEW AND SUPPORT OF THE MOTION TO DISMISS

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1. I am over the age of 21 and attest to the following information from personal knowledge.

2. I have been a legal assistant in the office of Perkins Coie for over fifteen years and worked directly with Mr. Alexander Mackie in connection with this case. My duties frequently involve research.

3. At Mr. Mackie's direction I copied the map attached to the Declaration of Josh Thompson, dated June 26, 2015, showing the roads in the vicinity of Three Devils Road submitted in the matter before this Court.

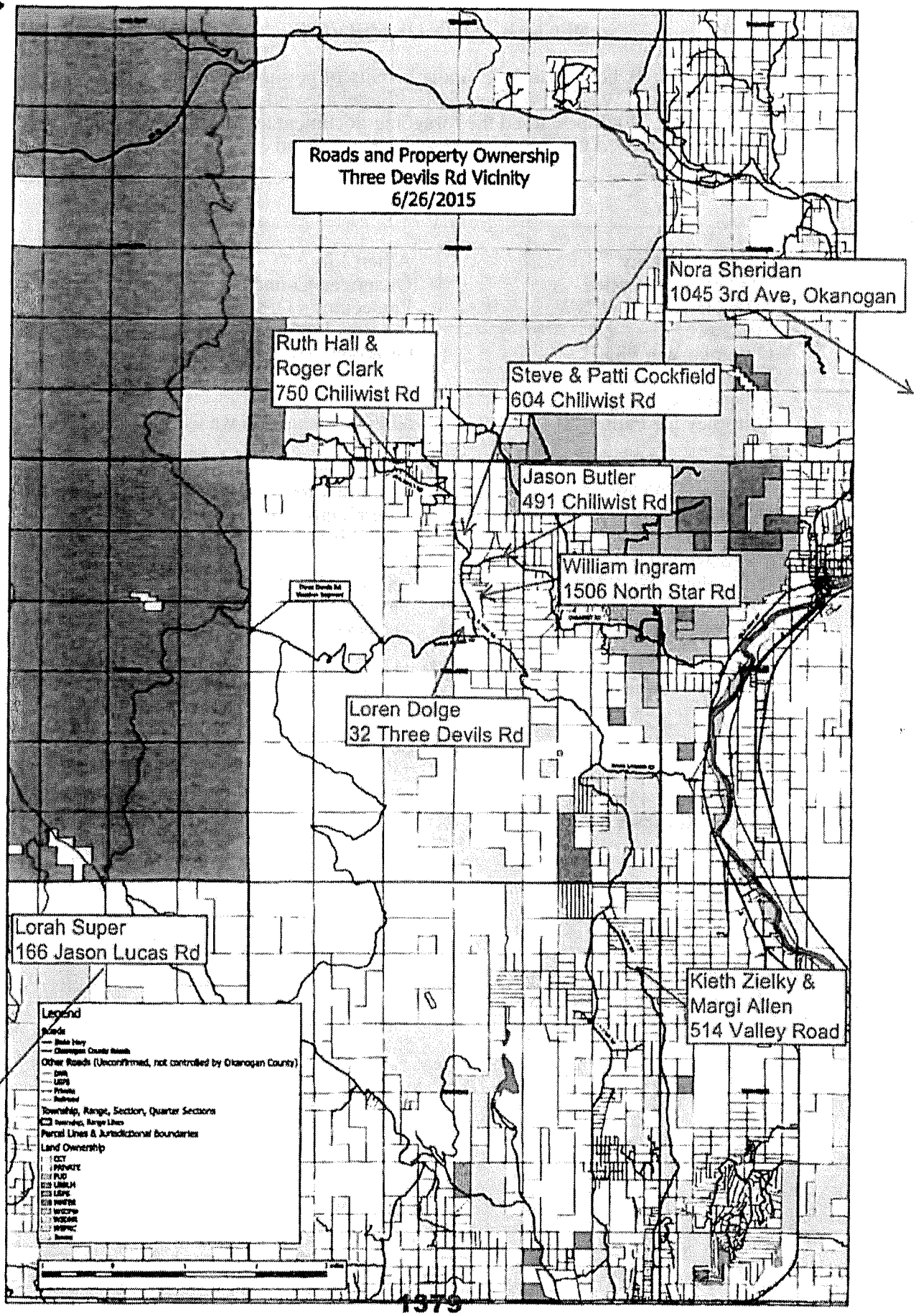
4. Using addresses from the record in this matter and other publically available sources, I located the residences of named Plaintiffs and others identified as members of the Coalition of Chiliwist Residents and Friends and added that information to the map, which is attached hereto.

5. I then utilized the Google Earth measurement tool, which I commonly use in exercises such as this, and calculated the distance by road from each identified residence to the entrance of the portion of Three Devils Road to be vacated. These are the distances cited in the brief. The measurements are approximate.

DATED this 28th day of August, 2015, at Seattle, Washington.

Brad Munson

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000


Roads and Property Ownership
Three Devils Rd Vicinity
6/26/2015
Nora Sheridan
1045 3rd Ave, Okanogan
Ruth Hall &
Roger Clark
750 Chiliwist Rd
Steve & Patti Cockfield
604 Chiliwist Rd
Jason Butler
491 Chiliwist Rd
William Ingram
1506 North Star Rd
Loren Dolge
32 Three Devils Rd
Lorah Super
166 Jason Lucas Rd
Kieth Zielky &
Margi Allen
514 Valley Road
Legend

DECLARATION OF SERVICE

Laura Field, hereby declares under penalty of perjury according to the laws of the State of Washington that she is of legal age and competence and that on April 15, 2016 she caused the foregoing document and this Declaration of Service to be served via U.S. Mail, postage prepaid and email to the following counsel:

Barnett Kalikow Kalikow Law Office 1405 Harrison Ave NW, Ste. 207 Olympia, WA 98502 Email: Barnett@Kalikowlaw.com (Attorney for Plaintiffs)	Albert Lin Okanogan County Prosecutor's Office PO Box 1130 Okanogan, WA 98840-1130 Email: alin@co.okanogan.wa.us
Thomas F. O'Connell Nicholas J. Lofing Davis Arneil Law Firm 617 Washington Street Wenatchee, WA 98801 Email: tom@dadkp.com and nick@dadkp.com	Mark R. Johnsen Karr Tuttle Campbell 701 Fifth Avenue, Suite 3300 Seattle, WA 98104 Email: mjohnsen@karrtuttle.com

DATED: April 15, 2016

By: Laura Field
Laura Field, Legal Assistant