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WASHINGTON STATE
SUPREME COURT by,

No. 92423-6

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.

Opening Brief of Respondent/Cross Appellant
Gamble Land & Timber, Ltd.

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INTRODUCTION

Gamble Land & Timber Ltd. (“Gamble”) took the depositions of all named Appellants (William Ingram, Ruth Hall, Roger Clark, Jason Butler and Loren Dolge) on August 19, 2015. All five individuals testified that they did not (and never have) lived on the portion of Three Devils Road being vacated (CP 1416, 1427, 1447, 1462, 1476-78), that Three Devils Road is not plowed in the winter and is impassable (CP 1398, 1432, 1445-46, 1468-69), and that they have never personally used Three Devils Road as an escape route and know of no one who has (CP 1387-88, 1431, 1443, 1451, 1467).

Appellants Roger Clark, Jason Butler, Loren Dolge and Ruth Hall all testified that they use Three Devils Road to access Forest Service land (CP 1394-95, 1442, 1452, 1475), but if Three Devils Road is not passable, there are other nearby access routes, including Woody Mountain Road, Golden Rule Road, and Landers Road (CP 1394-1396, 1415, 1444, 1453, 1466). In fact, multiple alternative routes exist nearby, other than Three Devils Road. (CP 376-378, 786, 806, 983-84).

Further, even during spring, summer and fall, Three Devils Road is impassable at times (due to road washouts, rock slides, etc.), and

intermittent, unannounced closures of the Forest Service gate. (CP 369, 385-386, 980-983, 999).

Appellants' practice throughout this case has been to make allegations, but make no effort to substantiate the allegations. Appellants have taken no depositions and have not propounded written discovery. Instead, Appellants' "evidence" is as follows:

- A newspaper article which states that one of the Okanogan County Commissioners gave a eulogy at Mr. Daniel Gebbers' funeral and was his friend.¹ (See CP 1201).
- That Jon Wyss (an employee in the Governmental Affairs Department of Gebbers Farms Inc.), was hired as a consultant by Okanogan County in August 2013 to analyze the financials related to current operations and to propose methods to improve efficiency. (See CP 613-621).
- That Jon Wyss sent a letter of recommendation in 2012 on behalf of Mr. Beardslee, which Appellants claim resulted in Mr. Beardslee being appointed as the Okanogan County Hearing

¹ Mr. Daniel Gebbers is the father of one of Gamble's principals.

Examiner. (CP 654.) This allegation is false, as Mr. Wyss (along with 27 other well-known North Central Washington business and government officials) in 2012 recommended Mr. Beardslee to the Eastern Washington Growth Management Hearing Board. (See CP 638-665). Mr. Beardslee didn't even apply for the Okanogan County Hearing Examiner position until late October, 2013. (See CP 631-636).

- That Mr. Wyss signed or initialed the Petition for Road Vacation (See Appellants' Brief, P. 1). However, Mr. Wyss is not a partner of Gamble, would have no authority to sign on its behalf, and did not sign or initial it. (See RP 27:8-25; 28:1-6 (Sept. 18, 2015)).

The foregoing "evidence", as well as other factual allegations and legal arguments by Appellants are not supported by the evidence, the record, or any supporting legal authority:

1. Appellants argue that Okanogan County Commissioner Campbell is a close friend and confidant of the Gebbers family. (See Appellants' Brief, Pg. 1). However, the record only indicates that Commissioner Campbell was a close friend of the patriarch of the Gebbers family, Danny Gebbers, who died four (4) months before the Petition to

Vacate was filed. (CP 237, 1201). There is no evidence in the record that Commissioner Campbell personally knew anyone else in the Gebbers family, let alone is friends with any Gebbers family members.

2. Appellants repeatedly allege that Three Devils Road is vital as an escape route, that 228 people signed a petition opposing the vacation, that of those 228 people, 21 provided written comments, and 16 orally testified in front of the hearing examiner. (See Appellants' Brief, Pg. 3). However, forty (40) of the signators on the petition (18%) do not even live in Okanogan County, and over 50% do not live within 15 miles of Three Devils Road. (CP 547-569). What Appellants also conveniently fail to mention is that none of the 228 signatories' properties are located adjacent to the vacated portion of Three Devils Road.

3. Appellants claim that alternate "escape routes" are all five to 10 miles long, through rugged mountainous back country, and pass through a combination of DNR, National Forest, and private land. (Appellant's Brief, Pg. 30). None of these allegations are supported by the record. What the record does establish is that the vacated portion of Three Devils Road is approximately three miles long (CP 245), is in rugged mountainous country, is in rough condition (See joint appendix), and that

Three Devils Road passes through a combination of DNR and private land, and connects at its west end to the National Forest. (See CP 237, 352, 376-78, 854-857, and 859; see joint appendix).

4. Appellants allege that Gamble went behind closed doors and had “secret meetings” with the County. (See Appellants’ Brief, P. 14). It has never been disputed that Gamble did lobby county officials regarding its road vacation petition, which lobbying occurred four months prior to the county commissioners’ hearing. Not only is lobbying allowed and expected in the legislative/political arena, Gamble formally disclosed in writing these “secret” contacts on March 18, 2015 (CP 392) (which email was provided to Appellants as part of public records requests). More importantly, nothing prevented Appellants from doing the exact same thing.

Based in part on the foregoing, Appellants seek application of the Appearance of Fairness Doctrine to a legislative act, and cite the case of *Smith v. Skagit County*, 75 Wn.2d 715, 453 P.2d 832 (1969) as authority.

Appellants base this on the following “factual” allegation:

“When powerful interests apply for a public benefit and go behind closed doors with decision makers, and those decision makers emerge from secret meetings and thwart the overwhelming will of

the impacted community by acceding to the application of those powerful interests, basic principles of equal justice and due process have been compromised. We have not just described this case, we have described *Smith v. Skagit County*, 75 Wn.2d 715, 453 P.2d 832 (1969), ...”

(Appellants’ Brief, Pg. 14-15). *Smith* involved an application for a rezone.

Two important rules came out of that case. First, the Washington Supreme Court held that public hearings before the planning commission and the county commissioners were legislative in nature, not quasi-judicial, *Id.*, at 741, stating:

Unlike a judicial hearing where issues of fact should be resolved from the evidence only without regard to the private views of the Judges, a legislative hearing may reach a decision in part from the legislative personal predilections or preconceptions. Indeed, the election of legislatures is often based on their announced views and attitudes on public questions... the legislative body may, in finally deciding the matter, draw upon all kinds and sources of information including the opinions of experts, ...*Id.* at 740-741, 453 P.2d at 847.

Second, the Supreme Court held that public hearings (while not quasi-judicial), must be fair and impartial in substance and appearance. When the Skagit County Planning Commission announced that it would go into executive session, and invited back the advocates for the zoning change, but deliberately excluded the opponents, the Court held the County’s

actions did not meet fundamental fairness. *Id.*, at 742-43. The present case has none of the factual circumstances as *Smith v. Skagit County!*

5. Appellants next argue (without citation to the record) that “the commissioners’ ignored virtually all the testimony and all the findings, and voted to vacate anyway.” (Appellants’ Brief, P. 29.). While Appellants recognize that a hearing examiner’s decision is not binding on the County Commissioners, Appellants argue that the Commissioners “do not have the discretion to simply ignore his [the hearing examiner’s] findings.” (Appellants’ Brief, P. 21.). Appellants’ allegation is patently false, as the transcript of the Board’s meeting clearly reflects that the Board considered the engineer’s report, the hearing officer’s recommendations, as well as evidence and testimony for and against the vacation:

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 - - 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 its back to us right smack in the middle to do our job and to, you know, review that information.

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 of 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 recommendation 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.

(CP 910-914) (Joint Appendix 3).

6. Appellants state that the Commissioners adopted none of the hearing examiner's findings or conclusions, and then allege:

“they [the Commissioners] made their own findings based exclusively on representations of the applicant, some of which appears to have been introduced after the record was closed and rejected by the hearing examiner.” (Appellants' Brief, P.4).

This claim is again false, as the record states that after Gamble's motion to reconsider was denied by the hearing examiner, that information was not forwarded to the County Commissions for consideration because the record was closed. (CP 907-908, 1121).

7. Appellants continue to make repeated unsubstantiated defamatory allegations of “collusion” (see CP 1348-1360; Appellants' Brief, P. 45), despite the fact all individual Appellants admit they have no evidence to substantiate this claim. (CP 1400-1404; 1406-1411; 1412-1414 (Ruth Hall); 1428-1429; 1433-1434 (Bill Ingram); 1436-1442 (Roger Clark); 1454-1455, 1457-1459, 1461 (Jason Butler); and 1470-1474 (Loren Dolge)). Even the trial court expressly found that “There is no direct or circumstantial evidence” of collusion or conspiracy. (CP 82, lines 5-8).

8. When the County Engineer examined Three Devils Road, the Forest Service gate at the end of Three Devils Road was closed. (CP 356). This fact is not disputed. Sometime after the County Engineer site visit, a member of the coalition, Jerry Brannon (CP 370-71, 373-74, 384, 387-388), requested a letter from David Colbert, who is a Forest Service employee and the spouse of another Coalition member, Sandra Colbert. (CP 369). Mr. Colbert's responsive letter said the Forest Service gate would be closed at intermittent times. (CP 369, 385-386). Chiliwist area residents are not advised when the Forest Service intends (or actually does) close the Forest Service gate at the end of Three Devils Road. (CP 1392, 1397).

9. Appellants repeatedly claim that a road vacation is quasi-judicial in nature, yet fail to cite any case that has made such a holding! The mere fact review is by writ of certiorari does not change the character of the administrative body's decision. Appellants also cite to the 4-part test used to determine whether administrative action is quasi-judicial, but then fail to cite any authority that has held that a road vacation is a process historically performed by the courts, or resembles the ordinary business of

the courts. (See Appellants' Brief, P. 12). This is because courts are not involved in legislative decisions.

10. Finally, Appellants ask this Court to establish a new rule of law that county commissioners are mandated to accept hearing examiner's findings (unless the findings are clearly erroneous), and that any failure to follow the hearing examiner's findings would in and of itself be arbitrary and capricious (Appellants' Brief Pg. 24). This argument is a recognition by Appellants that Washington law does not support their legal arguments.

ASSIGNMENTS OF ERROR AND RELATED ISSUES

A. Counterstatements of Appellants' Assignments of Error and Issues for Appeal

1. Whether the Superior Court correctly concluded that the statutory road vacation process permitting a county's legislative body to vacate a useless road constituted a legislative act of roadway management? (Appellants' Assignment No. 1; Issues 1(a)-(c), 3-4, 6-7).

2. Whether the Superior Court correctly concluded that Gamble's pre-petition lobbying of their legislative body, or one commissioner's prior friendship with the deceased father of the Gamble's principals, did not violate the appearance of fairness doctrine, due process

or equal protection? (Appellants' Assignment Nos. 2, 3; Issue 2).

3. Whether the Superior Court correctly denied the Appellants' request for attorney fees under 42 U.S.C § 1988. (Appellants' Assignment No. 5; Issue 8).

B. Respondent Gamble's Assignment of Error and Related Issue for Appeal.

The Superior Court erred when it concluded that the Coalition and its members had standing to file this writ of review to challenge the road vacation. Appellants' members do not own property that abuts the vacated roadway; the mountain roadway is frequently impassable, including throughout the winter; and no individual Appellants have ever used the road, or known any other person to have used the road, as an escape route from fire danger. Standing exists only for persons who own an interest in property abutting the vacated road or are dependent on the road for access to their properties. Did the Superior Court error when it concluded that the Coalition's members had standing to seek reversal of the Commissioners' road management decision? (See also Appellants' Assignment No. 4; Issues 5(a)-(b)).

STATEMENT OF THE CASE

A. Factual Background

Three Devils Road was privately built sometime after 1950 by the Otto Wagner family as a logging road. (CP 768). In 1955 the County unilaterally added Three Devils Road to the County Road system. (CP 245), but the subsequent owners of the adjoining land maintained the road for logging operations (CP 981-982).

Gamble Land & Timber, Ltd.² purchased the property on both sides of Three Devils Road in 1995 from Omak Wood Products. (CP 376). The total length of Three Devils Road is 4.84 miles. (CP 872). At the time of the 1995 sale, the County had removed Three Devils Road from the County road roster as not within the County's jurisdiction. (CP 491; 869-874). The County unilaterally added the road again to the County road system in 2005. (CP 491, 958, 967).

While the only way to legally close a road is by vacation, there are a number of other roads in the vicinity of Three Devils that were removed from the county road system without following the proper vacation

²Gamble Land & Timber Ltd. and Gebbers Farms, Inc. are two separate and distinct businesses, but Cass Gebbers is a principal in both entities.

procedures. (CP 823, 879-884, 966-967). In fact, one of these roads not properly vacated has been gated by Jerry Brannon, a member of Appellants. (CP 370-71, 373-74, 384, 387-388, 882-883).

After purchasing the property on either side of the road, Gamble rebuilt Three Devils Road to make it passable for logging equipment. (CP 376-377, 773). Because Three Devils Road is a primitive road (CP 356, 491), every time the road has been blocked or washed out since 1995, it has been reconstructed at Gamble's expense. (CP 376, 773).

Gamble regularly repairs and maintains Three Devils Road (including the portion that was not vacated). (CP 353-354, 376-378, 422-427, 429). The only full year record of maintenance expenditures on the full length of Three Devils Road by the County is 2013 (\$3,183.54), and 2014 (\$2,346.14). (CP 411-413). Since 1955, the Three Devils Road has been extensively rebuilt by Gamble with the County's knowledge. (CP 301, 353-54, 376-378, 422-427, 429).

The Petition for Vacation (CP 237) established that Gamble owns all land on either side of that portion of the road (approximately 3 miles in length) vacated (except a small portion that is DNR land - the DNR is not opposing the road vacation). (CP 245, 434, 467). The Forest Service

installed a gate and closes Three Devils Road intermittently at the Forest Service boundary where the National Forest begins (the western end of the road). (CP 352, 385-86).

The Board of County Commissioners, by Resolution 25-2015, directed the County Road Engineer to report upon the proposed vacation and abandonment per RCW 36.87.040. (CP 300).

The County Engineer personally examined Three Devils Road (CP 356, 433), determined that it is designated a primitive road, that the county performs little to no maintenance on it, and that the road is minimally used as evidenced by the two narrow wheel tracks with vegetation between (CP 352, 356, 854-857, 859); see also County Traffic Study (CP 410). The Engineer's report further states that "Whereas the adjoining property owners [Gamble] have performed all maintenance and improvements to the road since last summer, it may be advisable to vacate the road and allow them the control they are requesting." (CP 356). The County Engineer's report concludes 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. (CP 356). In the context of the report, which shows how little used the road is by the

public, this statement means that the public would not be “affected” i.e. “not benefitted, not inconvenienced.”

Three Devils Road does not abut a body of water, and as a result, RCW 36.87.130 does not apply. (CP 522-23).

Three Devils Road does not meet the minimum width standards for a county road. In the County Road logs for 1968 and 2010, Three Devils Road has an established road width of 0-14 feet. (CP 337-338). Okanogan County’s Road and Street Standards, adopted most recently in Resolution No. 44-2007, provides in relevant part as follows:

3.2 County Road. ... (Note: Okanogan County is responsible for maintaining only those roadways designated by the Board of County Commissioners to be on the County Road System. Other public roads within the County not designated as part of the County Road System and are not state highways are off-system roads. The County does not have the responsibility to maintain other public roadways).

Under the Subsection “Road Categories”, Section 6.2.6 identifies primitive roads as Category I, and for Category I, the finished roadway width is 16 feet, + 2 feet each side where Average Daily Traffic is under 400. (CP 123-124).

B. Procedural History

On February 19, 2015, Respondent Gamble filed a Petition for

Vacation of a County Road. (CP 237). On June 9, 2015, the Okanogan County Board of Commissioners signed a final Order of Vacation of the Three Devils Road. (CP 1132-1133).

On June 9, 2015, Appellants filed a Petition/Complaint for Declaratory and Injunctive Relief, Prohibition, and for Violation of Constitutional Rights (CP 1348-1360), and without notice, obtained a Restraining Order and Order to Show Cause. (CP 1340-1342).

On June 18, 2015, Respondent Gamble filed a Motion to Quash Temporary Restraining Order. (CP 1279-1281).

On June 30, 2015, the Okanogan County Superior Court Granted Appellants' Request for Preliminary Injunctive Relief, and the Court Clerk was directed to issue a Writ of Review to Okanogan County. (CP 1147-49).

On August 24, 2015, Defendant Gamble filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, and in the alternative for Summary Judgment Dismissal. (CP 208-210).

On September 25, 2015, the Okanogan Superior Court entered a written decision granting Defendant/Respondent's Motion for Summary Judgment and Dismissal of the case, and on October 20, 2015, the

Superior Court entered the Order on Summary Judgment Dismissal upholding the County's Road Vacation decision. (CP 62-64,78-83).

Appellants filed their Notice of Appeal on October 22, 2015 (CP 56-59), and Respondent filed a Notice of Cross Appeal on November 4, 2015 (CP 13-26).

LEGAL AUTHORITY AND ARGUMENT

I. The Court reviews summary judgment determinations de novo.

Summary judgment is reviewed de novo. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 182 (1982). 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). Ultimate facts or conclusions of fact are insufficient. *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988); see also *Las v. Yellow Front Stores*, 66 Wn.App. 196, 198, 831 P.2d 744 (Div. 1 1992) (in response 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”).

A bare allegation of fact by affidavit without any showing of evidence is insufficient to raise a genuine issue of fact for purposes of a motion for summary judgment. *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 955-59 421 P.2d 674 (1966). A genuine issue of fact cannot be raised by stated facts that are “not supported by authority or citations to the record.” *Roger Crane & Associates v. Felice*, 74 Wash.App. 769, 779, 875 P.2d 705 (Div. 3 1994). Unsupported facts are no more than bare allegations and conclusions, and are not true evidence. *Id.*, 875 P.2d 705.

II. This Court should affirm the Superior Court’s decision to deny the Coalition’s improper petition for writ of review.

A. The Appellants do not have standing to apply for a Writ of Review.

The general rule is that only abutting property owners, or those whose reasonable means of access has been obstructed, can question the vacation by the proper authorities. *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 365, 324 P.2d 1113 (1958). In that case, Group Health owned all the property abutting east John Street from Fifteenth to Sixteenth Avenue in Seattle, and filed a petition with the city to vacate a portion of east John. *Id.* at 361, 52 Wash.2d 359. The

plaintiffs, owners of property in the immediate vicinity, but not abutting the road in question, sought an injunction to prevent the closing of the street. The plaintiffs alleged they acquired their properties in reliance upon the recorded plat dedications; the street was their principal means of access, the street's closing would deprive them of convenient access to their properties; and the closing of the street would expose their properties to an extreme fire hazard. *Id.* At 364, 52 Wash.2d 359.

The Supreme Court held that since plaintiffs were not abutting property owners, to maintain an action “their right of access had to be ‘destroyed or substantially affected,’ or, to put it another way, their reasonable means of access must be obstructed, and *they must suffer a special damage*, different in kind and not merely degree, from that sustained by the general public”. *Id.* at 366, 52 Wash.2d 359 (italics in original). See *Olsen v. Jacobs*, 193 Wash. 506, 76 P.2d 607 (1938). See also *Taft v. Wash. Mutual Sav. Bank*, 127 Wash 503, 509-510, 221 P. 604 (1923) where 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. The further rule deducible from

our own cases 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. ...*” in *Capitol Hill Methodist Church*, 52 Wash2d at 365, 324 P.2d 1113.

The fact that a property owner may be inconvenienced or may have to go a more roundabout way to reach certain points, does not cause him/her an injury different in kind from the general public, but in degree only. *Capitol Hill Methodist Church*, 52 Wash 2d at 365-66, 324 P.2d 1113.

The rule on standing to challenge road vacations was confirmed in *DeWeese v. Port Townsend*, 39 Wn. App. 369, 693 P.2d 726 (1984). In *DeWeese*, the court first recognized cases granting municipal authorities’ broad discretion as to street vacations. See *Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash. 303, 83 P. 316 (1906) and *Taft* 127 Wash. 503, 221 P. 604 (1923). The court restated “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*, 39 Wn. App. at 373 (citing *Hoskins v. Kirkland*, 7 Wn.App. 757, 503 P.2d

1117 (1972) (*italics added*). The Court found this principal 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 traveling public would be to restrict unduly the discretion granted to municipalities for the management of streets.” *DeWeese*, 39 Wn. App. at 373-74, 693 P.2d 726.

The Court in *Capitol Hill Methodist Church of Seattle* also rejected a special damage argument based on exposure to an extreme fire hazard, concluding:

“that 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 ... is a governmental function (see *Benefiel v. Eagle Brass Foundry*, 154 Wash. 330, 282 P.2 13 (1929); 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... This is insufficient to warrant the court’s interference with a legislative function. We cannot and will not attempt to judge the wisdom of the council’s action, since, in a case of this nature, we cannot substitute our judgment for that of the municipal authorities on the degree of fire protection to be afforded the appellants’ properties. *Id.*, at 366-67, 693 P.2d 726.

In the present case, none of Appellants’ property abuts the vacated road. (CP 1416, 1427, 1447, 1462, 1476-1478). It is undisputed that

Gamble owns all property on either side of the vacated road (except for a small portion that runs adjacent to DNR land). (CP 434, 467). Appellants have presented no evidence that they are dependent on Three Devils Road for direct access to their properties. All named Appellants testified that they use Three Devils Road primarily to gain access to National Forest Service land (but also admit there are other access routes to Forest Service land). (CP 1394-96, 1415, 1442, 1444, 1452-53, 1466, 1475). It is undisputed that after it snows, Three Devils Road is not passable and not plowed or sanded. (CP 1398, 1432, 1445-46, 1468-69). All Appellants admit they have never used Three Devils Road to escape a fire and know of no one who ever has. (CP1387-88, 1431, 1443, 1451, 1467).

B. Appellants have presented no evidence of collusion or fraud, making summary judgment on those claims proper.

Appellants continue to argue that if road vacations are reviewed by writ, that is indicative that the legislative process itself is quasi-judicial. (Appellants' Brief, P. 5) The Land Use Petition Act (Chapter 36.70C RCW) created a statutory appeal process for most land use actions. One express exclusion to the statutory appeal process is road vacations. RCW 36.70C.020(2)(a) provides:

(2) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, **but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property**; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses; (emphasis added)

This leaves challengers to the statutory writ process. RCW

7.16.040 (grounds for granting writ) provides:

“A writ of review shall be granted by any 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 added).

A writ of review is reserved for judicial or quasi-judicial actions, and the law makes clear that the power to vacate roads is a legislative function. The one common law exception to the foregoing is if there is proof of collusion, fraud, or the interference with a vested right. See *Thayer v. King County*, 46 Wn.App. 734, 738, 732 P.2d 1167 (1987); *Capitol Hill Methodist Church* 52 Wn.2d 359, 368, 693 P.2d 726 (1958).

The Appellants have repeatedly alleged baseless allegations of collusion by and between Okanogan County, its employees or officials and Gamble (CP 1348-60, Appellants' Brief, PP. 45-46), but they have failed to put forth any competent evidence, or raise a genuine issue of material fact, that supports their allegations of collusion, making summary judgment proper. (See CP 1400-1404; 1406-1411; 1412-1414, 1428-1429; 1433-1434; 1436-1442; 1454-1455; 1457-1459; 1461; 1470-1474). The Appellants' remedy for unfavorable legislative decisions is political, not judicial, and the Appellants should not be permitted to further stall, delay, and hijack the legislative process of Okanogan County. That Okanogan County's taxpayers must fund this lawsuit to defend the political process against a minority of disgruntled opponents is as unfair and unjust as these same persons' demand that Okanogan County bear the maintenance expense and liability exposure of this useless road for their personal use.

C. The Appellants' writ of review should be denied because a partial road vacation decision is a legislative, not judicial, decision.

This Court cannot review the road vacation decision of the Board because the Board was not "exercising judicial functions" when it made the legislative decision to remove a portion of an infrequently used

primitive road from the County's massive road logs. A statutory writ of review can only "be granted . . . when an inferior tribunal, board or officer, *exercising judicial functions*, has exceeded the jurisdiction of such [board], or one acting illegally, ..." RCW 7.16.040 (emphasis added). The effort to distinguish "judicial" action from that which is "legislative" or "administrative" arises from the constitutional principle of separation of powers and concern for an improper encroachment upon the exclusive constitutional territory of another branch of government. *Standow v. Spokane*, 88 Wn.2d 624, 629, 564 P.2d 1145 (1977).

The Washington Supreme Court has set forth a four-part test for determining whether a court can review a legislative body's decision under the statutory writ of review: (1) whether a court could have been charged with making the agency's decision; (2) whether the action is one which historically has been performed by courts; (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and (4) whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators." *Chaussee v. Snohomish Cnty. Council*, 38 Wash.App. 630, 634-35, 689 P.2d 1084 (1984), citing *Williams v. Seattle School Dist.*

I, 97 Wash.2d 215, 218, 643 P.2d 426 (1982) (quoting *Wash. Fed'n of State Employees v. State Personnel Bd.*, 23 Wash.App. 142, 145-46, 594 P.2d 1375). See also *Standow*, 88 Wash.2d at 631, 624, 564 P.2d 1145 (1977), and *Raynes v. Leavenworth*, 118 Wash. 2d 237, 244, 821 P.2d 1204 (1992).

Application of this four-part test to the statutory road vacation decision here demonstrates that the Court should not review the legislative road vacation:

(1) *Whether a court could have been charged with making the agency's decision.*

A court could not have made the decision on Gamble's petition to vacate the road. Statute charges the Board only with such authority:

When a county road or any part thereof is considered useless, the board by resolution may declare its intention to vacate and abandon the same or any portion thereof and shall direct the county road engineer to report upon such vacation and abandonment. RCW 36.87.010.

RCW 36.87.020 requires a petitioner to "petition the county legislative authority to vacate" a road. RCW 36.87.060 charges "the county legislative authority" with making the vacation decision, which "shall be entered in the minutes of the hearing". A court could not have

been charged with making the Board's decision on Gamble's petition.

- (2) *Whether the action is one which historically has been performed by courts.*

Courts do not vacate County roads or otherwise become managers of county roadway systems. County commissioners make roadway decisions. The legislation for county road vacations was enacted in 1937 and has always vested this authority with the board of county commissioners, not the judiciary. Washington caselaw is in accord, definitively holding that road vacations are historically political, not judicial decisions. See *Capitol Hill Methodist Church*, 52 Wash.2d at 368, 324 P.2d 1113. See also *DeWeese*, 39 Wash.App. at 373-74, 693 P.2d 726:

“... to enlarge the rights of a general travelling public would be to restrict unduly the discretion granted to municipalities for the management of streets... Cities are vested with only such powers over streets as are conferred by the Legislature. *Yarrow First Assoc. v. Clyde Hill*, 66 Wash.2d 371, 402 P.2d 49 (1965).”

- (3) *Whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability.*

Road vacations required the Board to follow a statutory process, and make a determination of the road's usefulness with the Board. See RCW 36.87.020 - .060. The principal elements of this process include the

Board's review of the petition under RCW 36.87.020, obtaining a report from the county engineer under RCW 36.87.040, holding [or having a hearing examiner hold] a public hearing under RCW 36.87.060, and making a legislative decision as to whether the road is useful as part of the county road system under RCW 36.87.060. The decision does not require application of law or precedent to facts. It requires the judgment of elected officials. The decision is legislative, not judicial. The decision requires business judgment for management of the County's entire road system.

(4) *Whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators.*

Road management decisions bear no resemblance to the ordinary business of courts. The County is vested with management of its roads, through its public works department, as governed administratively, and through its Board, as the county legislative authority. See e.g. RCW 36.75 to RCW 36.89 (governing most all aspects of road management). See also RCW 36.75.040 on "Powers of county commissioners". Road vacation proceedings more closely resemble the business of legislators or administrators, not the business of courts. Courts should not second-guess or substitute their judgment for that of the elected legislative body,

whether they agree with the decision or not.

In *Raynes*, 118 Wash. 2d at 243, 821 P.2d 1204 (1992), the Supreme Court upheld the superior court's denial of a writ of review (to the city council's amendment of its zoning code) on the grounds that the proceedings were legislative in nature. The Supreme Court also affirmed the dismissal of the challengers' declaratory judgment claim, which was based on the appearance of fairness doctrine.

In *Raynes*, the City of Leavenworth amended its zoning ordinance to permit an RV park as a conditional use. The challengers alleged violation of appearance of fairness, because a councilmember was a real estate agent who had a pecuniary interest in the sale of the property to be developed into the RV park. The Supreme Court in *Raynes* stated: "If the actions before us are legislative in nature, great deference should be afforded them. It is not our role to substitute our judgment for that of duly elected officials." *Id.* at 243, 821 P.2d 1204. In applying the four-part test to determine whether an action is quasi judicial or legislative, the Supreme Court stated:

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 policy-making role of a legislative body[...]. The trial court was correct, then, when it determined that since the action was legislative, no writ should issue. *Id.* at 245, 821 P.2d 1204.

In reaching its conclusion, the *Raynes* court relied on *Harris v. Hornbaker*, 98 Wash.2d 650, 658–59, 658 P.2d 1219 (1983), where the court held that determining where to place a highway interchange was a distinctly legislative decision. There, the Court noted that two readily identifiable competing interest groups were involved in the hearing process, but nevertheless found that the board's task was legislative: "The board's responsibility was not to decide which of the two groups ... made the best argument; its task was to decide which interchange location was in the best interest of the county." *Id.* at 659, 658 P.2d 1219. Although legislative decisions may appear adjudicatory when groups focus on how the particular decisions will affect their individual rights, all policy decisions begin with the consideration and balancing of individual rights. *Id.*, at 658 P.2d 1219.

Case law is clear that "the power to vacate streets is a political function ... that will not be judicially reviewed", ..." *Thayer*, 46 Wash.App. at 738, 731 P.2d 1167 (Div. 1 1987); see also RCW 36.87.020 et seq.

(vesting decision to vacate and abandon roads with the "county legislative authority"). This Court cannot review the political decision of the Board, nor substitute its judgment for that entrusted to the elected public officials. Just as in *Raynes*, here the challenged decision (regarding road vacation) is legislative in nature and cannot be subject to the courts' review and judgment, absent collusion, fraud, or interference with a vested right. RCW 7.16.040, the four-part test, caselaw, and separation of powers considerations all preclude this Court from review to the Appellants' writ of review.

D. The administrative record supports the Board's decision to vacate a portion of Three Devils Road.

While this Court should not review the administrative record because the Court lacks subject matter jurisdiction of legislative decisions, and also Appellants lack standing, if the Court concludes a road vacation decision is quasi-judicial and undertakes such review, the administrative record demonstrates that the Board's vacation decision is supported by substantial evidence.

(1) The court is limited to the administrative record on review.

Generally, on a writ of review, the court does not accept original

evidence and make finding of fact; the review is limited to the record of the boards' proceedings. *Carleton v. Board of Police Pension Fund Com'rs of Seattle*, 115 Wash. 572, 576, 197 p. 925 (1921); *Bay Industry, Inc. v. Jefferson Cnty., Bd. of Com'rs of Jefferson Cnty.*, 33 Wash.App. 239, 241, 653 P.2d 1355 (Div. 2 1982) (court limited to review of the record before the board and to a determination of whether the board's action was arbitrary and capricious or contrary to law).

The court only considers evidence outside the record when the petition for writ of review involves allegations of procedural irregularities, appearance of fairness issues (which are only applicable when the proceedings are quasi judicial) or raises other constitutional questions. See *Responsible Urban Growth Group v. Kent ("RUGG")*, 123 Wash.2d 376, 384, 868 P.2d 861 (1994). Because no competent evidence of collusion or illegality has been submitted by the Appellants, the Court's review on the writ of review is limited to the administrative record, which record contains substantial evidence to support the Board's decision.

(2) *The Court's review under RCW 7.16.120 is limited to five enumerated standards, only the last of which is at issue here.*

RCW 7.16.120 governs the Court's review under the statutory writ

procedure of the merits of the decision, and limits the Court's review to five questions:

- (1) Whether the body or officer had jurisdiction of the subject matter of the determination under review.
- (2) Whether the authority, conferred upon the body or officer in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or to make the determination.
- (3) Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.
- (4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination.
- (5) Whether the factual determinations were supported by substantial evidence.

The first three sub-parts of RCW 7.16.120 consider the jurisdiction or authority of the administrative tribunal under review. *Chaussee*, 38 Wn.App. at 636, 689 P.2d 1084 (Div. 1 1984), citing *Andrew v. King Co.*, 21 Wn.App. 566, 586 P.2d 509 (1978); *Dulmage v. Seattle*, 19 Wn.App. 932, 578 P.2d 875 (Div. 1 1978); *State ex rel. Tidewater-Shaver Barge Lines v. Kuykendall*, 42 Wash.2d 885, 259 P.2d 838 (1953). In the present case, all agree the Board had jurisdiction to determine the road vacation petition, which is squarely vested by statute in the Board. RCW 36.87.060.

A challenge under RCW 7.16.120(4) requires the moving party to

claim that the administrative record fails to contain “any competent proof” of the necessary facts to make the decision. Appellants have not made such a claim. Further, as recited in the County’s final “Order on Vacation”, all procedural and statutory steps were strictly followed, such that the record contains competent proof of the necessary facts for the Board to make the decision. (CP 1132-1133). There appears to be no challenge under RCW 7.16.120(4), and even if there was, the record is complete with competent proof of all necessary facts for the making of the Board’s decision.

Appellants cannot meet their burden under RCW 7.16.120(5) because the record contains substantial evidence to support the Board’s decision. The Appellants filed suit because they disagree with the Board’s decision. The legal standard under RCW 7.16.120(5) requires the Court to consider only whether substantial evidence supports the Board’s decision. The substantial evidence test requires the reviewing court to accept the fact finder’s views regarding witness credibility and the weight to be given competing inferences. *Freeburg v. City of Seattle*, 71 Wn.App. 367, 372, 859 P.2d 610 (Div. 1 1993). The Court’s review is with great deference to the Board’s judgment. *See, e.g. Wash. State Dept. of Corrections v. City of Kennewick*, 86 Wn.App. 521, 937 P.2d 1119 (Div. 3 1997).

While Appellants claim that an arbitrary and capricious standard applies (Appellants' Brief, P. 27), the statute specifically provides for the more deferential standard of "substantial evidence". See *Freeburg*, 71 Wash.App. 367, 859 P.2d 610 (1993) (court held that case was subject to the substantial evidence standard of review, rather than the arbitrary and capricious standard).³

"Substantial evidence" is defined as evidence which "would convince an unprejudiced, thinking mind of the truth of the declared premise." *Nord v. Shoreline Savings Ass'n.*, 116 Wash.2d 477, 486, 805 P.2d 800 (1991) (internal quotes omitted), citing *Cowsert v. Crowley Maritime Corp.*, 101 Wash.2d 402, 405, 680 P.2d 46 (1984). "This factual review is deferential and requires review of the evidence and its reasonable

³ RCW 7.16.120(5) was amended on April 17, 1989 by S.B. No. 5030, expressly changing the prior preponderance of evidence (i.e. "arbitrary and capricious") standard to the present "substantial evidence" standard. Old caselaw, such as cited by Plaintiffs, references the arbitrary and capricious standard. This is not the correct standard, as discussed exhaustively in *Freeburg*, 71 Wash.App. 367, 859 P.2d 610 (1993). However, as discussed in *Freeburg*, post-amendment cases continued to apply the arbitrary and capricious standard e.g. see *Raynes*, 118 Wash.2d at 250, 821 P.2d 1204 (1992) (applying arbitrary and capricious standard). The distinction is not that critical as the Board's administrative record far surpassed its burden under both the substantial evidence and the arbitrary and capricious standard.

inferences in the light most favorable to the prevailing party, “a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.” *Freeburg*, 71 Wash. App. at 371-72, 859 P.2d 610.⁴

(3) *Substantial evidence supports the Board's decision.*

A. Three Devils Road was privately built by the Otto Wagner family sometime after 1950 as a logging road. (CP 768). In 1955 the county unilaterally adopted the road into the County Road System. (CP 245).

B. In 1980, Three Devils Road was designated a primitive road, which by statute and Resolution No. 29-80 means Three Devils Road is not classified as part of the County Primary Road System. (CP 356, 376-

⁴ Even under the past arbitrary and capricious standard, there are no grounds to overturn the Board's decision. Even an unwise decision or an error in judgment does not constitute arbitrary and capricious action. *Concerned Land Owners of Union Hill v. King County*, 64 Wash.App. 768 827 P.2d 1017 (Div. 1 1992). An arbitrary and capricious act is a “willful and unreasoning action in disregard of facts and circumstances”. *RUGG*, 123 Wash.2d at 382, 868 P.2d 861, citing *State v. Ford*, 110 Wash.2d 827, 836, 755 P.2d 806 (1988). The record demonstrates that the Board did not wilfully disregard facts and provide evidence supporting the legislative decision support the Board's decision to vacate the road.

378, 491).

C. Three Devils Road was removed from the County Road logs for 10 years (from 1995 to 2005) as not within the county's jurisdiction. (CP 491, 869-874).

D. The Petition for Vacation (CP 237) established that Gamble owns all land on either side of the road to be vacated (except a small portion that is DNR land, and the DNR does not oppose the road vacation). (CP 434, 467). The Forest Service installed a gate and closes Three Devils Road on occasion at the Forest Service boundary (the western end of the road). (CP 352, 385-86).

E. As a primitive road, the county rarely maintains it. On the other hand, Gamble regularly repairs and maintains the road to keep it open for its logging operations. (CP 376-78, 353-54, 422-427, 429).

F. Per Resolution 25-2015, the County Engineer personally examined the Three Devils Road (CP 300, 356, 433), determined that it is designated a primitive road, that the county performs little to no maintenance on it, and that the road is minimally used as evidenced by the two narrow wheel tracks with vegetation between. (CP 352, 356, 854-857, 859). See also County Traffic Study (CP 410).

G. The Engineer noted that the adjoining property owners [Gamble] performed all maintenance and improvements to the road since the last summer (CP 356), and concludes that this “portion of the road is useless as a part of the general road system and concluded that the public would “not be benefitted or inconvenienced” by the road’s vacation. (CP 356).

H. Three Devils Road has been extensively rebuilt by Gamble with the County’s knowledge. (CP 301, 376-378).

I. Three Devils Road does not meet the minimum width standards for a county road. (CP 123-24, 337-338).

J. The portion of Three Devils Road vacated is approximately three (3) miles long. (CP 241, 253).

K. There are multiple “escape” routes other than Three Devils Road. (CP 1394-96, 1415, 1444, 1455, 1466).

In *Bay Industry*, 33 Wn.App. 239, 653 P.2d 1355, landowners whose property abutted Lone Star Road petitioned the board to vacate it. The petition was opposed by another abutting landowner. The board of county commissioners vacated the county road, and the superior court affirmed. The appellant contended that, because of a ravine crossing its

property, the road provide the only feasible access to 30 of its 40 acres, and thus the board was arbitrary and capricious in finding that the road was not useful under RCW 36.87.060. The Court rejected this argument, stating:

The road was not only one-half mile long, had not been maintained by the county since the 1950's and did not comply with county width standards ... Vacating the road did not landlock appellant because it had access, albeit difficult, by another county road. *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 benefitted 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 241-42, 653 P.2d 1355 (emphasis added)⁵.

⁵ The Appellants misrepresent that Gamble has used significant precedent from cases and statutes that concern street vacations in cities and towns. Gamble has not cited the street vacation statutes applicable to cities and towns, which are located at RCW 35.79. Gamble has not relied on cases decided under that statutory scheme, except insofar as the holding or principle has analogous precedential value, for example, on the issues of standing and the appearance of fairness doctrine. To the contrary, Gamble has consistently relied on the county road vacation statutes at RCW 36.87, and county roads cases, including *Bay Industry*, 33 Wn.App. 239, 653 P.2d 1655; *Chaussee*, 38 Wn.App. 630, 689 P.2d 1084; *Thayer*, 46 Wash.App. 734, 731 P.2d 1167. Despite Appellants' broad, unsupported proclamations, Appellants fail to cite one "city" case on which Gamble wrongly relies or to explain why the distinction has any legal relevance to the question here. Most apparent is Appellants' complete failure to analyze or even cite the *county* precedent cited above.

The Okanogan County Commissioners followed all required procedural steps. The Board reviewed the petition to vacate under RCW 36.87.020, obtained a report from the county engineer per RCW 36.87.040, appointed a hearing officer to conduct a public hearing under RCW 36.87.060(2), considered the engineer's report, evidence for and objections against such vacation, and made a legislative decision whether the road is useful as part of the county road system under RCW 36.87.060. The decision does not require application of law or precedent to facts. It requires the judgment of elected officials. The decision is legislative, not judicial. The decision requires business judgment for management of the county's entire road system.

The Court's inquiry on writ of review is not whether the Board made the "right decision" or even a "wise decision". *Concerned Land Owners of Union Hill v. King County*, 64 Wash. App. 768 (1992). The Court inquires only if the record contains substantial evidence to support the Board's decision. As chronicled above, the record contains substantial evidence justifying the roads vacation. Judgment should issue from this Court that the record contains substantial evidence to support the Board's decision.

(4) *The record demonstrates that the Board reviewed the materials, including the competing recommendations, and made the legislative decision they were vested with making.*

On June 3, 2015 a special meeting of the Board took place. (CP 902-914). Appellants allege that the Board made its decision on the basis of the engineer's report and the matters presented on reconsideration⁶ and that the Board ignored the findings of the hearing officer.

What Appellants apparently fail to grasp is that the Board is not bound by the hearing officer's findings or recommendations. RCW 36.87.060(2) requires the hearing officer to prepare a record of the proceedings and a recommendation to the county legislative authority concerning the proposed vacation. While RCW 36.87.060(1) spells out what the Board must consider if it conducts the public hearing itself, if the Board appoints a hearing officer to conduct the hearing, other than receiving the engineer's recommendation, the statute states only that their "decision shall be made at a regular or special public meeting of the

⁶ While the Coalition alleges the Board considered Gamble's Motion for Reconsideration materials [that were submitted after the record was closed], the record is clear that none of the reconsideration material was given to the Board. (CP 901-908). All that was received was the Hearing Examiner's denial of the reconsideration motion, (CP 909), which sets forth no detail regarding the legal basis for the reconsideration or any factual evidence (CP 818-819).

County legislative authority.” RCW 36.87.060(1).

The transcript of the Board’s meeting clearly reflects that the Board considered the engineer’s report, the hearing officer’s recommendation, as well as evidence and testimony for and against the vacation. (CP 910-914).

E. The Appearance of Fairness Doctrine does not apply.

RCW 42.36 provides governing law for the appearance of fairness doctrine. By its terms, it applies only to local land use decisions and is further limited to quasi-judicial actions. RCW 42.36.010. A road vacation, unlike a subdivision or short plat, etc., is not a land use decision⁷.

Accordingly, the appearance of fairness doctrine does not apply in this circumstance.

⁷RCW 36.70C.020(2):

"Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses..." This history leaves the mode of court review of road vacation actions and decisions unchanged, with challengers' recourse being to the statutory writ process.

The applicability of the appearance of fairness doctrine turns on whether the County's actions were legislative or quasi-judicial in nature. See *Raynes*, 118 Wn.2d at 243, 821 P.2d 1204 (1992). Even if RCW 42.36 is somehow applicable, the statute states the appearance of fairness doctrine applies only to "quasi-judicial actions". The statute specifically excludes "legislative actions" relating to land use planning and zoning. RCW 42.36.010. Because "the power to vacate streets is a political function ... that will not be judicially reviewed", *Thayer*, 46 Wash.App. at 738, 731 P.2d 1167, road vacation by the Board is not a "quasi-judicial action" and is therefore not subject to the appearance of fairness doctrine.

Even if the appearance of fairness doctrine did somehow apply, the Appellant is incorrect in its assertion that it justifies invalidation of the Board's decision. RCW 42.36.030 provides that 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." See also RCW 42.36.090 (permitting member participation in a decision despite a basis for disqualification, if disqualification would result in a "lack of a quorum or would result in a failure to obtain a

majority vote as required by law,” so long as publicly disclosed⁸).

Finally, Plaintiffs failed to timely raise their objection to the any member(s), and are thus precluded from raising the concern only after an unfavorable decision. See RCW 42.36.080 (providing that anyone “seeking to rely on the appearance of fairness doctrine to disqualify a member of a decision-making body from participating in a decision must raise the challenge as soon as the basis for disqualification is made known to the individual. Where the basis is known or should reasonably have been known prior to the issuance of a decision and is not raised, it may not be relied on to invalidate the decision”).

Plaintiffs have alleged only that Commissioner Ray Campbell had a conflict of interest because he spoke at the funeral of the late Daniel Gebbers in November 2014. (CP 1201). The Coalition is statutorily precluded from raising this claim which it neglected to raise at any time prior to the Board’s decision. Regardless, the dispute becomes inconsequential in light of the fact that RCW 36.87.080 (titled “Majority vote required”) requires a majority vote of the Board on a petition to

⁸ The communications between Gambles’ representative and the Commissioners were fully disclosed prior to the first scheduled hearing on Gamble’s petition. (CP 392).

vacate a road. Because the other two commissioners were split, Commissioner Campbell's vote cannot be disqualified even if there was any merit to the Coalition's far-reaching, speculative, and after-the-fact allegations of a conflict of interest. See RCW 42.36.090.

CONCLUSION

The amorphous Coalition lacks standing, as do the five named members, to challenge the legislative decision of their elected Board of County Commissioners to manage County roads, including vacation of the useless Three Devils Road. Further, this Court does not, and should not, review that legislative decision under a statutory writ of review, where, as here, challengers fail to present any evidence, direct or circumstantial, of any illegality, conspiracy, or wrongdoing. Even if the Court undertakes statutory review, substantial evidence justifies and supports the Board's decision to vacate that primitive and useless portion of Three Devils Road.⁹

⁹ Gamble does not respond to Appellant's 42 U.S.C. § 1988 claims, as those are directed at the government officials. Gamble, however, joins and supports the County's position as to those meritless claims.

RESPECTFULLY SUBMITTED this 18th day of April, 2016.

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Joint Appendices of Gamble and County

Gamble referenced the joint appendices filed by the County. Gamble appends Appendix 4, again, however, to provide better quality photographs showing the poor condition of the road. Gamble has also mailed an electronic copy of this brief on compact disc to the Clerk.

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

APPENDIX 4



Posting Notice of Public Hearing set for
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

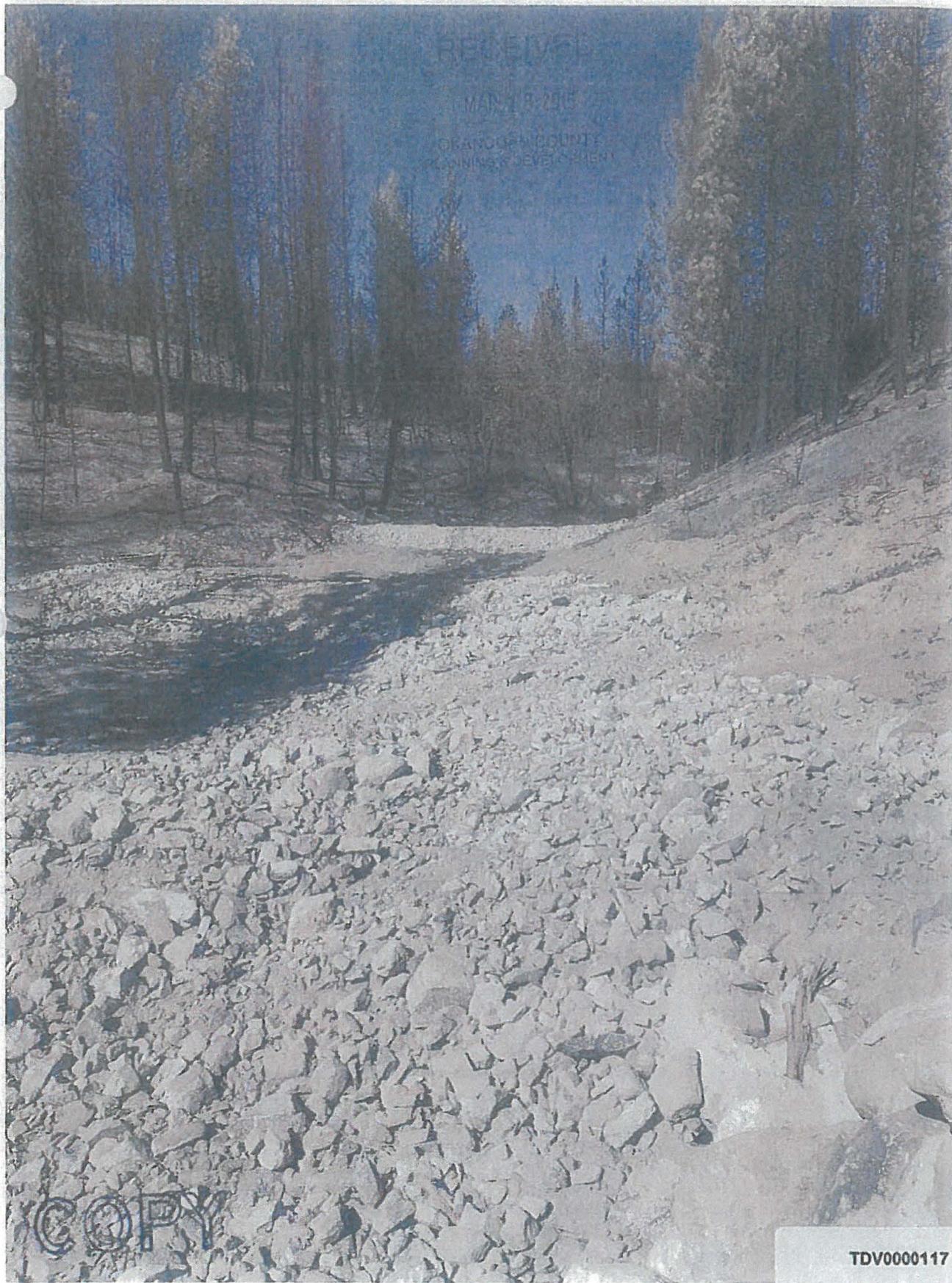
MAR 18 2015

ORANGE SAN COUNTY
PLANNING & DEVELOPMENT



TDV0000116

353



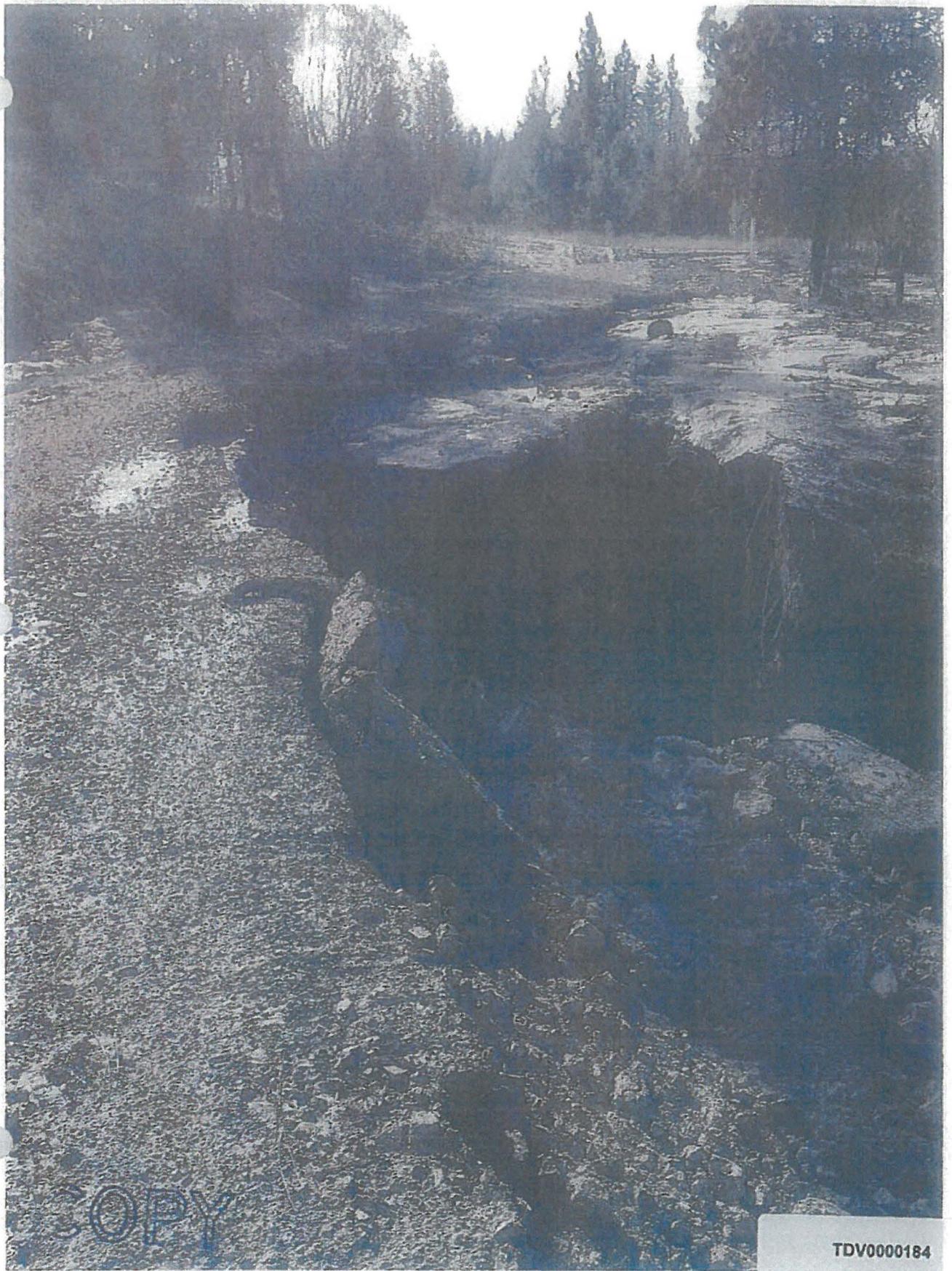
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MAY 18 2015

GRAND CANYON COUNTY
PLANNING & DEVELOPMENT

COPY

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TDV0000184

422



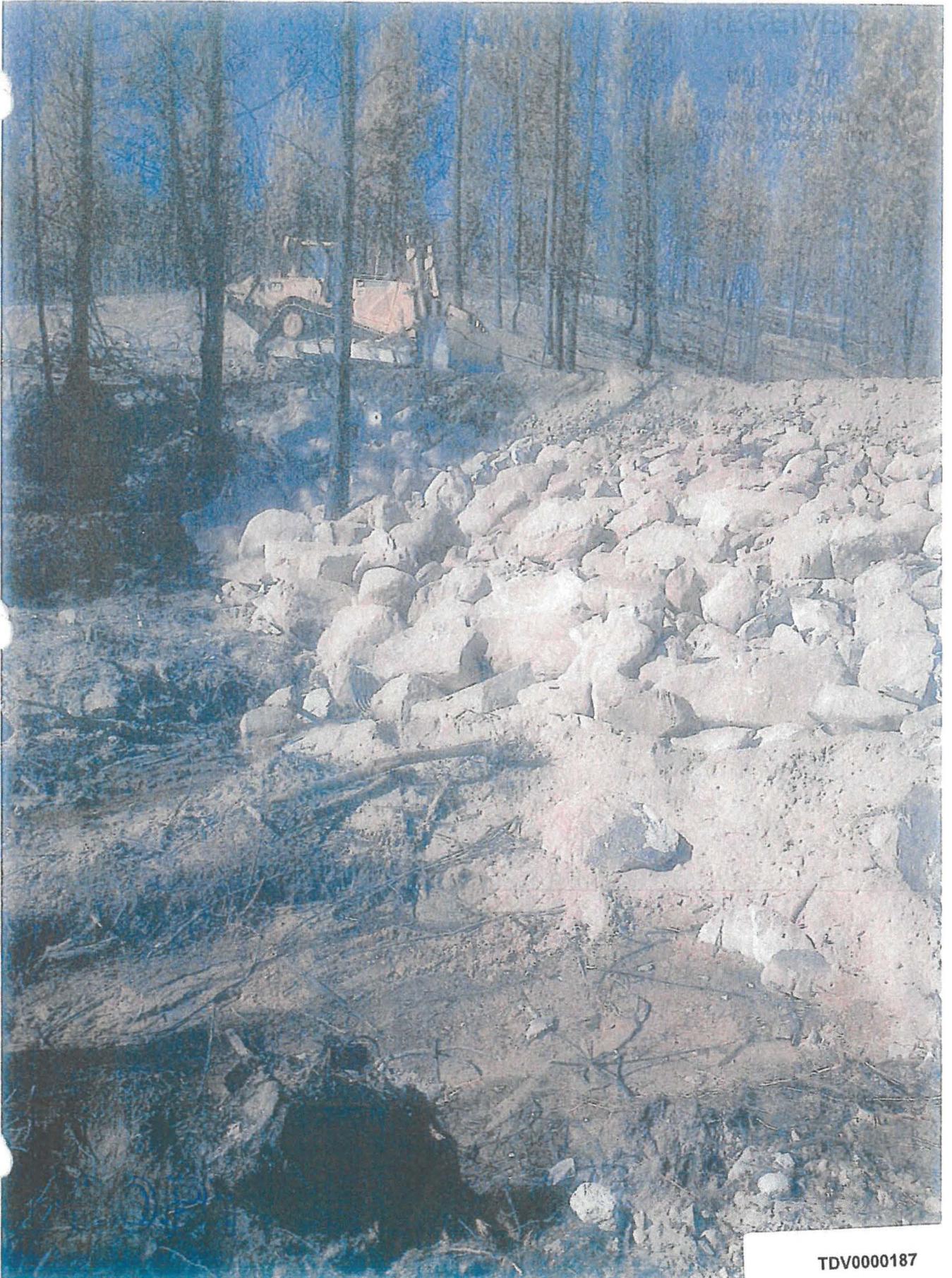
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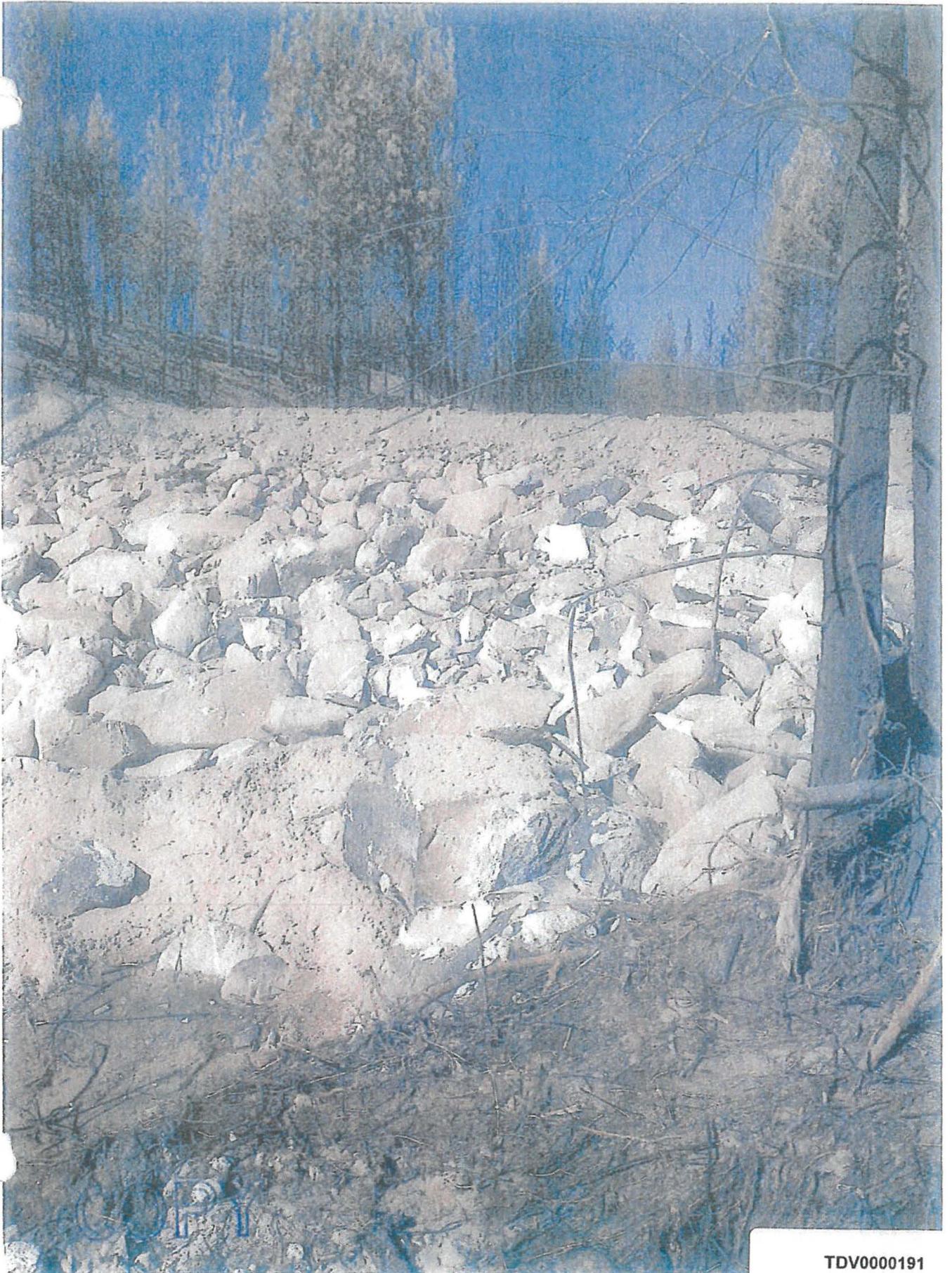
OKANOGAN COUNTY
PLANNING & DEVELOPMENT



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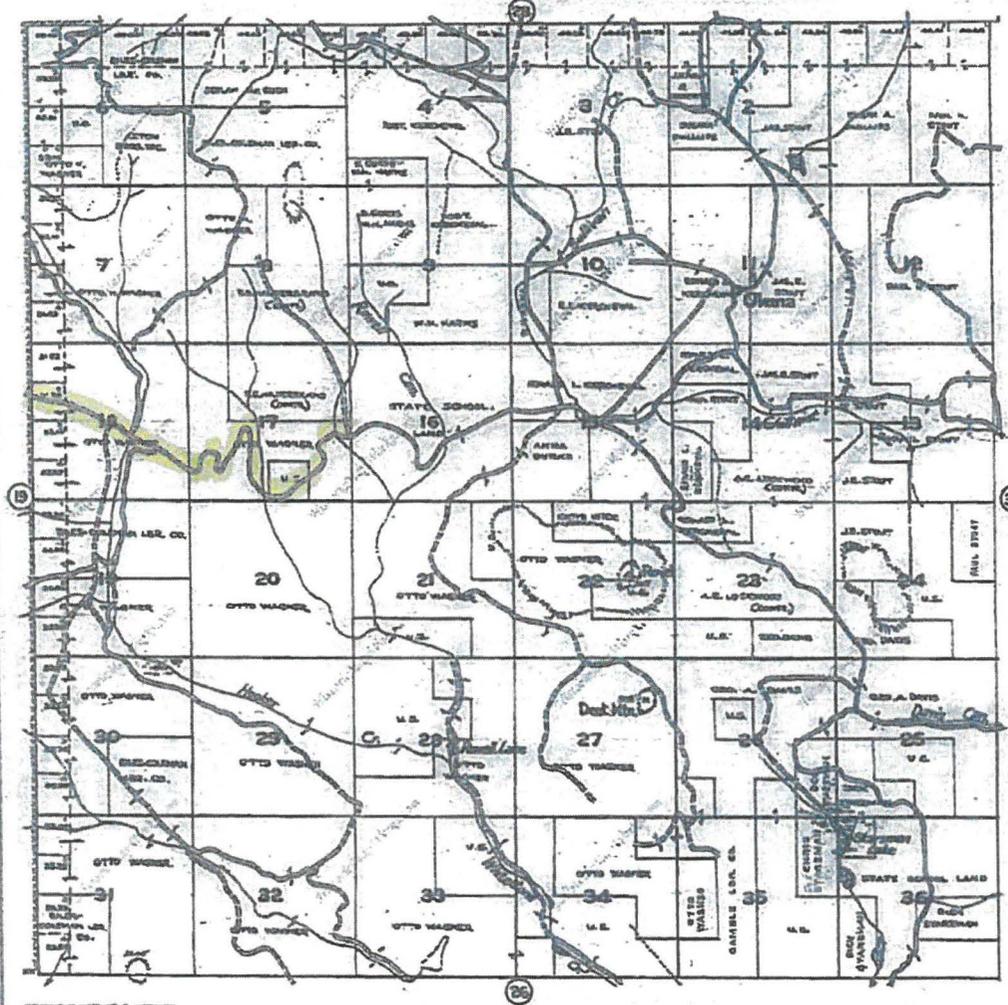
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SCALE 2 IN. = 1 MILE
 SOLD BY
METSKER MAPS
 171 SOUTH 10TH ST., TACOMA, WASHINGTON
 1620 THIRD AVE., SEATTLE, WASHINGTON

TOWNSHIP 32 N., RANGE 24 E.W. M.
OKANOGAN COUNTY, WASHINGTON

PAGE 27

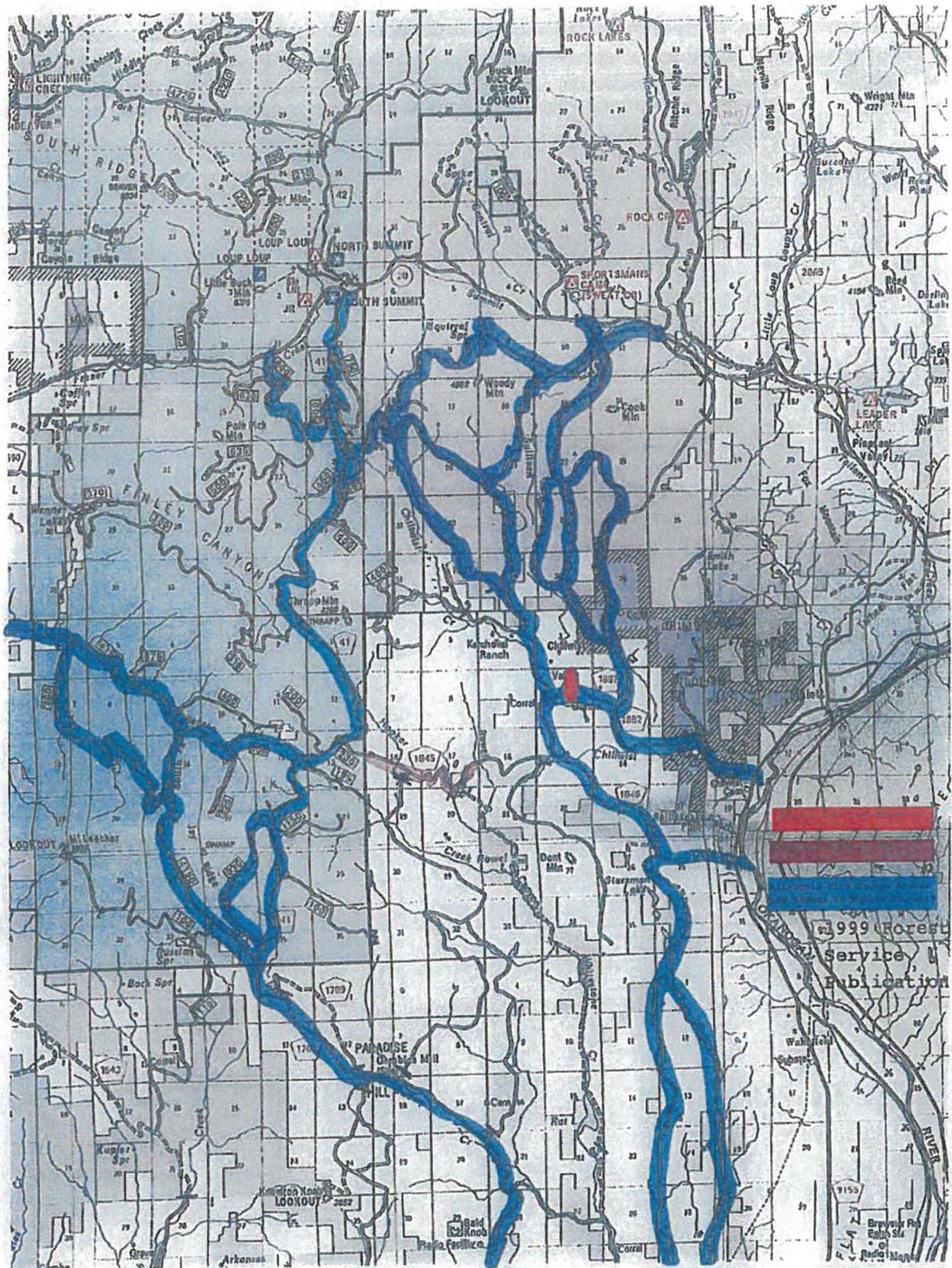


1959 Metsker Map depicting
 Three Devils Road after
 the county took the road
 without perfecting the
 road by law.

—LEGEND—
 PAVED ROADS
 STATE HIGHWAYS U.S. HIGHWAYS
 DIRT ROADS
 RIPARIAN ROADS
 RAILROADS
 TRAILS
 INTERMITTENT CREEKS
 SCHOOLS

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TDV0000569

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TDV0000617

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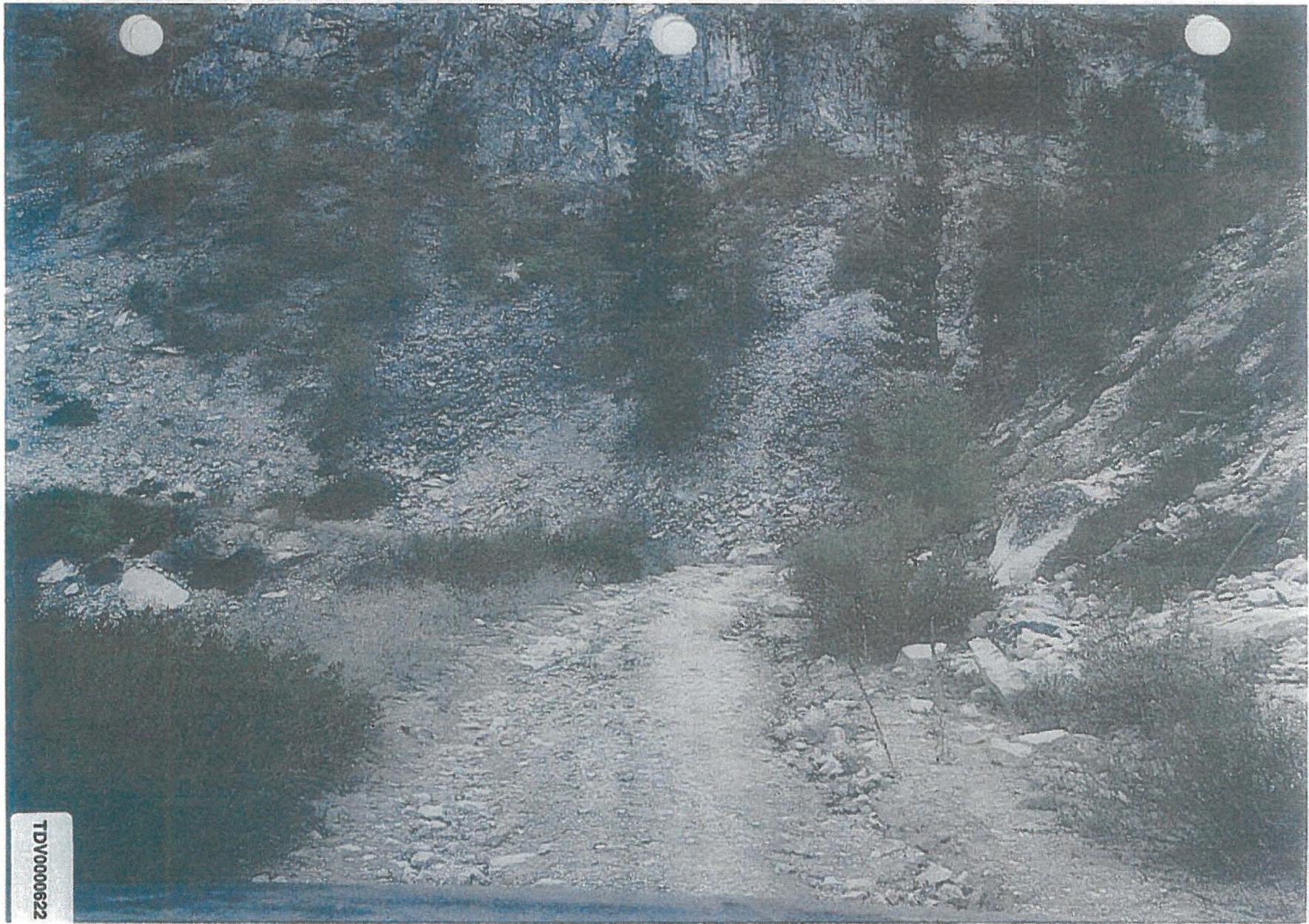
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CERTIFICATE OF SERVICE

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):

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

DATED this 18 day of April, at Wenatchee, Washington.


 Patty Gillin