

NO. 83385-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALIZON VEIT, an individual, by and through David M. Nelson, the
guardian of her estate,

Petitioner,

v.

BURLINGTON NORTHERN SANTA FE CORPORATION, a Texas
corporation; MICHAEL S. BURKS and JANE DOE BURKS,
husband and wife, and the marital community composed thereof;
and a number of unnamed Jane Does and/or John Does.

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER

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INTRODUCTION

Two sayings are relevant here: (1) a picture is worth a thousand words, and (2) when it comes to appellate court opinions, all truth is in the footnotes. The first is a truism, but the second is not.¹ The pictures (and a diagram) are in Appendix A to this brief. They plainly show how dangerous this train crossing is.

The appellate opinion in question is *Veit v. Burlington N. Santa Fe Corp.*, 150 Wn. App. 369, 207 P.3d 1282 (2009), *rev. granted*, 167 Wn.2d 1013 (2009). The footnotes in question are nn. 4, 6, and 10. In footnote 4, the appellate court erroneously concludes that Congress' recent clarification of its preemption statute is not "pertinent." It is not controlling, but it is certainly pertinent. Congress did not intend preemption here.

In footnotes 6 and 10, the court dismissed – as made too late – arguments Veit had raised many times. Certain authorities may not have been cited before, but the issues had been raised.

Veit was deprived of a fair trial. The Court should reverse and remand for trial under correct evidence and instructions.

¹ Neither saying is of ancient lineage. The truism likely originated in a twentieth-century streetcar advertisement. The other has been suggested to students by David Skover, Fredric C. Tausend Professor of Law at Seattle University, for at least 20 years.

SUPPLEMENTAL BRIEF ISSUES

1. Whether 49 U.S.C. § 20106 preempts Veit's claim of negligence based on the railroad's violation of its own plans and rules regarding speed limits?
2. Whether genuine issues of material fact precluded summary judgment on Veit's excessive-speed claim based on the railroad's violation of its own plans and rules regarding speed limits?
3. Whether the trial court erred in granting the railroad's motion *in limine* to preclude evidence and argument regarding RCW Chapter 46.61, which required Veit to stop no less than fifteen feet from the nearest rail, which she did, where a stop bar was indisputably placed too close to the nearest rail (4.5 feet) as a matter of law, obviating Veit's alleged duty to stop there?

FACTS

The general facts are fully set forth in Veit's opening brief, her reply brief, and her Petition for Review. Specific facts relevant to the legal issues addressed in this brief are discussed in the context of those arguments. As noted in the Petition for Review, the appellate court overlooked or misapprehended some key facts relevant to these issues.

ARGUMENT

- A. **The trial and appellate courts erred in determining that federal law preempts Veit's excessive-speed claims based on the railroad's violation of its own rules.**

Railroads have had a common-law duty to avoid colliding with vehicles on their tracks, if possible, since at least 1877. See, e.g., *Cont'l Improvement Co. v. Stead*, 95 U.S. 161, 164 (1877). Federal preemption did not become an issue until nearly 100 years later, when Congress enacted the Federal Railroad Safety Act (FRSA) to address a troubling increase in the number of collisions at railroad grade crossings. See, e.g., *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344, 347, 120 S. Ct. 1467, 146 L. Ed. 2d 374 (2000) (citing 49 U.S.C. § 20101 (2000)), *superseded by statute as stated in Hunter v. Canadian Pac. Ry. Ltd.*, 2007 U.S. Dist. LEXIS 85110 (D. Minn. 2007). Congress passed the FRSA expressly “to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 49 U.S.C. § 20101.

The FRSA delegated congressional authority to the Secretary of Transportation to “prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970”. 49 U.S.C. § 20103(a). The Secretary delegated its authority to the Federal Railroad

Administration (FRA). See, e.g., **Union Pac. R.R. Co. v. Calif. Pub. Util. Comm.**, 346 F.3d 851, 858 n.8. (9th Cir. 2003) (citing **Mich. S. R.R. Co. v. City of Kendalville**, 251 F.3d 1152, 1154 (7th Cir. 2001)), cert. den. sub nom., **Cal. Pub. Util. Comm'n v. Union Pac. R.R. Co.**, 540 U.S. 1104 (2004).

Under Washington law, a railroad's violation of its own internal speed rules has long been evidence of negligence:

[a] violation by railroad employees of a regulation adopted by the railroad itself with respect to the speed of a train may be considered in determining the due care of the railroad company in an action for injury to persons or property at a highway crossing, but it must appear that such regulation was adopted to secure the safety of persons using the highway crossing.

Goodner v. Chicago, Mil., St. Paul & Pac. R.R. Co., 61 Wn.2d 12, 19, 377 P.2d 231 (1962). Preemption applies only when state law conflicts with or frustrates federal law, in which case the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2) requires the state law to yield. See, e.g., **CSX Transp., Inc. v. Easterwood**, 507 U.S. 658, 663, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993), *superseded by statute as stated in Hunter, supra*. But courts must maintain a strong presumption against preemption to avoid "unintended encroachment on the authority of the States" within our federal system. **Easterwood**, 507 U.S. at 664. "Thus,

preemption will not lie unless it is “the clear and manifest purpose of Congress.” *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)).

Courts look to the text and structure of the federal statute, and where, as here, it contains an express preemption clause, its plain language provides the “best evidence of Congress’s preemptive intent.” *Id.* As it currently reads in relevant part, the preemption statute at issue, 49 U.S.C. § 20106, leaves intact broad areas of state law, and expressly provides that an allegation that the railroad violated its own internal plans or rules is not preempted:

(a) National uniformity of regulation.

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) Clarification regarding State law causes of action.

(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party—

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

The train collided with Alison Veit in the Pine Street crossing on September 10, 2001, only four months before Congress required that subsection (b) shall apply. Subpart (b)(1)(B) provides that “[n]othing in this section shall be construed to preempt an action under State law seeking damages for personal injury,” where (as here) a plaintiff alleges that the railroad “failed to comply with its own plan, rule, or standard that it created pursuant to a regulation.” 49 U.S.C. § 20106(b)(1)(B). Veit responded to the railroad’s

summary judgment motion that under **Goodner**, *supra*, genuine issues of material fact exist on whether the railroad ran its train at roughly 30 m.p.h. (see, e.g., CP 836) in violation of the railroad's own Timetables (*i.e.*, "its own plan, rule or standard . . . created pursuant to a regulation") imposing a 20 m.p.h. speed limit at the Pine Street crossing (see, e.g., CP 1707; Exs 36 & 48). See, e.g., CP 1244-46. Based on its preemption ruling, the trial court erroneously instructed the jury that the speed at the Pine Street crossing was 40 m.p.h. CP 174.

No valid opinions have addressed this precise issue: did an otherwise ambiguous subsection (a) ever preempt a claim based on the railroad's failure to follow its own internal speed rules, where Congress later clarified that it never intended to do so? If the answer is no, then Veit's claims are not preempted, the summary judgment was improper under **Goodner**, the "40 m.p.h." jury instruction was erroneous, and this Court should reverse and remand for trial on this claim.

The answer is no. Congress adopted subsection (b) as part of the Implementing Recommendations of the 9/11 Commission Act of 2007, which amended the FRSA to "rectify the Federal court decisions related to the [January 18, 2002] Minot, North Dakota

accident that are in conflict with precedent.” H.R. Rep. No. 110-259 (“110 H.R. 259”), at 347 (2007) (Conf. Rep.). The Minot derailment was a major disaster, spilling 220,000 gallons of anhydrous ammonia, killing one victim, and injuring hundreds. See **Lundeen v. Canadian Pac. Ry. Co.**, 507 F. Supp. 2d 1006, 1008-09 (D. Minn. 2007). The various federal courts involved eventually found all of plaintiffs’ claims preempted. See, e.g., *Id.* at 1012-13; **Mehl v. Canadian Pac. Ry., Ltd.**, 417 F. Supp. 2d 1104, 1120 (D.N.D. 2006); **Lundeen v. Canadian Pac. Ry. Co.**, 447 F.3d 606, 611 (8th Cir. 2006).²

The **Mehl** court noted that such preemption left “the judicial system . . . with a law that is inherently unfair to innocent bystanders and property owners who may be injured by the negligent actions of railroad companies.” 417 F. Supp. 2d 1120. It also called for congressional action, quickly leading to § 20106(b)’s adoption. *Id.* at 1120-21; 110 H.R. 259, at 347.

In adopting the new subpart, Congress reaffirmed subpart (a) exactly as it had previously existed, expressly refusing to alter

² Each of these decisions is expressly superseded by § 20106(b).

its meaning. 110 H.R. 259, at 347. But Congress explained subpart (b) as clarifying its original intent in subpart (a):

Subpart (b) of the Conference substitute provides further clarification of the intention of 49 U.S.C. § 20106, **as it was enacted in the Federal Railroad Safety Act of 1970**, to explain what State law causes of action for personal injury, death or property damage are not preempted.

Id. (emphasis added). Specifically, Congress clarified that it had never intended subsection (a) to preempt state law claims where the railroad had either (1) “failed to comply with the Federal standard of care established by a [federal] regulation” (subsection (b)(1)(A)),³ or (2) “failed to comply with its own plan, rule, or standard that it created pursuant to a regulation” (subsection (b)(1)(B)).⁴ Prior to the *Minot*-derailment decisions, no court had held otherwise, so those decisions were inconsistent with existing precedent. Thus, Congress plainly never intended subsection (a) to preempt Veit’s excessive-speed claim based on the railroad’s violation of its own plans and rules. In any event, no evidence

³ See 110 H.R. 259, § 1528(b)(1)(A); *but cf. Mehl*, 417 F. Supp. 2d at 1115 (preemption applied where railroad violated federal regulation).

⁴ See 110 H.R. 259, § 1528(b)(1)(B); *but cf. Lundeen*, 507 F. Supp. 2d at 1012-13 (preemption applied where railroad violated federal regulations requiring it to adopt an internal plan or rule).

exists of a “clear and manifest purpose” to do so. **Easterwood**, 507 U.S. at 664.⁵

This analysis is bolstered by the Ninth Circuit’s pre-subsection (b) decision in **Union Pac.**, *supra*. There, California adopted railroad regulations following a train derailment that contaminated a major river. 346 F.3d at 855-56. The Ninth Circuit affirmed some of the District Court’s preemption rulings, where the FRSA “covered” (*i.e.*, “substantially subsumed”) the California regulations and where the hazards they addressed (*e.g.*, steep grades) were not “essentially local” (*i.e.*, “adequately encompassed within the national uniform standards”). 346 F.3d at 858-62. But it found no preemption where California’s regulations merely required the railroads to enforce their own internal rules. *Id.* at 863-69.

Easterwood does not require a different result here. As the FRA itself has noted, **Easterwood** appears to rest on the false assumption that the FRA regulates train speeds:

⁵ In footnote 4, the Court of Appeals maintains that subsection (b) “is not pertinent to the analysis of this case.” 150 Wn. App. at 381 n.4. As explained above, Veit is not arguing that subsection (b) applies in this case, as subsection (b)(2) precludes that argument. Rather, this unusually clear expression of congressional intent regarding subsection (a)’s original preemptive effect counsels against finding subsection (a) preemption “clear and manifest” here, and no case or statute requires preemption in these circumstances.

Notwithstanding some of the language in *Easterwood* that a cursory reading may otherwise indicate, ***FRA has never assumed the task of setting train speed.*** Rather, the agency holds railroads responsible for minimizing the risk of derailment by properly maintaining track for the speed they set themselves. For example, if a railroad wants its freight trains to operate at 59 m.p.h. between two certain locations, it must maintain the tracks between those locations to Class 4 standards.

Track Safety Standards, 63 Fed Reg. at 33992, 33999 (June 22, 1998) (emphasis added). Since the FRA never “substantially subsumed” the setting of train speeds, Veit’s claim that the railroad violated its own internal speed rules is not preempted. See, e.g., ***Union Pac.***, 346 F.3d at 863-69 (enforcement of internal plans or rules not preempted); ***Anderson v. Wis. Cent. Trans. Co.***, 327 F. Supp. 2d 969 (E.D. Wis. 2004) (triable issues of fact on excessive speed, track classification, and individualized hazards, preclude summary judgment); ***Missouri Pac. R.R. Co. v. Lemon***, 861 S.W.2d 501 (Tex. App. 1993) (individualized hazard not preempted).

A very recent federal district court decision applies the correct analysis, albeit while granting a summary judgment preempting an excessive-speed claim due the absence of any genuine issue of material fact. ***Gauthier v. Union Pac. R.R. Co.***,

644 F. Supp. 2d 824, 838 (E.D. Tex. 2009). The *Gauthier* court correctly notes that the new subsection (b) precludes preemption:

the familiar preemption analysis of [*Easterwood*], [*Shanklin*], and their progeny is applied to allegations of state law negligence, **unless**: . . . the negligence involves a railroad's failure to comply with its own plan, rule, or standard created pursuant to a federal regulation and section 20106(b)(1)(B) applies.

Gauthier, 644 F. Supp. at 835 (bolding added) (citing *Van Buren v. Burlington N. Santa Fe Ry. Co.*, 544 F. Supp. 2d 867, 876 (D. Neb. 2008)). But there, unlike here, the railroad established as undisputed fact that it had not violated either federal regulations or its own internal rules on speed limits. *Id.* at 838.

Here, on the other hand, Veit raised a genuine issue of material fact through an expert opinion that the train was traveling at roughly 30 m.p.h. (CP 836) while the railroad's Timetables imposed a 20 m.p.h. limit at the Pine Street crossing (see, e.g., CP 1707; Exs 36 & 48). Taking these facts in the light most favorable to Veit, as the Court must on summary judgment,⁶ no federal preemption applies in this case. The Court should reverse and remand for trial on Veit's excessive-speed claim.

⁶ See, e.g., *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005).

B. The trial court erred in excluding an entire class of evidence relevant to proximate cause, and the appellate court erred in failing to reach the issue.

The Court of Appeals failed to reach one of Veit's critical arguments, that the trial court erred in precluding testimony about her duties at the crossing based on RCW Ch. 46.61. *Compare, e.g.,* BA 7, 31-33 *with* Slip Op. at n.10. The appellate court chose not to reach this argument because "the jury did not reach . . . Veit's negligence," so the court "need not address the assignments of error concerning contributory negligence." *Id.* But Veit's argument on this issue went to her theory of the case – that the railroad's negligence proximately caused her injuries – not just to her alleged contributory negligence. *Id.* Indeed, the railroad itself argued that it was not a proximate cause "because of [Veit's] negligence." 3/21/07 RP 1711-12. Because the trial court excluded an entire class of relevant evidence from trial, this Court should reverse and remand for trial under correct evidence.

As explained in Veit's Petition for Review, "issues of negligence and contributory negligence are so intertwined that they cannot realistically be dealt with as separate issues." Petition at 18-19 (citing and discussing *Bordynoski v. Bergner*, 97 Wn.2d 335, 644 P.2d 1173 (1982); *Gaines v. Northern Pac. Ry. Co.*, 62

Wn.2d 45, 380 P.2d 863 (1963); **Farrow v. Ostrom**, 10 Wn.2d 666, 117 P.2d 963 (1941)). The trial court's ruling taking Veit's facts and argument out of the case as a matter of law requires reversal and remand for a new trial. *Id.* Similarly, the erroneous ruling *in limine* prejudicially excluding relevant evidence and preventing Veit from arguing her theory of the case requires a remand for a new trial on proper evidence. **Barrett v. Lucky Seven Saloon, Inc.**, 152 Wn.2d 259, 263-64, 274-75, 96 P.3d 386 (2004).

Here, the railroad brought a motion *in limine* to preclude Veit from citing or referring to RCW 46.61.345 (requiring drivers to stop "within fifty feet but not less than fifteen feet from the nearest rail of the railroad" when a stop sign is present), which the trial court granted over Veit's strong objections. CP 520-21; 3/6 RP 59-75. Under the trial court's order *in limine*, Veit was precluded from discussing the statute in *voir dire* and opening, and from cross-examining four witnesses who testified that Veit had a duty to stop at the stop bar and failed to do so. 3/8 RP 235, 247 317-18; 3/12 RP 366; 3/19 RP 1177. Two of these witnesses were police officers, but the order *in limine* absolutely handcuffed trial counsel in questioning their assertions that she had a duty to stop at the stop bar. 3/8/07 RP 317-18; 3/12/07 RP 366.

The jury also heard testimony that Veit did stop at or near the stop sign between 50 and 15 feet from the nearest rail (3/12/07 RP 524, 532), that you could not even see a train coming from there due to the large embankment and foliage (3/8/07 234-35, 237), and that the City therefore placed the stop bar only 4.5 feet from the nearest rail (*Id.*), which is plainly in violation of provisions of the Manual on Uniform Traffic Control Devices (MUTCD) (3/12 RP 390-91; CP 299). See also App. A to this brief (photos and diagram). But Veit's trial counsel could not develop this testimony at trial due to the order *in limine* barring him from discussing Veit's actual legal duty under RCW 46.61.435. Indeed, a witness had testified in a deposition that Veit stopped well before the stop bar and "crept" down the hill, but counsel did not develop that testimony at trial because the trial court had erroneously ruled *in limine* the jury would not hear that her earlier stop was consistent with her legal duty under RCW 46.61.345. See CP 1527, 1538.

Veit later submitted a trial brief again detailing the law in this area. CP 289-99. The trial court reconsidered its ruling, deciding to instruct the jury on the MUTCD, in the following jury instructions:

An administrative rule in Washington [WAC 468-95-010] provides that the *Manual on Uniform Traffic Control Devices for Streets and Highways* (MUTCD), 1988 edition, and future

revisions approved by the Federal Highway Administrator has the authority of law.

CP 163 (Court's Instruction to the Jury (JINS) No. 19).

The MUTCD reads, in part, as follows:

With due regard for safety and for the integrity of operations by highway and railroad users, the highway agency and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. **This requires joint responsibility in the traffic control function between the public agency and the railroad.** The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.

CP 164 (JINS 20) (emphasis added).

The [MUTCD] at railroad crossings recommends that the stop bar at railroad crossings be placed 15 feet from the nearest rail.

CP 165 (JINS 21).

Defendant . . . had a duty to comply with the rules, regulations and specifications contained in the [MUTCD] at railroad crossings.

CP 167 (JINS 23, in relevant part). The trial court also instructed the jury on RCW 46.61.345 (CP 159, JINS 15):

A statute in Washington requires that when a stop sign is erected at a grade crossing of a railroad the driver of any vehicle shall stop within fifty feet but not less than fifteen feet from the nearest rail of the railroad and shall proceed only using due care.

When the trial court changed its ruling, the railroad's counsel said, "You've had multiple witnesses testify that the duty is to stop at the stop bar, and I think that makes that a confusing instruction and I would object." 3/20/07 RP 1342. He was right: under these instructions and the undisputed facts, the railroad plainly violated MUTCD. But the railroad successfully diverted the jury from its own negligence by pointing at Veit, despite the deceptive and misleading stop bar, and despite the fact that Veit actually did stop at least 15 feet from the nearest rail in full compliance with the law. Had the jury heard about the law, including cross-examination of the railroad's key witnesses, they would have known that she met her duties and the railroad did not.

The trial court plainly erred in entering an order *in limine* excluding the applicable law, obviating relevant testimony, and precluding cross-examination of the four witness who said Veit did not stop at the stop bar. This Court should reverse and remand on this independently sufficient ground.

CONCLUSION

For the reasons stated above, and in Veit's briefing and Petition, this Court should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 18th day of February, 2010.

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CERTIFICATE OF SERVICE BY MAIL

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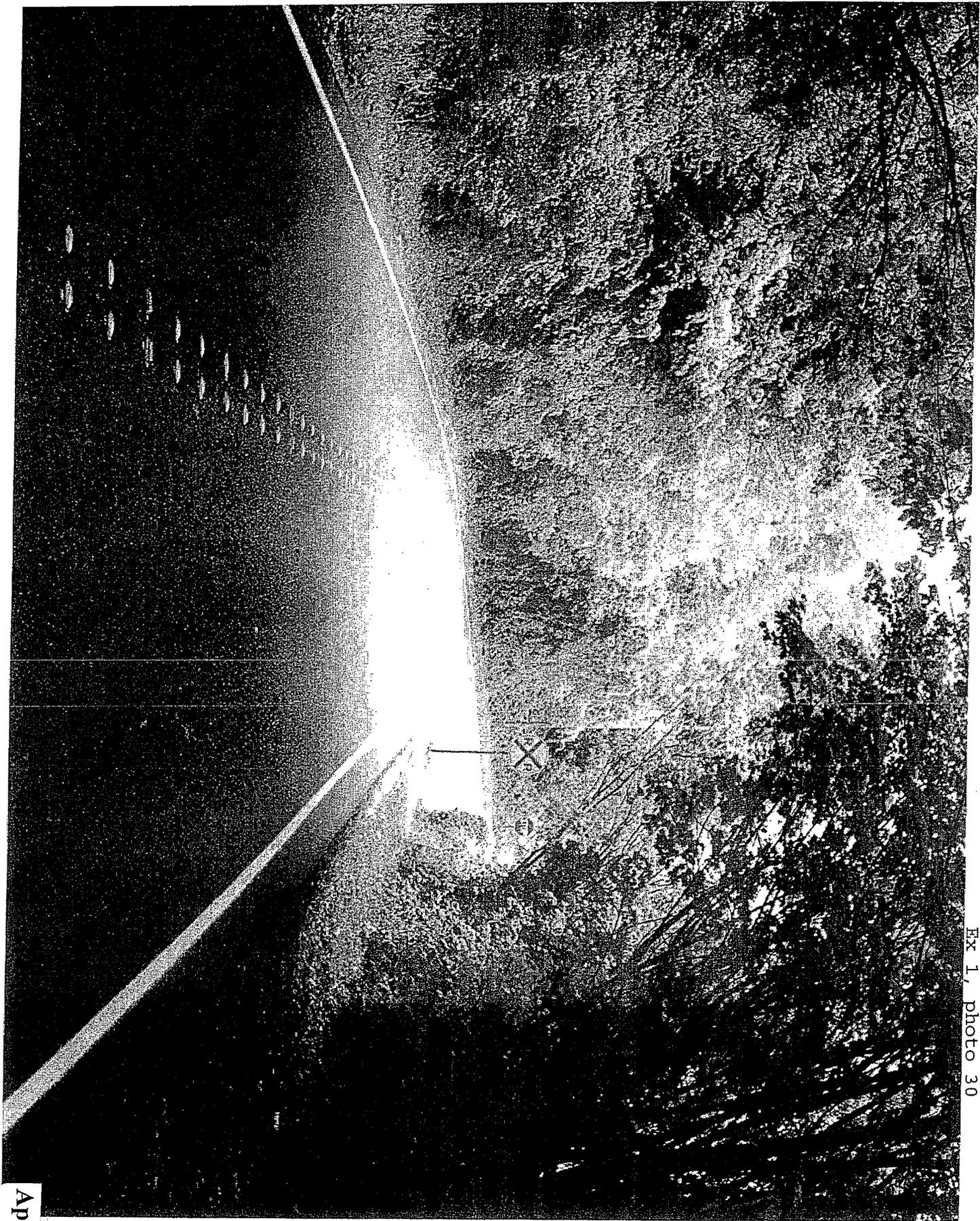
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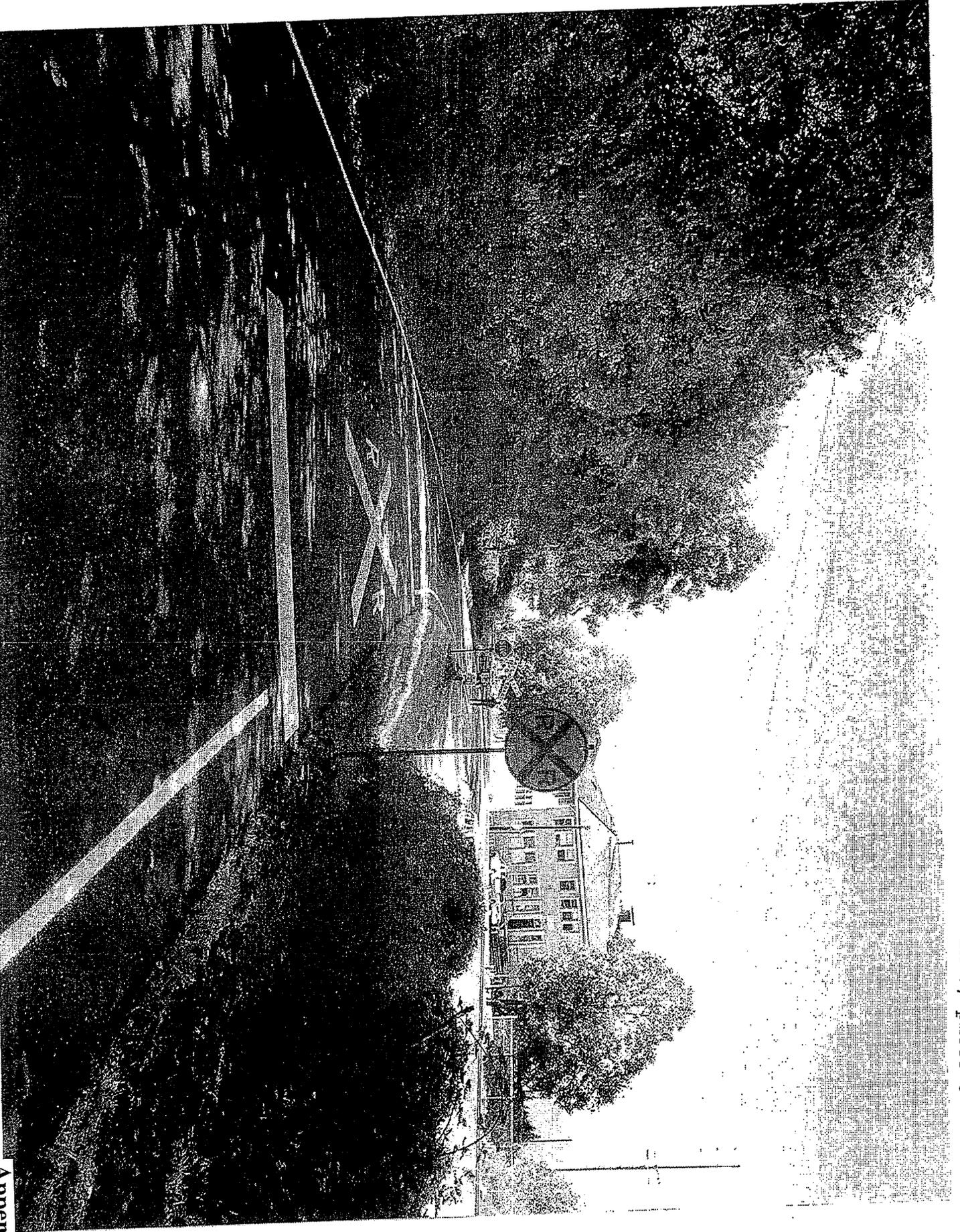


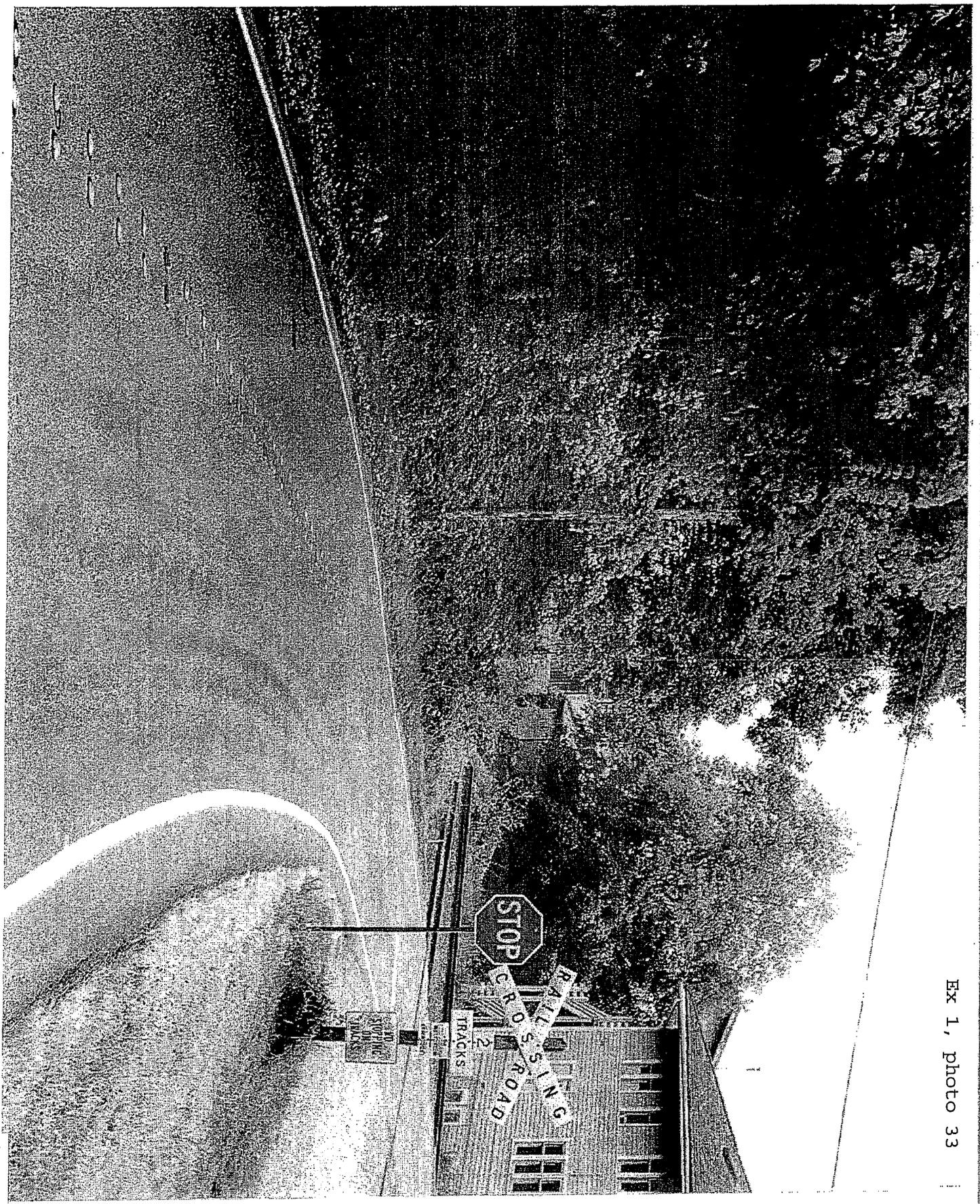
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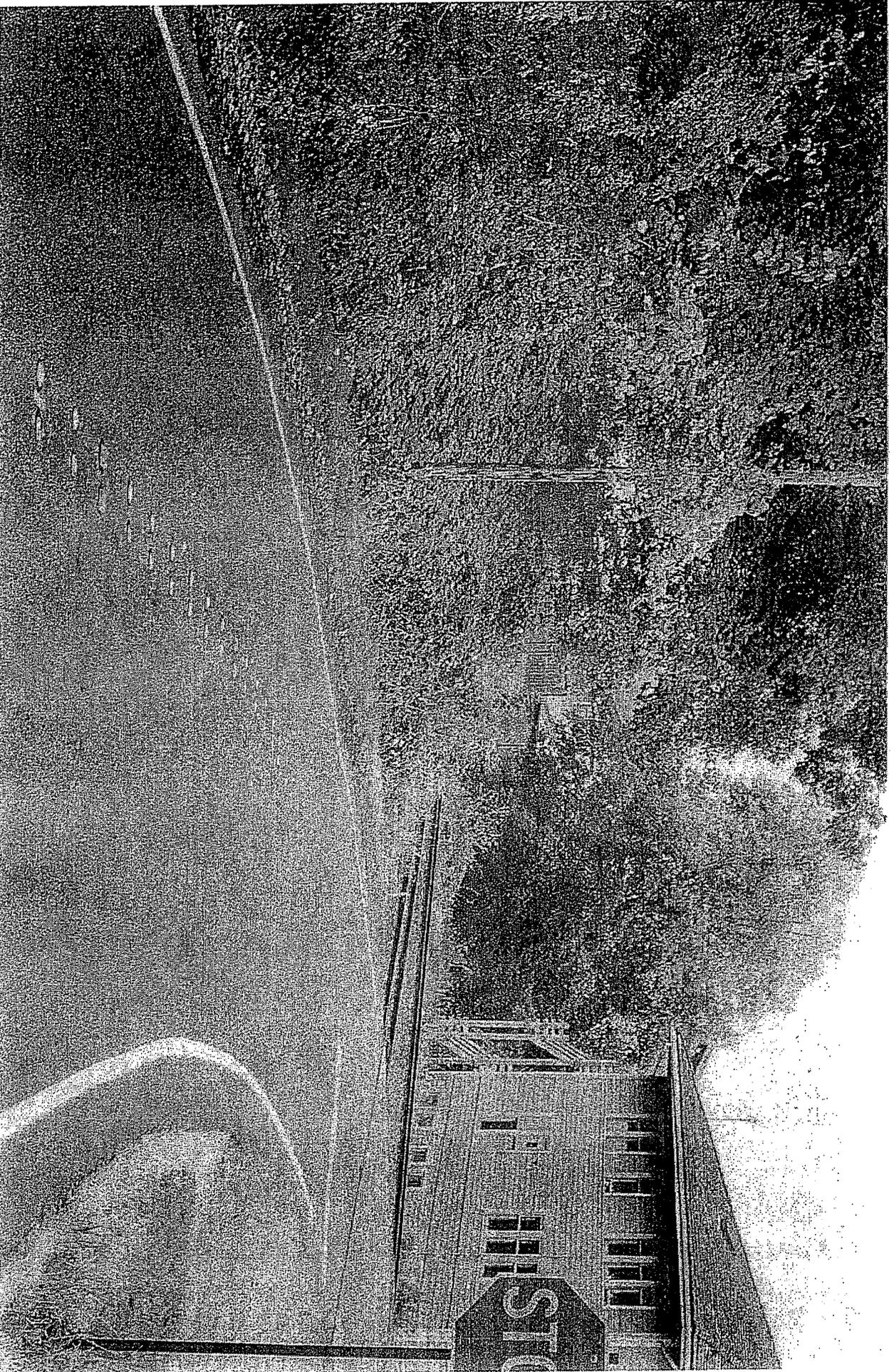
Ex 1, photo 30

Ex 7, photo 6



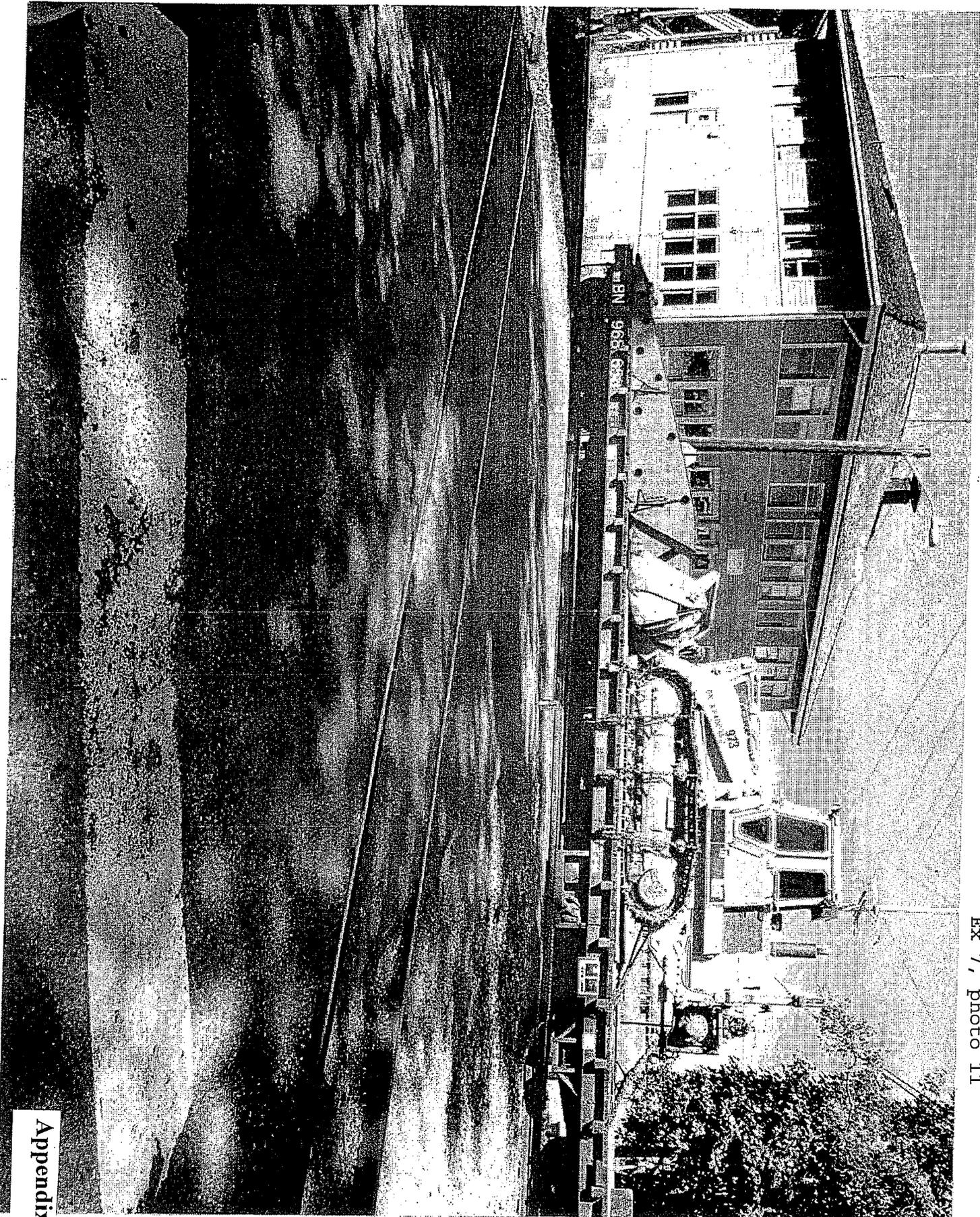


Ex 1, photo 35



Appendix A

Ex 7, photo 11



Ex 7, photo 14

