

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. FD35496

ENTERED
Office of Proceedings

MAR 01 2011

**DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION'S
PETITION FOR DECLARATORY ORDER**

Part of
Public Record

**CITY OF MONTE VISTA, CO
RESPONSE AND PROTEST**

230739

INTRODUCTION

On July 12, 2011, the Denver & Rio Grande Railway Historical Foundation (“DRGHF” or “Petitioner”) filed a Petition for Declaratory Order with the Surface Transportation Board (“the Board”) seeking a ruling that activities it is conducting on a rail siding located inside the City of Monte Vista (“Monte Vista” or “the City”) preempt the City’s municipal ordinances and zoning laws. Monte Vista opposes DRGHF’s request for the simple reason that DRGHF is wrong. DRGHF’s activities do not constitute “transportation by a rail carrier” within the meaning of the ICC Termination Act (“ICCTA”) entitling it to federal preemption of City laws. Accordingly, the City requests that the Board promptly issue an order denying the requested relief so that the City can enforce its laws against DRGHF.

STATEMENT OF FACTS

The City is a political subdivision located in south central Colorado just north of New Mexico. The City lies along an active common carrier line of railroad formerly owned and operated by the Denver & Rio Grande Western Railway. Eventually that carrier was acquired by the Union Pacific Railroad which sold the branch line serving the City to the San Luis & Rio Grande Railroad (“SLRG”), a class III short line railroad, that currently provides common carrier rail service to local industries. DRGHF is a self-described not-for-profit Colorado corporation that owns a 21.6 mile long line of railroad extending between South Fork and Creede, CO, that it purchased in 2000 from the Union Pacific Railroad in an abandonment proceeding.¹ The Board is well familiar with both this line and DRGHF as it has been the subject of previous litigation before this agency involving both that railroad’s preemption claims and a successful “adverse abandonment” application filed by the City of Creede.² Monte Vista is located approximately 30 miles east of South Fork and nowhere near the “line of railroad” that DRGHF claims to operate.

DRGHF currently leases a small 1.84 acre parcel of land inside the City limits from a sister corporation, the Rio Grande Southern Railroad Company that

¹ *Union Pacific Railroad Company—Abandonment Exemption—in Rio Grande and Mineral Counties, CO*. Docket No. AB-33 (Sub-No. 132X), STB served May 11, 1999.

² *City of Creede, CO-Petition for Declaratory Order*, FD 34376, STB served May 3, 2005 and *Denver & Rio Grande Railway Historical Foundation-Adverse Abandonment in Mineral County, CO*, Docket No. AB-1014, STB served May 23, 2008.

had purchased that property from SLRG in 2005. A short rail siding which DRGHF identifies as the "Centerline Spur Track ICC No. 15" traverses that property. That siding connects with SLRG's mainline. DRGHF uses that property and the siding to store various pieces of railroad or railroad-related equipment in various states of disrepair.

On or about July 12, 2011, DRGHF filed the instant Petition for Declaratory Order with the Board seeking a ruling that City ordinances and zoning laws do not apply to DRGHF's "activities" on the subject parcel and track. The City was not given notice by the Petitioner in these proceedings, but became aware on or about July 14, 2011, that a "pro se" petition had been filed by it. The timing of the Petition coincides with the fact that the Petitioner was convicted in the Municipal Court of the City of Monte Vista on April 1, 2011, in case #2010-0936 for the unlawful storage of railcars upon commercially zoned property in the City, in violation of Monte Vista municipal code, section 12-17-110 (3) and (5).

Petitioner's owner Donald H. Shank was sentenced on May 18, 2011, to serve 30 days in jail and a \$1,000 fine for his willful violation of the municipal code. The Petitioner has appealed his conviction to the Rio Grande County District Court, under docket #11CV29. At the time of this Response, the Appellant's *Brief* is due on August 22, 2011.

1. The factual situation of this case is not accurately portrayed by the Petition for Declaratory Order and the City submits the following factual scenario:

- a. As background, the Petitioner, doing business as DRGHF apparently received characterization as a Class III railroad from the Board and operates, during the summer months, a “scenic” or “excursion” railcar (which is an open-air single car, traveling under its own power over a stretch of rail line, which had been in non-use since 1985, until the Petitioner purchased it in 2000. As noted above, that line extends from South Fork, to Creede, a distance of some 21.6 miles all in the State of Colorado. Petitioner operates no “full size” locomotives, passenger or freight cars on that line, nor would it be able to do so without extensive bridge and track renovations – which it has no apparent ability to undertake (even though it has apparently performed some renovation on the track). The City of Creede attempted to enforce its own zoning code over the Petitioner concerning the rail line as it extended through the City. The Petitioner argued, before this agency, that DRGHF was exploring the possibility of adding setback facilities in its right-of-way for transporting of commodities from truck to railroad, that it planned to use the yard and depot for “spotting empty freight cars”, loading and unloading of

freight and passenger railcars, staging of freight and passenger train movements and for general railroad purposes.

The Board found in that case (*City of Creede, CO – Petition for Declaratory Order, supra*, that DRGHF had explained why it needed the full width of its ROW for current and future rail operations and that the 37.5' wide outer portion of the right of way is necessary for railroad purposes. The Board stated, however, that in order to come within its jurisdiction and the federal pre-emption provision, an activity must be both “transportation” and offered by a “rail carrier”... “conversely, state and local laws are not pre-empted where the activity is not ‘transportation’”. (*Creede Decision*, p 2, last ¶.) The Board cited *Hi Tech Trans., LLC – Petition for Declaratory Order- Hudson County, NJ* FD 34192, STB served Nov. 20, 2002. (No pre-emption for activity that is not part of rail transportation ... additionally the section 10501(b) pre-emption does not apply to state or local actions under their retained police powers so long as they do not interfere with railroad operations or the Board’s regulating programs” (*Creede Decision*, p 5, last ¶.))

While the Petitioner prevailed upon the Creede zoning issue, its victory was “pyrrhic” as the Board, thereafter, in the subsequent

adverse abandonment decision cited in footnote 2 at page 3, *supra*, ruled that DRGHF had “abandoned” the City of Creede portion of the track (which had been in non-use since 1972) and it was forced to remove its track from the city. Nevertheless, DRGHF’s initial success before the Board has apparently emboldened it to file this instant *Petition* concerning the Monte Vista operation.

- b. The Petitioner’s Monte Vista situation is quite different than that of the South Fork line to Creede. The City of Monte Vista is separated from the Town of South Fork and the Petitioner’s track ownership by over 30 miles. The only track now owned by DRGHF, to the best of Respondent’s knowledge, is the length from the Colorado State Highway 149 crossing in South Fork to the area south of Creede, where the Petitioner had to abandon the track. Also, there may be a short spur crossing US Highway 160 on the east side of South Fork and connecting to SLRG, upon which either Mr. Shank or DRGHF parks some old cars, an old engine and some equipment.

The track from South Fork extending east through the Town of Del Norte, the City of Monte Vista, City of Alamosa, Town of Blanca, over La Veta Pass to the Town of La Veta, and to the Town of Walsenburg, is owned by SLRG. (See map – Attachment I—

Petitioner's rail line is depicted in pink and SLRG's in yellow.) The only connection the Petitioner has with SLRG is that Petitioner's rail line connects with it in the Town of South Fork. Petitioner runs no trains or freight on that line nor would it be able to do so without an agreement and appropriate tariff payments to SLRG. More significantly, there is no physical connection between Petitioner's South Fork operation and its Monte Vista operation.

- c. Petitioner owns two adjacent parcels of property in the City of Monte Vista that are the subject of this this case. They are depicted on the Attachment II (which is Exhibit 7 in the Monte Vista municipal court case). Petitioner acquired the southern tract (depicted in pink, Book 518, Pages 1921 – 1922 of the Records of the Rio Grande County Clerk and Recorder) in 2005, in his own name. Petitioner resides in an old commercial/industrial building located on that parcel, which can be seen in Attachment V, Exhibit 8-B, and has placed four old dilapidated rail cars on blocks or rail strips, next to his residence. These were apparently placed prior to the zoning code amendment making the storage of railcars a violation, (even though Petitioner's use of rail car storage in a commercial district was not a permitted use, even at that time) – so Mr. Shank was given the benefit of the

“nonconforming use” provision in the Monte Vista zoning code and found not guilty of that violation. However, Petitioner acquired the northern parcel (depicted in yellow) consisting of 1.84 acres, from SLRG, on March 29, 2005, in the name of an LLC which Mr. Shank had formed and registered as Rio Grande Southern Railway Company, LLC, (RGSR) with the Colorado Secretary of State. Petitioner is the managing member of the LLC. (See Attachment III, Exhibit 4 in the Monte Vista municipal court case.) The northern parcel contained a spur off SLRG’s main line and the ownership of the spur was specifically reserved to SLRG in the deed. (See attachment IV Exhibit B and attachment V, Exhibit 8-C), which shows the spur to the left of the photo as well as the main line of SLRG in in the Center. Nevertheless, Petitioner parked and stored a combination of approximately eleven cars/engines and cabooses on the spur – apparently without the permission of SLRG. The parcel had been utilized as a commercial retail lumber company until its destruction by a fire in 1979, prior to SLRG’s acquisition.

The City of Monte Vista did not attempt to cite the Petitioner with a violation of the cars on the spur since its ordinance was crafted in a

manner to avoid, to the extent possible, any interstate commerce conflicts:

Monte Vista Municipal Code §12-17-110 (3)

“Railcars may not be stored in any residential, industrial or commercial zone of the City when not connected to a rail line.”

Petitioner brought in 17 additional dilapidated rail cars after the amendment to the Monte Vista zoning code prohibiting storage of rail cars and placed them on blocks or rail strips north of the spur. When Petitioner was contacted by the City Code Enforcement Officer and the Chief of Police, Mr. Shank responded that he could do as he wished and that the City was pre-empted from any zoning enforcement against him because Petitioner was a “railroad”.

Attachment V (Exhibits 8 A – N in the municipal court case) demonstrates the storage of the rail cars – which are located in the commercial business zoned district of the City immediately north of the City’s downtown business strip and in the heart of its commercial district.

The zoning regulations were designed to address the health, safety and welfare of citizens of the city and to prevent the type of blight which the Petitioner has created and promoted by the institution and continuation of a wrecking yard in the middle of the City. It is indistinguishable from any other salvage yard except that it is limited to rail cars and parts thereof. Mr. Shank was vague on how many, if any, railcars he has actually rehabilitated in the municipal case and there appears to be no evidence that Petitioner even uses any of the rehabilitated cars on his South Fork – Creede line.

- d. The crux of Petitioner's argument is that he and RGSR leased both the northern and southern parcels of the Monte Vista property to DRGHF, that the DRGHF (South Fork) railroad rehabilitates the old dilapidated rail cars and sells them, that the salvage operation is part of DRGHF's business and that the City of Monte Vista is therefore pre-empted by the ICCTA from enforcing its zoning and nuisance codes against it.

ARGUMENT

The Board has the discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty under 5 U.S.C. 554(e) and 49 U.S.C. 721. *San Luis & Rio Grande Railroad-Petition for a Declaratory Order,*

FD 35380, STB served Aug. 12, 2010. However, the Board will not do so when the law is clear as it is here. *Town of Milford*, FD 34444, STB served Aug. 12, 2004 (cited as *Town of Milford*).

49 U.S.C. 10501 provides that the jurisdiction of the Board over the *transportation by rail carriers* [emphasis supplied] with respect to their services and facilities is exclusive and preempts any other remedies under federal or state law. However, for an entity or an activity to come within the scope of federal preemption two elements must exist. First, the activity must constitute “transportation” as that activity is defined in the ICCTA. Second, the party seeking preemption must be a “rail carrier” as defined in the ICCTA. *James Riffin-Petition for Declaratory Order*, FD 34997, STB slip op. at 5, served May 2, 2008 (cited as *Riffin*) and cases cited therein. DRGHF’s activities in Monte Vista fail both aspects of this test. Accordingly, it has no right to preemption from the otherwise applicable laws of the City.

DRGHF would have the Board believe that it satisfies the first element of the preemption criteria insofar as it is arguably a class III short line railroad due to its ownership of the line between South Fork and Creede. However, to claim preemption agency precedent holds that the petitioning railroad must be engaged in providing rail transportation or activities closely related thereto, not unrelated

matters such as manufacturing or equipment storage. *Town of Milford, supra*, at 2.

Indeed the statute defines "transportation" as including:

a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and services related to that movement. 49 U.S.C. 10102(9).

While Petitioner's facility and activities might superficially appear to fall within the ambit of this provision, they do not involve the movement of passengers or property in any sort of common carrier rail service. Furthermore, the Board has found that to be a carrier, a petitioner must hold itself out to provide for hire transportation to the public for compensation upon reasonable request. *Riffin, supra*, at 1-2. Petitioner's operations between South Fork and Creede appear to entail some sort of excursion service using a crude self propelled vehicle rather than standard railroad equipment. The City also understands that at times Petitioner has allowed individuals access to its lines using self propelled vehicles known as "speeders." By contrast, DRGHF is not conducting any sort of rail service, excursion or otherwise, at Monte Vista. Rather it appears to be using the subject property for storing and perhaps repairing railroad equipment. The facility seems to be a cross between a repair shop and a flea market for railroad equipment. It is unclear whether this facility is even used to repair or store equipment operated on DRGHF's South Fork to Creede line. Moreover, courts have held that

nonrailroads leasing and operating facilities on property owned by and leased from railroads are not entitled to claim any sort of preemption right. *See, Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F3d, 1324, 1327 (11th Cir. 2001), [where the Court used an "economically integral" test (i.e., whether the local regulation impacts the rail carrier in an "an economically meaningful way") to find that the City's regulation of an aggregate distribution business operated by the lessee of a railway was not subject to ICCTA pre-emption].

The situation here does not present the first time the Board has addressed the question of whether an entity storing and perhaps repairing railroad cars and related equipment is entitled to claim preemption. The Board addressed this very issue in a whole series of cases initiated by or involving an individual named James Riffin. *See, Riffin, supra; James Riffin-Petition for Declaratory Order*, FD 35245, STB served Sept. 15, 2009, and *James Riffin-Petition for Declaratory Order*, FD 34997, STB served July 13, 2011 (on remand from the D.C. Circuit).³ These cases appear to be right on point and dispositive of Petitioner's claim. As here, Riffin had acquired through an offer of financial assistance a rail line authorized for abandonment by the Board. He also owned a facility located in Cockeysville, MD, on a noncontiguous rail line that he was attempting to acquire and was seeking a Board ruling that his activities at that facility were preempted

³ Collectively cited as the *Riffin decisions*.

from the application of state and local environmental laws. He had constructed and was using that facility to store some sort of maintenance right of way equipment not unlike what DRGHF seeks to do in Monte Vista. Maryland state and local authorities sought to enjoin Riffin's activities in connection with the construction and operation of the Cockeyville facility until he had obtained the required permits and authorities. Riffin sought a ruling that his status as the owner of a rail line elsewhere in the State preempted the application of state and local laws under the ICCTA. In response the Board denied his requested relief. As pertinent here, the Board ruled that:

- To be a carrier entitled to preemption, a petitioner must hold himself out to provide for hire transportation to the public for compensation upon reasonable request;
- To come within the Board's jurisdiction entitling it to claim preemption an entity's activity must constitute "transportation" and be performed by or under the auspices of a "rail carrier;"
- Transportation is defined to include a facility related to the movement of property by rail and the facility must be closely related to and part of a railroad's ability to provide direct rail service;
- The fact that the petitioner might be a carrier at another, disconnected location does not render it a railroad elsewhere if it could not operate as a

rail carrier on the subject line. If anything, The Board regarded Riffin as a mere "shipper" at Cockeysville;

See, the Riffin Decisions.

Even assuming that DRGHF's activities could be seen in some far fetched way to constitute some sort of "transportation by a rail carrier" and therefore entitled to preemption, that relief would still not be available here. The Board has long taken the position that certain types of state and local regulation involving public health and safety are not preempted. The critical distinction as to what may or may not be preempted is whether the law at issue is being applied so that it restricts a railroad from conducting its common carrier operations or unreasonably burdens interstate commerce. *Joint Petition for Declaratory Order-Boston and Maine Corporation And Town of Ayer, MA*, FD 33971, STB served May 1, 2001. The Courts having held that a "state" law that affects rail carriage survives preemption if it does not discriminate against rail carriage and does not unreasonably burden rail carriage. "State" regulations do not discriminate against rail carriers if they "address state concerns generally, without targeting the railroad industry". *New York Susquehanna & W. Ry. Corp v. Jackson*, 500 F3d 238, 242 (3rd Cir. 2007).

In *Williams Rail Service, LLC v. Steward*, 2007 WL 2471198 (D.C., SC Spartanburg Div., 2007), the Court stated that when the state's police power is

involved, federal pre-emption is not presumed. Where the state acts "in a field which the states have traditionally occupied, the Court will retain the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." The Court looks at the text, the legislative history and the purpose of the ICCTA. The statute provides that "express preemption applies only to state laws with respect to regulation of rail transportation ... thus, electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, nondiscriminatory regulations and permit requirements would seem to withstand preemption" *Id.*

In a similar manner the U.S. Court of Appeals, Third Circuit stated "...we agree that a state law that affects rail carriage survives pre-emption if it does not discriminate against rail carriage and does not unreasonably burden rail carriage" (*New York Susquehanna and Western RG Corp. v. Jackson*, 500 F3d 238 US Ct App 3'd Cir. 2007).

Finally, the U.S. Court of Appeals for the Tenth Circuit has stated that the "preemption analysis starts with the assumption that the historic police powers of the State are not to be superseded by ... Federal Act unless that is the clear and manifest purpose of Congress. Accordingly, the purpose of Congress is the ultimate touchstone of pre-emption analysis". *Emersen v. Kansas City Southern*

Ry. Co., 503 F3d 1126 (2007). Whether a state's regulation is pre-empted by the ICCTA requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation. State and local regulation that affects railroad property that does not interfere with interstate rail operations is not "conflict pre-empted" by ICCTA; localities retain certain police powers to protect public health and safety. *Id.*

CONCLUSION

If the Petitioner were a rail carrier transporting persons and/or property along an interstate rail line and the city was attempting to curtail his activities along that line by zoning into his right-of-way and if that zoning had the effect of an "economic regulation" of his railroad, then he would at least have an argument as to whether federal pre-emption applies. That is not the situation in the case before this agency.

1. Petitioner's Monte Vista operation is not even connected-physically or otherwise to its South Fork operation. It is broken into two parcels both being in the area of 20 North Broadway in the middle of the City. Other than its claim of a "lease" to DRGHF, the Petitioner cannot even make a claim of connection with a railroad for the southern tract-which is owned by him individually. Petitioner is in no different position from any other citizen who decides to store rail cars on his property. The northern parcel, placed into the

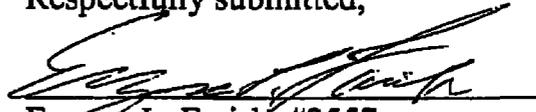
name of the Rio Grande Southern RR Co. LLC, is the location where it has stored the majority of its dilapidated rail cars and old passenger cars. There is no indication that this company is anything other than a "shell" LLC incorporated by Petitioner. In any event it does not own the rail siding because it is owned by SLRG. In fact the Petitioner does not even own the spur of railroad onto its property from that line-as is evident from the deed.

2. Petitioner's operation is simply a train wrecking yard or "salvage yard" more akin to an auto salvage yard than to any railroad operation. It even has to transport the cars to the property by flatbed vehicle and crane and remove them in the same manner.
3. Petitioner's claim to be operating as a rail carrier in the Monte Vista facility appears without merit. Even if it were operating as a rail carrier it is likely that this type of operation Petitioner is conducting would not be pre-empted by the provisions of the ICCTA.
4. Monte Vista's zoning and nuisance regulations are an exercise of the traditional "police powers" of a municipality. *Rademon v. City and County of Denver*, 186 Colo 250, 526 P2d 1325 (1974), *Flinn v. Treadwell*, 120 Colo 117, 207 P2d 967 (1949); *Wilkin Homes Inc. v. City and County of Denver*, 31 Colo App 410, 504 P2d 1121 (1972), C.R.S. § 31-15-401 (l)(c)

and deemed "necessary to public health and safety" (Monte Vista Ordinance 796 § 4, Health & Safety Clause.)

5. The City's exercise of its zoning and nuisance ordinances has no direct effect on interstate commerce and if there is any collateral effect it is certainly not of the type visualized by the purposes of the ICCTA.
6. The City requests that the Board deny the issuance of a *Declaratory Order*, in the form requested by Petitioner, and find that the City of Monte Vista is not pre-empted from enforcing its zoning regulations concerning Petitioner's salvage/rehab operation under the circumstances set forth in this case.

Respectfully submitted,

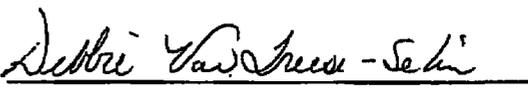

Eugene L. Farish, #2557
Attorney for the City of Monte Vista

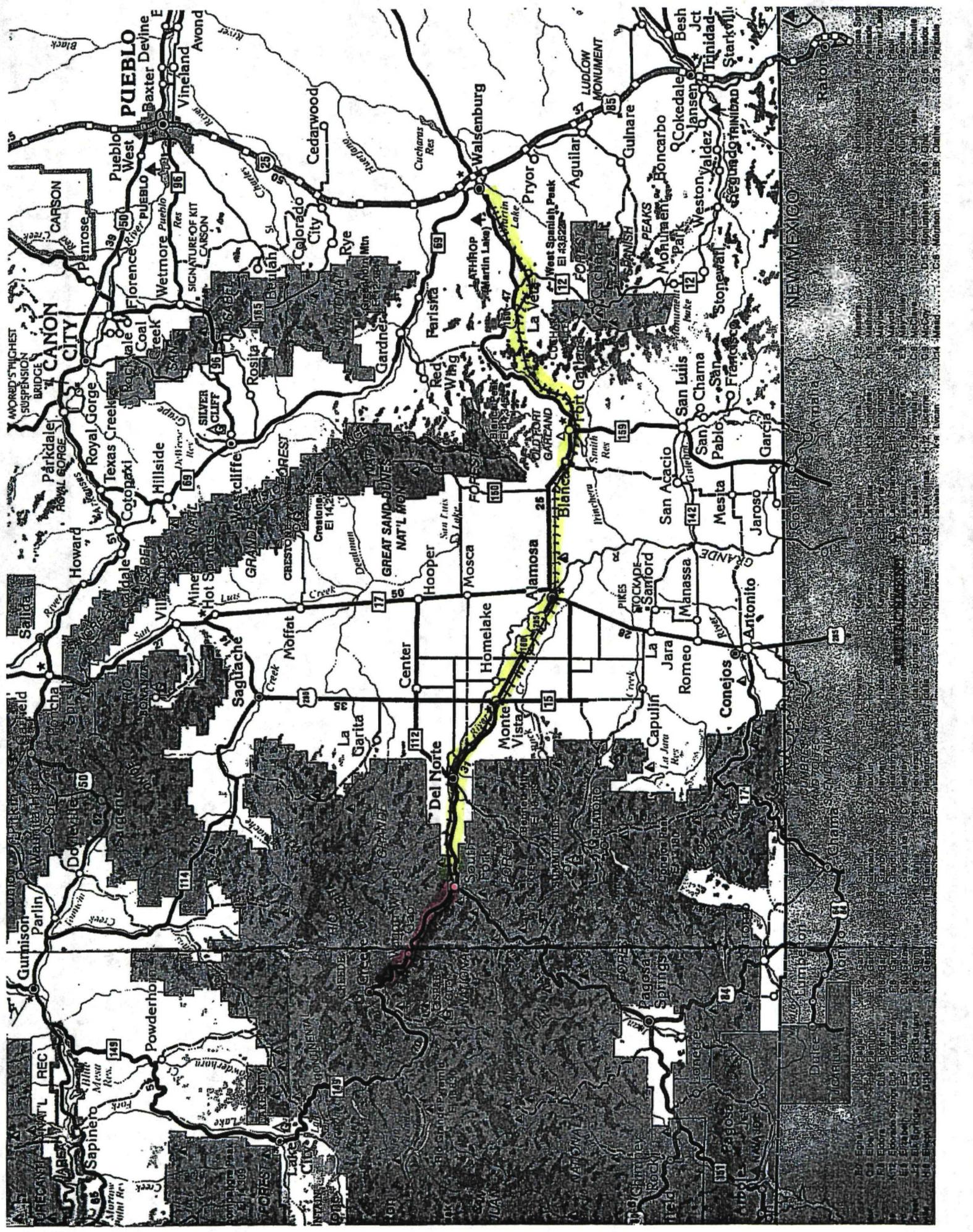
CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2011, I mailed a copy of the foregoing, *Response to Petition for Declaratory Order to Participate*, by United States mail, postage prepaid, to:

Donald H. Shank
Denver & Rio Grande Railway
Historic Foundation
20 N Broadway St.
Monte Vista, CO 81144

John D. Heffner
John D. Heffner, PLLC
1750 K Street, NW, Ste.200
Washington, DC 20006


Debbie Van Treese-Selin



NEW MEXICO

LEGEND

PEAKS
 1000' - 10,000' ...
 10,000' - 15,000' ...
 15,000' - 20,000' ...
 20,000' - 25,000' ...
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WATER
 Lakes ...
 Rivers ...
 Creeks ...
 Swamps ...
 Wetlands ...

ROADS
 Interstate ...
 State ...
 County ...
 Local ...

BOUNDARIES
 County ...
 State ...
 National ...

OTHER
 Railroads ...
 Airports ...
 Camps ...
 Forts ...
 Monuments ...
 Cemeteries ...
 Schools ...
 Churches ...
 Public Buildings ...
 Parks ...
 Reservoirs ...
 Dams ...
 Power Plants ...
 Mines ...
 Quarries ...
 Oil Wells ...
 Gas Wells ...
 Geothermal ...
 Wind ...
 Solar ...
 Hydro ...
 Nuclear ...
 Coal ...
 Oil ...
 Gas ...
 Uranium ...
 Silver ...
 Gold ...
 Copper ...
 Iron ...
 Lead ...
 Zinc ...
 Nickel ...
 Cobalt ...
 Manganese ...
 Potash ...
 Boron ...
 Phosphorus ...
 Sulfur ...
 Selenium ...
 Tellurium ...
 Vanadium ...
 Chromium ...
 Molybdenum ...
 Niobium ...
 Rhenium ...
 Ruthenium ...
 Rhodium ...
 Palladium ...
 Silver ...
 Cadmium ...
 Indium ...
 Tin ...
 Antimony ...
 Bismuth ...
 Polonium ...
 Astatine ...
 Francium ...
 Radium ...
 Actinium ...
 Thorium ...
 Protactinium ...
 Uranium ...
 Neptunium ...
 Plutonium ...
 Americium ...
 Curium ...
 Berkelium ...
 Californium ...
 Einsteinium ...
 Fermium ...
 Mendelevium ...
 Nobelium ...
 Lawrencium ...
 Rutherfordium ...
 Dubnium ...
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 Copernicium ...
 Tennessine ...
 Oganesson ...

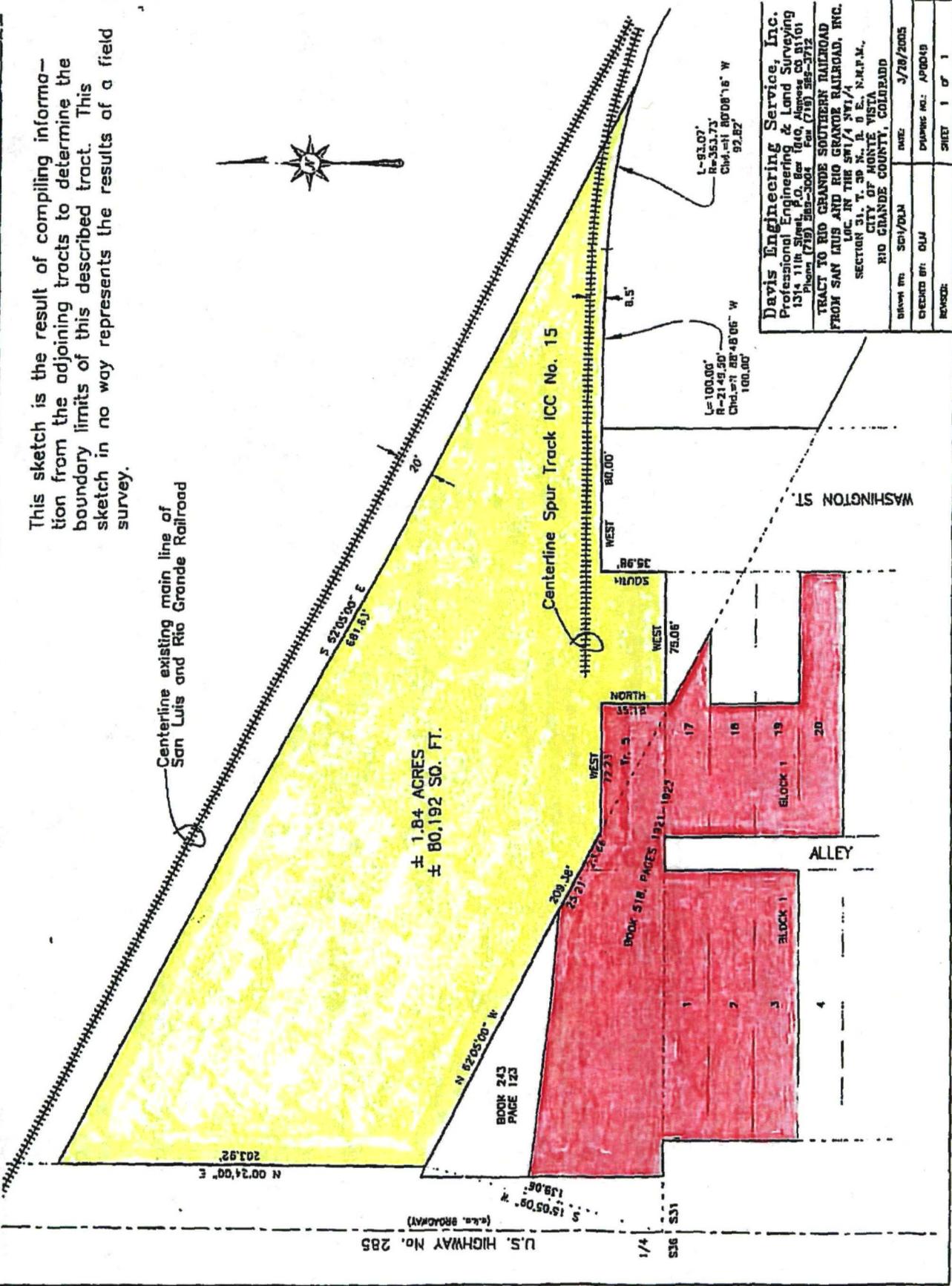
ATTACHMENT II

7 LIBIRH3

Sent By: Davis Engineering

This sketch is the result of compiling information from the adjoining tracts to determine the boundary limits of this described tract. This sketch in no way represents the results of a field survey.

Centerline existing main line of San Luis and Rio Grande Railroad



| | |
|--|----------------------|
| Davis Engineering Service, Inc. Professional Engineering & Land Surveying 1314 11th Street, P.O. Box 1040, Alamosa, CO 81101 Phone: (719) 585-3004 Fax: (719) 585-3712 | |
| TRACT TO RIO GRANDE SOUTHERN RAILROAD FROM SAN LUIS AND RIO GRANDE RAILROAD, INC. SECTION 31, T. 50 N., R. 8 E., N.M.P.M., CITY OF MONTE VISTA, RIO GRANDE COUNTY, COLORADO | |
| DRAWN BY: SCV/DLN | DATE: 3/28/2005 |
| CHECKED BY: DLJ | PLOTTING NO.: AP0049 |
| REVISION: | SHEET 1 OF 1 |

MAIL TO:
Colorado Secretary of State
Corporations Office
1560 Broadway, Suite 200
Denver, Colorado 80202
(303) 894-2251

Total Fees: \$50.00
Submit original and
one copy
Must be Typewritten

961141732 M \$50.00
SECRETARY OF STATE
10-30-96 14:06

ARTICLES OF ORGANIZATION

I/we the undersigned natural person(s) of the age of eighteen years or more, acting as organizer(s) of a limited liability company under the Colorado Limited Liability Company Act, adopt the following Articles of Organization for such limited liability company:

FIRST: The name of the limited liability company is Rio Grande Southern Railroad Company, L.L.C.

SECOND: The period of duration is 30 years. (Not to exceed 30)

THIRD: The limited liability company is organized for Any Legal and Lawful Purpose Pursuant to the Colorado Limited Liability Company Act. A more specific purpose may be stated: This limited liability company is organized for any and all lawful purposes.

FOURTH: The street address of the initial registered office of the limited liability company is:

736 Main Avenue, Suite 219, Durango, Colorado 81301
and the mailing address (if different from above) of the initial registered office of the limited liability company is:

see above

and the name of the initial registered agent is Donald Shank

FIFTH: The names and business addresses of the initial manager or managers are:

| NAME | ADDRESS (include zip code) |
|---------------------|--|
| <u>Donald Shank</u> | <u>736 Main Avenue, Suite 219, Durango, CO 81301</u> |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

SIXTH: The name and address of each organizer is:

| NAME | ADDRESS (include zip code) |
|------------------------|--|
| <u>Donald H. Shank</u> | <u>736 Main Avenue, Suite 211, Durango, CO 81301</u> |

Signed *Donald H. Shank* Signed _____

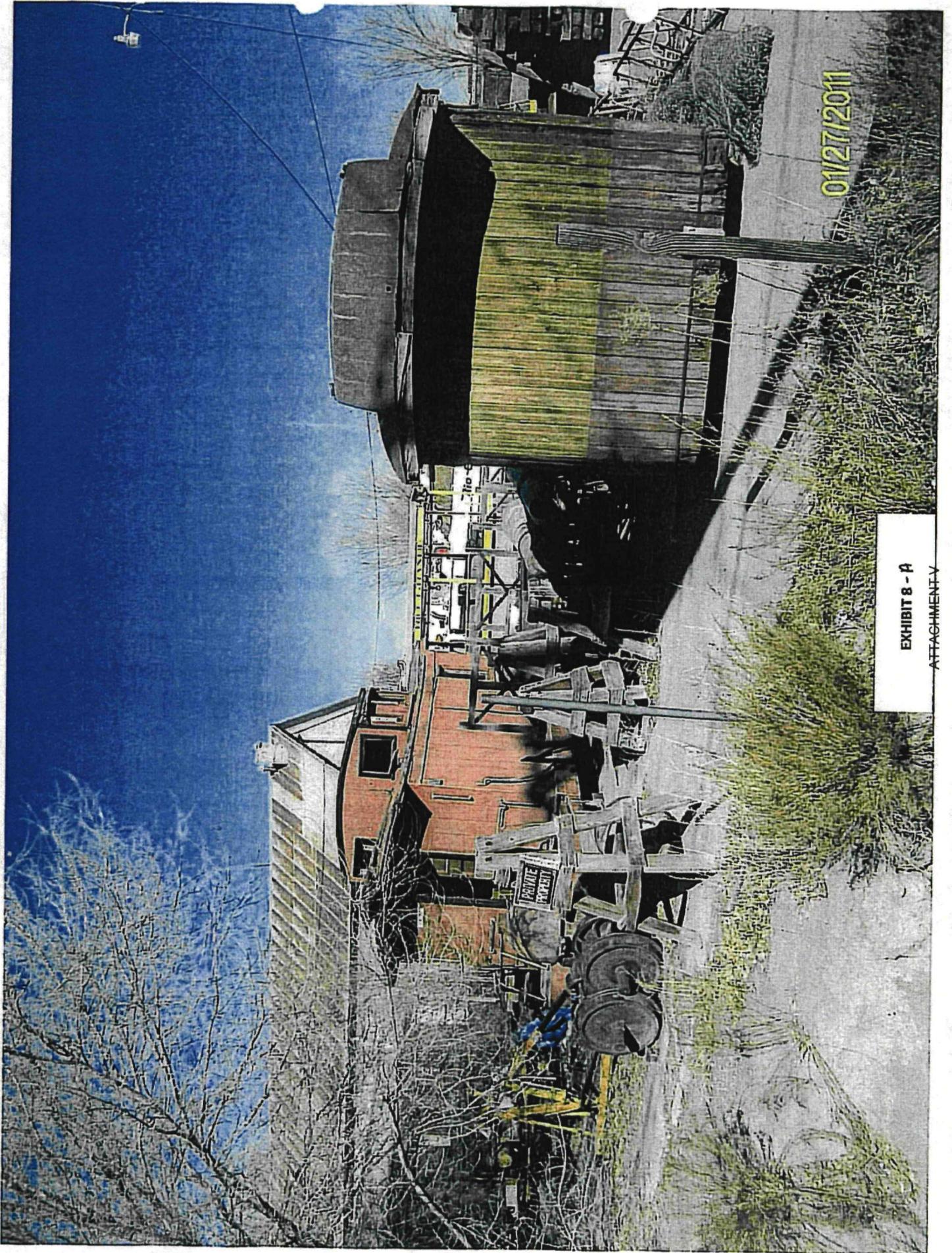
STATE OF COLORADO)
)ss:
County of La Plata)

Subscribed and sworn to before me this 29 day of October, 1996 by Donald H. Shank, Organizer and Registered Agent. Witness my hand and Official Seal.

My Commission expires: 4.20.98

Terri Cleland
Notary Public

ESD



01/27/2011

EXHIBIT 8 - A
ATTACHMENT

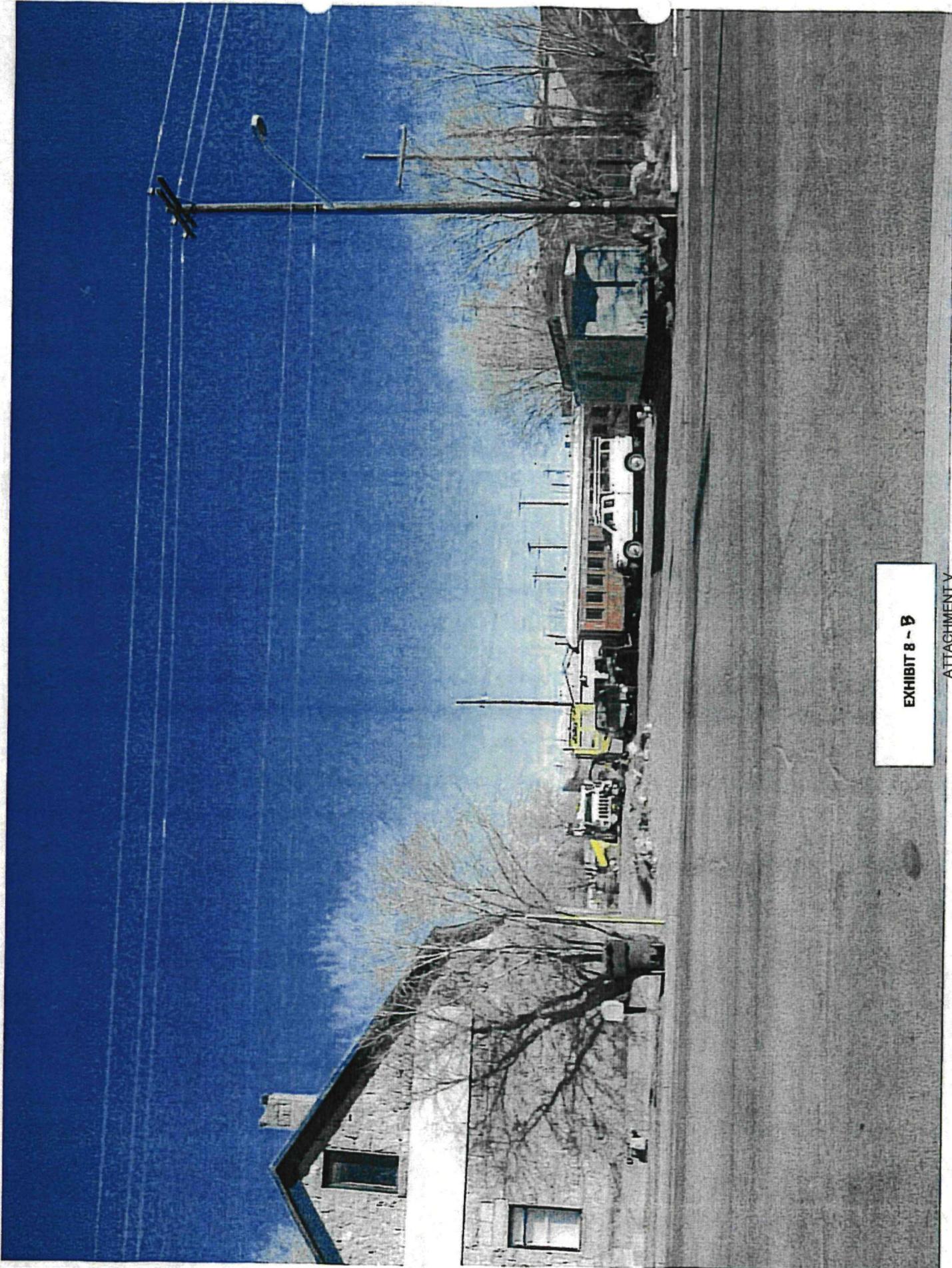


EXHIBIT 8 - B

ATTACHMENT V



EXHIBIT 8 - C
ATTACHMENT

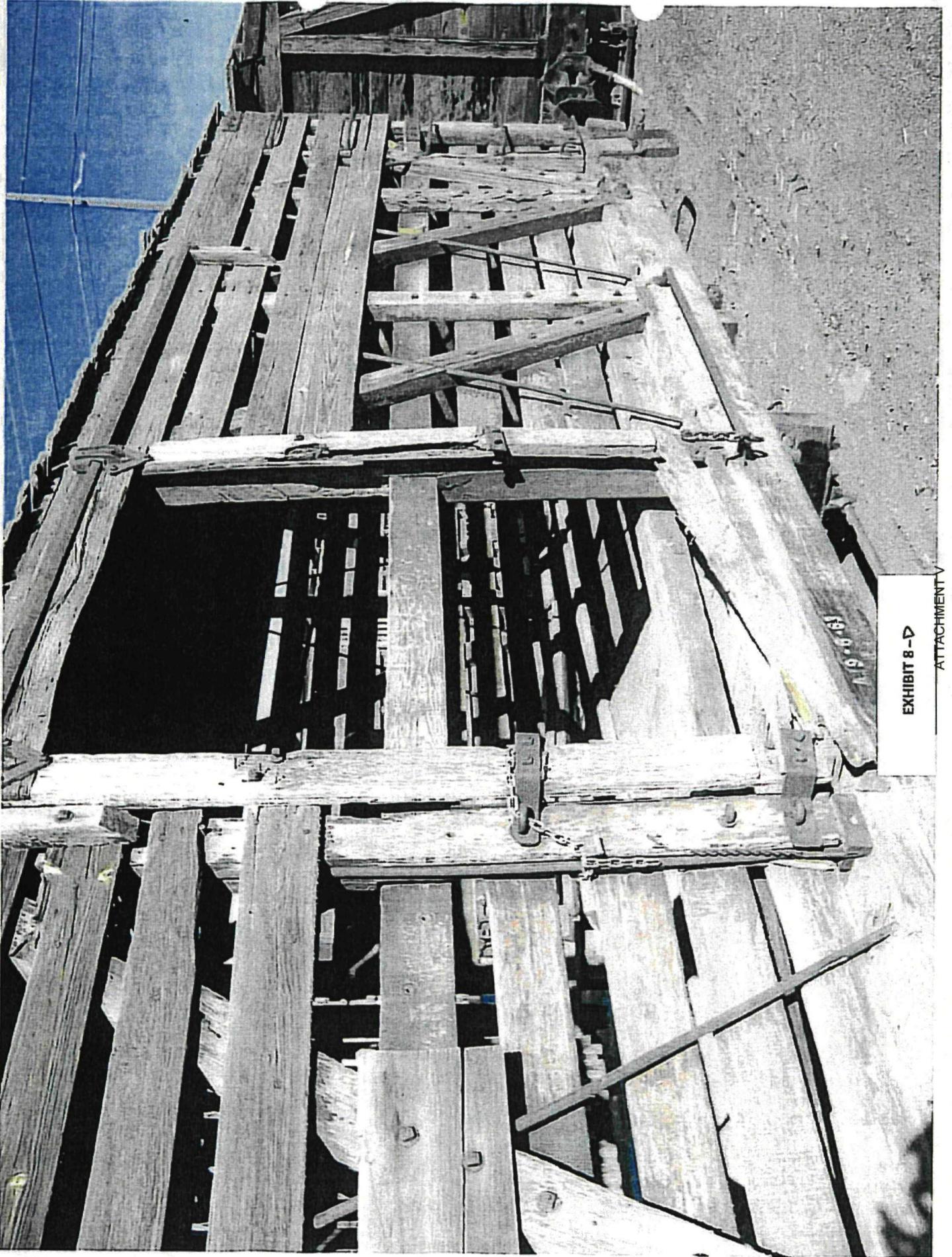
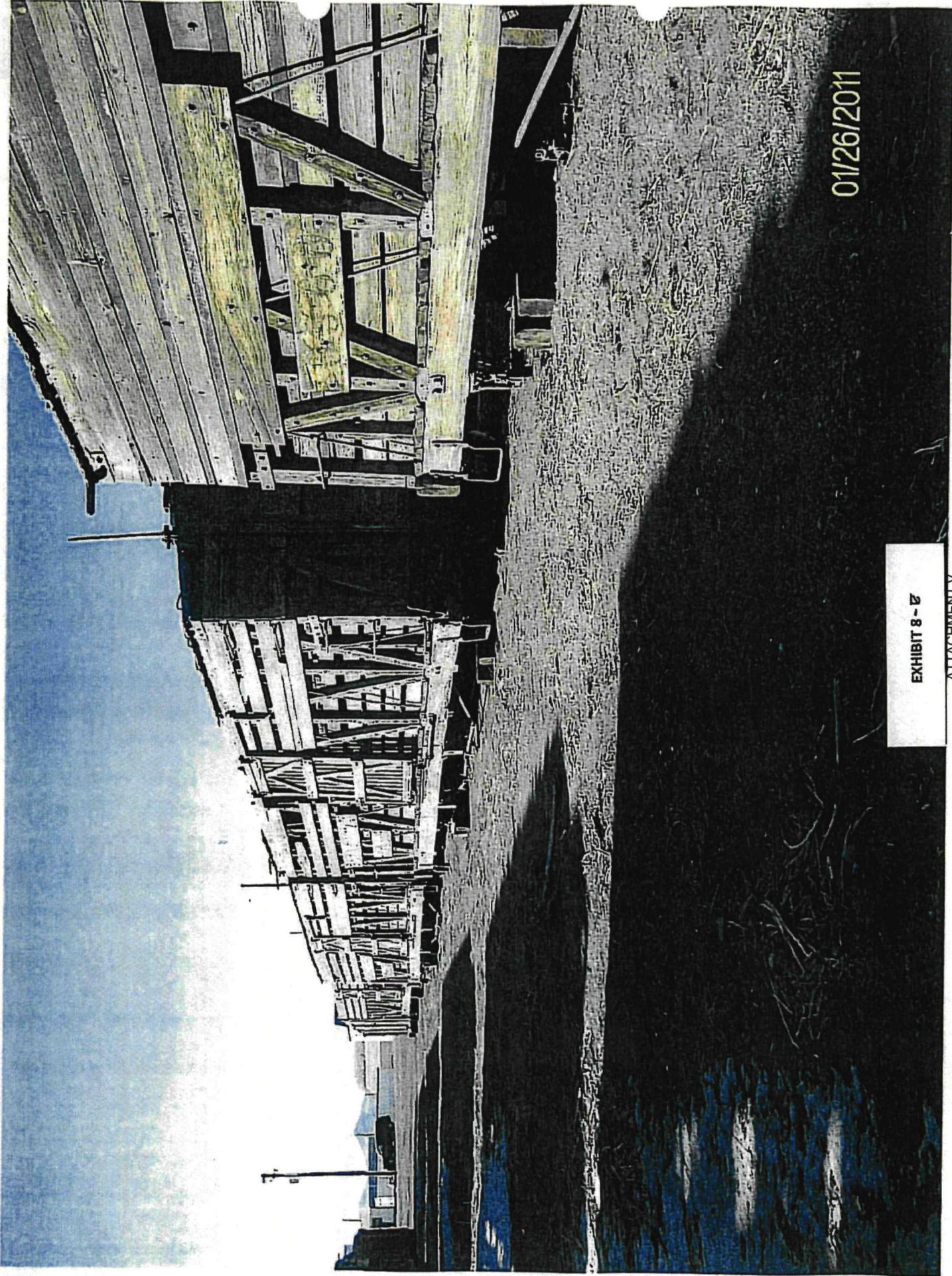


EXHIBIT 8-D

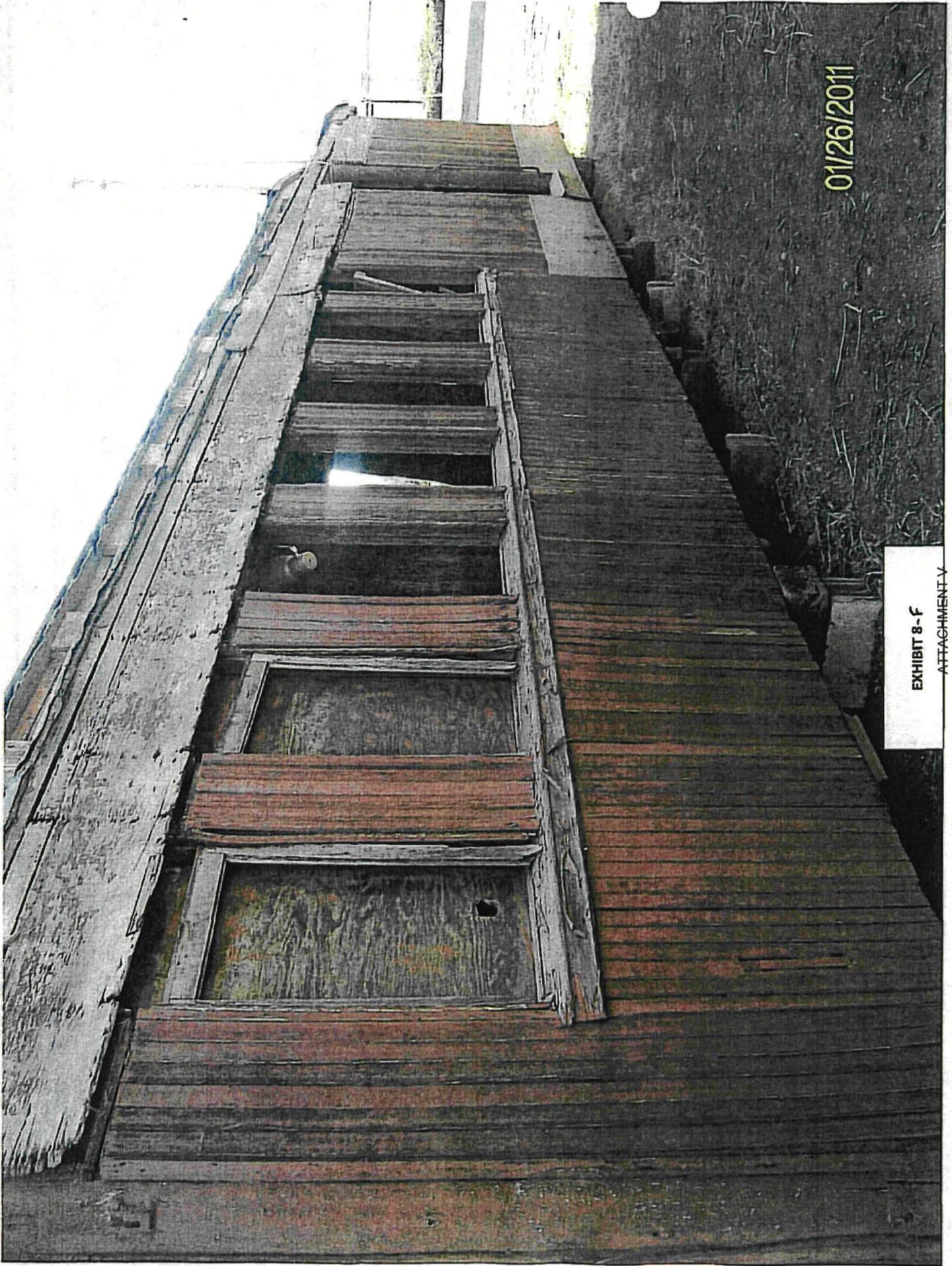
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01/26/2011

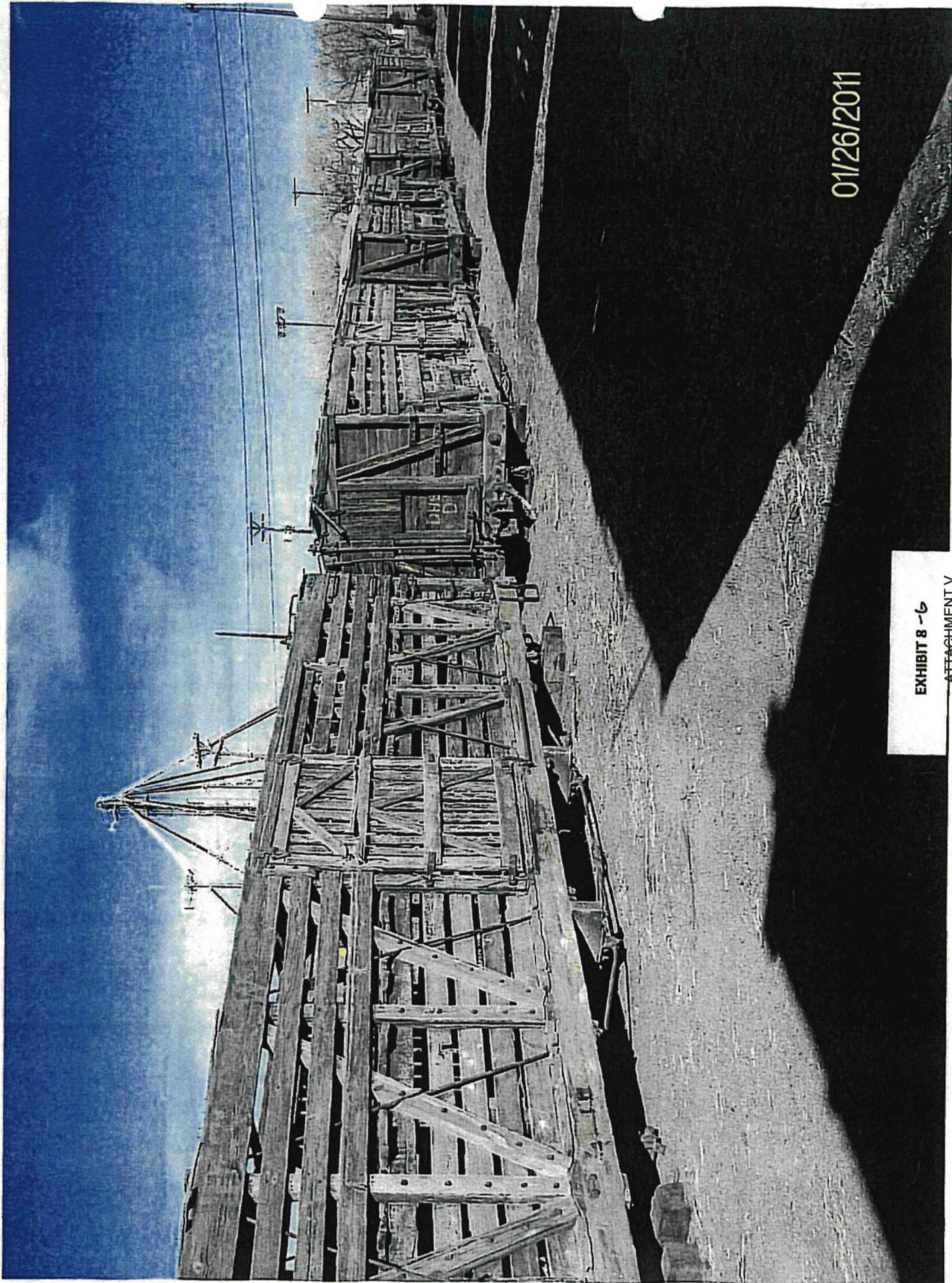
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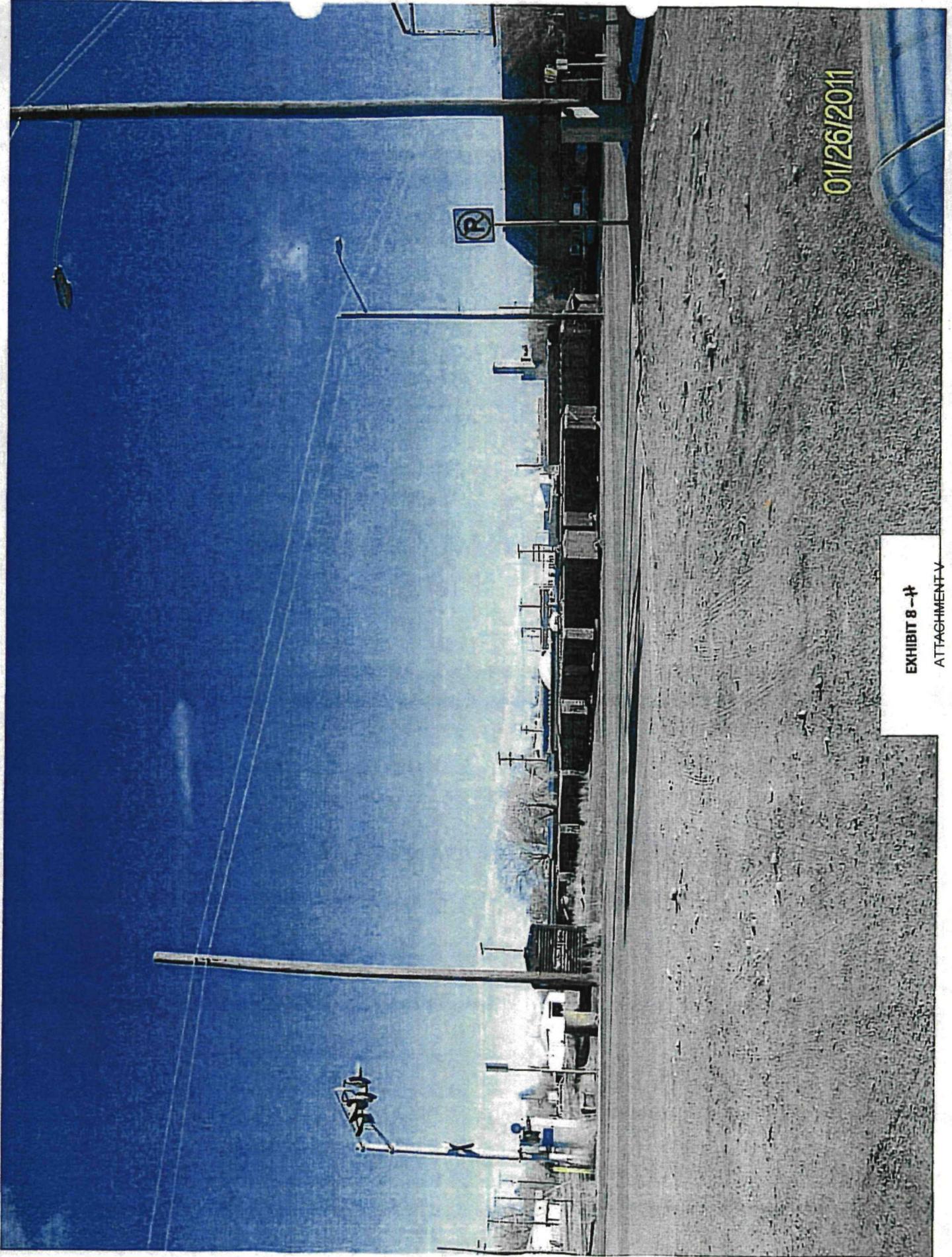
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01/26/2011

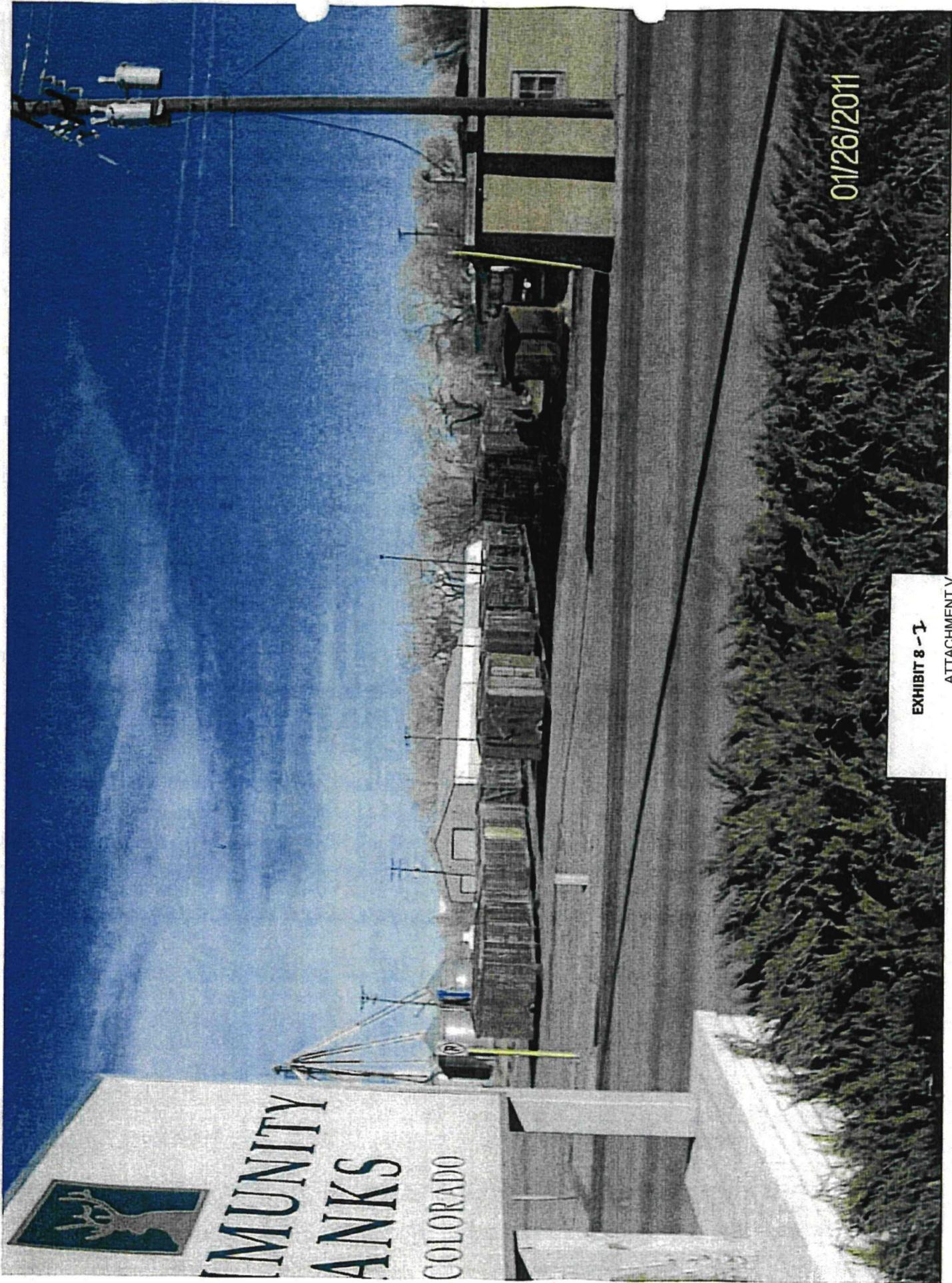
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01/26/2011

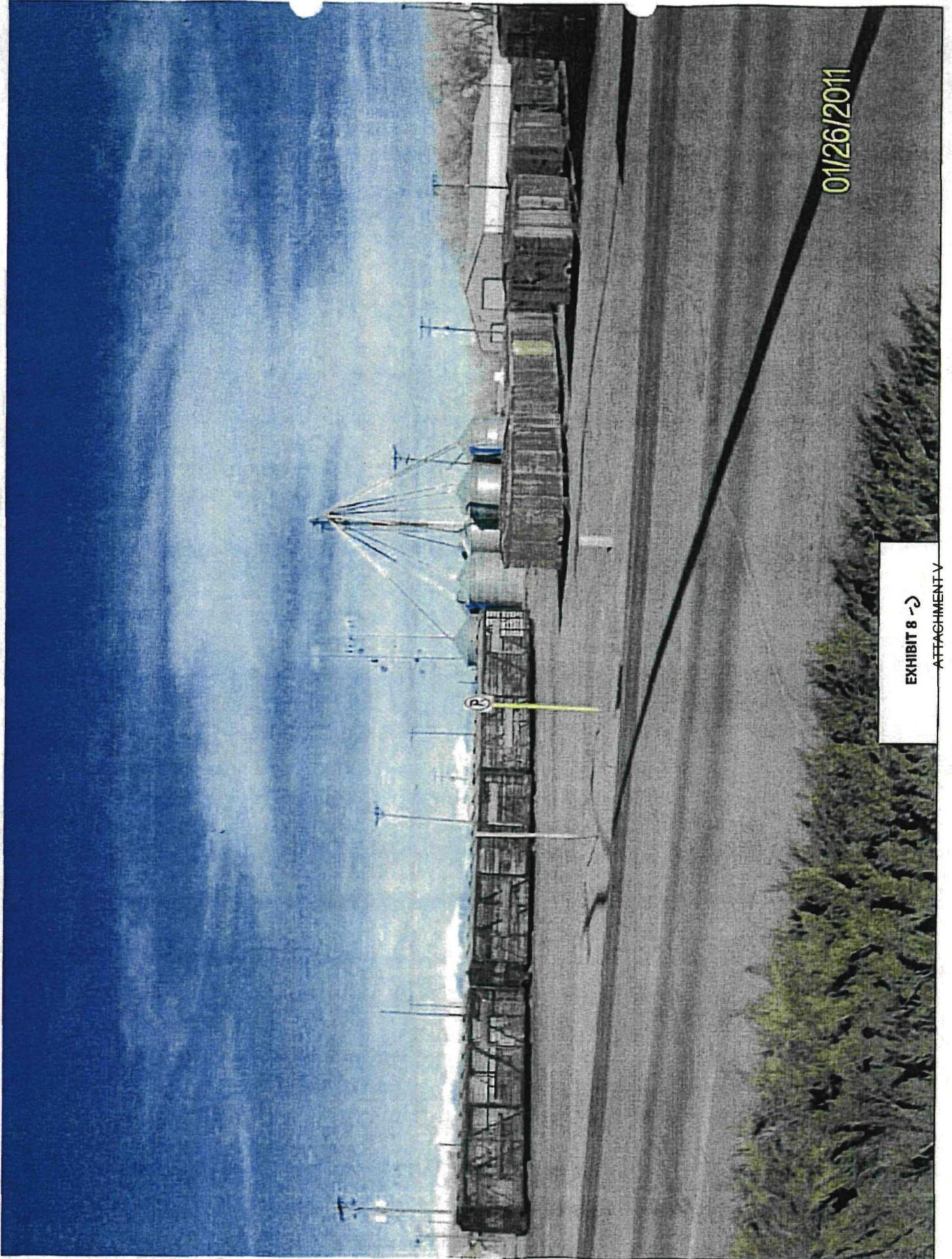
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01/26/2011

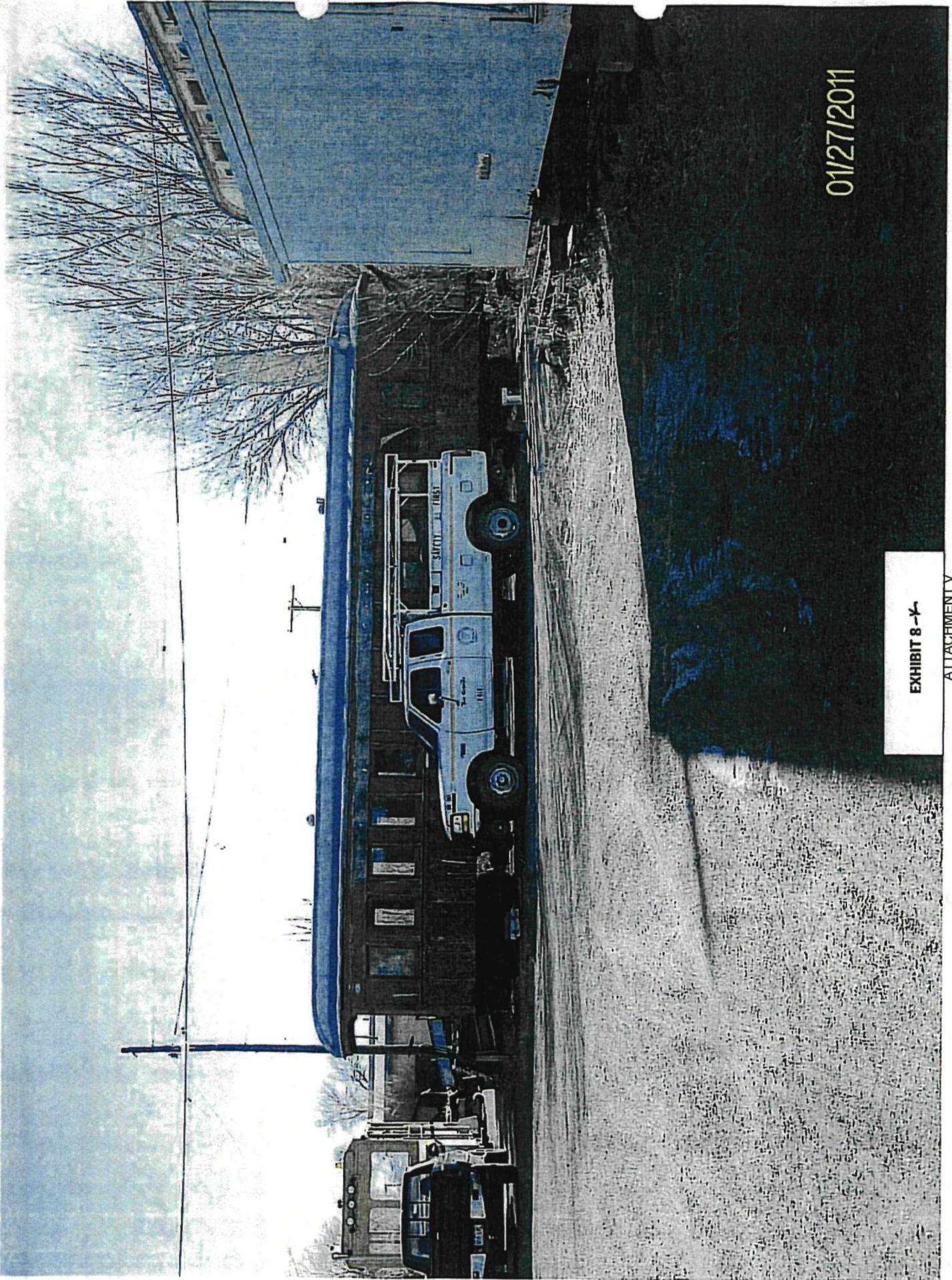
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ATTACHMENT V



01/26/2011

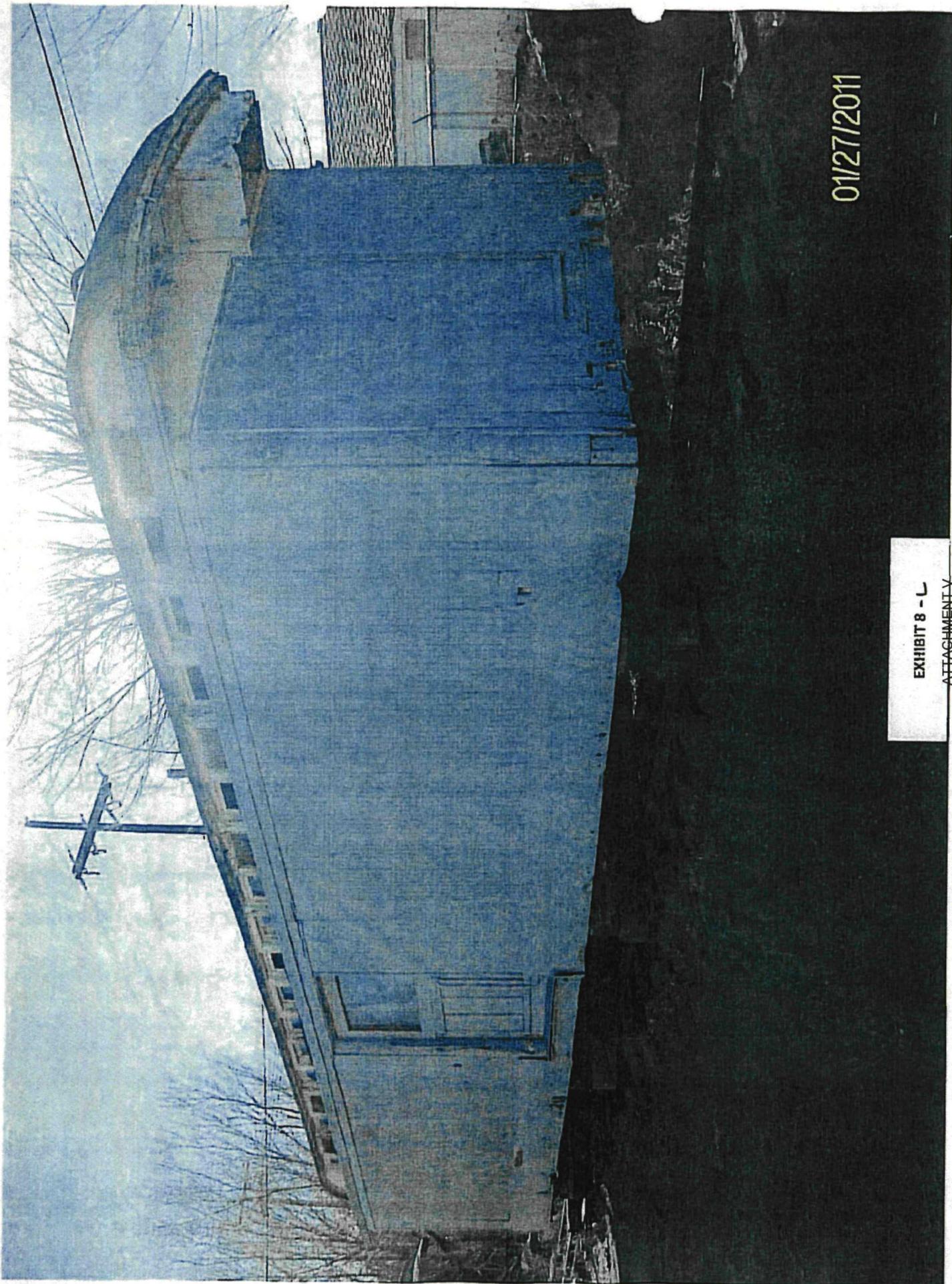
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01/27/2011

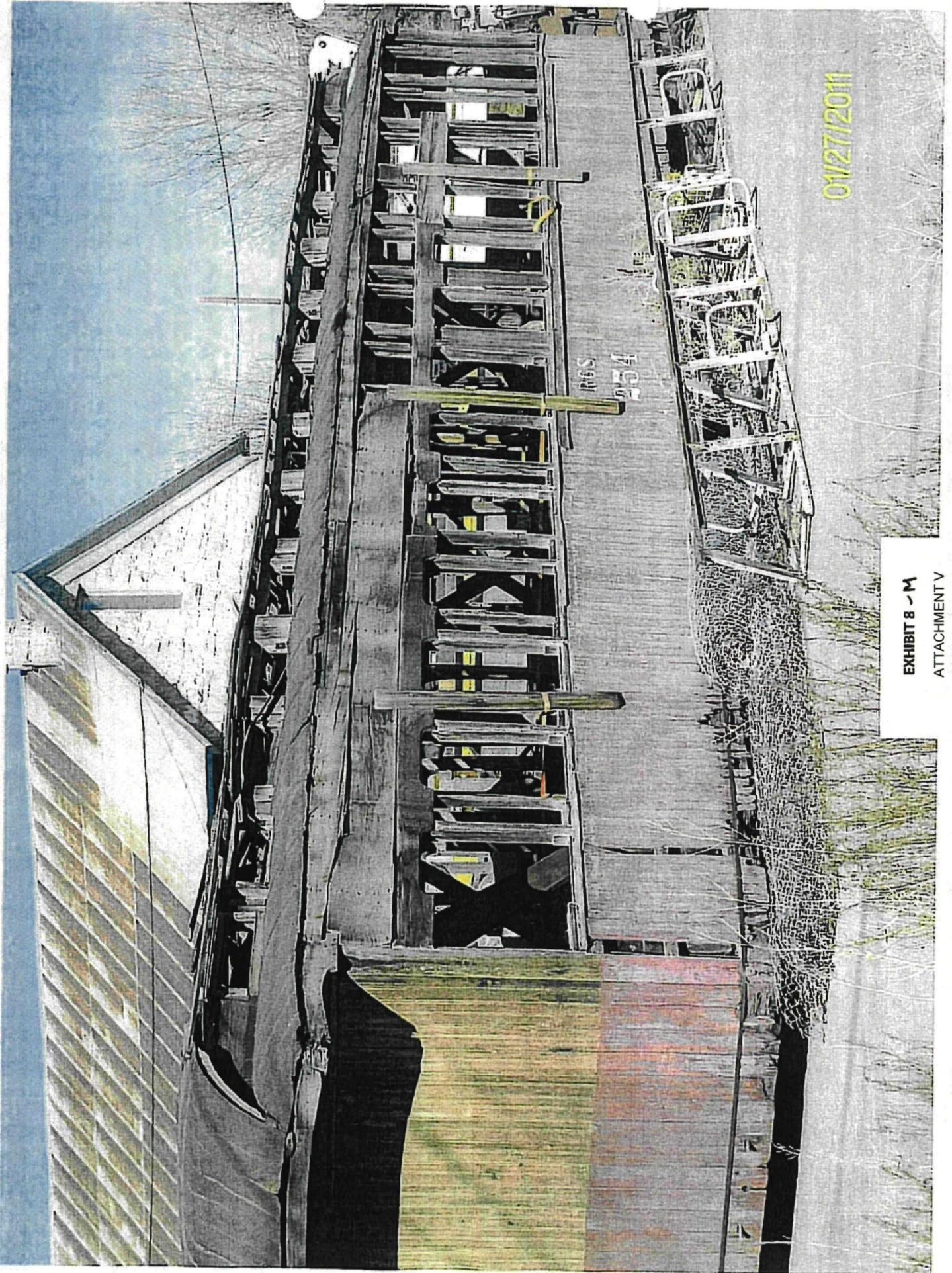
EXHIBIT 8-4

ATTACHMENT V



01/27/2011

EXHIBIT 8 - L
ATTACHMENT Y



01/27/2011

EXHIBIT 8 - M
ATTACHMENT V

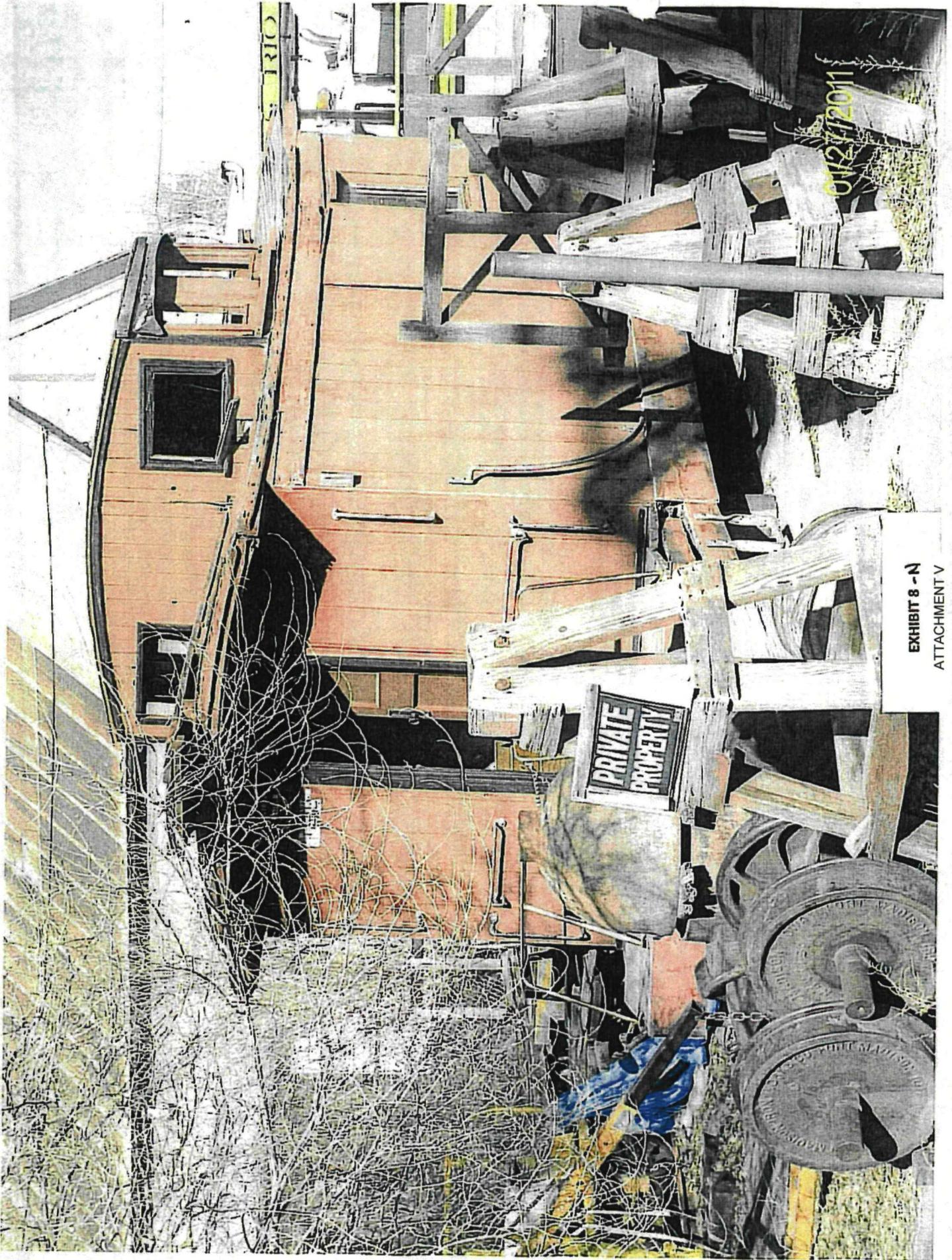


EXHIBIT 8 - N
ATTACHMENT V

QUITCLAIM DEED

THIS INDENTURE WITNESSETH, That SAN LUIS & RIO GRANDE RAILROAD, INC., a Delaware corporation, ("Grantor") having a mailing address of 601 State Street, Alamosa, Colorado 81101, Releases and Quit-Claims to RIO GRANDE SOUTHERN RAILROAD COMPANY, LLC, a Colorado corporation, whose address is 20 N. Broadway, Monte Vista, Colorado 8114, ("Grantee"), for and in consideration of Ten and No/100 Dollars (\$10.00) and other good and valuable consideration, the receipt whereof is hereby acknowledged, all of its right, title and interest in and to all of that certain real property situated in Monte Vista, County of Rio Grande, State of Colorado, as more particularly described in the Exhibit "A" attached and hereby made a part hereof, (the "Premises"), subject to all covenants, leases, licenses, conditions, restrictions, exceptions, easements, rights-of-way, rights-of-access, agreements, reservations, encumbrances, liens and other matters whether of record or not; any matters which would be disclosed by survey, investigation or inquiry; and any tax, assessment or other governmental lien against the Premises, together with all buildings, structures and improvements, and all and singular the rights, alleys, ways, waters, privileges, hereditaments and appurtenances to the Premises belonging or in anyway incident or appertaining (other than Excepted or Reserved herein).

RESERVING unto Grantor, and Grantor's lessees, licensees, designees, successors, and assigns, the ownership of all existing railroad signal and communications equipment, railroad crossing warning and protection devices, poles, cables and other ancillary facilities located above, below and upon the Premises (hereinafter collectively referred to as the "Equipment"), along with an exclusive easement for the benefit of Grantor, and Grantor's lessees, licensees, designees, successors, and assigns over, above, upon and across the Premises for the operation, use, installation, maintenance, relocation repair, and removal of Equipment.

AND FURTHER RESERVING unto Grantor, and its lessees, licensees, designees, successors, and assigns, the ownership of all track and other track materials located within the boundaries of the Premises, along with an exclusive easement for railroad operating purposes over a 30-foot wide strip of land measured 15 feet in each direction from the centerline of existing trackage located within the boundaries of the Premises. Said easement will terminate and all title in the easement area vest in Grantee in the event all railroad trackage and track material within the easement area is removed by Grantor.

Said property being a part of the same property conveyed by Union Pacific Railroad Company to San Luis & Rio Grande Railroad, Inc. by deed dated June 27, 2003 and recorded among the land records of Rio Grande County, Colorado on July 3, 2003, Book 509, Page 163 (hereinafter "Prior Deed").

SUBJECT TO any existing encumbrances which may or may not be revealed by an inspection of the Premises, all existing roads and public utilities; reservations, exceptions, easements and restrictions, both of record and not of record; any applicable laws; taxes and assessments, both general and special, which become due and payable after the date of conveyance and which Grantee assumes and agrees to pay.

AND, FURTHER SUBJECT TO those specific reservations, conditions and/or exceptions made by and in favor of Union Pacific Railroad Company, its successors and assigns, in the Prior Deed, which may affect the hereinbefore described portion of the properties conveyed therein and thereby.

TO HAVE AND TO HOLD the same unto Grantee and Grantee's heirs, successors and assigns forever.

Grantee acknowledges that Grantor is operating (and will continue to operate) a railroad upon its adjoining property, and recognizes that such operation may create some noises and vibrations affecting the Premises. Grantee accepts the Premises subject to such noises and vibrations, and hereby covenants to release Grantor from all liability, cost and expense resulting therefrom.

Grantee, by the acceptance hereof, hereby covenants and agrees with Grantor that Grantor shall not: be required to erect or maintain any fences, railings or guard rails along any boundary lines between the Premises and the adjacent land(s) of Grantor or of any other company affiliated with Grantor; or be liable for or required to pay any part of the cost or expense of erecting or maintaining such fences, railings or guard rails or any part hereof; or be liable for any damage, loss or injury that may result by reason of the nonexistence or the condition of any fences, railings or guard rails or the absence thereof. Grantee covenants and agrees that it shall erect and forever maintain a fence along the northern (trackside) boundary of the Premises, said fence or barricade to be subject to the approval of Grantor.

Grantee, by the acceptance hereof, hereby covenants that it, its successors, heirs, legal representatives or assigns, shall maintain the existing drainage on the Premises in such a manner as to not impair adjacent railroad right-of-way drainage and to not redirect or increase the quantity or velocity of surface water runoff or any streams into said Grantor's drainage system or upon the right-of-way or other lands and facilities of Grantor. If said Premises or existing drainage are modified or improved, Grantee agrees to construct and maintain, in accordance with all applicable statutes, ordinances, building and subdivision

codes, covenants and restrictions, an adequate drainage system from the Premises to the nearest public or non-Grantor owned drainage or storm sewer system, in order to prevent the discharge of roof, surface, stream and other drainage waters upon said right-of-way or upon other adjacent lands and facilities of Grantor.

Grantee, by the acceptance hereof, expressly acknowledges that Grantee is buying the Premises in an "AS IS" condition and that Grantee has relied upon its own independent investigation of the physical condition of the Premises. Grantee hereby releases Grantor and Grantor's shareholders, officers, directors, agents and employees from all responsibility and liability regarding the condition (including, but not limited to, the physical condition or presence of hazardous materials), valuation or utility of the Premises.

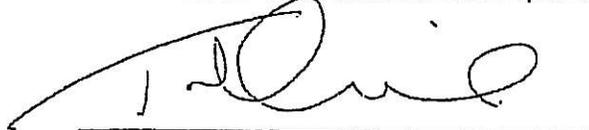
The above covenants shall run with the title to the Premises conveyed, and bind upon the Grantee, Grantee's heirs, legal representatives and assigns, or corporate successors and assigns, and anyone claiming title to or holding Premises through Grantee.

Send tax statements to: Rio Grande Southern Railroad Company, LLC
 20 N. Broadway
 Monte Vista, Colorado 81144

In construing this Deed and where the context so requires, the singular includes the plural, and all grammatical changes shall be implied to make the provisions hereof apply equally to corporations and individuals.

In Witness Whereof, the said SAN LUIS & RIO GRANDE RAILROAD, INC. has hereunto set its seal, effective the 29th day of March, 2005.

SAN LUIS & RIO GRANDE RAILROAD, INC.



Todd N. Cecil
Vice President

(Notary acknowledgment on following page)