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**ATTORNEYS FOR PLAINTIFFS**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

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**AMERICAN ATHEISTS, INC.**, a Texas :  
non-profit corporation; **R. ANDREWS,** :  
**S. CLARK** and **M. RIVERS,** : Case No. 02:05-CV-00994 DS  
 :  
    Plaintiffs, : **MEMORANDUM RE:**  
 : **MOTION FOR PARTIAL**  
vs. : **SUMMARY JUDGMENT**  
 : **RE: CHRISTIAN CROSS AS**  
 : **RELIGIOUS SYMBOL**  
**COLONEL SCOTT T. DUNCAN,** :  
Superintendent, Utah Highway Patrol; :  
**JOHN NJORD,** Executive Director, :  
Utah Department of Transportation; :  
**D'ARCY PIGNANELLI,** Executive Director, : (Judge David Sam)  
Department of Administrative Services; and, :  
**F. KEITH STEPAN,** Director :  
Division of Facilities Construction and Management :  
Department of Administrative Services, :  
 :  
    Defendants. :  
**UTAH HIGHWAY PATROL ASSOCIATION,** :  
 :  
    Defendant/Intervener :

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PLAINTIFFS, by and through counsel, have moved this Court to grant a partial summary judgment pursuant to Rule 56(a), (c) & (d), Fed. R. Civ. Pro. This motion is based upon the facts and record in this case and is supported by this memorandum of points and authorities.

### **STANDARD FOR REVIEW**

A district court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); Nelson v. Geringer, 295 F.3d 1082, 1086 (10<sup>th</sup> Cir. 2002).

"An issue of material fact is genuine if a reasonable jury could return a verdict for the non-movant." Jenkins v. Wood, 81 F.3d 988, 990 (10<sup>th</sup> Cir. 1996). That "genuine" issue of fact is deemed "material" if it "might effect the outcome of the suit under the governing law."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986);

Dunbar v. Jackson Hole Mountain Resort Corp., 392 F.3d 1145, 1147 (10<sup>th</sup> Cir. 2004).

When applying the aforementioned standards, the Court must, with respect to each motion, "view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." Schutz v. Thorne, 415 F.3d 1128, 1132 (10<sup>th</sup> Cir. 2005) (internal quotation omitted). Procedurally, the moving party can carry its initial burden by producing affirmative evidence that negates an essential element of the nonmovant's case, or by establishing that the nonmovant lacks the quantum of evidence needed to satisfy its burden of persuasion at trial. Trainor v. Apollo Metal Specialities, Inc., 318 F.3d 976, 979 (10<sup>th</sup> Cir. 2002).

Once this has occurred, the procedural burden shifts to the party opposing summary judgment, who must go beyond the pleadings and, through the marshaling of evidence, affirmatively establish a genuine issue on the merits of the case. Fed.R.Civ.P. 56(e). The nonmovant must do more than simply deny the veracity of everything offered – show more than a mere "metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Likewise, "[t]he mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient" to create a genuine dispute of material fact. Herrick v. Garvey, 298 F.3d 1184, 1190 (10<sup>th</sup> Cir. 2002). To avoid summary judgment, the nonmoving party must, in the words of the Rule, "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The nonmoving party's failure of proof "renders all other facts immaterial," creating no genuine issue of fact, thereby entitling the moving party to the summary judgment it sought. Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A partial summary judgment is authorized when, in a case such as that at bar, the Court may ascertain that certain material facts are without substantial dispute. Fed.R.Civ.Pro. 56(d).

### **INTRODUCTION**

The Utah Highway Patrol Association ("UHPA") has erected thirteen (13) stand-alone large Christian crosses (12" tall) as memorials to Utah Highway Patrol troopers killed in the line of duty. Some are erected on private property adjacent to state highways. Some are erected on Utah government property, non-public forums, *e.g.*, the right-of-way or rest stops adjacent to

state highways and in the parking lot of a state office. Defendants herein have granted permission for the erection of some of the religious memorials on the government property. Id. Those crosses, their placement and adornments are the subject matter of this action.

Intervener UHPA mis-characterizes the nature of this action and plaintiffs' claims herein. Plaintiffs are not opposed to memorializing Utah's slain law enforcement officers. Plaintiffs' goal is not to prevent memorialization nor in any way restrict how families and friends privately honor and revere those officers and loved ones. This action is based, *inter alia*, on the Establishment Clause and seeks to restrict official government sanction, endorsement and participation by the State of Utah in the use of a poignant and exclusively religious symbol, the Christian cross, which is the memorial used by UHPA

If plaintiffs' claims herein are validated by the Court, UHPA and the family and friends of the fallen officers may continue to memorialize the officers. However, the State of Utah would henceforth be restricted in its endorsement, support and participation in that religious commemoration.

Plaintiffs make no challenge to the right of UHPA to memorialize fallen officers. Plaintiffs have no legal authority to do so. Plaintiffs make no challenge to the UHPA's use of Christian crosses to memorialize fallen officers. Plaintiffs have no legal authority to do so.

Courts that have considered the issue presented in the pending motion have unfailingly found that the Latin cross is an exclusive symbol of Christianity and its presence on government property conveys endorsement of Christianity.

. . . the Latin cross (a cross whose base stem is longer than the other three arms) is

a readily identifiable symbol of Christianity. . . . The Court is constrained to find that cross cannot satisfy the secular effect prong of the *Lemon* test because it conveys a message of endorsement of Christianity.

Jewish War Veterans of U.S. v. U.S., 695 F. Supp. 3, 12-13 (D.D.C. 1988)

. . . the Latin cross is an unmistakable symbol of Christianity as practiced in this country today.

Gonzales v. North Tp. of Lake County, Ind. 4 F.3d 1412, 1418 (7<sup>th</sup> Cir. 1993).

The Christian cross is a religious symbol exclusive to the Christian faith. That exclusivity and that poignant symbolism are not subject to diminution by individuals' claims that their use of the cross was not for a religious purpose.<sup>1</sup> Similarly, a resolution passed by the Utah Legislature<sup>2</sup> does not and can not alter the inherent and exclusive symbolism of the Christian Cross. Finally, referring to UHPA's Christian crosses as *memorials* does not alter the unquestionable fact that the crosses clearly represent one religion, and, are first and foremost the reminder of the death of Jesus Christ.

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<sup>1</sup> UHPA attempts to divert attention from the Establishment Clause violation committed by the State of Utah by asserting "UHPA had no religious purpose in erecting the memorials." Regardless of any subjective intent, the incontrovertible result is the bold public display on government property with government endorsement of **the** symbol of Christianity.

<sup>2</sup> Utah House of Representatives, Joint Resolution, H.C.R. 4, 2006 Utah Legislative Session: "a white cross has become widely accepted as a symbol of a death, and not a religious symbol, when placed along a highway," *id.*, ll.54-55; "the primary feature of the [UHP] memorials is a white cross, which was never intended as a religious symbol, but as a symbol of the sacrifice made by these highway patrol officers," *id.*, ll. 60-62; and "given the heartfelt yet nonsectarian intentions of the memorials." *Id.*, ll. 67-68.

### **UNDISPUTED FACTS**

1. Thirteen (13) stand alone Christian Crosses have been erected by the Utah Highway Patrol Association to commemorate the deaths in the line of duty of Utah Highway Patrol Officers. Complaint, Doc. # 1; Aff. of Luke Stradinger, Doc. # 6; Aff. of Lee Perry Doc. # 7; *see* Aff. of K. Thorne Doc. # 8; *see* Aff. of E. Brumett Doc. # 9; and, *see* Aff. of B. Lund, Doc. # 10.

2. The crosses are twelve (12) feet tall, striking in appearance, painted bright white and inscribed with the name of the trooper, his badge number and the year of his death. *Id.*; Exhibits “A,” “B” & “C” to Complaint, Doc. # 1; Exhibits “A,” “B” & “C” attached to this memorandum; Aff. of Perry, ¶ 25. The crosses also have a prominent representation of the official logo of the Utah Highway Patrol where the cross bar intersects. *Id.*

3. At least seven (7) of the Christian Crosses are installed in prominent locations on real property non-public forums belonging to the State of Utah, either on right-of-way property adjacent to state highways, rest areas or park areas adjacent to highways or real property adjacent to office buildings and parking lot owned by the State of Utah. Complaint, Doc. # 1; Aff. of Perry, ¶ 33.

### **ISSUE PRESENTED**

Intervener, Utah Highway Patrol Association (“UHPA”) as per affidavits submitted, contends that the Christian Cross is not a religious symbol, in large part because they do not see and they did not intend to send a religious message with the use of the cross. *See* Aff. of Perry, p.

4; *see* Aff. of Lund, ¶ 12, ¶ 15; *see* Aff. of Brumett, ¶ 13, ¶ 14; *see* Aff. of Thorne, ¶ 16. UHPA so contends in order to defeat plaintiffs' position that the presence of the Christian Crosses on government property and containing the Utah Highway Patrol logo implicates the Establishment Clause of the First Amendment and of the Utah Constitution, Art. I, § 4.<sup>3</sup> UHPA and its affiants suggest that subjective interpretation by a speaker or a viewer can nullify or defeat the clear, unequivocal and long standing meaning of the Christian Cross.

In response to that suggestion, by a motion for partial summary judgment, the plaintiffs seek a determination and declaratory judgment that:

**THE STAND ALONE CHRISTIAN CROSSES THAT ARE THE SUBJECT MATTER OF THIS ACTION ARE, AS A MATTER OF LAW, EXCLUSIVELY RELIGIOUS SYMBOLS.**

### ARGUMENT

The Latin or Roman cross is unmistakably a religious symbol, synonymous with a belief in Christianity or in Jesus Christ as savior. Numerous jurisdictions have found this to be the

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The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.

Utah Const., Art. I, § 4.

case, including the Tenth Circuit in multiple cases.

#### **A. The Tenth Circuit**

In Robinson v. City of Edmond, a city seal containing four quadrants, one of which depicted a Latin or Christian cross was found religious in nature and thus, contrary to the Establishment Clause. The Tenth Circuit stated, “[t]he religious significance and meaning of the Latin or Christian cross are unmistakable.” 68 F.3d 1226, 1232 (10<sup>th</sup> Cir. 1995).

Also, in Friedman v. Board of County Comm'rs of Bernalillo County, the court held in regard to a cross on a city seal:

A person approached by officers leaving a patrol car emblazoned with this seal [containing a prominent Latin cross] could reasonably assume that the officers were Christian police, and that the organization they represented identified itself with the Christian God. A follower of any non-Christian religion might well question the officers' ability to provide even-handed treatment. A citizen with no strong religious conviction might conclude that secular benefit could be obtained by becoming a Christian.

781 F.2d 777, 782 (10<sup>th</sup> Cir. 1985).

#### **B. The Second Circuit**

In Libin v. Town of Greenwich, a volunteer fire department displayed a cross at its firehouse during the Christmas season. 625 F. Supp. 393 (D. Conn. 1985). Individuals in the city sued, and the court concluded that, “To the contrary, the only connection that a cross has to Christmas is as a religious symbol. There simply is no historical connection of a cross to Christmas except as a symbol of those Christian religions which accept Jesus Christ as a central figure.” Id. at 398.

#### **C. The Fifth Circuit**

In Greater Houston Chapter of American Civil Liberties Union v. Eckels, three Latin-style crosses erected as part of a war memorial in a public park were found unconstitutional. In making this determination the court concluded that they were “unable to conclude that a secular purpose exists,” and found the purpose was, *inter alia*, “the preservation of our Judeo-Christian heritage.” 589 F. Supp. 222, 234 (S.D. Tex. 1984) .

#### **D. The Sixth Circuit**

In the case of Granzeier v. Middleton, the court found that the posting on a courthouse door of a sign that, in addition to announcing a closing of the county offices and courts in observance of Good Friday, contained a picture of a four-inch high crucifix with the image of Christ violated the Establishment Clause. 955 F. Supp. 741 (E.D. Ky. 1997), *aff'd*, 173 F.3d 568, 1999, 1999 FED App. 0143P (6<sup>th</sup> Cir. 1999). In this case, the court found that “the sign could be, and was in fact, perceived by reasonably informed observers, to be a government endorsement of the Christian religion.” *Id.* at 746.

#### **E. The Seventh Circuit**

In American Civil Liberties Union of Illinois v. City of St. Charles, an illuminated 35 foot by 18 foot Latin cross on top of fire station as part of city's annual Christmas display was deemed religious and thus, violated the constitution. The court stated:

It is, indeed, the principal symbol of Christianity as practiced in this country today. When prominently displayed on a public building that is clearly marked as and known to be such, the cross dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be.

794 F.2d 265, 271 (7<sup>th</sup> Cir. 1986).

In Gonzales v. North Tp. of Lake County, Ind., a crucifix was removed from a public park where it was intended to act as a war memorial because it was religious and violated the Establishment Clause. The court held:

we are masters of the obvious, and we know that the crucifix is a Christian symbol. We reached a similar conclusion about the Latin cross, acknowledging that it is an unmistakable symbol of Christianity as practiced in this country today. In fact, the crucifix is arguably the quintessential Christian symbol because it depicts Christ's death on the cross and recalls thoughts of his passion and death.

4 F.3d 1412, 1418 (7<sup>th</sup> Cir. 1993).

In Harris v. City of Zion, Lake County, Ill., a Latin cross, shield, sword, scepter, dove, and crown on a city's seal was found unconstitutional because the cross was a religious symbol. 927 F.2d 1401 (7<sup>th</sup> Cir. 1991). The court concluded, “[t]here also can be no doubt that a Latin cross is the principal and unmistakable symbol of Christianity as practiced in this country today.” Id. at 1404.

#### **F. The Ninth Circuit**

In Separation of Church and State Committee v. City of Eugene of Lane County, a 51-foot Latin cross which was located on a butte in the city park was found to violate the Establishment Clause. 93 F.3d 617 (9<sup>th</sup> Cir. 1996). The court emphatically stated, “[t]here is no question that the Latin cross is a symbol of Christianity.” Id. at 620.

In Buono v. Norton, a cross in a national preserve operated by National Park Service was found religious in nature and thus, contrary to the constitution. 371 F.3d 543, (9<sup>th</sup> Cir 2004). The court stated, “[t]he Latin cross is the preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion.” Id. at 544-45.

### **G. The Eleventh Circuit**

In Mendelson v. City of St. Cloud, the display of a Latin cross atop the city water tower was unconstitutional. The court held:

The Latin cross is unmistakably a universal symbol of Christianity. Each witness at trial, including a Catholic Priest and a Jewish Rabbi, testified that they could perceive of no secular purpose for a Latin cross. Such a cross has always been a symbol of Christianity, and it has never had any secular purpose. In fact, no federal case has ever found the display of a Latin cross on public land by a state or state subdivision to be constitutional.

719 F. Supp. 1065, 1069 (M.D. Fla. 1989)

### **H. The District of Columbia**

In Jewish War Veterans of U.S. v. U.S., a large cross on a Marine Corps base intended as a symbol of national resolve was rather found to be a religious symbol of Christianity and removed. 695 F. Supp. 3 (D.D.C. 1988). In this, the court held:

Running through the decisions of all the federal courts addressing the issue is a single thread: that the Latin cross (a cross whose base stem is longer than the other three arms) is a readily identifiable symbol of Christianity. . . . The use of a cross as a memorial to fallen or missing servicemen is a use of what to some is a religious symbol where a nonreligious one likely would have done as well. The Court is constrained to find that cross cannot satisfy the secular effect prong of the *Lemon* test because it conveys a message of endorsement of Christianity.

Id. at 12-13.

### **I. Mississippi State Court**

In American Civil Liberties Union of Mississippi v. Mississippi, the court did not allow the display of a Christian cross on the side of a state office building and concluded:

The cross is the symbol of the Christian religion. . . . it reminds Christians of the passion and resurrection of Christ their Savior, . . . Although not understanding or

believing the significance of the cross to Christians, those of other faiths and even those who profess no faith in the existence of a higher being recognize the cross as the symbol of Christianity.

652 F.Supp. 380, 382 (S.D.Miss.,1987).

### **J. Historical Research on the Religious Nature of Crosses**

In a recent study conducted of roadside crosses and memorials, it was determined that “[t]he cross as an indication of death is connected with the biblical account of Jesus Christ’s death and resurrection as told in the gospels of Matthew, Mark, Luke, and John.” HOLLY EVERETT, *ROADSIDE CROSSES IN CONTEMPORARY MEMORIAL CULTURE* 23 (Univ. of N. Tex. Press 2002). In looking at the cross as a symbol, it was adopted by Christians in the late fourth century, but it took on its true religious meaning in the eighth century. At this point Christians adopted it as their symbol, believing this is what the biblical Saint Paul wanted when he stated, “But God forbid that I should glory, save in the cross of our Lord Jesus Christ, by whom the world is crucified unto me, and I unto the world.” *Id.* (quoting Gal. 6:14).

The history of roadside crosses in America is also of a religious nature. Though roadside crosses are seen throughout the entire United States, they are particularly prevalent in the Southwest. This is because of the Catholic culture brought by the Spanish in the colonizing of the Americas. It was a custom among Catholic priests and settlers that “fellow believers must be buried in hallowed, or *camposanto*.” *Id.* at 26. When travelers died between settlements, they had to be buried *in situ*. At these sites, a cross was used to “mark the spot,” but also “to informally consecrate it.” *Id.* Besides marking the place of a religiously consecrated grave, crosses also were used to mark spots where, in walking to the cemetery, “pallbearers stopped to rest,” a sort

of “ritual pausing” where they would “recite the rosary or a requiem prayer.” Id.

Today this is not just a Catholic practice anymore, “the custom is quite widespread outside its community of origin.” Id. at 30. Even though it has spread, its religious nature has been maintained, marking the spot of the death as “an indication of death . . . connected with the biblical account of Jesus Christ’s death and resurrection.” Id. at 23.

WHEREFORE, this court should grant a partial summary judgment determining that the stand alone Christian Crosses which are the subject matter of this action are, as a matter of law, exclusively religious symbols.

Dated this 17<sup>th</sup> day of MARCH 2006.

UTAH LEGAL CLINIC  
Attorneys for PLAINTIFFS

by 

\_\_\_\_\_  
BRIAN M. BARNARD

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing MEMORANDUM SUPPORTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CHRISTIAN CROSS AS RELIGIOUS SYMBOL to:

Mark Shurtleff  
Utah Attorney General  
Thom Roberts, AAG  
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on the 17<sup>th</sup> day of MARCH 2006, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC  
Attorneys for Plaintiffs

By 

BRIAN M. BARNARD  
JAMES L. HARRIS, Jr.

## **EXHIBITS**

### **Exhibit “A”**

The right-of-way south of I-80 in Parley’s Canyon, Salt Lake County, Utah

### **Exhibit “B”**

The parking lot of the Utah Highway Patrol facilities east of I-15 at 5770 South 360 West, Murray, Salt Lake County, Utah

### **Exhibit “C”**

The northwest corner of junction of Utah Highway 89 and Utah Highway 20 in Garfield County, Utah



## **Exhibit “A”**

The right-of-way south of I-80 in Parley’s Canyon, Salt Lake County, Utah



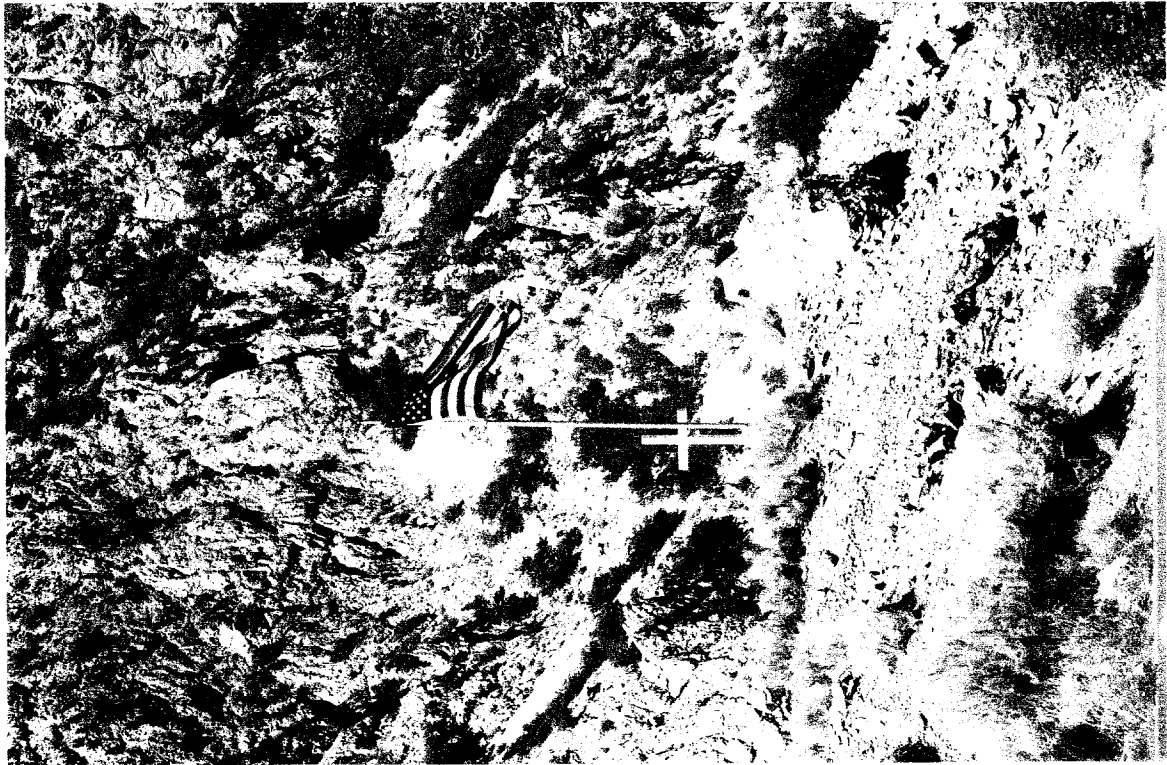
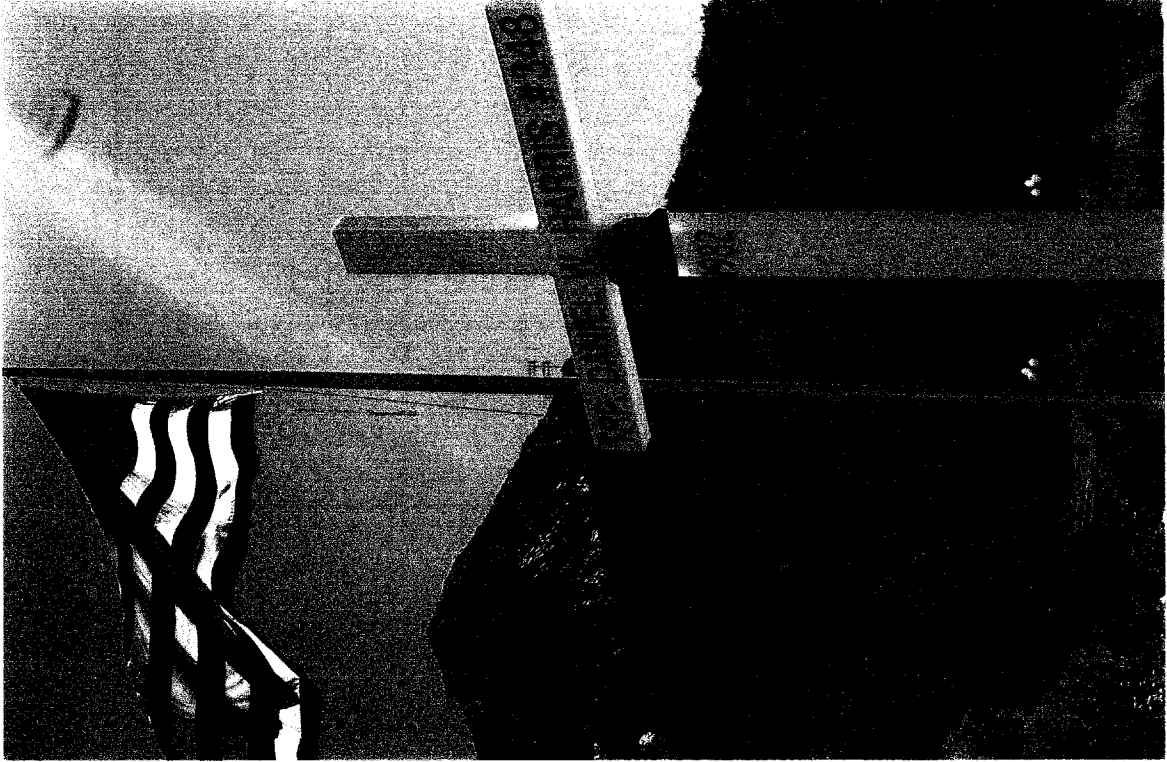


EXHIBIT  
"A"

## **Exhibit “B”**

The parking lot of the Utah Highway Patrol facilities east of I-15 at 5770 South 360 West, Murray, Salt Lake County, Utah



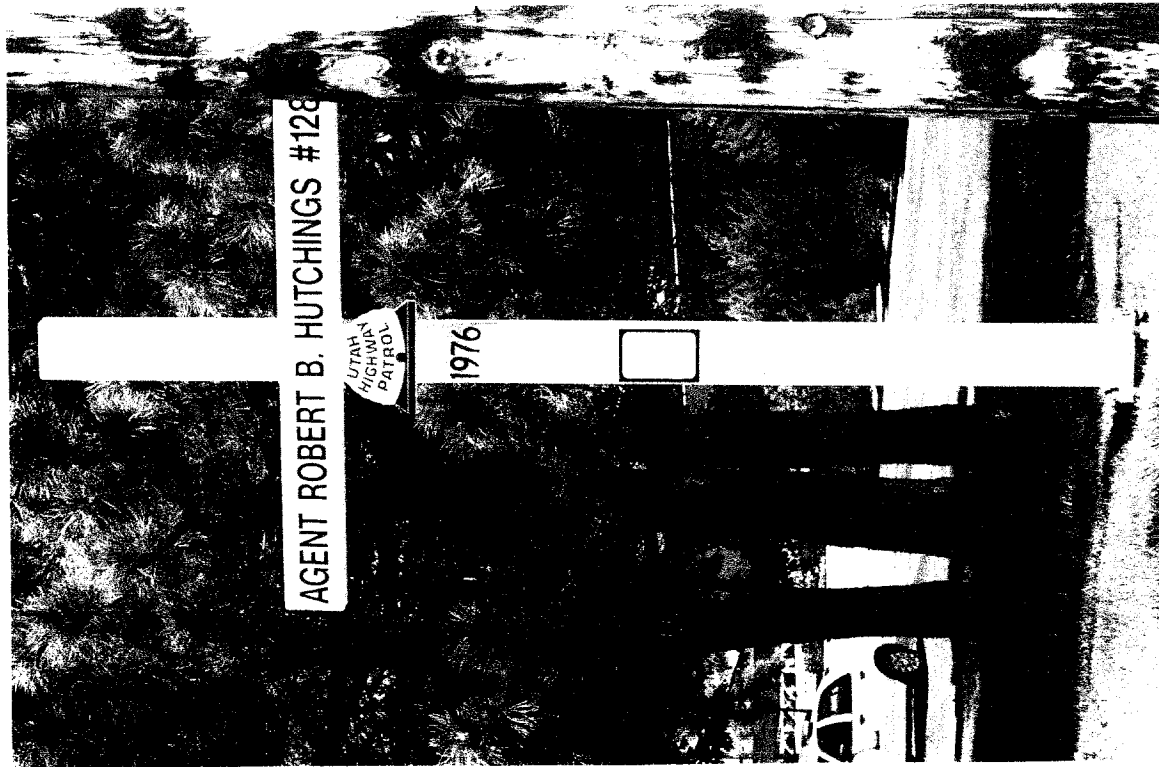
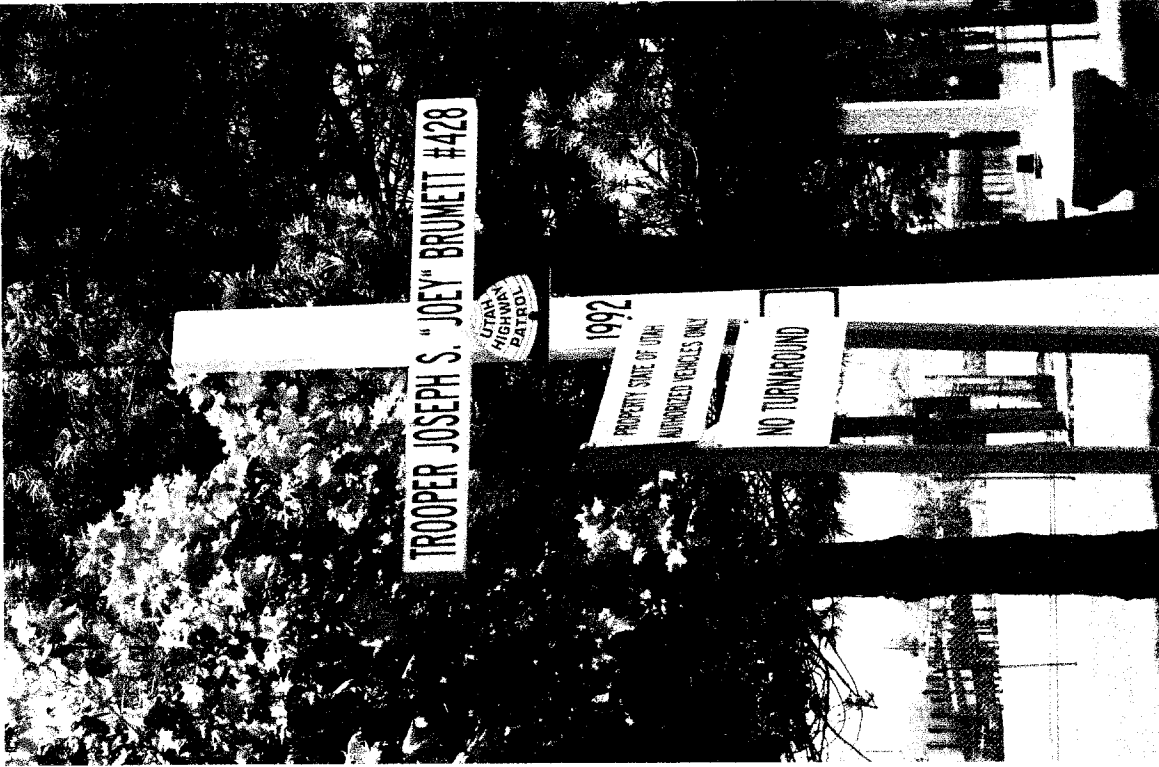


EXHIBIT  
"B"

## **Exhibit “C”**

The northwest corner of junction of Utah Highway 89 and Utah Highway 20 in Garfield County, Utah





EXHIBIT  
"C"