

**Extensively abridged by the instructor with unmarked abridgements and format changes  
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**UNITED STATES COURT OF APPEALS TENTH CIRCUIT  
August 18, 2010**

**AMERICAN ATHEISTS, INC., [and others]**

**v.**

**SCOTT T. DUNCAN, Colonel, Superintendent of Utah Highway Patrol [and others]  
& UTAH HIGHWAY PATROL ASSOCIATION, Defendant-Intervenor-Appellee.**

**Appeal from the United States District Court for the District of Utah**

The Utah Highway Patrol Association (“UHPA”), with the permission of Utah state authorities, erected a number of twelve-foot high crosses on public land to memorialize fallen Utah Highway Patrol (“UHP”) troopers.

Plaintiffs-Appellants, American Atheists, Inc. ... and three individual members of American Atheists who reside in Utah, challenge the legality of these memorials under the Establishment Clause of the federal constitution and Article I of Utah’s constitution. We hold that these memorials have the impermissible effect of conveying to the reasonable observer the message that the State prefers or otherwise endorses a certain religion. They therefore violate the Establishment Clause of the federal constitution. In light of this conclusion, we need not reach the separate question of whether these displays also violate Utah’s constitution.

UHPA, a non-profit organization that supports UHP officers and their families, initiated the memorial project in 1998. The memorials are twelve-foot high crosses with six-foot horizontal cross-bars. The fallen trooper’s name, rank, and badge number are printed in large letters on the horizontal cross-bar. Immediately underneath the place where the two bars meet hangs a large (approximately 12" high and 16" wide) depiction of the UHP’s official “beehive” symbol. Beneath that are printed the year the trooper died and a small plaque containing a picture of the trooper and some biographical information.

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*Amicus Curiae* included: The Unitarian Universalist Association; The Union For Reform Judaism; The Society For Humanistic Judaism; The Interfaith Alliance; The Hindu American Foundation; The Anti-Defamation League; Eugene J. Fisher; Americans United For Separation Of Church And State; American Humanist Association; Foundation For Moral Law; Robert E. Mackey; The American Legion; State Of Colorado; State Of Kansas; State Of New Mexico; State Of Oklahoma; The Becket Fund For Religious Liberty; Gregory Bell [with 20 other Utah politicians]; City Of Santa Fe; Utah Sheriffs’ Association

UHPA member and officer Lee Perry and his friend Robert Kirby came up with the idea for these memorials and designed the crosses, which UHPA approved. UHPA asserts that

[t]he purpose of these memorials is fourfold: (1) the memorials stand as a lasting reminder to UHPA members and Utah highway patrol troopers that a fellow trooper gave his life in service to this state; (2) the memorials remind highway drivers that a trooper died in order to make the state safe for all citizens; (3) the memorials honor the trooper and the sacrifice he and his family made for the State of Utah; and (4) encourage safe conduct on the highways.

Perry and Kirby determined that “only a cross could effectively convey these weighty messages instantaneously” to motorists driving by a memorial. (Id. at 3165.) According to Perry, they chose a white Roman or Latin cross because

only a white cross could effectively convey the simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety. I determined this because a cross is widely recognized as a memorial for a person’s death and especially respect to those who have given their lives to insure the safety and protection of others.

Moreover, a “cross, near the highway, with the inscriptions, symbols and plaques mentioned above, conveys the unmistakable message that a Utah Highway Patrolman died near this spot while serving the people of Utah.”

**[extensive abridgment]**

As permanent monuments erected on public land,<sup>7</sup> the cross memorials at issue in this case fall squarely within the rule pronounced by the Court in *Pleasant Grove City v. Summum* and, therefore, must be analyzed not as private speech, but as government speech—the scope and content of which is restrained, *inter alia*, by the Establishment Clause.

Both at oral argument and in a letter . . . , the state *amici* and the Becket Fund for Religious Liberty attempt to distinguish this case from *Pleasant Grove City*, arguing that even in light of the Court’s opinion in *Pleasant Grove City*, the displays at issue in this case should be treated as private speech. They argue that *Pleasant Grove City* can be distinguished from our case in three ways: (1) in *Pleasant Grove City*, the city took ownership of the displays at issue, while in this case, the UHPA has retained ownership of the memorial crosses; (2) Utah has distanced itself from the message conveyed in these displays by issuing a statement that the Utah Department of Transportation “neither approves or disapproves the memorial marker” and (3) unlike the displays at issue in *Pleasant Grove City*, these displays are not really permanent because both Utah and the UHPA retain the right to remove the display at any time.

These distinctions are unpersuasive. The fact that the UHPA retains ownership over these displays does not materially affect our analysis of whether the displays at issue in this case constitute government speech. In *Pleasant Grove City*, the Supreme Court noted that the city had taken ownership of “most of the monuments in the Park.” However, the Court gave no indication

that only those monuments which the city actually owned constituted government speech. To the contrary, the Court strongly implied that all the monuments in that park were government speech, and further indicated that, in the vast majority of cases, a permanent monument on public land will be considered government speech. The fact that the Court thought all of the monuments in that park were government speech is perhaps best illustrated by the Court's choice of an example of a permanent monument on public land that would not be government speech: a "monument on which all the residents . . . could place the name of a person to be honored or some other private message." The Court's choice to use a hypothetical example, and not just to point to some of the memorials in the park at issue that might be privately owned in that case indicates that the Court considered all the monuments in that park to be government speech. Thus, the fact that the UHPA, not Utah, owns the memorial crosses does not affect our determination of whether they are government speech.

Similarly, Utah's attempt to distance itself from the message conveyed by these memorial crosses, by stating that it neither "approves or disapproves" them, falls flat in light of the Supreme Court's discussion in *Pleasant Grove City*. In *Pleasant Grove City*, the Court explicitly rejected the respondent's argument that, in order for a monument to constitute government speech, the state must formally adopt the message conveyed by the display. The Court noted that the City's decision to display that permanent monument on its property "provided a more dramatic form of adoption than the sort of formal endorsement that respondent would demand . . . ." Conversely, the government's actions in this case—allowing these memorial crosses to be displayed with the official UHP insignia primarily on public land—cannot be overshadowed by its attempts to distance itself from the message conveyed by these displays. Finally, we reject the state amici's contention that, because the UHPA and Utah each retained the right to remove these displays, they are not "permanent" and, therefore, the Court's decision in *Pleasant Grove City* does not cover this case. This project began more than ten years ago, and there is no evidence that any of the memorial crosses erected since that time have been removed. We think that is permanent enough to constitute government speech.

**[abridged]**

Although the Supreme Court is sharply divided on the standard governing Establishment Clause cases, see *Green* (discussing the confusion generated by the Supreme Court's decision in *Van Orden v. Perry*), this court [the Tenth Circuit] has recently affirmed that "the touchstone for Establishment Clause analysis remains the tripartite test set out in *Lemon*."

Addressing the first and second *Lemon* tests, "[t]his court 'interpret[s] the purpose and effect prongs of *Lemon* in light of Justice O'Connor's endorsement test.'" Under that test, "[t]he purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch v. Donnelly*. Justice O'Connor's modification of the *Lemon* test makes our inquiry very case-specific, as it asks this court to examine carefully the particular context and history of these displays before concluding what effect they would likely have on the reasonable observer. See *County of Allegheny*.

The question presented by the first prong of the *Lemon* test, then, is “whether the government conduct was motivated by an intent to endorse religion.” ...

Here, we can discern a plausible secular purpose. Considering first the evidence of the UHPA’s motivation, that organization has, throughout the course of this project, consistently asserted that its intent in erecting these memorials is only secular: to honor fallen troopers and to promote safety on the State’s highways. The secular nature of the UHPA motive is bolstered by the fact that the memorials were designed by two individuals who are members of the Mormon faith, the Church of Jesus Christ of Latter Saints (“LDS Church”), a religion that does not use the cross as a religious symbol. These men explained that they were inspired to use the Latin cross for the fallen trooper memorials because of the presence of such crosses in military cemeteries, which honor fallen service members for their sacrifice, and roadside memorials found where traffic fatalities have occurred. Plaintiffs are unable to point to any evidence suggesting that the UHPA’s motive is other than secular.

Nevertheless, the focus of this first *Lemon* test is on the government’s purpose, and not that of a private actor. But in this case the evidence supports our attributing the UHPA’s motivation to the State Defendants. In allowing the UHPA to use the UHP insignia on the memorial crosses and in giving UHPA permission to place some of those crosses on public land, state officials accepted the UHPA’s assertion of its motives and further acknowledged support for the UHPA’s intent. Plaintiffs have failed to present any evidence that, to the contrary, suggested that the State Defendants’ motivation was different than that expressed by UHPA ...

Next, we consider whether the State Defendants violated the second *Lemon* test. The Establishment Clause “mandate[s] governmental neutrality between religion and religion, and between religion and non-religion.” Thus, this court recently observed that [g]overnments may not “mak[e] adherence to a religion relevant in any way to a person’s standing in the political community.” And actions which have the effect of communicating governmental endorsement or disapproval, “whether intentionally or unintentionally . . . make religion relevant, in reality or public perception, to status in the political community.” When determining whether a display has the impermissible effect “of communicating a message of governmental endorsement or disapproval” of religion, we look through the eyes of an objective observer who is aware of the purpose, context, and history of the symbol. The objective or reasonable observer is kin to the fictitious “reasonably prudent person” of tort law. So we presume that the court-created “objective observer” is aware of information “not limited to ‘the information gleaned simply from viewing the challenged display.’” *Weinbaum*, 541 F.3d at 1031 (emphasis added). While the reasonable observer “is presumed to know far more than most actual members of a given community,” “we do not treat the reasonable observer as omniscient.”

Context can determine the permissibility of displays of religious symbols on public property. The significance of context is perhaps best illustrated by the Supreme Court’s two recent decisions involving displays of the Ten Commandments on public land ... [a brief discussion of *Van Orden* and *McCleary County* follows ...]

This case involves memorials using a Latin cross, which “is unequivocally a symbol of the Christian faith.” *Weinbaum*. In light of that, there is little doubt that Utah would violate the Establishment Clause if it allowed a private group to place a permanent unadorned twelve-foot cross on public property without any contextual or historical elements that served to secularize the message conveyed by such a display. Thus, these displays of “the preeminent symbol of Christianity,” can only be allowed if their context or history avoid the conveyance of a message of governmental endorsement of religion.

Here, we conclude that the cross memorials would convey to a reasonable observer that the state of Utah is endorsing Christianity. The memorials use the preeminent symbol of Christianity, and they do so standing alone (as opposed to it being part of some sort of display involving other symbols). That cross conspicuously bears the imprimatur of a state entity, the UHP, and is found primarily on public land.

The fact that the cross includes biographical information about the fallen trooper does not diminish the governmental message endorsing Christianity. This is especially true because a motorist driving by one of the memorial crosses at 55-plus miles per hour may not notice, and certainly would not focus on, the biographical information. The motorist, however, is bound to notice the preeminent symbol of Christianity and the UHP insignia, linking the State to that religious sign.

Moreover, the fact that all of the fallen UHP troopers are memorialized with a Christian symbol conveys the message that there is some connection between the UHP and Christianity. This may lead the reasonable observer to fear that Christians are likely to receive preferential treatment from the UHP—both in their hiring practices and, more generally, in the treatment that people may expect to receive on Utah’s highways.[**ftn 13**] The reasonable observer’s fear of unequal treatment would likely be compounded by the fact that these memorials carry the same symbol that appears on UHP patrol vehicles. And the significant size of the cross would only heighten this concern.

**[Footnote 13:** The connection between the UHP and Christianity is perhaps even more strongly conveyed by the two memorial crosses located immediately outside the UHP office. We are deeply concerned about the message these crosses would convey to a non-Christian walking by the UHP office or, even more troubling, to a non-Christian walking in against his will.]

Defendants argue that the placement of these displays, in combination with the troopers’ names emblazoned on the crosses and the biographical information included in these displays, clearly conveys the message, instead, that these crosses are designed as memorials and, therefore, that they do not convey a message of religious endorsement. We agree that a reasonable observer would recognize these memorial crosses as symbols of death. However, we do not agree that this nullifies their religious sectarian content because a memorial cross is not a generic symbol of death; it is a Christian symbol of death that signifies or memorializes the death of a Christian. The parties agree that a cross was traditionally a Christian symbol of death and,

despite Defendants' assertions to the contrary, there is no evidence in the record that the cross has been universally embraced as a marker for the burial sites of non-Christians or as a memorial for a non-Christian's death. The UHPA acknowledges that when it asserts that it would honor the request made by a Jewish state trooper's family to memorialize him with a Star of David rather than a cross.

The State Defendants point to the use of crosses as markers for fallen soldiers as evidence that the cross has become a secular symbol of death. However, the evidence in the record shows that the military provides soldiers and their families with a number of different religious symbols that they may use on government-issued headstones or markers. Even in the American military cemeteries overseas, which include rows and rows of white crosses, fallen Jewish service members are memorialized instead with a Star of David. Thus, while the cross may be a common symbol used in markers and memorials, there is no evidence that it is widely accepted as a secular symbol.

Defendants argue that crosses are a fairly common symbol used in roadside memorials and, in that context, they are seen as secular symbols. However, the mere fact that the cross is a common symbol used in roadside memorials does not mean it is a secular symbol. There is no evidence that non-Christians have embraced the use of crosses as roadside memorials. Further, there is no evidence that any state has allowed memorial crosses to be erected on public property that, like the memorials at issue in this case, display the official insignia of a state entity. Finally, even if we might consider a roadside cross generally to be a secular symbol of death, the memorial crosses at issue in this case appear to be much larger than the crosses typically found on the side of public roads. Defendants provided a statement from a representative of the Montana American Legion White Cross Highway Fatality Marker Program in support of their claim that roadside crosses are common, recognizable symbols of highway fatalities. The cross memorials at issue here are ten times as large as those crosses, which are only between twelve and sixteen inches in height.

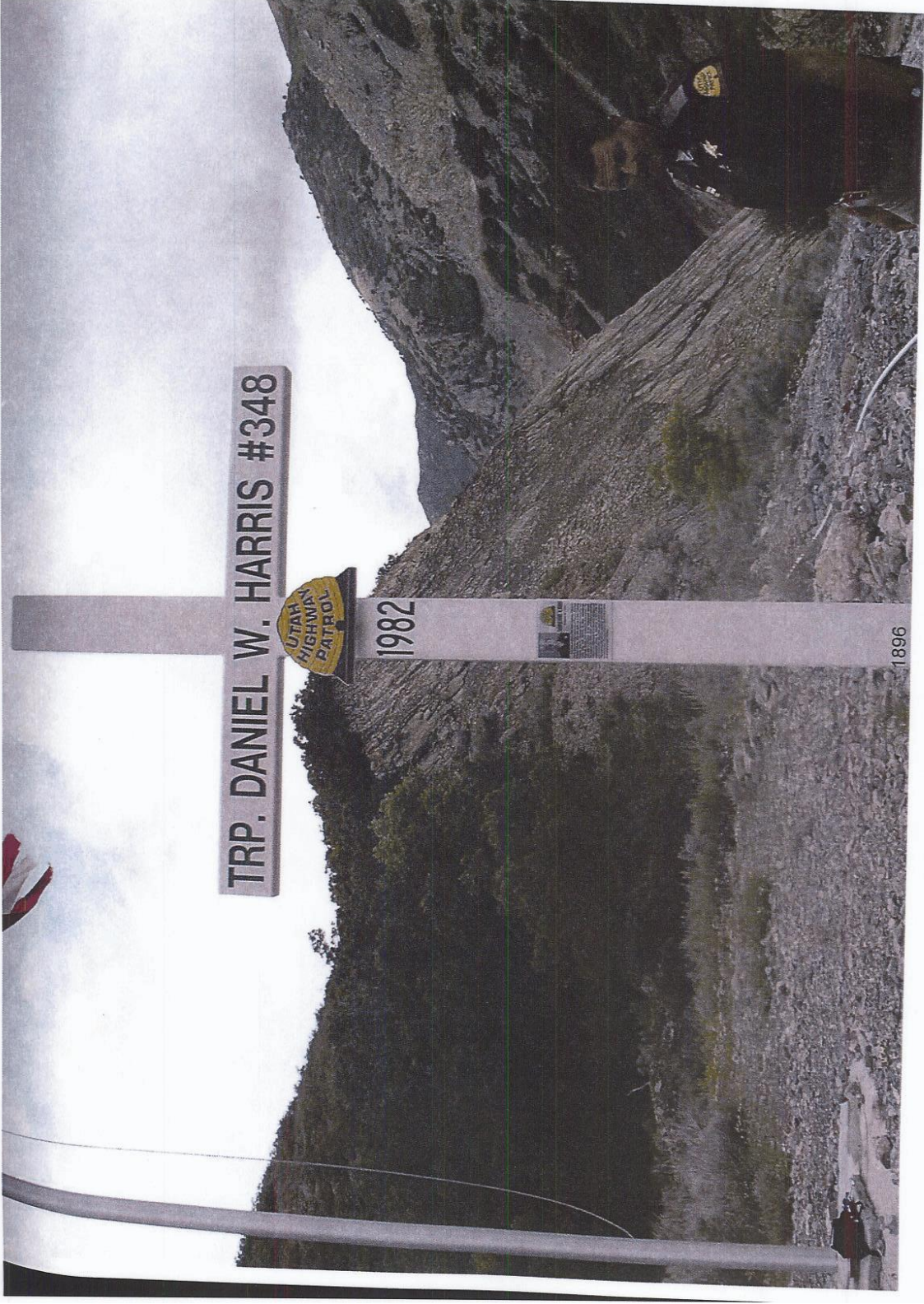
Nor are we persuaded of the significance of the fact that many of the designers and producers of these displays do not revere the cross as a symbol of their faith. As the Supreme Court recently explained, "[b]y accepting a privately donated monument and placing it on [state] property, a [state] engages inexpressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator." *Pleasant Grove City*. Thus, the designers' purpose in creating the displays at issue in this case may not always coincide with the displays' likely effect on the reasonable observer. We conclude that is the case here.

Similarly, the fact that cross-revering Christians are a minority in Utah does not mean that it is implausible that the State's actions would be interpreted by the reasonable observer as endorsing that religion. [The court discusses the holding that the menorah on the Pittsburgh City Hall steps was not a religious symbol] ... a majority of the Justices in *County of Allegheny* determined that a city could violate the Establishment Clause by publicly displaying the symbol of a religion whose members constituted a mere 12% of that city's population. In this case, the

parties agree that cross-revering Christians comprise approximately 18% of the population in Utah, which is greater than the percentage of Jews in Pittsburgh at the time of the Court's decision in County of Allegheny. Thus, the fact that most Utahns do not revere the cross as a symbol of their faith does not mean that the State cannot violate the Establishment Clause by conduct that has the effect of promoting the cross and, thereby, the religious groups that revere it.

This appears to be especially true in this case because members of the majority LDS Church "may not necessarily share the same sensitivity to the symbol [of the cross] as a Jewish family." Although the evidence indicates that LDS Church members do not use the cross as a symbol of their religion, they do "remember with reverence the suffering of the Savior." And, in any event, there are many cross-revering Christians and many non-Christians for whom the Roman cross has an unmistakable Christian meaning.

These factors that Defendants point to as secularizing the memorials do not sufficiently diminish the crosses's message of government's endorsement of Christianity that would be conveyed to a reasonable observer. Therefore, the memorials violate the Establishment Clause.



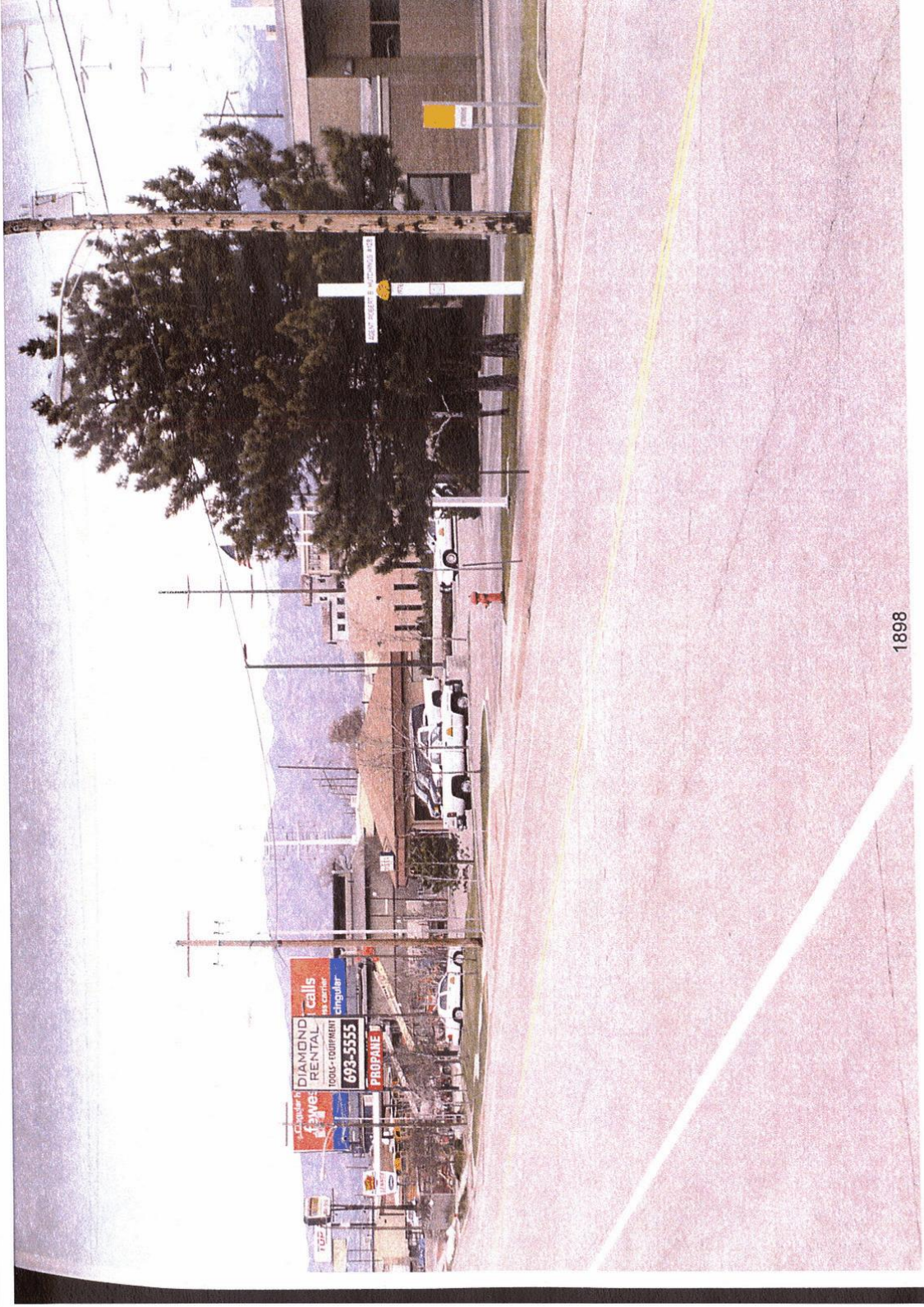
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