

RICHARD D. RUCKENBROD
Attorney for Protestant
700 El Paso Gas Bldg.
315 East Second South
Salt Lake City, Utah 84111
Phone: 521-7751

HAROLD G. PRICE
President of the Board
of Trustees
Mount Olivet Cemetery
1270 Crystal Avenue
Salt Lake City, Utah
Phone: 467-2907

IN THE OFFICE OF THE STATE ENGINEER OF THE STATE OF UTAH

Re: Application No. a-6538

MEMORANDUM IN SUPPORT OF THE PROTEST OF
MOUNT OLIVET CEMETERY ASSOCIATION

Applicant: UTAH STATE DEPARTMENT OF HIGHWAYS
Protestant: MOUNT OLIVET CEMETERY ASSOCIATION
Application No. a-6538 (Application for Permanent Change
of Point of Diversion.)

Protestant, MOUNT OLIVET CEMETERY ASSOCIATION acting through its president, HAROLD G. PRICE and its legal counsel, RICHARD D. RUCKENBROD, submits this memorandum in support of its Protest heretofore filed in these proceedings on the 17th day of January, 1972, in which objection was made to the subject application and rejection of said application was requested.

1. DESCRIPTION OF PROTESTANT'S WATER RIGHTS

Water rights of Mount Olivet Cemetery Association which would be affected by the action sought in said application are:

- A. Certificate of Appropriation of Water, No. 2220 (Application No. 9207)
Source of water: Emigration Creek, Salt Lake County, Utah.
Amount of water: 1.17 second feet from March 1 to November 30
Not to exceed three acre feet of water per
acre of land irrigated.

A copy of said certificate, marked Exhibit "A" is attached to this memorandum

- B. Certificate of Appropriation of Water No. 8139 (Application No. 26456 a-5313 Water Users' Claim No. 57-2526)
Source: Underground water from 470 foot well on Mount Olivet premises located north 2366 feet west 3708 feet from east quarter corner Section 9, Township 1 South, Range 1 East.
Quantity of water: 1.2 c.f.s.

A copy of the above certificate is attached hereto, marked Exhibit "B"

- C. Segregated Right: Application No. 26456-a
Remaining 0.8 c.f.s. (out of a 2.0 c.f.s. right) is segregated for development of 0.8 c.f.s. in period extended to August 20, 1972.

D. Diligence Rights

Protestant, Mount Olivet Cemetery Association submits the following material as evidence of its early use of water from Emigration Canyon. This use established early diligence rights which were in part reflected in the Appropriation Certificate (Exhibit "A") but which originate and have a time priority much earlier than the appropriation certificate.

(i) Utah Supreme Court Decision

The case of Mount Olivet Cemetery Association vs. Salt Lake City, 65 U 193, 235 P 876, decided by the Supreme Court of Utah April 13, 1925, involved litigation over the rights to water from Emigration Canyon. The court in its opinion said:

"The cemetery was established in 1874 with an area of twenty acres, and thereafter water from the source in dispute was used for the irrigation of the cemetery grounds. For thirty-five years following, and until the year 1909, the water in

controversy was used for the irrigation of the city lots referred to and the cemetery grounds; the cemetery being limited in quantity in times of scarcity to 4 miner's inches or one tenth of a cubic foot per second. . . . In the year 1909 the cemetery association obtained an additional and adjoining tract of land for burial purposes containing an area of fifty acres. This additional tract was at once improved and irrigated from the waters involved in this action. For the succeeding eight years water from the source in controversy was used beneficially for the irrigation of the seventy acres of cemetery grounds without interference by anyone."

The Supreme Court ruled Mount Olivet Cemetery Association to be the owner of the right to the use of one cubic foot per second of the water. Pursuant to the ruling of the Supreme Court the District Court, to whom the case was remanded, adjudged Mount Olivet Cemetery Association to be the owner of one c.f.s. during all seasons of the waters of Emigration Canyon Creek "...and if the plaintiffs use said water from six o'clock a.m. Monday morning until the following Saturday at six o'clock p.m. of each week, then the plaintiffs shall be entitled to use 1.27 c.f.s. of time of said water during said period of each week."

(ii) District Court Decree Determining Water Rights of Mount Olivet Cemetery

On June 30, 1925 the District Court of Salt Lake County, complying with the above ruling of the Supreme Court decreed that Mount Olivet Cemetery is the owner of the water right defined by the Supreme Court in the above decision. The Findings of Fact, based upon the evidence received by the District Court include the following, which are probative of early use by Mount Olivet of the waters of Emigration Creek:

(Note: the plaintiffs referred to in the court's Findings are Mount Olivet Cemetery Association and the individual trustees of the cemetery association. When paragraph 6 of the Findings says "land hereinabove described" this refers to the land of Mount Olivet Cemetery.)

6) That near the mouth of Emmigration Canyon is a weir which divides the water of Emmigration Canyon Creek into two parts about one-third thereof being diverted through a channel in a Southwesterly direction and used by parties not involved in this action and the remaining two-thirds thereof being diverted through the channel which runs in a Westerly direction across the land hereinabove described and into the corporate limits of Salt Lake City. That the water involved in this case is the two-thirds flow of Emmigration Canyon Creek next above set forth.

9) That in about the year 1878 the plaintiffs and their predecessors in trust appropriated from the unappropriated water of Emmigration Canyon Creek one-tenth of a second foot thereof and used the same for a beneficial purpose upon the lands herein above described for the purpose of irrigating the crops, lawns, trees and shrubbery growing thereon and ever since said last mentioned date the plaintiffs and their predecessors in trust have used said water as aforesaid continuously, openly, uninterruptedly and under claim of right.

10) That the remainder of the two-thirds flow of the waters of Emmigration Canyon Creek was prior to the year 1878 appropriated by persons residing in the neighborhood of the land hereinabove described and was used by said persons for a beneficial purpose to-wit for irrigation of their farm lands and garden tracts.

11) That prior to the year 1909 the persons next above referred to with the exception of three or four in number abandoned their rights to the use of the waters of Emmigration Canyon Creek and ceased to use the same for a beneficial purpose or any other purpose.

12) That in the year 1909 the plaintiffs and their predecessors in trust appropriated from the unappropriated water of Emmigration Canyon Creek nine tenths of a cubic foot per second thereof in addition to the one-tenth of a cubic foot per second above mentioned and used the same upon the lands hereinabove described for a beneficial purpose to-wit for the irrigation of the agricultural crops.

lawns, trees and shrubbery growing thereon and ever since said last mentioned date the plaintiffs and their predecessors in trust have used said water for said beneficial purposes continuously, openly, uninterruptedly and under claim of right and have paid all taxes assessed against said water. That ever since the year 1909 up to and including the time of commencement of this action plaintiffs and their predecessors in trust have been in the actual, open and exclusive possession of one cubic foot per second of the waters of Emigration Canyon Creek and during all of said time have used said water for a beneficial purpose to-wit for the purpose of irrigating the agricultural crops, lawns, trees and shrubbery growing upon the land herein above described.

(iii) Ancient Documents

The following excerpts from ancient documents of Mount Olivet Cemetery Association evidence early use by Mount Olivet of waters from Emigration Canyon:

Excerpts From the Book of Minutes of Mount Olivet Cemetery Association

Page 143--September 8, 1890 On motion of Mr. Collins, a committee of three was appointed by the Chair to make formal and proper application to the City Council and Mayor for the same amount of water from Emigration Canyon as now used. This action being necessary owing to the fact of the City now being engaged in piping the entire volume of water from that source.

Page 290--August 27, 1913 These minutes set forth a resolution asking for a revocable license from the Secretary of War for continued use of a ditch and reservoir for conveying water to Mount Olivet Cemetery. The resolution says, in part, "...Whereas, during the past thirty-nine years Mount Olivet Cemetery Association has used a reservoir; whereas for said thirty nine years, and many years prior thereto the water belonging to the cemetery and to Salt Lake City citizens has been conveyed from the point of appropriation and diverted over the reservation through an open ditch which was constructed for this purpose more than fifty years ago...."

2. OBJECTION TO THE APPLICATION - GROUNDS

Mount Olivet Cemetery Association respectfully requests that the application of the Utah State Department of Highways be rejected by the State Engineer upon the ground that allowance of change would not be

proper. This protestant submits that during critical times of the year when the flow of water in Emigration Creek is low the taking of water by said Applicant in the quantity and at the point Applicant seeks to make such diversion would virtually extinguish the supply of water available to meet the water rights of this Protestant and of others who hold rights to water from Emigration Creek.

For information substantiating this contention see point 3 "Water Flow Records" and point 4 "Barnett Report" below.

3. WATER FLOW RECORDS

Attached hereto as Exhibit "C" are flow records from Emigration Canyon Creek as measured and compiled by the Water Department of Salt Lake City Corporation at its rating station at the mouth of Emigration Canyon.

Note: For published discharge records of Emigration Creek, see Geological Survey Water Supply Paper 1314 P 198 and 1734 P 132.

4. BARNETT REPORT

A study by Jack Arnold Barnett (Utah State Engineer's Office, June 1966) entitled "Ground-Water Hydrology of Emigration Canyon" contains these observations:

Page 92 "Established surface-water rights on Emigration Creek are for more water than the flow of the creek during most of each year."

Throughout the Barnett report there are comments indicating the hydrologic system of Emigration Canyon is closely interrelated and that substantial changes in points of diversion of water from the system would affect the supply of water available to meet the rights of other water right holders.

The conclusion of the Barnett treatise, at page 98 and following contains this observation which cogently supports the position of this

Protestant in objecting to the diversion sought in Application No. a-6538. Barnett states "Reduction in stream flow by surface diversions high in the canyon could have an influence on both surface and ground water rights...."

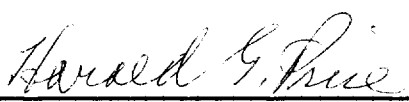
5. CONCLUSION

Mount Olivet's critical period of need for water coincides with the time of year when records show that water flow from Emigration Creek is extremely low. To permit the Department of Highways, or Emigration Improvement District which appears to be the real party in interest as assignee of the Highway Department's water right, to make the diversion of 2.0 c.f.s. of water at the diversion point which they request would destroy the rights of Mount Olivet and other water right holders. Information submitted at the hearing held on this matter by the State Engineer on January 17, 1972 by a representative of the Emigration Improvement District revealed that a portion of the 2.0 c.f.s. of water sought to be diverted would ultimately be used as culinary supply for domestic homes not even yet in existence. Mount Olivet submits that to allow the proposed diversion for the purpose of supplying homes not yet even constructed, and applying the water sought to be diverted to uses substantially different from the uses for which the waters were originally applied (and particularly since said uses have to some degree been discontinued for some time) would be improper and inconsistent with beneficial uses which have been made of the water for many years by the holders of existing water rights long authorized and established.

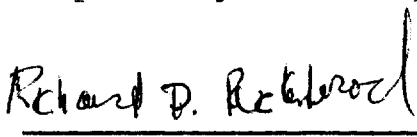
This Protestant requests that the above described application of the Department of Highways be denied.

Dated this 5 day of April, 1972.

Respectfully submitted,



HAROLD G. PRICE
President, Board of Trustees
Mount Olivet Cemetery Association



RICHARD D. RUCKENBROD
Attorney for Protestant, Mount
Olivet Cemetery Association

CERTIFICATE OF APPROPRIATION OF WATER STATE OF UTAH

APPLICATION NO. 9207

UTAH LAKE AND JORDANI RIVER WATER DIVISION

CERTIFICATE NO. 2220

Whereas, It has been made to appear to the satisfaction of the undersigned, State Engineer of the State of Utah, that the appropriation of water from EMIGRATION CREEK in SALT LAKE County, made by *MOUNT OLIVET CEMETERY ASSOCIATION (Assignee) has been perfected in accordance with the application therefor, received in the office of the State Engineer on the 11th day of December 1922 and recorded on page 250 in book I-23 of the record of applications to appropriate water; Therefore, Be it known that I, T. H. Humphreys, State Engineer of the State of Utah, under and by authority and direction of the Law of Utah, as of the date of filing of the above numbered application, do hereby certify that the said MOUNT OLIVET CEMETERY ASSOCIATION of SALT LAKE CITY in SALT LAKE County, State of UTAH, is entitled to the use of 1.17 sec. ft. of water, subject to prior rights and to the following restrictions, to-wit:

Said water is diverted from March 1 to November 30 inclusive of each year at a point which bears S. 4° 56' E. 1933 ft. from the NW cor. of Sec. 11, T. 1 S., R. 1 E., S.L.B.& M. and conveyed thence in what is known as the Emigration Creek Canal for a distance of 11800 ft., and used to irrigate 82.29 acres of land in the Mount Olivet Cemetery embraced in the S½ S½ Sec. 4, NW¼ Sec. 9, T. 1 S., R. 1 E., aforesaid base and meridian; more specifically described as follows: Beg. at a point 100 ft. N. of a point which bears S. 6° 27' E. 1606.7 ft. from the NW cor. of said Sec. 9, thence N. 2026.5 ft., W. 33.3 ft., N. 660 ft., E. 1365.3 ft., S. 661 ft., S. 43° 57' W. 13.5 ft., S. 2018.2 ft., W. 1326 ft. to place of beg. containing 82.29 acres.

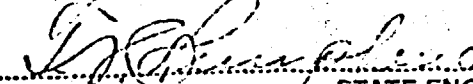
This certificate does not entitle the holder to use to exceed 3 acre feet of water per acre of land irrigated per annum.

The rights of applicant granted under this Certificate are as against "the world", subject however to the terms of a decree entered June 30, 1925 in the Third Judicial District Court in and for Salt Lake County, State of Utah, in the case of Mt. Olivet Cemetery Association, Plaintiff, v. Salt Lake City, a municipal corporation, et al, Defendants.

* Application No. 9207, pursuant to which this certificate is issued, was filed in the State Engineer's office December 11, 1922 by Arthur B. Gattrell and assigned to the Mount Olivet Cemetery Association by instrument dated June 1, 1925 and filed in the State Engineer's office August 13, 1927.

The date of priority of this right is December 11th, 1922.

In Witness Whereof, I have hereunto set my hand and affixed the seal of my office this THIRTY-FIRST day of JULY, A. D. 1936.


T. H. Humphreys • STATE ENGINEER