BEFORE THE EXECUTIVE DIRECTOR
OF THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY

| **In the Matter of:**<br><br>**JORDAN VALLEY WATER CONSERVANCY DISTRICT**<br><br>**Notice of Violation and Compliance Order No. 1709022** | **ORDER ON (i) MOTION FOR PROTECTIVE ORDER; (ii) MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS (SOVEREIGN IMMUNITY); AND (iii) MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS (CONTRACTOR LIABILITY)**<br><br>April 2, 2018<br><br>Langdon T. Owen, Jr.<br>Administrative Law Judge |
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On March 19, 2018, a hearing was held at the Department of Environmental Quality with respect to three matters: (i) the Motion for Protective Order under Jordan Valley Water Conservancy District's ("Jordan Valley") Response to Request for Issuance of Administrative Subpoena and Motion for Protective Order dated February 5, 2018; (ii) the Director's Motion for Partial Judgment on the Pleadings (Sovereign Immunity) dated January 25, 2018, filed by the Director of the Division of Waste Management and Radiation Control (the "Division"); and (iii) the Director's Motion for Partial Judgment on the Pleadings (Contractor Liability) dated January 25, 2018, filed by the Division. At the hearing, Jordan Valley was represented by Gregory S. Roberts and Marie Bradshaw Durrant, and the Division was represented by Raymond D. Wixom and Bret F. Randall.

I. MOTION FOR PROTECTIVE ORDER

Jordan Valley's Motion for Protective Order was made in response to the Director's Amended Request for Issuance of an Administrative Subpoena dated January 26, 2018. The

request for the subpoena sought an administrative subpoena for the production of documents from Infinity Corrosion Group, Inc., the corporation for which Erik Llewellyn worked. Mr. Llwellyn was the project engineer for Jordan Valley in the project at issue in these proceedings. The Division believed that formal discovery was appropriate under the Notice of Further Proceedings issued by the Administrative Law Judge ("ALJ") which designated these proceedings as formal proceedings. The ALJ, however, interprets the order as only designating the overall proceedings as formal, in which formal proceedings informal discovery was still applicable unless the standards for formal discovery under R. 305-7-310(2) were met (absent an agreement of the parties). That provision of the Rule provides:

> (2) Formal discovery is allowed in a matter by agreement of the parties involved in the formal discovery or if so directed by the ALJ in a formal proceeding. The ALJ may order formal discovery when each of the following elements is present:
> (a) informal discovery is inadequate to obtain the information required;
> (b) there is no other available alternative that would be less costly or less burdensome;
> (c) the formal discovery proposed is not unduly burdensome;
> (d) the formal discovery proposed is necessary for the parties to properly prepare for the hearing;
> (e) the formal discovery does not seek a party's position regarding a question of law or about the application of facts to law that could be addressed in a motion to dismiss or a motion for summary judgment; and
> (f) the formal discovery proposed will not cause unreasonable delays.

The ALJ finds that the elements of R. 305-7-310 have been met and that formal discovery consisting of the issuance of the requested subpoena is appropriate and that the requested subpoena will be issued.

First, informal discovery is inadequate to obtain the information required. The parties have engaged in informal discovery efforts beginning prior to the Notice of Further Proceedings,

and dating back to meetings in November of 2017 and email exchanges in December of 2017. Some information was provided by Jordan Valley, notably a summary report prepared by Mr. Llwellyn and Jordan Valley and its counsel. This is not sufficient because the Division needs access to the source information under the control of Mr. Llewellyn and his employing company, who are not parties to these proceedings, and informal attempts to obtain this information have been unsuccessful for several months. Particularly where the information is not under the direct control of a party, a subpoena is necessary to assure that the party needing the information will be able to seek sanctions if the information is not provided.

Second, there is no other available alternative that would be less costly or less burdensome. As found above, informal processes have not been successful, and the cost and burden of obtaining the requested information will be about the same whether formal or informal methods are used to obtain it.

Third, the formal discovery proposed is not unduly burdensome. The information requested is critical and highly relevant, and in a litigation setting would be required to be provided as part of an initial disclosure. Given the importance of the information, it is not unduly burdensome that it be disclosed. The information is of a type that it could be expected to be readily available.

Fourth, the formal discovery is necessary for the parties to properly prepare for the hearing. As found above, this information is critical, and it is needed for adequate preparation at the hearing for both parties. It should not be denied to the Division, which would be at a great disadvantage without it.

Fifth, the formal discovery does not seek a party's position regarding a question of law or about the application of facts to law that could be addressed in a motion to dismiss or a motion for summary judgment. No such position material is sought – only factual material.

Sixth, the formal discovery will not cause delays. The requested discovery is designed to speed these proceedings along, where informal efforts have resulted in delays. Any delay caused by the time it takes to respond on the request is not unreasonable, particularly given the key importance of the material requested.

Jordan Valley's motion for a protective order is denied, and the Division's request for the subpoena is granted. The subpoena will issue forthwith.

Other discovery requests are pending between the parties. If the parties cannot reach agreement on these requests, then after April 6, 2018, a motion relating to such requests may be brought. The response to such a motion on discovery will be due within fifteen (15) days after the motion is filed, and any reply will be due within four (4) days after any such response.

## II. MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS (SOVEREIGN IMMUNITY)

Both of the Division's Motions for Partial Judgment on the Pleadings were filed under R. 305-7-312, which encourages such motions in appropriate cases, and Ut. Rul. of Civ. Proc. 12(c), which, under R. 305-7-312, governs such a motion. Under URCP 12(c), judgment may be entered on the pleadings when the moving party is entitled to judgment on the face of the pleadings. *Mountain America Credit Union v. McClellan*, 854 P. 2d 1356 (UT. App. 1993).

It is not disputed that Jordan Valley is a political subdivision of Utah. The issue is whether it is entitled to sovereign immunity as a defense against the relief sought by the Division in these proceedings. That defense is governed by UCA §§ 63G-7-101, et seq., the Governmental Immunity Act of Utah. Under this Act, a "claim" means "any asserted demand

for or cause of action for money or damages..." UCA § 63G-7-102(2). The immunity granted is from "suit for any injury that results from the exercise of a governmental function." UCA § 63G-7-201(1). "Injury" means "death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to the person or estate, that would be actionable if inflicted by a private person or the private person's agent." UCA § 63G-7-102(6). Here an injury of the sort described in the Act is not involved. The Act describes tort-type injuries of the sort that would be actionable by a private person. There is no claim by the Division of a tort-type injury, and certainly not one that could be actionable by a private person. What is involved here is an exercise of the police power of the state to enforce laws designed to protect the environment through a Notice of Violation and Compliance Order, a form of relief unavailable to private persons, and that does not fit the basic grant of immunity under the Act.

Further, it is clear that subdivisions of the State of Utah are subject to the Environmental Quality Code, in this case under the Utah Solid and Hazardous Waste Act (UCA §§19-6-101 et seq.), which act, at UCA § 19-6-112, authorizes a notice of violation to any "person," which term expressly includes any "state, state or federal agency or entity, municipality, commission, or political subdivision of a state." UCA § 19-1-103(4). Statutes making political subdivisions subject to environmental laws and their enforcement are consistent with the conclusion that such environmental laws are not the sort of matter for which governmental immunity applies in the first place. Alternatively, the specificity of the environmental laws could also be seen as itself a waiver of any otherwise applicable immunity.

The argument that ultimately a monetary penalty could be imposed by a court (see UCA § 19-6-113(2)) for failure to comply with enforcement orders or with injunctions (Jordan Valley does not propose that equitable remedies are subject to immunity) does not make the nature of

the monetary penalty the same as a monetary damage award. The amount of penalty is not determined by the damage caused, as in a civil tort-type action, but by the need to enforce compliance based on a number of factors. See R. 315-101 et seq.; R. 315-102-1. The purpose is not to compensate for the harm done, but to force compliance. Without the ability to use monetary sanctions for failures to comply with proper orders or injunctions, the environmental laws would become essentially unenforceable against governmental agencies; this is clearly not the intention of the Environmental Quality Code. The provisions of Utah's Environmental Quality Code itself make this abundantly clear, but this conclusion is bolstered because that Code contains a state program sufficiently equivalent to the federal environmental program to allow the federal Environmental Protection Agency (EPA) to delegate authority to the State of Utah under the Resource Conservation and Recovery Act ("RCRA"). See 42 USC § 6926(b) and 40 CFR Part 271. Thus, the state and federal rules in this area should be applied in a matter fundamentally consistent with each other. This requires that governmental agencies must be made effectively subject to the environmental rules, the effectiveness of such rules depends on the effectiveness of the sanctions supporting them, and such sanctions to be effective must include monetary sanctions, even if not tort-style damages. The federal program does not give governmental agencies immunity from enforcement penalties, and neither should the Utah program.

The reference by Jordan Valley to the Utah Hazardous Substances Mitigation Act is not useful in determining the sovereign immunity issue here which at this point relates to the causing of an environmental condition, not to injuries arising from acts taken in the investigation or clean up of the condition. See UCA §§ 19-6-321(2) and 19-6-302.

The Division's Motion for Partial Judgment on the Pleadings is granted, and Jordan Valley's defense of sovereign immunity is dismissed.

## III. MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS (CONTRACTOR LIABILITY)

The standard for deciding motions on the pleadings is discussed in part II above, and applies here as well.

Jordan Valley has raised as a defense that its painting contractor, State Painting, is solely responsible for any environmental issues arising through the contractor's conduct. There is no factual issue but that State Painting was hired by Jordan Valley to "provide full containment, proper handling, storage, sampling, transportation, and disposal of hazardous and non-hazardous waste," and that under the agreement "Materials and equipment removal as part of the Work under this Contract shall become the property of the CONTRACTOR, unless specifically stated otherwise." Jordan Valley's Request for Agency Action ("RFAA") of October 20, 2017, Factual Background, pp. 3-4, ¶ 2. The issue is whether such an agreement can relieve Jordan Valley of its duties under the environmental laws.

The duty of compliance under the environmental laws was on Jordan Valley. It could use contractors or employees to meet its duties. It chose to use a contractor and the contractor agreed to comply with the environmental laws. RFAA, Factual Background, p. 4, ¶ 3. The contractor relationship was also an agency relationship. "One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor." Restatement (Second) Agency §14N. Such a delegation to a contractor of authority to act and to comply with the law does not delegate the legal duty of the principal so as to relieve the principal (here Jordan Valley) from its compliance obligations under the law. A duty is not escaped by naming an agent to perform it, whether that agent is a contractor or not.

Here, Jordan Valley granted to State Painting the authority to perform the acts that generated the waste and that would dispose of the waste. State Painting's actions were in the scope of this authority as actions necessary, usual, proper, or incidental to the authorized action. *Zions First National Bank v. Clark Clinic Corp.,* 762 P. 2d 1090 (UT 1988). State Painting had actual authority to act as agent for Jordan Valley. In such a situation, "A principal required by contract or otherwise by law to protect another cannot avoid liability by delegating performance of the duty, whether or not the delegate is an agent." Restatement of Agency (Third) § 7.06 (2006). This has long been the common law rule. Restatement Agency (First) § 214 (1933); Restatement of Agency (Second) § 214 (1958). Here there was a duty imposed by law, under the Environmental Quality Code and the Solid and Hazardous Waste Act, to protect another, namely residents of the State of Utah; under common law principles this duty cannot be delegated away.

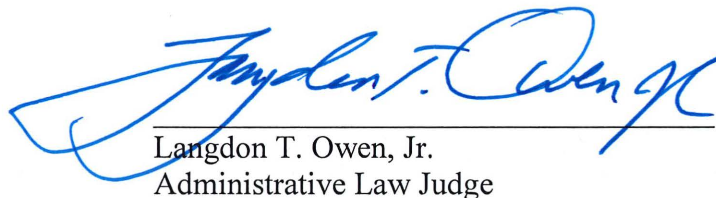
Even more strongly than under common law principles, under environmental law, duties of compliance cannot be delegated away by contract. See *United States v. A & F Materials Co.,* 582 F. Supp. 842 (S.D. IL 1984) (applying the CERCLA environmental law). The "cradle to grave" regulatory intent of RCRA (See H.R. Rep. No. 1016, Part I, 96th Long., 2d Sess. 17, reprinted in 1980 U.S. Code. Cong. & Admin. News 6119, 6120) does not allow a waste generator to contract away its obligations under applicable environmental law. As noted earlier, Utah law, which performs the functions of RCRA, should be applied in a manner consistent with RCRA. Jordan Valley hired State Painting on its behalf to generate waste and dispose of the waste. If State Painting did not dispose of it properly, Jordan Valley, as the waste generator, remains responsible for the disposal.

Jordan Valley argues that it did not have sufficient control over State Painting in order to be held responsible for State Painting's failure to properly dispose of waste. In particular, it

points out that State Painting breached its contract and acted surreptitiously in disposing of the waste. The extensive contract with State Painting included provisions providing levels of control for Jordan Valley, among others and in particular, through the engineer who reported to Jordan Valley on the project and who kept track of the project and received reports and information from State Painting. Even without such control mechanisms, and even without any neglect or other fault of any kind on the part of Jordan Valley, Jordan Valley would, under the environmental law, remain responsible since no fault is required under those laws, which have been "interpreted to impose strict liability." *United States v. Aceto Agricultural Chemicals Corp.*, 872 F. 2d 1373, 1378 (8th Cir. 1989). State Painting may well have acted wrongfully, but any such wrongful conduct was within the scope of the actions authorized by Jordan Valley, the creation and disposal of solid waste. The risk of State Painting's failure to perform properly remained with Jordan Valley because it had duties under the Environmental Quality Code and the Solid and Hazardous Waste Act which it could not contract away. This remains the case even if State Painting acted wrongfully and surreptitiously to avoid the controls Jordan Valley had in place and even if Jordan Valley was in no way at fault. The generation of the waste by Jordan Valley using State Painting's services was enough to impose this duty.

The Division's motion for partial judgment on the pleadings is granted and the independent contractor defense is dismissed.

DATED this 2nd day of April, 2018.



Langdon T. Owen, Jr.
Administrative Law Judge

## CERTIFICATE OF SERVICE

I certify that on this 2nd day of April, 2018, a true and correct copy of the foregoing Order on Motion to Strike and Order on Motion for Stay was sent by electronic mail to the following:

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