

2001

James Lovendahl v. Jordan School District : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Stephen G. Homer; attorney for appellants.

Blake T. Ostler; Burbidge, Carnahan, Ostler & White; attorneys for appellee.

Recommended Citation

Reply Brief, *James Lovendahl v. Jordan School District*, No. 20010274.00 (Utah Supreme Court, 2001).
https://digitalcommons.law.byu.edu/byu_sc2/1817

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES LOVENDAHL, SUE LOVENDAHL,)	
and James Lovendahl and)	
Sue Lovendahl as guardians)	
ad litem for WESLEY)	
LOVENDAHL, a person under)	
the age of 18 years,)	
)	
Plaintiffs-Appellants)	
)	
vs)	
)	
JORDAN SCHOOL DISTRICT, a body)	
politic and a political)	[ORAL ARGUMENT REQUESTED]
subdivision of the State)	
of Utah,)	[Argument Priority 15]
)	
Defendant-Appellee)	Supreme Court Case 20010274SC

APPELLANTS' REPLY BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY

The Honorable Ronald E Nehring, District Judge

STEPHEN G HOMER
Attorney at Law
9225 South Redwood Road
West Jordan, Utah 84088
Attorney for Plaintiffs-Appellants
JAMES LOVENDAHL, SUE LOVENDAHL,
and WESLEY LOVENDAHL

BLAKE T OSTLER
Attorney at Law
Burbidge, Carnahan, Ostler and White
50 South Main Street, Suite #1400
Salt Lake City, Utah 84144
Attorney for Defendant-Appellee
JORDAN SCHOOL DISTRICT

FILED
UTAH SUPREME COURT

DEC 13 2001

PAT BARTHOLOMEW
CLERK OF THE COURT

IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES LOVENDAHL, SUE LOVENDAHL,)	
and James Lovendahl and)	
Sue Lovendahl as guardians)	
ad litem for WESLEY)	APPELLANTS' REPLY BRIEF
LOVENDAHL, a person under)	
the age of 18 years,)	
)	
Plaintiffs-Appellants)	
)	
vs)	
)	
JORDAN SCHOOL DISTRICT, a body)	
politic and a political)	
subdivision of the State)	
of Utah,)	
)	
Defendants-Appellees)	Supreme Court Case 20010274SC

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	i
REPLY ARGUMENT	1
CONCLUSION	22
CERTIFICATE OF DELIVERY	23

ATTACHMENTS

1: Excerpt from legislative history of 42 U.S.C. §7412

TABLE OF AUTHORITIES

Cases cited

Branam vs Provo School District,	
780 P.2d 810 (Utah 1989)	3, 4, 22
Guardian State Bank vs Humpherys,	
762 P.2d 1084 (Utah 1988)	22

Horgan vs Industrial Design Corporation,	
657 P.2d 751 (Utah 1982)	22
Sandford vs University of Utah,	
488 P.2d 471, 26 Utah 2d 285 (Utah 1971)3, 4, 22	
Williams vs Board of Education,	
780 P.2d 818 (Utah 1989)	2, 3, 4, 22

Statutes cited

Section 19-6-102, Utah Code	6, 8
Section 19-6-106, Utah Code	8
Section 19-6-302, Utah Code	14, 15, 18
Section 19-6-502, Utah Code	7
Section 63-30-8, Utah Code	4
Section 63-30-9, Utah Code	4
Section 63-30-10(18), Utah Code	4, 8, 21
Section 63-30-10.5, Utah Code	4
42 U.S.C. § 6991	15, 16
42 U.S.C. § 7412	17

Administrative Regulations cited

Utah Administrative Regulation R315-1-1	8
Utah Administrative Regulation R315-2-4	8, 9
40 C.F.R. § 116.4	17
40 C.F.R. § 261.2	12, 13
40 C.F.R. § 261.3	9, 10
40 C.F.R. § 261.4	34, 35
40 C.F.R. § 261.33	9, 11, 12

REPLY ARGUMENT

I

**THE DEFENDANT JORDAN SCHOOL DISTRICT,
HAVING NO STATUTORY RESPONSIBILITY
FOR THE REGULATION, MITIGATION OR HANDLING
OF "HAZARDOUS MATERIALS", IS NOT WITHIN
THE CLASS OF GOVERNMENTAL AGENCIES FOR WHICH
IMMUNITY FROM SUIT WAS CONTEMPLATED**

The Defendant JORDAN SCHOOL DISTRICT is a governmental entity, created and charged with the responsibility to operate and administer a public school system, for the education of children in kindergarten through high school. The District has NO STATUTORY RESPONSIBILITY OR MANDATE to handle or regulate "hazardous waste" or "hazardous materials", as such, and is thus not within the "class" of Utah governmental agencies---such as the Department of Environmental Quality and the Department of Health---which are so statutorily charged with those responsibilities.

Obviously, the Legislature intended to shield those agencies [e.g. the DEQ; the Department of Health] from the potentially-extraordinary claims (for negligence and/or liability) in this field. The Legislature did not intend the grant of immunity to extend to a local school district, negligently disposing of wastes from its toilets, sinks and food-preparation facilities, from suit for "nuisance" arising from the damaging effect intentionally inflicted upon an adjacent propertyowner! In this context the argument and assertion of the District (as to entitlement to immunity) is similar to those unsuccessful arguments raised by other governmental entities operating OUTSIDE

of their limited area of responsibility.

This Court's decision in the case of **Williams vs Board of Education**, 780 P.2d 818 (Utah Supreme Court 1989)], is authority for the proper, common-sense analysis of the scope of "governmental immunity". In **Williams** the school district argued that the run-off of stormwaters onto the "downhill" adjoining propertyowner was immunized from suit, by reason of the Act, because the district was engaged in the "management of floodwaters". This hypertechnical argument WAS REJECTED by this Court which engaged in a common-sense reading of the Act and thereafter wrote:

We do not need to reach here the question of whether the second paragraph of section 63-30-3 provides "absolute immunity" for the flood control activities of governmental entities. That is because **we hold that defendant's activities in the instant case simply do not come within the contemplation of paragraph two. . . .** Under this standard of review, the facts in the record clearly indicate that plaintiff's damages from the runoff surface waters which are the subject of this action are not the result of defendant's "management of flood waters and other natural disasters (or) the construction, repair, and operation of flood and storm systems." **Defendant school district has no such statutory responsibility.** We do not believe it was the legislature's intention in enacting the 1984 amendment to shield defendant from possible liability for damages arising from its negligence in the resurfacing of a parking lot, a question of fact to be determined on remand. Like private property owners, owners of public property must exercise reasonable care in controlling surface water runoff.

780 P.2d at 820-821. Emphasis added.

Contrary to the assertions of the DISTRICT, **Williams** IS a "persuasive analogy" (opposing counsel's term, p. 15 of APPELLEE'S BRIEF) for the proposition that the Court engage in a

common-sense reading AND APPLICATION of the Governmental Immunity Act.

The odors, vapors and gases from the sewer vent pipe are--- legally---no different from the run-off waters from the parking lot in **Williams** and for which the public entity may be held liable! [Indeed, if there is a difference between the sewer gases, odors and vapors and the runoff waters, it is only that in the case at bar that the JORDAN SCHOOL DISTRICT has INTENTIONALLY ACTED to take those gases, vapors and odors---which would arguably have remained in the underground sewer line---and "vent" them into the atmosphere a mere 17 feet away from Plaintiffs' residence!]

As the **Williams** decision correctly noted in connection with "management of flood waters", the Jordan School District in this case has NO STATUTORY RESPONSIBILITY to manage "hazardous wastes" within the contemplation of the Governmental Immunity Act and thus should enjoy no "immunity" from suit for its negligence.

Essentially similar results were reached by this Court in its decision in **Branam vs Provo School District**, 780 P.2d 810 (Utah Supreme Court 1989), in which this Court wrote:

In the present case, **the district certainly does not fall within the intendment of the statute. It was not charged with the responsibility to deal with flood waters or to construct flood or storm systems, and the school did not act to protect the public at large from flood waters. Its actions were indistinguishable from those any other landowner might have taken to protect its property. As such, it enjoys no immunity from Branam's suit under section 63-30-3 of the Code.**

780 P.2d at 813. Emphasis added.

Similar results are found in this Court's decision in

Sanford vs University of Utah, 488 P.2d 741, 26 Utah 2d 285 (1971) [claims for "nuisance" injuries to neighbor NOT immunized under Governmental Immunity Act].

II

**THE ROUTINE HANDLING AND DISPOSAL OF "DOMESTIC SEWAGE"
AND ITS CONSTITUENTS, INCLUDING HYDROGEN SULFIDE GAS,
DOES NO ENCOMPASS HANDLING "HAZARDOUS WASTE" OR
"HAZARDOUS MATERIALS" AS CONTEMPLATED BY
THE UTAH GOVERNMENTAL IMMUNITY ACT**

If the Court adopts the common-sense, limited reading and application of the "governmental immunity" as per **Williams**, **Standford** and **Branam**, discussed in Point I, above, the Court need not engage in the "daisy-chain" analysis advocated by the Defendant DISTRICT.

The arguments of the Defendant SCHOOL DISTRICT [that Subsection 63-30-10(18) retains "immunity" against suit---for Section 8 ("dangerous condition of structures") AND for Section 9 ("defective public building or structure") BUT NOT for Section 10.5 ("inverse condemnation") claims] are jurisprudentially correct ONLY IF the DISTRICT was actually engaged in handling "hazardous wastes" or "hazardous materials". Thus, the first step in ascertaining whether the Defendant DISTRICT is "immune" from suit is to determine whether or not the "hydrogen sulfide" is EITHER (1) a "hazardous material" OR (2) a "hazardous waste".

At the outset the Court should keep in mind that in the context of the "public health" and "environmental protection statutes", there is an intentional and consistent "ranking" of the described "wastes" and "materials". This "ranking"---as evidenced by the type and depth of the statutory and

administrative controls and the imposed penalties for the violation of the regulatory scheme---is generally as follows:

1. unregulated "wastes"
2. "solid wastes" [i.e. regular landfill-type wastes]
3. "hazardous wastes" ["solid wastes" which, for some identified reason, are particularly "hazardous": e.g. asbestos-laden construction debris, which requires specially permitted and constructed designated landfill disposal, etc.]
4. "hazardous materials" [not per se "wastes", but intentionally-created and controlled "materials", which are truly hazardous: the discharge of such materials into the environment brings out the "haz mat response teams" with their "space suits", "kitty litter", and so forth!]
5. "toxic wastes" and "toxic substances" [the truly deadly stuff]

A careful analysis of the pertinent statutes and administrative regulations evidences a clear legislative intent that the "hydrogen sulfide" gas, as a naturally-occurring by-product of putrification within "domestic sewage" falls within the unregulated "wastes" [#1 in the listing], rather than at the #4 level as the DISTRICT asserts.

A

HYDROGEN SULFIDE GAS, AS A NATURALLY-OCCURRING BY-PRODUCT OF THE PUTRIFICATION OF "DOMESTIC SEWAGE" IN RELATIVELY SMALL QUANTITIES, IS NOT A "HAZARDOUS WASTE" FOR WHICH IMMUNITY ATTACHES

The term "hazardous waste" is NOT DEFINED within the Utah Governmental Immunity Act. Thus, it is perhaps instructive and helpful---but not necessarily controlling---for the Court to consider other statutory definitions of the phrase. The phrase "hazardous waste" IS DEFINED within Section 19-6-102, entitled

"Definitions", as part of the "Solid and Hazardous Waste Act" of Utah, as follows:

(9) **"Hazardous waste"** means **a solid waste** or combination of solid wastes other than household waste which, because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause or significantly increase serious irreversible or incapacitating reversible illness or may pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed.

Emphasis added. Thus, for the "hydrogen sulfide" gas to be a "hazardous waste", it must be a "solid waste", which is "defined" in Subsection 19-6-102(17), as follows:

(17)(a) "Solid waste" means any garbage, refuse, sludge, including sludge from a waste treatment plan, water supply treatment plant, or air pollution control facility, or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining, or agricultural operations and from community activities **but does not include solid or dissolved materials in domestic sewage** or in irrigation return flows or discharges for which a permit is required under Title 19, Chapter 5, Water Quality Act, or under the Water Pollution Control Act, 33 U.S.C., Section 1251 et seq.

. . .

Emphasis added. The first point of analysis would be to determine if the "hydrogen sulfide" (as a "gaseous material") is a "solid". It isn't! That conclusion should truncate any further need for analysis.

Continuing with the statutory analysis, the gaseous material is a "solid or dissolved materials in domestic sewage". The phrase "domestic sewage" defines and describes the routine sanitary sewer discharges from the Riverton Elementary School---consisting entirely of human wastes from the school restroom

facilities (sinks and toilets), drinking fountains, and/or the water discharges from food-preparation activities conducted within the school cafeteria. The phrase "domestic sewage" is not so "defined", so the Court must arrive at a point wherein the commonly-accepted meaning of common words must be utilized in the statutory construction. [Note, however, that the phrase "domestic sewage" IS DEFINED by administrative regulation---as described below---so as to NOT be a "solid waste", so it (the domestic sewage) could NOT be a "hazardous waste".]

Section 19-6-502, as "definitions" for the "Solid Waste Management Act", provides in relevant part:

19-6-502. Definitions.

As used in this part:

. . .

(7) "Solid waste" means all putrescible and nonputrescible materials or substances discarded or rejected as being spent, useless, worthless, or in excess to the owner's needs at the time of discard or rejection, including garbage, refuse, industrial and commercial waste, sludges from air or water control facilities, rubbish, ashes, contained gaseous material, incinerator residue, demolition, and construction debris, discarded automobiles and offal, **but not including sewage and other highly diluted water carried materials or substances and those in gaseous form.**

. . .

Emphasis added. It is obvious that the Legislature does not believe or intend that "sewage" and or wastes "in gaseous form" be characterized as "solid wastes". The "bottom line" is that the statutory definition specifically EXCLUDES "domestic sewage" from

the "definition" of "hazardous waste". SUCH SHOULD END THE DISCUSSION!

The Riverton Elementary School sanitary sewer discharges, including the "gaseous material" in the form of the hydrogen sulfide ("rotten egg") gas, are contained within and contemplated by the phrase "domestic sewage" and thus, "hydrogen sulfide" gas from this type of activity (i.e. operation of the public school) IS NOT a "hazardous waste" within the meaning of state statutes, including Section 63-30-10(18)(c) of the Immunity Act.

The Plaintiffs' interpretation (that the hydrogen sulfide is NOT "hazardous waste") is further bolstered by the administrative agency regulations adopted pursuant to statutory authority [Section 19-6-106, Utah Code] and for the purpose of implementing and enforcing those regulatory functions. Administrative Regulation R315-1-1, pertaining to "Utah Hazardous Waste Definitions and References", incorporates---for the purposes of the "administrative regulations"---the statutory definitions contained in Sections 19-6-102, Utah Code. The administrative regulations EXCLUDE "domestic sewage" from being a "solid waste", which thus precludes those materials from being a "hazardous waste", by providing in relevant part:

R315-2-4. Exclusions.

(a) MATERIALS WHICH ARE NOT SOLID WASTES.

The following materials are not solid wastes for the purposes of this rule:

- (1) **Domestic sewage** or any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment. **"Domestic**

sewage" means untreated sanitary wastes that pass through a sewer system.

. . .

Emphasis added. The Riverton Elementary School sanitary sewer wastes at issue in this litigation are "untreated sanitary wastes that pass through a sewer system", per the second sentence of the "definition". Thus, working backwards, the "domestic sewage" is not a "solid waste" and thus it is NOT a "hazardous waste". For sure, the hydrogen sulfide gases within the sewer line---whether those gases are in fact a constituent part of the liquid sewer effluent or not---are, in fact and in law, "untreated sanitary wastes that pass through a sewer system". End of discussion!

The Defendant DISTRICT asserts [page 30 of APPELLEE'S BRIEF] that the Plaintiffs

"ignore the plain language of the hazardous waste definition in 40 C.F.R. §261.3(a)(2)(ii).

Defendant's rhetoric has several flaws. These are disclosed by a careful examination of the text of the federal regulation, which provides, in pertinent part:

261.3 Definition of hazardous waste.

(a) A **solid waste**, as defined in §261.2, is a **hazardous waste** if:

(1) It is not excluded from regulation as a hazardous waste under §261.4(b);

and

(2) It meets any of the following criteria:

. . .

(ii) It is listed in subpart D of this part and has not been excluded from the lists under subpart D of this part under §260.20 and 260.22 of this Chapter.

. . .

Emphasis added.

The first flaw in Defendant's assertion is the self-serving OMISSION of subparagraph (1) from the analysis: subparagraph (1) must be included, due to the word "and" (as distinguished from the word "or") between the two subparagraphs.

But the fatal flaw of Defendant's assertion is its failure to examine the provisions of §262.4(a), which provides:

§261.4 **Exclusions.**

(a) Materials which are not solid wastes. The **following materials are not solid wastes** for the purposes of this part:

(1)(i) **Domestic sewage;** and

(ii) **Any mixture of domestic sewage and other wastes that passes through a sewer system** to a publicly-owned treatment works for treatment. "Domestic sewage" means untreated sanitary wastes that pass through a sewer system.

Emphasis added.

The Defendant has conveniently ignored the provisions of the controlling regulation! The Defendant DISTRICT might argue that the provisions of §261.4(a) are not expressly incorporated into the provisions of §261.3 [Definition of hazardous waste], and thus are inapplicable to §261.3. WRONG! WRONG! Section 261.4(a) IS APPLICABLE. First, because the provision is there, "in the book, on the page"! A mere quarter-inch away from the provisions of Section 261.3. Secondly, the provisions of Section 261.4 expressly provide "for the purposes of this part", thus expressing an all-encompassing "definition" (or modification thereof) for the entire "Part" of the federal regulation: namely, §§261.1, 261.2, 261.3, and so forth! Federal regulations of a

technical nature are hard enough to read and understand as written, without requiring them to contain every "exception" and every "exemption" in the exact same grammatical sentence to which they obviously refer! Defendant's narrow and self-serving selection of text is misplaced and erroneous!

In similar vein, Defendant's assertion that the mere LISTING of "hydrogen sulfide" within 40 C.F.R. §261.33 is similarly incorrect and out-of-context! This inappropriateness is illustrated by a careful reading of the federal regulation, as follows:

§261.33 Discarded commercial chemical products, off-specification species, container residues, and spill residues thereof.

The following materials or items are hazardous wastes if and when they are discarded or intended to be discarded as described in §261.2(a)(2)(i), when they are mixed with waste oil or used oil or other material and applied to the land for dust suppression or road treatment, when they are otherwise applied to the land in lieu of their original intended use or when they are contained in products that are applied to the land when, in lieu of their original intended use, they are produced for use as (or as a component of) a fuel, distributed for use as a fuel, or burned as a fuel.

. . .

(f) The **commercial chemical products**, manufacturing chemical intermediates, or off-specification commercial chemical products referred to in paragraphs (a) through (d) of this section, are identified as toxic wastes (T), unless otherwise designated and are subject to the small quantity generator exclusion defined in §261.5(a) and (g). **These wastes** and their corresponding EPA Hazardous Waste Numbers are:

. . .

U-135 7783-06-4 Hydrogen sulfide H2S

. . .

Emphasis added. That "hydrogen sulfide" is so LISTED does not mean that is a "hazardous waste". To the contrary! The "listing" is grossly out-of-context.¹

The "listing" of hydrogen sulfide in Appendix VIII following the narrative provisions of 40 C.F.R. §261 is similarly misanalyzed by the Defendant. Appendix VIII of 40 C.F.R. §261, by its own terms, is devoid of any explanation of what the pages-long "appendix" even is, other than its title "hazardous constituents". There are but two brief references---both contained in 40 C.F.R. §261.2(d)---as to what is intended by Appendix VIII. Subsection 261.2(d)(3)---THE only reference which is significant---shows the inappropriateness of the DISTRICT's

¹The inappropriateness of the DISTRICT's reliance upon and analysis of 40 C.F.R. §261.33 is further illustrated by the "comment" actually included within the text of the federal regulation, as follows:

[Comment: The phrase "commercial chemical product or manufacturing chemical intermediate having the generic name listed in . . ." refers to a chemical substance which is **manufactured or formulated for commercial or manufacturing use which consists of commercially pure grade of the chemical, any technical grades of the chemical that are produced or marketed, and all formulations in which the chemical is the sole active ingredient**. It does not refer to a material, such as a manufacturing process waste, that contain any of the substances listed in paragraph (e) or (f). Where a manufacturing process waste is deemed to be a hazardous waste because it contains a substance listed in paragraph (e) or (f), such waste will be listed in either §261.31 or §261.32 or will be identified as a hazardous waste by the characteristics set forth in subpart C of this part.]

Emphasis added. Obviously, 40 C.F.R. §261.33 is concerned with "commercially pure grades" of the chemical, "produced or marketed", etc. Obviously, the "sewer gas" vented from the sewer line lateral of the Riverton Elementary School, even if such might contain "hydrogen sulfide" gas, is something other than what the federal regulation is concerned with.

assertions, by providing:

(3) The Administrator will use the following criteria to add wastes to that list:

(i) (A) The materials are ordinarily disposed of, burned, or incinerated; or

(B) The materials contain toxic constituents listed in **appendix VIII of part 261** and these constituents are not ordinarily found in raw materials or products for which the materials substitute (or are found in raw materials or products in small concentrations) and are not used or reused during the recycling process; and

(ii) The material may pose a substantial hazard to human health and the environment when recycled.

Emphasis added. Obviously, Appendix VIII to Part 261 of 40 C.F.R. has been relied upon by the DISTRICT in an extreme out-of-context manner. The LISTING of "hydrogen sulfide" as a "hazardous constituent" has NO LEGAL SIGNIFICANCE to the situation-at-hand.

The Defendant DISTRICT's arguments [page 26 of APPELLEE'S BRIEF] that the hydrogen sulfide gas at issue is not "domestic sewage" (as "defined" in the UTAH STATUTES, the Utah administrative regulations, and even in the pertinent federal regulations) because the hydrogen sulfide is being pumped from the sewer lines BEFORE the gas reaches the sewage treatment facility BORDERS ON THE RIDICULOUS. The gas is being pumped FROM THE SANITARY SEWER LINE. The vent pipe is connected directly to the sanitary sewer line. The DISTRICT's argument might have merit if the "vent pipe" were connected to the roof of the school and sucked air and/or odors DIRECTLY out of the rooms. But such is not the situation at hand. The hydrogen sulfide gases---and who knows what other obnoxious and offensive other odors, vapors and

gases from other parts of the entire system---are part of the "domestic sewage", as so defined. The obvious legislative intent--to EXCLUDE "domestic sewage" and its related constituent gases from the definition of "hazardous waste"---cannot be overlooked in a rhetorical sleight-of-hand of such an absurd factual argument!

The "bottom line" is that the Utah statutes, the Utah administrative regulations, AND the federal administrative regulations, uniformly and consistently, EXPRESSLY PROVIDE that "domestic sewage" is not "hazardous waste". If the "domestic sewage", by definition, is not a "hazardous waste", then its naturally-occurring constituent components---including hydrogen sulfide gas, in relatively minute albeit offensive quantities---cannot be a "hazardous waste" within the contemplation of those statutes and regulations!

B

SEWER LINE "HYDROGEN SULFIDE" GAS IS NOT A "HAZARDOUS MATERIAL" UNDER FEDERAL REGULATIONS

Subsection 19-6-302 of the "Hazardous Substances Mitigation Act" of Utah defines "hazardous materials", by providing in relevant part:

19-6-302. Definitions.

As used in this part:

. . .

(7) "Hazardous materials" means hazardous waste as defined in the Utah Hazardous Waste Management Regulations, PCBs, dioxin, asbestos, or a substance regulated under 42 U.S.C., Section 6991(2).

. . .

Emphasis added. Although Section 19-6-302(7) "defines" the phrase "hazardous materials", the phrase "hazardous materials" IS NOT FURTHER EVEN MENTIONED within the remainder of the statutory provisions of Part 3 of Chapter 6 of Title 19. The phrase "hazardous materials" is nevertheless so "defined" to be one of the following items:

1. a "hazardous waste" as defined in the Utah Hazardous Waste Management Regulations;
2. a PCB;
3. dioxin;
4. asbestos; or
5. a substance **regulated** under 42 U.S.C., Section 6991(2).

Emphasis added.

The analysis shown above evidences that the hydrogen sulfide IS NOT a "hazardous waste as defined in the Utah Hazardous Waste Management Regulations". The DISTRICT does claim that the "hydrogen sulfide" is "a substance regulated under 42 U.S.C., Section 6991." In analyzing the meaning of the federal statutes, one must first consider what the Utah Legislature had in mind when it utilized the words "a substance **regulated** under 42 U.S.C., Section 6991(2)".

In the instant situation, there is NO FACTUAL "regulation" of the hydrogen sulfide "vented" by the District from its sewer line at the Riverton Elementary School! In this context, the Utah Legislature utilized the word "regulated"---as contrasted with the word "defined". The wording "regulated under" connotes a

FACTUAL REGULATION.

The DISTRICT acknowledges [page 21 of APPELLEE'S BRIEF] that 42 U.S.C. §6991 applies to "underground storage tank" regulation. Thus, the first question to be answered is whether the Legislature intended---for governmental immunity purposes---to truncate the analysis, or would be inclined to go further in the "daisy chain" arguments advanced by Defendant DISTRICT.

Hydrogen sulfide as a "hazardous" air pollutant

The Defendant DISTRICT asserts [p. 22 of its BRIEF] that hydrogen sulfide

. . . is listed as a hazardous air pollutant in Section 112 of the Clean Air Act, codified at 42 U.S.C. §7412. In subsection (r) of this section, which addresses **the prevention of accidental releases** of "any substance listed pursuant to paragraph (3) or any other extremely hazardous substance," paragraph (3) directs the Administrator to promulgate a list of hazardous substances, and expressly directs that "[t]he initial list shall include . . . hydrogen sulfide. . ." 42 U.S.C. §7412(r)(1), (r)(3) (emphasis added). Therefore, hydrogen sulfide is specifically identified as a hazardous air pollutant in this section, and it is therefore a hazardous substance under 42 U.S.C. §9601(14), and is as a matter of law a hazardous material under Utah Code Ann. §19-6-302(7).

APPELLEE'S BRIEF, page 22. Emphasis added.

IF the Clean Air Act is, as indicated in the quoted text, concerned with the **"prevention of accidental releases"** of hydrogen sulfide and other "hazardous substances", it certainly is perplexing and counter-intuitive to believe that the Defendant DISTRICT's actions in INTENTIONALLY AND CONTINUOUSLY RELEASING hydrogen sulfide into the atmosphere would not be the subject of regulatory oversight and prohibition! NO PERMIT! NO REGULATORY OVERSIGHT! The DISTRICT is simply "venting" the "hazardous

material" into the atmosphere! And then the DISTRICT claims "immunity" for the "nuisance" that activity is!

The truth of the matter is that the Clean Air Act DOES NOT "list" hydrogen sulfide as a "hazardous substance". See Act of December 4, 1991, which DELETED "hydrogen sulfide" from the listing of "air pollutants" under 42 U.S.C. §7412.² See ATTACHMENT 1 to this APPELLANTS' REPLY BRIEF.

Opposing counsel has overlooked a significant amendment to the statute. In light of the CONGRESSIONAL REPEAL of any "listing" of hydrogen sulfide as a "hazardous air pollutant", AS A MATTER OF LAW hydrogen sulfide CANNOT NOW BE CHARACTERIZED AS A "HAZARDOUS MATERIAL", under the Clean Air Act and other federal statutes (at least for airborne discharges)!

Hydrogen sulfide as a maritime pollutant

Similarly, Defendant DISTRICT's reliance upon the LISTING of hydrogen sulfide as a "hazardous substance" under the provisions of 40 C.F.R. §116.4 [contained as EXHIBIT 7 to APPELLEE'S BRIEF], as promulgated by the Environmental Protection Agency **for the protection and purity of the nation's maritime (oceanic) waters**, has no application here. Utah---a "landlocked" state having no "oceanfront" and certainly no maritime waters or connection

²Page 373 of the United States Code Service volume, current as of 1997, applicable to 42 U.S.C. § 7412, contains the following entry as part of the "legislative history" of §7412 of the Clean Air Act:

1991. Act Dec. 4, 1991, in subsec. (b) (1),
**deleted "7783064 Hydrogen sulfide" from the
list of pollutants.**

Emphasis added. See ATTACHMENT 1 to this APPELLANTS' REPLY BRIEF.

thereto---cannot be concerned with these "maritime" pollutants, which undoubtedly pose great danger to those maritime waters and the plant and animal life therein. The airborne discharge of hydrogen sulfide gas by the DISTRICT has no application the maritime pollution regulations, "definitions" or listings!

conclusion:

That the Defendant, WITHOUT ANY KIND OF PERMIT OR RESTRICTION is apparently allowed, with apparent impunity, to discharge untold quantities of the claimed pollutant into the atmosphere, 24 hours a day, seven days a week in direct contradiction to the very statutes and regulations it relies upon as "authority" for "governmental immunity" purposes certainly brings into question the accuracy and validity of its legal position.

In the instant situation, there is NO FACTUAL "regulation" of the hydrogen sulfide "vented" by the District from its sewer line, IN UNCONTROLLED QUANTITIES INTO THE ATMOSPHERE! In this context,

The Utah Legislature utilized the word "regulated" in Section 19-6-302---as contrasted with the word "defined"---in retaining "governmental immunity". It is suspect that the Legislature intended that a governmental entity (such as the Defendant DISTRICT), having no "statutory responsibility" for the "handling" of "hazardous materials", would grant "immunity" (i.e. the entity cannot be sued at all) for "negligently" handling those UNREGULATED "hazardous materials" simply "vented" in uncontrolled quantities INTO THE ATMOSPHERE!

The wording "regulated under" connotes a FACTUAL REGULATION. The hydrogen sulfide is not FACTUALLY "regulated". The "hydrogen sulfide" with which we are here dealing is not the same "hydrogen sulfide" as described to be a "commercial chemical product", applied "to the land", etc. The "hydrogen sulfide" gas, in relatively minute quantities within the "domestic sewage" from the Riverton Elementary School, are not and were not intended to be "discarded" as described in the federal regulations! The mere "listing" of the "hydrogen sulfide" chemical within a long "laundry list" enumeration of chemical substances does not make the Riverton Elementary School "hydrogen sulfide" a "hazardous material" or "hazardous waste", when the introductory text (and other regulations) obviously and expressly mandate a contrary conclusion. The FEDERAL REGULATIONS, as cited by the Defendant, DO NOT APPLY TO THE CASE AT HAND! The DISTRICT's reliance upon the quoted regulations is inappropriate and misplaced.

The Defendant's claimed "immunity" defense is an illusory argument, born of desperation and not deserving of judicial belief or application! The judgment of the District Court granting summary judgment must be overturned!

III

OTHER DISTRICT ARGUMENTS

The DISTRICT's arguments [page 15 of APPELLEE'S BRIEF] that the DISTRICT's actions are merely following the mandate of state-promulgated administrative regulations [for odor-free rooms within schools] are misplaced, for at least two reasons. First, a careful reading of the regulation [Rule R392-200-6(B)(2)(b)]

indicates the regulation applies to those "rooms from which obnoxious odors, vapors or fumes originate": the rest rooms, perhaps the cafeteria kitchens, the high school industrial arts room where welding and metal fabricating activities (in which odorous petroleum-based "cutting oils" might be used) are conducted, and even the high school "chemistry lab", in which "rotten egg gas" is intentionally produced as part of the educational instruction! The regulation requires the "room" be "mechanically vented to the outside of the building". In the instant situation, the DISTRICT wasn't venting the "room" or even the "building" at large---which should have been separated from the sanitary sewer "lateral" (which was "vented") by an effective, water-filled P-trap which prevents the odors from the sewer line from entering the structure in the first instance! Unless the P-trap between the sanitary lateral connection and the building (and or the individual plumbing fixtures and drains therein) were completely dry so as to allow an unobstructed air passage from the room into the sewer line outside the building, it would be physically and mechanically impossible to "mechanically vent" the building in that manner: water-filled P-trap prevents the passage of air directly from the building into the sewer lateral, and vice-versa. The motor-driven "venting" fan could run continuously, but would suck ONLY those gases and odors from the sewer lateral and perhaps the rest of the underground sewer lines! Such a misguided approach to the problem was destined for failure from the inception thereof, as evidenced by the DISTRICT's ultimate temporary "closure" of the Elementary

School for several weeks (in February and March 1998)---during which time the venting fan was continuously operation until the DISTRICT, facing a "temporary restraining order" hearing later that day, "capped" the "vent pipe".

The DISTRICT does not deny committing the activities complained of. The DISTRICT, however, relies entirely on the "governmental immunity" allegedly afforded it under Section 63-30-10(18)(c) ["handling, mitigating or regulating hazardous materials or hazardous wastes"] as a shield to Plaintiffs' "nuisance" claims.

IV

PLAINTIFF'S "INVERSE CONDEMNATION" CLAIMS

The Defendant DISTRICT asserts that it is entitled to summary judgment because the Plaintiff did not object to counsel's statements that the Plaintiffs stated in their deposition their real property did not suffer a permanent diminishment of value. That's not true. The Plaintiffs did object to that characterization.

The real question whether the summary judgment may stand is whether the Defendant has produced "affidavits" and other sworn testimony to show that there is no "genuine dispute as to material fact". The operative "factual" issues pertaining to the "taking" and the "damaging" of the private property---even if there was not "permanent" damage (although Plaintiff's grass still has not grown back)---are in genuine dispute and a not overcome by the self-serving statements of opposing counsel during oral argument.

In reviewing a summary judgment, the Supreme Court must evaluate the facts and all reasonable inferences fairly drawn therefrom in a light most favorable to the party opposing summary judgment. **Guardian State Bank vs Humpherys**, 762 P.2d 1084, 1086 (Utah 1988); **Horgan vs Industrial Design Corporation**, 657 P.2d 751, 752 (Utah 1982).

As no evidence was actually before the Court at the "summary judgment hearing" on the "taking or **damaging**" issue, there was no basis for the Court to make any "findings" on that factually-intensive issue!

CONCLUSION

The Defendant SCHOOL DISTRICT has no "statutory responsibility" to "handle" or "mitigate" the claimed "hazardous waste" or "hazardous materials". Thus, following the common-sense reading and application of the Governmental Immunity Act and its text utilized in **Williams, Branam and Standford**, the Court should rule simply that the Legislature did not intend to retain immunity for the handling everyday "domestic sewage", even if a small constituent part thereof might be "hydrogen sulfide" gas.

As a matter of law, hydrogen sulfide is NOT a "hazardous waste", as defined by Utah statute, which expressly excludes "domestic sewage" from being "hazardous waste". Pertinent state and federal administrative regulations are consistent in that exclusion!


Similarly, the "hydrogen sulfide" gas emanating from the sanitary sewer line is not a "hazardous material" under pertinent state statute and/or correlated federal statute or administrative

regulation. The federal regulations relied upon by the Defendant are, according to the express terminology of those regulations, inapplicable factually and legally to the case at bar! The mere presence of the compound hydrogen sulfide in an extensive LISTING does not mean that hydrogen sulfide is a "hazardous material", particularly when closer examination and reading of the introductory text evidences otherwise!

Similarly, the District Court's ruling granting summary judgment on the "inverse condemnation" was erroneous. The facts with respect to the "damaging" or "taking" were in dispute. Plaintiff submitted no hard evidence (affidavits, etc.) to show otherwise. The trial court also erred in its application of the "immunity" to the "inverse condemnation" claims.

The District Court decisions must be reversed and the case remanded for the jury trial on the merits.

Respectfully submitted this 13th day of December, 2001.


STEPHEN G. HOMER
Attorney for Appellants
JAMES LOVENDAHL, SUE LOVENDAHL
and WESLEY LOVENDAHL

CERTIFICATE

I certify that I caused two copies of the foregoing APPELLANTS' REPLY BRIEF to be mailed, first-class postage prepaid, to Mr Blake T Ostler, Attorney at Law, Burbidge, Carnahan, Ostler and White, 50 South Main Street, Suite #1400, Salt Lake City, Utah 84144, this 13th day of December, 2001.



ATTACHMENT 1

Excerpt of 1997 volume of United States Code Service
"legislative history" of 42 U.S.C. §7412 [Clean Air Act]
showing DELETION of "hydrogen sulfide" from list of pollutants

finds that the technology to implement such standards is not available and the operation of such source is required for reasons of national security. An exemption under this paragraph may be extended for one or more additional periods, each period not to exceed two years. The President shall make a report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

“(d) State implementation and enforcement. (1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing emission standards for hazardous air pollutants for stationary sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard under this section.

“(e) Design, equipment, work practice, and operational standards. (1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in his judgment is adequate to protect the public health from such pollutant or pollutants with an ample margin of safety. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

“(2) For the purpose of this subsection, the phrase ‘not feasible to prescribe or enforce an emission standard’ means any situation in which the Administrator determines that (A) a hazardous pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

“(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

“(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of an emission standard whenever it becomes feasible to promulgate and enforce such standard in such terms.

“(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as an emission standard for purposes of the provisions of this Act (other than the provisions of this subsection).

1991. Act Dec 4, 1991, in subsec (b)(1), deleted “hydrogen sulfide” from the list of pollutants

ATTACHMENT 1

Page 1 of 1 page

Excerpt of 1997 volume of United States Code Service
 "legislative history" of 42 U.S.C. §7412 [Clean Air Act]
 showing DELETION of "hydrogen sulfide" from list of pollutants