

2011

# Living Rivers v. Utah Department of Natural Resources, Division of Oil, Gas and Mining : Reply Brief

Utah Court of Appeals

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Steven F. Alder; Michael S. Johnson;; Emily E. Lewis; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Attorneys for Appellee.

Patrick A. Shea; Jacque M. Ramos; J. Ramos Law Firm; Attorneys for Appellant.

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IN THE UTAH COURT OF APPEALS

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LIVING RIVERS,

Petitioner/Appellant,

vs.

UTAH DEPARTMENT OF NATURAL  
RESOURCES, DIVISION OF OIL,  
GAS AND MINING,

Respondent/Appellees.

**Appeal No. 20110242 CA**

**Agency Decision Nos.:** Docket No.  
2010-029, Cause No. UIC-358

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REPLY BRIEF OF APPELLANT

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PETITION FOR REVIEW OF DECISIONS AND ORDERS FROM  
THE UTAH DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF OIL, GAS AND MINING  
Agency Decision Nos.: Docket No. 2010-0219, Cause No. UIC 358

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Patrick A. Shea (2929)  
Patrick A. Shea, P.C.  
252 South 1300 East, Suite A  
Salt Lake City, Utah 84102  
Telephone: 801-582-0926  
Facsimile: 801-582-0834  
Email: [pas@patrickashea.com](mailto:pas@patrickashea.com)

Jacque M. Ramos (10720)

Steven S. Alder, No. 0033  
Michael S. Johnson, No. 6903  
Emily E. Lewis, No. 13281  
Assistant Attorneys General  
Mark L. Shurtleff, No. 4666  
Utah Attorney General  
1594 West North Temple, #300  
Salt Lake City, Utah 84116  
Telephone: 801-538-7227

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Patrick A. Shea (2929)  
Patrick A. Shea, P.C.  
252 South 1300 East, Suite A  
Salt Lake City, Utah 84102  
Telephone: 801-582-0926  
Facsimile: 801-582-0834  
Email: [pas@patrickashea.com](mailto:pas@patrickashea.com)

Jacque M. Ramos (10720)

Steven S. Alder, No. 0033  
Michael S. Johnson, No. 6903  
Emily E. Lewis, No. 13281  
Assistant Attorneys General  
Mark L. Shurtleff, No. 4666  
Utah Attorney General  
1594 West North Temple, #300  
Salt Lake City, Utah 84116  
Telephone: 801-538-7227

J. RAMOS LAW FIRM P.L.L.C.  
2709 South Chadwick Street  
Salt Lake City, Utah 84106  
Telephone: 801-521-2442  
Facsimile: (801) 582-0834  
Email: [jramos@jramoslawfirm.com](mailto:jramos@jramoslawfirm.com)

*Attorneys for Petitioner/Appellant*

Facsimile: 801-538-7440

*Attorneys for Respondents/Appellees*

Thomas W. Clawson  
Thomas R. Barton  
36 South State St., Suite 1900  
Salt Lake City, Utah 84111  
Telephone: 801-532-3333  
Facsimile: 801-534-0058

*Attorneys for Intervenor/Appellee*

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## ARGUMENT

### **I. THE BOARD FAILED TO CONSIDER ISSUES OF IMPOSING MONITORING WELLS TO THE UIC PERMIT WHEN THE EVIDENCE POSED POSSIBLE POLLUTION OR CONTAMINATION OF THE COLORADO RIVER.**

As conceded by Westwater and Appellees, Utah regulations specifically require that, “[i]njection wells shall be completed, equipped, operated, and maintained in a manner that *will prevent pollution and damage* to any USDW (United States Drinking Water), *or other resources* and will confine injected fluids to the interval approved.” Utah Oil and Gas Conservation Rule R649-5-2(1)(emphasis added). To ensure the integrity of the well and *to eliminate, prevent, or reduce the possible pollution or contamination, other test procedures or devices* may be required by the division. Utah Oil and Gas Conservation Rule R649-5-5(3.3). The standard of imposing additional security measures is that of “possible” pollution or contamination of injected fluid or formation water into other resources such as the Colorado River. It does not require a “more likely than not” burden in order to invoke three monitoring wells as a pertinent safety precaution where admittedly they would not be a problem. AR 0206 at p. 88:1 – 88:16.

Living Rivers properly raised the issues of possible seepage, migration of formation waters, or that the injection operations may initiate fractures through the overlying strata. AR 0206 at pp. 38:15 – 38:22, 43:9 – 43:14. Additionally, Living Rivers addressed the insufficiency of Westwater’s evidence that was based solely on a single “modeling” that demonstrated the injection fluid was compatible with formation water if any and only if at some time in the future an effective “sequestering agent” was developed and utilized. AR 0206, pp. 46:6 – 47:6, 47:24 – 48:2. Indeed, Westwaters’ only evidence presented to confirm and monitor that there are no seeps was based on a casual inspection from Paul Stone associated with Westwater, and two unidentified BLM rangers. AR 0206 at pp. 78:24 – 82:6. Moreover, the only evidence presented in contravention to the possibility of fractures was that “frac flow back water” was not to be injected. AR 0206 at p. 59:4 – 59:13.

Although Appellees and Westwater argue that by not requiring monitoring wells, the Board made an implicit finding that they were not necessary, the fact is there is no record of any consideration either at the hearing or in its Findings of Fact, Conclusions of Law, and Order of possible pollution or contamination through seepage or migration of formation water into the Colorado River and/or whether they should be required to “[e]liminate, prevent, or reduce the possible



*pollution or contamination*” from the use of the UIC by Westwater in direct contravention to its own regulations. AR 0146 – 0156, 0206.

Indeed, the Board improperly foreclosed an opportunity to Living Rivers to present a full and fair consideration of the likely contamination or pollution of the Colorado River and the imposition of monitoring wells to prevent the possibility of contamination by denying Living Rivers’ motions to continue or allowing the record to remain open. AR 0077 – 0078, 0093 – 0096, 0117 – 0120, 206 at pp. 5 – 14:12, 15:18 – 16:24, 199:23 – 199:25; *Commercial Carriers v. Industrial Commission (Judd)*, 888 P.2d 707, 713 (Utah Ct. App. 1994)(the test of substantial prejudice is whether the party was given full and fair consideration of the issues); *Orchard Park Care Center v. Department of Health Division of Health Systems Improvement*, 2009 UT App. 284, ¶13, 222 P.3d 64, 69 (Utah Ct. App. 2009)(finding substantial prejudice where Department of Health failed to address issues that required resolution and, as a result failed to develop an adequate record and prejudiced Petitioners). The substantial prejudice suffered by Living Rivers was that it was not given full and fair consideration and failure to develop an adequate record of the issues of possible pollution or contamination through seepage or migration of formation water into the Colorado River and/or whether the UIC permit should be required to have monitoring wells to “[e]liminate,

prevent, or reduce the possible pollution or contamination.” Utah Oil and Gas Conservation Rule R649-5-5(3.3).

**II. LIVING RIVERS HAS MARSHALLED THE EVIDENCE SHOWING THAT THE BOARD’S GRANT OF THE UIC PERMIT WITHOUT THE CONDITION OF MONITORING WELLS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

Living Rivers has marshaled the evidence, based on the record as a whole, demonstrating that even viewing the evidence in the light most favorable to the Board of Oil, Gas and Mining, the evidence is insufficient to support the Board’s grant of the UIC permit to Westwater without monitoring well conditions. *Martinez v. Media-Playmaster Plus/Church of Jesus Christ of Latter-Day Saints, et al.*, 2007 UT 42, ¶ 17, 164 P.3d 384, 390 (Utah 2007). However, even where the court determines that Living Rivers has failed to meet its marshalling requirement, the court retains discretion to consider independently the whole record and determine if the decision below has adequate factual support. *Id.* at ¶ 20.

**A. SOLOMON’S REPORT CONSTITUTES PART OF THE WHOLE RECORD ON APPEAL.**

When a petition for rehearing or modification is filed, R641-110-400 requires that that the Board will act upon the petition for hearing at its next regularly scheduled meeting following the date of its filing. This is to allow sufficient time for all parties to the proceeding to file responses or supplements to

the petition, at or before the hearing, and allow the parties to argue the merits of the request. AR 0172; Utah Oil and Gas Conservation Rules R641-110-300, R641-110-400.

Pursuant to R641-110-400, the Board properly included Living River's Request on the agenda for the Board's regularly scheduled February 24, 2011 hearing. AR 0207. On February 22, 2011—two days prior to the Board's scheduled time to act upon the petition and pursuant to filing and service requirements under the rules—Living Rivers properly filed the full and complete expert report of Kip Solomon. AR 0195 – 0205.

On February 22, 2011, Living Rivers, submitted an expert report of D. Kip Solomon, Ph.D., PG, setting forth his conclusions and recommendations to ensure the prevention of pollution or contamination of other resources, including the Colorado River, by the utilization of the injection well by Westwater. AR 0199 – 0205. In his review and analysis, Dr. Solomon finds that “[t]he slope of the simulated potentiometric surface is towards the [Colorado] river for most of the cross section as a result of the injection” and “[w]hen the higher hydraulic diffusivity value is utilized . . . the existing Wingate Formation fluid would begin discharging into the Colorado River.” AR 0202. This supported and illustrates his concern “that the buildup of fluid pressure as a result of an injection could reverse

the regional hydraulic gradient and cause existing Wingate Formation water to discharge into the Colorado River.” AR 0202. This propagation of fluid pressure may reverse what currently appears to be northward moving regional groundwater flow. *Id.* Dr. Solomon then offers recommendations, including monitoring wells to protect pollution or damage to the Colorado River from Wingate Formation Water discharging into the Colorado River as a result of the injection operation. AR 0202 – 0203.

Although Living Rivers supplement to its motion for rehearing and modification including Kip Solomon’s report was filed within hours on the same day after the Board issued its Order Denying Rehearing, it was properly filed two-days before any action by the Board was to be taken under the scheduled time to act upon the petition and pursuant to filing and service requirements of Utah Oil and Gas Conservation Rules R641-110-300 and R641-110-400. AR 0199 – 0205. In fact on February 24, 2011, the Board did act on Living Rivers request for rehearing and modification by striking any additional testimony submitted by Living Rivers, clearly not foreclosing final agency action until the February 24, 2011 hearing. AR 0207 at p. 4:12 – 5:23. Accordingly, Mr. Solomon’s report constitutes part of the whole record and should be encompassed in a substantial evidence analysis.

**B. NOTWITHSTANDING MR. SOLOMON'S EXPERT REPORT  
THE BOARD'S GRANT OF THE UIC PERMIT WITHOUT  
THE CONDITION OF MONITORING WELLS IS NOT  
SUPPORTED BY SUBSTANTIAL EVIDENCE.**

Westwater's brief at p.26 claims the Board found certain technical findings. The purported findings are based solely on the testimony of Westwater's expert, Mr. David Allin. AR pp. 94-190.

Mr. Allin's qualifications, AR 95 while impressive in experience lack in both academic training, particularly modeling, and of greater significance, no training in hydrology. AR 98-106. Indeed, Counsel for Living Rivers was precluded from examining Mr. Allin on aspects of hydrology. AR 106. Mr. Allin's testimony regarding the proposed UIC was not on the actual formation in question - Wingate - but instead on the Entrada formation six miles to the North. AR 139-141.

Westwater's primary thesis for the Board's consideration was that the formation fluid, in the volume of approximately 240,000 gallons a day, (AR42-43) being pumped into the Wingate formation "would just spill over." AR 163. When Mr. Allin was asked where it would spill he stated: "it simply moves in a radial direction through the formation to points of lower pressure". AR 165.

Westwater performed one modeling exercise for the proposed UIC permit.

AR 51. Essentially Westwater believes the State should be satisfied with a monitoring of the wellhead pressure based on the assumption if the pressure increases beyond a certain unspecified point the operator would then do something about it. This is despite Professor Solomon's recommendation that several modeling exercises be performed to avoid potential fracturing or pressure build up. AR 0199 – 0200.

The only two statements made by Westwater's brief at p. 27, which are supported by the uncontested record, are that there are no wells nor no fresh water aquifers within a half-mile radius of the Subject Well. Every other purported finding was contested and unanswered during the December 8th hearing when the record is viewed as a whole. AR 54 – 55, 65, 100, 106, 166, 194, 199.

Where evidence is timely presented to the contrary of the Board's findings, implicit or otherwise, the Board abused its discretion by failing to consider and evaluate the potential, significant risks to the health of persons and to the Colorado River. Utah Oil and Gas Conservation Rule R649-5-2(1).

### III. THE BOARD'S FAILURE TO CONSIDER LIVING RIVERS REQUEST FOR RECONSIDERATION, REHEARING, AND MODIFICATION WAS AN ABUSE OF DISCRETION.

Utah Code Annotated Section 63G-4-302 provides, in relevant part, that a party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested. U.C.A. 63G-4-302 (1953, as amended). On February 1, 2011—within 20 days from the Board's Findings of Fact, Conclusions of Law, and Order was issued—Living Rivers timely filed its request to reconsider and modify the Board's Findings of Fact, Conclusions of Law and Order and requested a rehearing based upon Living River's specific representations that additional information had been recently obtained from Professor Kip Solomon that calls into question the public safety and welfare of the citizens of Grand County and the State of Utah arising from permitted use of the subject underground injection well. AR 0160 – 0162. In its request, although admittedly not by separate affidavit, Living Rivers set forth the nature and extent of the evidence to be presented to the Board and its relevancy to the question of public health and safety, including contamination of drinking water supply, that is central to the Board's decision of approving a UIC permit. *Id.* Specifically, Living Rivers set forth that “[D]r. Solomon believes it to be prudent for the application of West Water Farms to have a condition on its injection well permit requiring a

system which will allow underground monitoring of where the injected fluids, under the proposed application, are located and where they will be migrating.” AR 0161. The request was signed, served, and filed by Living Rivers’ counsel pursuant to Utah Rule of Civil Procedure 11 and Utah Code Annotated 78B-5-705, certifying through signature that “to the best the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . it is not being presented for an improper purpose; . . . allegations and other factual contentions have evidentiary support . . .; and factual contentions are warranted . . .” Utah R. Civ. P. 11(b).

When a petition for rehearing or modification is filed, Utah Oil and Gas Conservation Rule R641-110-400 requires that that the Board will act upon the petition for hearing at its next regularly scheduled meeting following the date of its filing. This is to allow sufficient time for all parties to the proceeding to file responses or supplements to the petition, at or before the hearing, and allow the parties to argue the merits of the request. AR 0172, Utah Oil and Gas Conservation Rules R641-110-300, R641-110-400.

Pursuant to R641-110-400, the Board properly included Living River’s Request on the agenda for the Board’s regularly scheduled February 24, 2011 hearing. AR 0207. On February 22, 2011—two days prior to the Board’s



scheduled time to act upon the petition and pursuant to filing and service requirements under the rules—Living Rivers properly filed the full and complete expert report of Kip Solomon. AR 0195 – 0205.

Notwithstanding the Board's scheduled time to act upon Living River's petition on February 24, 2011, the Board without allotting the necessary time for full briefing and without any consideration of the proposed expert testimony, issued its opinion denying Living Rivers' Motion for Rehearing two days prior to the February 24, 2011 action date. AR 0190 – 0194. Although the Board certified that it had considered Living Rivers opening request, Petitioner Westwater Farms, LLC's oppositional memorandum filed February 17, 2011, and the Division of Oil, Gas, and Mining oppositional memorandum filed February 22, 2011, the Board failed to allot any time for response or supplement to cure any alleged defect by Living Rivers. AR 0190 – 0194. The Board essentially deprived Living Rivers of due process and rendered the decision based upon inadequate briefing and procedural grounds alone.

Intervenor, Westwater Farms, and Appellees argue that Living Rivers have failed to explain in their motion for reconsideration/rehearing why Dr. Solomon's report was not presented earlier (specifically at the December 8, 2010 hearing) and therefore the reconsideration and rehearing motion denial was proper. Brief of

Appellees The Board of Oil, Gas and Mining and The Division of Oil, Gas and Mining at pp. 33 – 37; Brief of Intervenor Westwater Farms, LLC at pp. 37 – 41. However, Appellees' and Westwater's arguments do not properly take into account that Living Rivers, a non-profit entity, needed adequate time to raise funds to engage an attorney and an expert as well as consideration of the record of this case.

Two days after being contacted and engaged by Living Rivers, Living Rivers' counsel entered their formal notice of appearance of counsel on November 24, 2010. AR 0080. At the same date and time, in order to afford Living Rivers ample opportunity to present its best evidence before the Board, Living Rivers filed its first Motion to Continue Hearing on Notice of Agency's Action to continue the hearing to January 26, 2011. AR 0077 – 0078. On December 2, 2010, the Board denied Living Rivers' request to continue the hearing, notwithstanding the fact that counsel had only been retained only two weeks prior to the scheduled hearing. AR 0093 – 0096. On December 8, 2010, Living Rivers again requested a continuance based upon detailed questions and issues concerning the quality of Westwater's evidence presented to the Board. AR 0117 – 0120. Again, the Board denied Living River's request for continuance and denied allowing the record to remain open. AR 206 at pp. 5 – 14:12, 15:18 – 16:24, 199:23 – 199:25. Surely, two weeks is not reasonable time to afford Living Rivers, acting through counsel, to

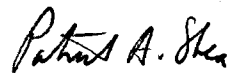
retain, prepare, and submit an expert report evaluating Westwaters' highly technical evidence. Based on the above, the Board abused its discretion in denying Living River's request for rehearing under the circumstances presented in this matter.

### CONCLUSION

For the reasons stated above, and on those set forth in Appellant's opening brief, Appellant Living Rivers, believes that the Board of Oil, Gas and Mining abused its discretion when it approved the UIC permit to Westwater without specific monitoring well conditions in light of the whole record. Additionally, the Board of Oil, Gas and Mining abused its discretion when it denied Living Rivers' request for reconsideration and rehearing, and supplements thereto, that demonstrate through substantial evidence and data a finding that the proposed injection well may cause formation fluid to enter the Colorado River. The Board of Oil, Gas and Mining is specifically mandated to ensure that injection wells are completed, equipped, operated, and maintained in a manner that will prevent pollution and damage to any USDW, or other resources and will confine injected fluids to the interval approved. Utah Oil and Gas Conservation Rule R649-5-2(1). Failing to consider and impose those conditions was an abuse of discretion. Accordingly, Living Rivers respectfully request this court to set aside the Board of

Oil, Gas and Mining order issuing the UIC permit to Westwater without Living River's requested monitoring conditions and order the Board of Oil, Gas, Mining to exercise its discretion as required by law to properly and fully hear and evaluate evidence and data supporting a finding that the proposed injection well may cause formation fluid to enter the Colorado River or other damage to other resources.

Respectfully submitted this 21st day of September 2011.



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Patrick A. Shea  
Patrick A. Shea, P.C.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of September 2011, I caused true and correct copies of the REPLY BRIEF OF APPELLANT to be mailed via first class mail postage prepaid to the following:

Steven S. Alder  
Assistant Attorneys General  
Mark L. Shurtleff  
Utah Attorney General  
1594 West North Temple, #300  
Salt Lake City, Utah 84116

Petro Resrc Corp.  
777 Post Oak Boulevard, Ste. 910  
Houston, TX 77056

Thomas W. Clawson  
Van Cott, Bagley, Cornwall &  
McCarthy  
36 South State Street, Suite 1900  
Salt Lake City, Utah 84111

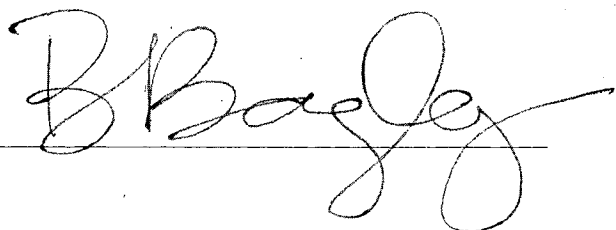
RMOC Holdings, LLC  
518 17<sup>th</sup> Street, Suite 1105  
Denver, CO 80202

Mid America Pipeline Company  
P.O. Box 3102  
Tulsa, OK 74101

Shiprock Helium, LLC  
P.O. Box 51166  
Amarillo, TX 79159

Utah School and Institutional Trust  
Lands Admin  
675 East 500 South, Suite 500  
Salt Lake City, Utah 84102

RETAMCO Operating, Inc.  
Attn: Joe Blennon  
P.O. Box 790  
Red Lodge, MT 59068-0790

A handwritten signature in black ink, appearing to read "B. Bagley", is written over a horizontal line.

**ADDENDA:**

- Addendum 1: Utah Oil and Gas Conservation Rule R641-110-300.
- Addendum 2: Utah Oil and Gas Conservation Rule R641-110-400.
- Addendum 3: Utah Code Annotated Section 63G-4-302 (1953, as amended).
- Addendum 4: Utah Rule of Civil Procedure 11.

ADDENDUM 1: Utah Oil and Gas Conservation Rule R641-110-300.

**R641-110-300. Response to Petition.**

All other parties to the proceeding upon which a rehearing is sought may file a response to the petition at any time prior to the hearing at which the petition will be considered by the Board. Such responses will be served on the petitioner at or before the hearing.

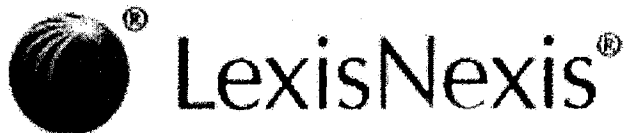


## ADDENDUM 2: Utah Oil and Gas Conservation Rule R641-110-400.

**R641-110-400. Action on the Petition.**

The Board will act upon the petition for a rehearing at its next regularly scheduled meeting following the date of its filing. If no action is taken by the Board within such time, the petition will be deemed to be denied. The Board may set a time for a hearing on said petition or may summarily grant or deny the petition.

## ADDENDUM 3: Utah Code Annotated Section 63G-4-302.



UTAH CODE ANNOTATED  
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\*\*\* STATUTES CURRENT THROUGH THE 2011 2ND SPECIAL SESSION. \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH 2011 UT 25 (05/15/2011); 2011 UT App 169  
(05/15/2011) AND MAY 1, 2011 (FEDERAL CASES). \*\*\*

TITLE 63G. GENERAL GOVERNMENT  
CHAPTER 4. ADMINISTRATIVE PROCEDURES ACT  
PART 3. AGENCY REVIEW

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*Utah Code Ann. § 63G-4-302 (2011)*

§ 63G-4-302. Agency review -- Reconsideration

(1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under *Section 63G-4-301* is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.

(b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.

(2) The request for reconsideration shall be filed with the agency and one copy shall be mailed to each party by the person making the request.

(3) (a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

**HISTORY:** C. 1953, 63-46b-13, enacted by L. 1987, ch. 161, § 269; 1988, ch. 72, § 23; 2001, ch. 138, § 18; renumbered by L. 2008, ch. 382, § 1390.

**NOTES:** AMENDMENT NOTES. --The 2008 amendment, effective May 5, 2008, renumbered this section, which formerly appeared as § 63-46b-13, and updated references to conform to the recodification of Title 63.

**LexisNexis 50 State Surveys, Legislation & Regulations**

Administrative Procedures

## ADDENDUM 4: Utah Rule of Civil Procedure 11.

**Utah Rule Civil Procedure 11. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions.**

(a) Signature.

(a)(1) Every pleading, written motion, and other paper shall be signed by at least one attorney of record, or, if the party is not represented, by the party.

(a)(2) A person may sign a paper using any form of signature recognized by law as binding. Unless required by statute, a paper need not be accompanied by affidavit or have a notarized, verified or acknowledged signature. If a rule requires an affidavit or a notarized, verified or acknowledged signature, the person may submit a declaration pursuant to Utah Code Section 78B-5-705. If a statute requires an affidavit or a notarized, verified or acknowledged signature and the party electronically files the paper, the signature shall be notarized pursuant to Utah Code Section 46-1-16.

(a)(3) An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to court. By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(b)(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b)(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(b)(3) the allegations and other factual contentions have evidentiary

support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(b)(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(c)(1) How initiated.

(c)(1)(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

(c)(1)(B) On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(c)(2) Nature of sanction; limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into

court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

(c)(2)(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(c)(2)(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(c)(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.