STATE OF NEW MEXICO
SAN JUAN COUNTY
THE ELEVENTH JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER, **Plaintiff,** vs. THE UNITED STATES OF AMERICA, *et al.*, **Defendants,** THE JICARILLA APACHE TRIBE AND THE NAVAJO NATION, **Defendant-Intervenors.**	D-1116-CV-75-184 HON. JAMES J. WECHSLER Presiding Judge SAN JUAN RIVER GENERAL STREAM ADJUDICATION AB-07-1 Claims of the Navajo Nation

NAME OF PARTY: The United States of America

DESCRIPTIVE SUMMARY: Response to motion to disqualify attorneys for the United States.

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THE UNITED STATES' RESPONSE TO THE MOTION TO DISQUALIFY

REQUEST FOR EXPEDITED DECISION

The United States hereby responds in opposition to *Defendants B Square Ranch et al.'s Motion to Disqualify Attorneys for United States of America from Participation in the Subject Action* (January 9, 2013) ("Motion to Disqualify"). For the reasons stated below, the Court should deny the Motion and should do so in an expedited manner without additional oral argument by the parties.

I. INTRODUCTION

On March 13, 1975, the State of New Mexico initiated this action against the United States pursuant to NMSA 1953, Section 75-4-4 *et seq.* (now NMSA 1978, Section 72-4-15 *et seq.*) as part of a general stream adjudication of the San Juan River Basin in New Mexico. Although a general stream adjudication ultimately involves every water right holder in the San Juan Basin, the complaint filed by the State of New Mexico in 1975 was specifically directed to the United States. An obvious goal of the complaint was to identify and quantify every water right held by the United States pursuant to federal law.[1]

In response to the State's complaint and for almost four decades, the United States has appeared before this Court to assert and defend its water rights in the San Juan River Basin. The United States has done so through its attorneys of the United States Department of Justice as provided by federal law and delegated by the Attorney General of the United States. 28 U.S.C. §§ 515-519. With respect to the specialized, complicated area of federally-reserved water rights, the Attorney General has generally assigned such cases to the attorneys associated with the Environment and Natural Resources Division (ENRD) of the Department of Justice principally based in Washington, D.C. and Denver, Colorado. 28 C.F.R §0.65.

Currently, and consistent with the Department of Justice's practice over the past four decades, three Department of Justice ENRD attorneys are entered in this case as counsel of

[1] Through the McCarran Amendment (43 U.S.C. § 666(a)) the United States has waived its sovereign immunity so that this Court may join the United States in a general stream adjudication, such as the San Juan River Basin of New Mexico. This waiver, however, is a narrow one and goes only so far as to adjudicate such water rights See *United States v. Idaho*, 508 U.S.1, 6-7 ("[w]aivers of federal sovereign immunity must be unequivocally expressed in the statutory text ... [and] any such waiver must be strictly construed in favor of the United States and not enlarged beyond what the language of the statute requires." (internal quotations and citations omitted)).

record for the United States.[2] Undersigned counsel are attorneys of the Department of Justice's ENRD and are "duly licensed and authorized to practice as an attorney under the law of a State ... ." 28 U.S.C. § 530C(c)(1) (limiting compensation payable to attorneys providing legal services from funds appropriated to the Department of Justice to licensed attorneys). Undersigned counsel do not practice in the State of New Mexico except to represent the United States' interests. In their capacity as Department of Justice attorneys, undersigned counsel have been assigned to attend to the interests of the United States in its assertion of water rights claims in the San Juan River Basin. Further, in the many general stream adjudications throughout the State of New Mexico, numerous ENRD attorneys have entered their appearance as counsel of record for the United States, just as undersigned counsel have in this adjudication.

II. REQUEST FOR EXPEDITED DECISION

B Square Ranch, *et al.* ("B Square Ranch") first raised its Motion orally before the Court on January 9, 2013. Prior to January 9th, B Square ranch had not contacted the United States concerning its motion as required by LR 11-104(D), nor did it inform the Court of the motion in advance. The Court responded that it would take no action on the motion because B Square Ranch was attempting to advance a motion which it had previously neither presented to the United States nor brought to the attention of the Court. Immediately following the hearing, B Square Ranch drafted and filed the Motion to Disqualify, which repeats its oral motion.

Since January 9th, undersigned counsel have continued to take the many steps that are necessary to ensure that this case progresses under very tight and well-known deadlines established by the Court. One of those steps included contacting counsel for B Square Ranch

[2] Undersigned counsel have been assigned primary responsibility by the Department of Justice to conduct the litigation in this adjudication on behalf of the United States.

concerning a discovery dispute involving B Square Ranch's failure to provide adequate discovery responses after this Court ordered it to do so. *See Order Concerning the Responses and Objections of the Non-Settling Parties to Discovery Requests* (November 30, 2012) at pg. 8. With critical deadlines expiring and the last status hearing during the discovery period looming, B Square Ranch has informed the United States that it will not respond to assigned counsel on any matter for fear that it will be deemed to have waived its position with respect to the pending Motion to Disqualify. *See* Attachment A (correspondence between undersigned counsel and counsel for B Square Ranch). Such conduct is without legitimate basis and has serious and immediate consequences to these proceedings. Because of the serious delays that B Square Ranch is attempting to impose upon these proceedings, this Court should expedite resolution of the Motion to Disqualify.

III. ARGUMENT

A. Representation of the United States by the Attorney General and attorneys of the Department of Justice is controlled by federal law and state law does not limit the authority of the Attorney General to designate attorneys of the Department of Justice to represent the interests the United States.

Despite decades of orderly appearance and practice of an untold number of attorneys for the United States in this and many New Mexico general stream adjudications, Defendants B Square Ranch now insist that this Court take the extreme step of disqualifying undersigned counsel for doing nothing more than following established practice before this Court and federal law. The Motion to Disqualify was made without prior warning or precedent and without any reasonable request to cure any previously unknown defect. As such and particularly in light of B

Square Ranch's current conduct (Attachment A), the motion appears to be a litigation tactic that will unnecessarily disrupt these proceedings.

In its motion, B Square Ranch argues that because undersigned counsel have failed to comply with Rule 1-089.1 and Rule 24-106, NMRA, undersigned counsel should be immediately disqualified from any further participation in this case. In almost four decades of litigation associated with this case, B Square is the first and only party to have ever suggested to this Court that attorneys representing the United States must comply with state rules concerning lawyers not actively licensed to practice in New Mexico. B Square Ranch simply ignores the controlling federal statutory authority that authorizes undersigned counsel to represent the United States before this and any state court.[3] Such federal authority is conclusive on the issue raised by B Square Ranch and fatal to the Motion to Disqualify.

As an initial matter, the Supremacy Clause of the Constitution of the United States provides, in relevant part, that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Constitution, Art. VI, Cl. 2. Pursuant to Constitutional authority, Congress has stipulated that:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

28 U.S.C. § 517 (1993).

[3] When B Square Ranch orally raised its motion, B Square Ranch counsel was specifically informed by undersigned counsel that the practice of U.S. Department of Justice Attorneys was controlled by federal statute under title 28 of the U.S. Code. Despite being specifically informed of controlling federal authority, the Motion to Disqualify entirely ignores such authority.

The authority conferred by this statute first appeared in the Act of June 22, 1870, chapter 150, section 5 of 16 Stat. 162, establishing the Department of Justice. The modern statutory language is virtually identical to the language of the original Act and, as articulated, without limitation. In commenting on the purposes of the Act, the sponsor, Representative Jenckes from Rhode Island stated:

> One of the objects of this bill is to establish a staff of law officers sufficiently numerous and of sufficient ability to transact this law business of the Government in all parts of the United States ... Cases in which the Government is concerned are constantly arising in different courts in various parts of the country. If a sugar case is to be tried today the Attorney General can send his solicitor to attend to the trial.

Cong. Globe, 41st Cong., 2nd Sess., pt. 4, 3035-3036 (1870).

Undersigned counsel have uncovered little case law directly addressing a challenge to the authority of out-of-state Justice Department attorneys to appear in state court. In light of the very clear language of the controlling statute, the scarcity of such case law is the significant fact. It suggests that 28 U.S.C. § 517 is too straightforward to allow any legitimate disagreement.

Numerous cases recognize the broad authority conferred by 28 U.S.C. § 517 on related issues,[4] but there appears to be only one opinion directly on point. In *Hersh v. United States of America*, 1986 WL 31684 (E.D.WIS.) (Attachment B), petitioners sought to strike pleadings because they were signed by a Justice Department attorney who was not a member of the bar of the presiding court. In a terse, one-page opinion, the court held that 28 U.S.C. § 517 "clearly provides an exemption for Justice Department attorneys from the admission requirements to the

[4] *See, e.g., Merryweather v. United States*, 12 F.2d 407, 410 (9th Cir. 1926)("[The predecessor statute of § 517] expressly provides that an officer of the Department of Justice may attend to the interest of the United States in any suit pending in any of the courts of the United States or in the courts of any state."); *Government of the Virgin Islands v. May*, 384 F. Supp. 1035, 1038 (D.V.I. 1974)("28 U.S.C. § 517 provides that the Attorney General may send any officer of the Department of Justice to attend to the interests of the United States in any suit pending in state court or federal court."); *United States v. Rosenthal*, 121 F. 862, 867 (C.Ct, S.D.N.Y. 1903)(Statute gives Justice

bar of this Court." *Id.* The court found petitioner's motion to strike "frivolous" and imposed Rule 11 sanctions on the moving party, because "a reasonable inquiry into the law would have revealed the untenable nature of ... the motion to strike." *Id.* Clearly, under the plain language of 28 U.S.C. § 517, attorneys assigned by the United States Department of Justice have all the authority they need to represent the interests of the United States in the San Juan River Basin adjudication.

This reading of the Justice Department's authority is confirmed by 28 U.S.C. § 515(a) which directs in relevant part:

> The Attorney General or any other officer of the Department of Justice . . . . may, when specifically directed by the Attorney General, conduct any kind of legal proceeding . . . . which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

Further, the Attorney General's authority in this provision is consistent with the Supreme Court's construction of the Supremacy Clause of the United States Constitution with respect to the activities of other federal officers and agents. It is well established in a variety of contexts that the activities undertaken by federal officers and agents in carrying out their duties on behalf of the United States are free from direct state regulation, except where Congress has expressly provided otherwise. *See, e.g., Goodyear Atomic Corp. v. Miller,* 486 U.S. 174,180-181 (1988); *Hancock v. Train,* 426 U.S. 167, 178-179 (1976); *James Stewart & Co. v. Sadrakula,* 309 U.S. 94, 103-104 (1940). Thus, in *Cunningham v. Neagle,* 135 U.S. 1, 62-63 (1890), the Supreme Court made clear that a California sheriff could not interfere with a U. S. Marshal carrying out his duties to protect the safety of federal officials. The Court explained the constitutional underpinnings of its ruling:

Department attorneys authority to argue any case in state court.).

> The United States is a government with authority extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it.

Id. at 62.

Moreover, the Supreme Court has in numerous circumstances held that the states cannot regulate the activities of the Federal Government without clear Congressional authorization. For instance, in *Sperry v. Florida,* 373 U.S. 379 (1963), the Court ruled that Florida could not enjoin an individual from preparing and prosecuting patent applications within the state on the ground that the individual was engaging in the unauthorized practice of law under state law. The Court reasoned that, "since patent practitioners are authorized to practice only before the Patent Office, the State maintains control over the practice of law within its borders *except to the limited extent necessary for the accomplishment of federal objectives." Id.* at 402 (emphasis added).

Attorneys for the Justice Department are charged with conducting the litigation of the United States in every forum in which the interests of the United States are implicated. This directive has not changed over the last 140 years and presently appears in 28 U.S.C. §§ 515 and 517. Therefore, any attempt to impose New Mexico's practice requirements for out-of-state attorneys to bar Justice Department attorneys from representing federal interests is inconsistent with the clear directive of these federal statutes. The potential consequences associated with B Square Ranch's current refusal to communicate with counsel for the United States are precisely the consequences that federal law has prohibited from occurring. 28 U.S.C. § 517. Were this

Court to conclude that undersigned counsel may not represent the Government's interests unless they comply with New Mexico' rules governing the practice of out-of-state attorneys, the Court would render 28 U.S.C.§§ 515 and 517 meaningless because then the Attorney General, and the attorneys he delegates, **could not** be sent "to any State or district in the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." *See* 28 U.S.C. § 517.

Finally, the most concerning aspect of Rules 1-089.1 and 24-106, NMRA is the requirement that out-of-state counsel associate "with counsel licensed to practice law in good standing in New Mexico, who, unless excused by the court, must be present in person in all proceedings before the court." Rule 1-089.1(A), NMRA; *see also* Rule 24-106(A), NMRA. This requirement improperly imposes costs and burdens directly on the United States as its attorneys appear in New Mexico solely to represent the interests of the United States. This requirement is clearly contrary to the express language of 28 U.S.C. § 517 and would constitute an undue and unwarranted drain of Department of Justice financial and personnel resources.

Generally speaking, such a requirement would require the United States to double-staff cases that are, for valid administrative reasons, being handled outside the office of the New Mexico United States Attorney. For example, because of their subject matter calling for specialized expertise, certain cases are assigned for handling to attorneys at Department of Justice headquarters in Washington, D.C. or field office in Denver, Colorado; in other cases, proper resource allocation might demand such an assignment. And, in some situations, the New Mexico U. S. Attorney's Office might be recused from a matter. In that circumstance, the New Mexico U.S. Attorney's Office cannot act as local counsel for the government lawyers brought in

from elsewhere to handle the matter. The requirement that the federal government have associated local counsel is also inconsistent with the principles of Supremacy Clause law described above.

B. Attorneys of the Department of Justice follow the ethical standards of the State of New Mexico.

As described above, there is no authorization from Congress providing states with the authority to interfere with the U.S. Attorney General's authority to send officers of the Department of Justice to attend to the interests of the United States in state courts. And, absent such Congressional authorization, the imposition of New Mexico' rules governing the practice of out-of-state attorneys on federal government attorneys appearing on behalf of the United States violates the Supremacy Clause. Nonetheless, Congress has recognized the importance of ethical standards and has directed federal government attorneys to follow the ethical standards of each state in which they appear.

Pursuant to 28 U.S.C. § 530B, Congress has provided that federal government attorneys are "subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." The text, legislative history, implementing regulations, and cases interpreting Section 530B make very clear, however, that this provision was intended only to subject federal government attorneys to a state bar's ethical standards, and not to undermine the Attorney General's ability to assign federal attorneys in providing representation to the United States.

First, the statute's title, "Ethical standards for attorneys for the Government," indicates its narrow focus. *See Stern v. United States District Court,* 214 F.3d 4, 19-20 (1st Cir. 2000); *United*

States v. Lowery, 166 F.3d 1119, 1124-25 (11th Cir. 1999). Second, the legislative history shows that the statute was intended to "insure[] that ... Department of Justice ... lawyers [are subject to] the same rules of ethics that govern the professional conduct of all other attorneys." 144 Cong. Rec. E301-01 (daily ed. March 5, 1998) (extension of remarks of Rep. McDade). Third, the statute's implementing regulations provide that 28 U.S.C. § 530B "requires Department attorneys to comply with state ... rules of professional responsibility... but should not be construed in any way ... to interfere with the Attorney General's authority to send Department attorneys into any court in the United States." 28 C.F.R. § 77.1(b); *see also id.* at § 77.2(h)(3) ("The phrase *state laws and rules ... governing attorneys ...* does not include ... [a] statute, rule, or regulation requiring licensure or membership in a particular state bar"). Finally, 28 U.S.C. § 530(B) has been specifically interpreted to require compliance with state ethical rules not state licensing requirements. *Augustine v. Department of Veterans Affairs*, 429 F.3d 1334, 1341 (C.A. Fed. 2005) ("nothing in section 530B suggests that government attorneys must abide by state licensing requirements."). Thus, Federal Government Attorneys are subject to New Mexico substantive ethical rules but not subject to New Mexico's procedural requirements for out-of-state attorneys.

C. Undersigned counsel meet the substantive requirements of Rule 1-089.1(A) and Rule 24-106, NMRA.

The gravamen of B Square Ranch's complaint is that undersigned counsel have not yet complied with Rule 1-089.1(A) and Rule 24-106, NMRA. Notwithstanding that undersigned counsels' appearance in this action is governed by federal law and notwithstanding that undersigned counsel are not required to comply with New Mexico rules normally associated with out-of-state counsel, by their signatures below undersigned counsel certify the following as outlined in the rule:

1) That the attorneys are licensed and in good standing in another state;[5]

2) That the attorneys will comply with applicable laws and procedural rules of New Mexico; and

3) That the attorneys will comply with the New Mexico rules of professional conduct.

See Rule 1-089.1(A) and Rule 24-106(B)(1) – (3). Undersigned counsel make this certification out of respect for this Court and in accord with understood notions of comity between the Federal Government and the State of New Mexico. *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 111-112 (1981); *see also Younger v. Harris*, 401 U.S. 37, 44 (1971) (the principle of comity includes a "proper respect for state functions" but "does not mean blind deference to `States Rights' any more than it means centralization of control over every important issue in our National Government and its courts.").

IV. CONCLUSION

For the reasons outlined above, this Court should deny the Motion to Disqualify.

Respectfully submitted this 23rd day of January 2012.

For the United States of America:

Andrew J. "Guss" Guarino
Bradley S. Bridgewater
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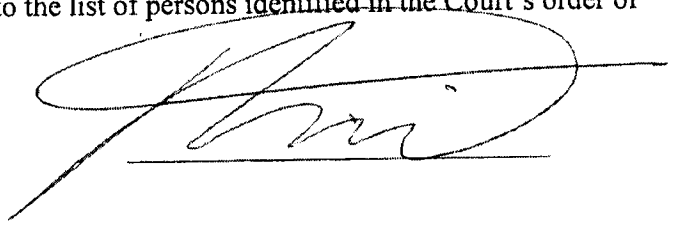
[5] Mr. Guarino and Mr. Gehlert are actively licensed in Colorado and Mr. Guarino is also licensed, but inactive, in New Mexico, Utah, and the Navajo Nation. Mr. Bridgewater is actively licensed in Oklahoma.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January 2012, an electronic version of this **RESPONSE TO THE MOTION TO DISQUALIFY** was served by attaching an electronic copy to an email sent to the following address: wrnavajointerse@nmcourts.gov. In addition, an electronic copy of this document was sent by e-mail to the list of persons identified in the Court's order of November 16, 2012.



Guarino, Guss (ENRD)

From: Tully Law Firm [tullylawfirm@qwestoffice.net]
Sent: Monday, January 21, 2013 10:30 AM
To: Guarino, Guss (ENRD)
Cc: 'John W. Utton'; 'Singer, Arianne, OSE'; 'Stanley M. Pollack'; 'Gollis Samuel'; 'Umshler, Sue'; Gehlert, David (ENRD); 'Gary Horner, Esq.'; 'Gary Risley, Esq.'; 'Jolene McCaleb, Esq.'; 'Kyle Harwood, Esq.'; 'Liz Taylor, Esq.'; 'Mark Sheridan, Esq.'; 'Richard Cole, Esq.'; 'Victor Marshall, Esq.'
Subject: RE: Concerning Discovery Responses of December 21st - B Square Ranch

Hi, Guss:

In order for our clients to not waive their position, we will not respond to following e-mail until the Court rules on our clients' motion for disqualification of the USA/a attorneys in this matter or the USA presents credible evidence that it is now complying with Rule 1-089.1 NMRA 2012 and Rule 24-106 NMRA 2012.

Regards,

Richard ("Rick") T. C. Tully

From: Guarino, Guss (ENRD) [mailto:Guss.Guarino@usdoj.gov]
Sent: Wednesday, January 16, 2013 8:11 PM
To: Rick Tully
Cc: John W. Utton; Singer, Arianne, OSE; Stanley M. Pollack; Gollis Samuel (sgollis@hotmail.com); Umshler, Sue; Gehlert, David (ENRD)
Subject: Concerning Discovery Responses of December 21st - B Square Ranch

Rick,

As you will recall, the Court instructed B Square Ranch *et al.* to respond to Interrogatory Nos. 1, 3, 5, 6, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 and RFPs Nos. 1, 5, 6, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 of the United States' discovery requests. I have had an opportunity to review your discovery responses that you served on December 21st. Based on my review, the B Square Ranch appears to have crafted a single, conclusory statement for every discovery request of the United States that B Square Ranch was required to respond to. I can perceive no basis why B Square Ranch would believe that such a response would constitute an adequate response to discovery requests.

To the extent you are interested in resolving this potential discovery dispute, I would consider any further explanation as to why you feel that B Square Ranch have responded to these discovery requests. Otherwise, please let me know if, when, and how B Square Ranch will respond to these discovery requests in the near future. Obviously, if you take no action, I will seek to have this matter addressed on February 4th.

Also, I assume that you have filed signed verification statements of the affiants identified on December 21st. Please let me know if this assumption is incorrect.

Regards,

Guss Guarino
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Not Reported in F.Supp., 1986 WL 31684 (E.D.Wis.), 86-1 USTC P 9297
(Cite as: 1986 WL 31684 (E.D.Wis.))

C

United States District Court, E.D. Wisconsin.
Mark E. Hersh and Jody A. Hersh
v.
United States of America

85-C-1606
February 25, 1986

WARREN, District Judge

*1 This is an action filed by the petitioners seeking an order quashing a third-party summons from the Internal Revenue Service to the First National Bank of New Hampton, Iowa. The United States, respondent herein, has filed a motion to dismiss this case for lack of jurisdiction and requests an award of costs and attorney's fees. The petitioners have responded with their own motion to dismiss this action for lack of jurisdiction, as well as a motion to strike all responsive pleadings in this case. The petitioners also ask that the Court deny respondent's request for costs and attorney's fees.

First, the Court denies petitioners' motion to strike the responsive pleadings in this case. The petitioners' stated reason for striking the responsive pleadings-that the Justice Department attorney who signed those pleadings is not a member of the bar of this Court-is not supported by law. Under 28 U.S.C. § 517, an attorney employed by the Department of Justice may represent the interests of the government in any district of the United States. Thus, the requirements for admission to the bar of this Court do not apply to respondent's counsel.

Second, the Court will dismiss this action for lack of jurisdiction. An action brought to quash an IRS summons must be brought in the district in which the summoned party resides. 26 U.S.C. § 7609(h). Since the summons at issue was served upon a resident of Iowa, this Court lacks jurisdiction over the matter.

Finally, the Court will impose a sanction against counsel for the petitioner pursuant to Rule 11, Federal Rules of Civil Procedure. In addition to having filed this action in the wrong district, petitioners' counsel exacerbated the situation by filing a frivolous motion to strike pleadings. The statute upon which the petition to quash the summons at issue was based clearly sets forth the appropriate district in which such a petition shall be filed. Likewise, the law clearly provides an exemption for Justice Department attorneys from the admission requirements to the bar of this Court. Counsel's signature on the petition and the motion to strike constituted his certification that the petition and subsequent motion were, "to the best of his knowledge" after "reasonable inquiry," well grounded in fact and law. Rule 11, Fed.R.Civ.P. In fact, a reasonable inquiry into the law would have revealed the untenable nature of both the petition and the motion to strike. Accordingly, counsel for the petitioner is ordered to pay two hundred and fifty dollars ($250.00) to the Clerk of Court of the Eastern District of Wisconsin within ten (10) days of the date of this Order. The Court declines to make an award to costs and attorney's fees.

For the foregoing reasons, the Court hereby GRANTS the respondent's motion to dismiss and DENIES the petitioners' motion to strike.

SO ORDERED.

E.D.Wis. 1986.
Hersh v. U.S.
Not Reported in F.Supp., 1986 WL 31684 (E.D.Wis.), 86-1 USTC P 9297

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