

STATE OF NEW MEXICO  
COUNTY OF SAN JUAN  
ELEVENTH JUDICIAL DISTRICT

DISTRICT COURT  
SAN JUAN COUNTY NM  
FILED  
2013 FEB -1 PM 3:16

STATE OF NEW MEXICO, *ex rel.*,  
STATE ENGINEER,

D-1116-CV-75-184  
HON. JAMES J. WECHSLER  
Presiding Judge

Plaintiffs,

v.

SAN JUAN RIVER ADJUDICATION

THE UNITED STATES OF AMERICA et al.,

Cause No. AB-07-1  
Claims of the Navajo Nation

Defendants,

DESCRIPTIVE SUMMARY: Defendants B Square Ranch, LLC et al. reply to their motion for attorneys for United States of America to be disqualified from the subject action.

NAME OF PARTY: Defendants B Square Ranch, LLC et al.

NUMBER OF PAGES: 10

DATE OF FILING: February 1, 2013 by electronic service and February 1, 2013 with Court Clerk

**DEFENDANTS B SQUARE RANCH, LLC ET AL.'s REPLY BRIEF TO  
MOTION TO DISQUALIFY ATTORNEYS FOR UNITED STATES OF  
AMERICA FROM PARTICIPATION IN THE SUBJECT ACTION**

Defendants B Square Ranch, LLC et al. file this Reply Brief to their prior Motion to Disqualify Attorneys for United States of America from Participation in the Subject Action ("Motion to Disqualify"), which Motion to Disqualify was served on January 10, 2013.

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The United States filed its Response to the Motion to Disqualify on or about January 23, 2013 and requested an expedited hearing on the Motion to Disqualify.

The Court entered an Order Concerning Motion to Disqualify on January 29, 2013 providing that arguments on the Motion to Disqualify would be heard on February 4, 2013 at 9:00 a.m.; Defendants B Square Ranch, LLC et al. could file a reply to the Response by the United States by 5:00 p.m. on February 1, 2013; and prior to the Court's entry of its order on the Motion to Disqualify, Defendants B Square Ranch, LLC et al. are to participate on all aspects of this action, including discovery with the United States, and such participation shall not be deemed a waiver in any respect of the Motion to Disqualify.

Rule 1-007.1 NMRA 2012 (D) and Rule 1-007.1 (F) state in relevant part as follows:

“D. Response. Unless otherwise specifically provided in these rules, any written response ... shall be filed within fifteen (15) days after service of the motion. ...”

“F. Reply brief. Any reply brief shall be filed within fifteen (15) days after service of any written response.”

The Response by the United States to the Motion to Disqualify requesting an expedited hearing should be considered as a motion under Rule 1-007.1 (D), and Defendants B Square Ranch, LLC et al. should have until February 7, 2013 to respond to such request for expedited hearing.

Defendants B Square Ranch, LLC et al. should also have until February 7, 2013 to file their Reply Brief to the Response by the United States to the Motion to Disqualify under Rule 1-007.1 (F).

The 15 days for Defendants B Square Ranch, LLC et al. to file their Response to the motion for expedited hearing and to file a full and complete Reply Brief are needed by these Defendants because counsel for Defendants is in trial all day Wednesday, January 30, 2013, all day Thursday, January 31, 2013 and Friday afternoon, February 1, 2013.

Further, due to the above-described lack of availability of counsel, it is not possible for Defendants B Square Ranch, LLC et al. to file this Reply Brief and to participate with discovery with the United States during this same time frame. To the extent that time allows in this same time period, Defendants will continue to participate in the other aspects of this action.

Finally, and with all due respect for the Court, until this Court enters its order concerning the Motion to Disqualify, Defendants B Square Ranch, LLC et al. do not believe they can rely upon this Court's order stating that their continued participation shall be deemed a waiver in any respect of the subject Motion to Disqualify.

#### United States' Response to Motion to Disqualify

The United States provided a myriad of reasons for this Court to allow it to participate in the subject action including: (i) attorneys for the United States have appeared in water adjudication cases for many years; (ii) Defendants B Square Ranch, LLC et al. did not inform the attorneys for the United States and this Court prior to making a verbal Motion to Disqualify; (iii) Defendants B Square Ranch, LLC et al.'s failure to respond to a discovery dispute with the United States until this Court rules on the Motion to Disqualify is without legitimate basis and has serious and immediate consequences to the subject action; (iv) the Motion to Disqualify appears to be a

litigation tactic that will unnecessarily disrupt the subject action; (v) Defendants B Square Ranch, LLC et al. ignore controlling federal authority that authorizes attorneys for the United States before this Court and any state court; (vi) the practice of United States Department of Justice attorneys is controlled by federal statute 28 U.S.C. and the subject Motion to Disqualify entirely ignores such statute; (vi) the case of Mark E. Hersh v. United States of America, 1986 WL 31684 (E.D. Wis.) is directly on point; (vii) any attempt to impose New Mexico's practice requirements for out-of-state attorneys is inconsistent with federal statutes; (viii) if the United States attorneys cannot represent the interests of the United States unless they comply with New Mexico's rules governing the practice of out-of-state attorneys, then 28 U.S.C. Sections 515 and 517 are rendered meaningless; (ix) Rule 1-089.1 NMRA and Rule 24-106 NMRA improperly impose costs and burdens on the United States and impose a drain on U. S. Department of Justice's financial and personnel resources; and (x) the United States may bypass NMRA Rule 1-089.1 and Rule 24-106 NMRA by making certain certifications to this Court instead of the New Mexico State Bar.

28 U.S.C. Section 530B

The statute the United States' attorneys rely upon to govern the practice of United States Department attorneys is 28 U.S.C. The Court's attention is directed to 28 U.S.C. Section 530 B (2011 Edition), which became effective in April, 1999, and states in relevant part as follows:

"(a) An attorney for the Government shall be subject to State laws and 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.

“(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section. ...”

### 28 CFR Part 77

The rules of the Department of Justice that the Attorney General has adopted under 28 U.S.C. Section 530B are stated in 28 CFR Part 77.

28 CFR Section 77.1, **Purpose and Authority**, states that United States Department attorneys are to perform their duties in accordance with the highest ethical standards.

28 CFR 77.3, **Application of 28 USC 530B**, states in relevant part as follows.

“..., in all civil investigations and litigation (affirmative and defensive), ..., attorneys for the government shall conform their conduct and activities to the state rules and laws,... 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, as these terms are defined in Section 77.2 of this part.”

“Conduct” and “activity” are defined in 28 CFR Section 77.2(e) as any act performed by the Department attorney that implicates a rule governing attorneys as defined as state laws and rules.

“State laws and rules” are defined in 28 CFR Section 77.2(h) as rules enacted or adopted by any State of the United States that prescribe ethical conduct for attorneys and that would subject an attorney, whether or not a Department attorney, to professional discipline, such as a code of professional responsibility.

“Where such attorney engages in that attorney’s duties” is defined in 28 CFR Section 77.2(j)(1) and identifies which rules of ethical conduct a Department attorney should comply with and, if there is a case pending, the rules of ethical conduct adopted by the state court before which the case is pending.

“Case” is defined in 28 CFR Section 77.2(b) and means any proceeding over which a state court has jurisdiction, including civil actions.

The phrase “to the same extent and in the same manner as other attorneys” is defined in 28 CFR Section 77.2 (k) and means that Department attorneys shall only be subject to law and rules of ethical conduct governing attorneys in the same manner as such rules apply to non-Department attorneys. This phrase does not purport to eliminate or otherwise alter state laws and rules that expressly exclude some or all government attorneys for particular limitations or prohibitions.

NMSA 1978, Section 36-2-27 (2012)

NMSA 1978, Section 36-2-27 (2012), “Practice without admission; contempt of court; foreign attorneys”, states in relevant part as follows:

“No person shall practice law in a court of this state ..., nor shall a person commence, conduct or defend an action or proceeding unless he has been granted a certificate of admission to the bar under the provisions of Chapter 36 NMSA 1978. ... all persons violating the provisions of that chapter shall be deemed guilty of contempt of the court in which the violation occurred, as well as of the supreme court of the state; provided however, that nothing in this section call be construed to prohibit persons residing beyond the limits of this state, otherwise qualified, from assisting resident counsel in participating in an action or proceeding.”

The practice of law in any New Mexico court is limited to duly licensed attorneys who are members of the State Bar of New Mexico or as otherwise authorized by the New Mexico Supreme Court’s rules in specific and limited circumstances. The limited exceptions allowing certain persons without a bar license to practice law in New Mexico require that a proper authority be notified in writing of their non-licensed status, and that the State Bar of New Mexico be notified in the case of an out-of-state attorney. Rule 24-101 NMRA 2012 and Steve v. Rivera, 2012 NMSC 003, 268 P.3d 40, reversing in part, 2010 NMCA NMCA 109, 149 N.M. 406, 249 P.3d 944.

Rule 16-505 NMRA 2012  
(New Mexico Rules of Professional Conduct)

Rule 16-505 NMRA 2012, Unauthorized practice of law; multijurisdictional practice of law, states in relevant part as follows:

“A. A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so. ...”

”D. A lawyer who is not admitted to practice in this jurisdiction shall not:  
“1. except as authorized by the rules of Professional Conduct or other law, establish ...other systematic and continuous presence in this jurisdiction for the practice of law;

“E. A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice on any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

“1. are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; ...

“4. ...in transactions involving issues specific to New Mexico law, the lawyer shall associate counsel admitted to practice in this jurisdiction.

“F. A lawyer admitted in another United States jurisdiction , and not disbarred or suspended from practice in any jurisdiction and who is in compliance with applicable registration requirements, may provide legal services in this jurisdiction that:

...(2) are services that the lawyer is authorized by federal or other law to provide in this jurisdiction.”

Rule 16-804 NMRA 2012  
(New Mexico Rules of Professional Conduct)

Rule 16-804 NMRA 2012, Misconduct, states in relevant part as follows:

“It is professional misconduct for a lawyer to:

“A. violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another; ...

“C. engage in conduct involving ... deceit or misrepresentation;

“D. engage in conduct that is prejudicial to the administration of justice; ....”

INTRODUCTION

While recently attempting to comply and serve responses/answers with the discovery requests of the United States under the scheduling orders previously entered by this Court and the discovery rules of the New Mexico Rules of Civil Procedure for the

District Courts, Defendants B Square Ranch, LLC et al. reviewed the 2012-2013 Bench & Bar Directory for the State Bar of New Mexico to ascertain street addresses for the attorneys for the United States. At that time counsel for Defendants B Square Ranch, LLC et al. became alerted to the fact that the United States attorneys were not active members of the State Bar of New Mexico.

When this information was discovered, an investigation was conducted to determine its accuracy, and counsel for Defendants B Square Ranch, LLC et al. brought this matter to the attention of the Court at the commencement of the hearing on January 9, 2013 to alert the Court as soon as possible concerning the failure of the United States' attorneys to comply with the above-described rules, New Mexico statute and federal statute.

Counsel for Defendants B Square Ranch, LLC et al. and the attorneys for the remaining Settling Parties (State of New Mexico and Navajo Nation) are officers of the Court, and as New Mexico licensed attorneys have the duty to bring to the attention of the Court when there is an unauthorized practice of law by a person or attorney appearing before the Court.

#### ARGUMENT

Defendants B Square Ranch, LLC et al. will not repeat the statements, positions and arguments included in their Motion to Disqualify pertaining to Rule 1-089.1 NMRA 2012 of the Rules of Civil Procedure for the District Courts and Rule 24-106 of the Rules Governing the New Mexico Bar.

It makes no difference to Defendants B Square Ranch, LLC et al. if the attorneys for the United States have or have not appeared in water adjudication cases for many



years. 28 U.S.C. Section 530B has been in effect since April, 1999 and it should have been complied with by the United States' attorneys since that time.

As the Court is aware, Defendants B Square Ranch, LLC et al. only recently become involved in the subject action and these Defendants do not desire to waive the non-compliance of the United States' attorneys by the failure of these Defendants to bring this matter to the Court's attention as soon as it was discovered.

The subject action is in the District Court of San Juan County, New Mexico and the United States' attorneys have not satisfied Rule 1-089.1 NMRA 2012 of the Rules of Civil Procedure for the District Courts; Rule 24-106 of the Rules Governing the New Mexico Bar Rule; Rule 16-505 NMRA 2012 and Rule 16-804 NMRA 2012 of the Rules of Professional Conduct; NMSA 1978, Section 36-2-27 (2012); 28 U.S.C. Section 530B; and 28 CFR Section 77.3.

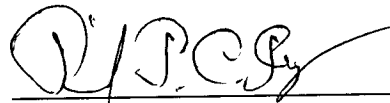
Further, the United States' attorneys cite the case of Mark E. Hersh v. United States of America, 1986 WL 31684 (E.D. Wis.) as being directly on point with the subject Motion to Disqualify. The Hersh case is not directly on point because it: (i) was before the United States District Court for the Eastern District of Wisconsin and not a State court; and (ii) concerns federal law, federal jurisdiction, the federal rules of civil procedure and the practice of law by a Justice Department attorney before the federal bar of the Eastern District of Wisconsin.

In citing the Hersh case, it could be perceived or construed the United States' attorneys in the subject action before this State court may be attempting to threaten and intimidate counsel for Defendants B Square Ranch, LLC et al. for filing the subject Motion to Disqualify with possible sanctions under Rule 11 of the Federal Rules of Civil

Procedure or Rule 1-011 NMRA 2012 of the Rules of Civil Procedure for the New Mexico District Courts.

WHEREFORE, Defendants B Square Ranch, LLC et al. move that Andrew J. ("Guss") Guarino and David W. ("Dave") Gehlert be disqualified from any further participation in the above-styled action for failure to comply with Rule 1-089.1 NMRA 2012 of the Rules of Civil Procedure for the District Courts; Rule 24-106 of the Rules Governing the New Mexico Bar; Rule 16-505 NMRA 2012 and Rule 16-804 NMRA 2012 of the Rules of Professional Conduct; NMSA 1978, Section 36-2-27 (2012); 28 U.S.C. Section 530B; and 28 CFR Section 77.3.

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