

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF WEST VIRGINIA**

**UNITED STATES OF AMERICA,  
Plaintiff,**

**v.**

**Criminal No. 2:05-CR-22**

**DEREK BENEDICT,  
Defendant.**

**BRIEF OF THE UNITED STATES  
AND REQUEST FOR HEARING**

Comes now the United States of America and Rita Valdrini, Acting United States Attorney for the Northern District of West Virginia, by Assistant United States Attorney Stephen D. Warner, and moves this Honorable Court for an Order scheduling a hearing, and as well, ultimately dismissing the defendant's appeal, and affirming the conviction and sentence imposed by the Magistrate Judge. In support hereof, the government states:

1. During the summer of 2005, the "Rainbow Family" scheduled its annual reunion in the Monongahelia National Forest, at a site commonly known as "Rattlesnake", north of Stuart Recreation Area. The "Rainbow Family" is a group of thousands of "hippies", who gather each summer for world peace. The defendant was one of the first "Rainbow Family" members to set up his camp. When he set up camp, there were fewer than 75 Rainbow Family members present. On June 11 and 12, 2005, the U.S. Forest Service, concerned that the group was predicted to eventually rise into the thousands, handed out pamphlets to the defendant and his friends, advising them of 36 C.F.R. 261.10(k), which requires a "special-use" permit prior to any congregation on the National Forest System of more than 75 persons. *See* Transcript, p. 128. On June 12, 2005, the group numbered more than 75 persons, and the U.S. Forest Service handed out a new notice to the

defendant and his friends, that they were over the 75 person threshold, and that they would either have to apply for a permit, or reduce their numbers. *See* Transcript, at p. 128. The defendant ignored the U.S. Forest Service warnings. The next day, June 13, 2005, the defendant and other Rainbow Family members were issued citations for violating Section 261.10(k).

2. Thereafter, the group applied for a “10(k)” permit, which was granted. This permit authorized the Rainbow Family to congregate their thousands of members at a site near the Cranberry Visitors Center in Pocahontas County. During the height of the three week Rainbow Family gathering, and at the Cranberry site, thousands of Rainbow Family members were present. Citations (followed by convictions), were issued to numerous of these Rainbow Family members for drug possession, public nudity and violence.

3. On June 28, 2005, a bench trial was held before the Hon. John S. Kaul, Magistrate Judge, at an off-site courtroom, and the defendant was found guilty of the “10(k)” violation. He was fined two hundred and seventy-five dollars (\$275.00), and assessed a twenty-five dollar (\$25.00) assessment. He herein appeals this conviction and sentence, complaining that Section 261.10(k) violates his First Amendment rights.

4. The Monongahelia National Forest is home to a surprising number of endangered species, such as the Indiana Bat and the Cheat Mountain Salamander. A thousand years ago, Native Americans hunted and lived in these woods, and they have left priceless archaeological sites, many yet undiscovered. On any given weekend, the national forest is filled with backpackers, anglers, hunters, and campers. In its southern Cranberry Glades, the Forest is home to one of the most treasured botanical sites in North America. In the northern Potomac Highlands, the bald eagle population has made a brilliant recovery. It is one of our great national forests. Of these facts, the

Court can take judicial notice.

5. In his appeal, the defendant/appellant argues that he has an unfettered First Amendment right to molest any of these endangered species habitats, to desecrate any of these archaeological sites, and to interfere with other tax paying citizens who might be enjoying a quiet backpacking trip on any given weekend. He argues that he can molest, desecrate and interfere at will, by plopping five thousand of his “Rainbow Family” friends at any location within any National Forest, at any time and for any length of time, he chooses. He argues that he can totally disregard the rights of other citizens who might have scheduled a family reunion in the Forest. He argues that he can ruin a weekend fishing trip of a father and his sons, by surrounding the angling site with ten thousand tents, filled with marijuana smoking, half naked “Rainbow Family” members, screaming obscenities through the woods. And he calls this First Amendment “religion.”

6. The defendant/appellant has filed a thirty-five (35) page brief, crying First Amendment depravity at the hands of the “group use” authorization requirement set forth in 36 C.F.R. 261.10(k). In a nutshell, this regulation requires that, anytime a group of more than 75 persons desires to congregate within the national forest system, they must first apply for, and obtain, a “special-use” permit (which is free-of-charge). The permit requirement is designed for “the protection or administration of the National Forest System.” In pertinent part, the regulation reads:

Title 36. Parks, Forests, and Public Property  
Chapter II. Forest Service, Department of Agriculture  
Part 251. Land Uses  
Subpart B. Special Uses

Section 251.50 Scope.

(a) All uses of National Forest System lands, . . . except those authorized by the regulations governing sharing use of roads (section 212.9); grazing and livestock use (part 222); the sale and disposal of timber and special forest products, such as greens,

mushrooms, and medicinal plants (part 223); and minerals (part 228) are designated “special uses.” Before conducting a special use, individuals or entities must submit a proposal to the authorized officer and must obtain a special use authorization from the authorized officer, unless that requirement is waived by paragraphs (c) through (e)(3) of this section.

...

(c) A special use authorization is not required for noncommercial recreational activities, such as camping, picnicking, hiking, fishing, boating, hunting, and horseback riding, or for noncommercial activities involving the expression of views, such as assemblies, meetings, demonstrations, and parades, unless:

(1) The proposed use is a noncommercial group use as defined in section 251.51 of this subpart;

Section 251.51 Definitions.

Group use -- an activity conducted on National Forest System lands that involves a group of 75 or more people, either as participants or spectators.

36 C.F.R. 261.1a. Special use authorizations, contracts and operating plans.

The Chief, each Regional Forester, each Forest Supervisor, and each District Ranger . . . may issue special-use authorizations, . . . authorizing the occupancy or use of a . . . part of the National Forest System in accordance with authority which is delegated elsewhere in this Chapter or in the Forest Service Manual. . . . In authorizing such uses, the Forest Officer may place such conditions on the authorization as that officer considers necessary for the protection or administration of the National Forest System.

36 CFR 261.10 Occupancy and use.

The following are prohibited:

(k) Use or occupancy of National Forest System land or facilities without special-use authorization when such authorization is required.

7. Fortunately, the defendant/appellant’s brief is missing two things: (1) law, and (2) facts.

8. With respect to the law, the Fourth Circuit published an opinion, in United States v.

Johnson, 159 F.3d 892 (4th Cir. 1998) (regarding citations issued at a Rainbow Family gathering in the North Carolina National Forests), that Section 261.10(k) is constitutionally sound. Other circuits have reached the same conclusion. United States v. Linick, 195 F.3d 538 (9th Cir. 1999) (regarding Section 261.10(k) citations issued at a Rainbow Family gathering in the Apache-Sitgreaves National Forest), Black v. Arthur, 201 F.3d 1120 (9th Cir. 2000) (regarding 261.10(k) citations issued at a Rainbow Family gathering in the Ochoco National Forest), United States v. Kalb, 234 F.3d 827 (3rd Cir. 2000) (regarding 10(k) citations issued at a Rainbow Family gathering in the Allegheny National Forest), and United States v. Nenninger, 351 F.3d 340 (8th Cir. 2003) (regarding 10(k) citations issued at the 1998 Rainbow Family gathering).

9. It is important to note that all of the appellate cases cited in the above paragraphs involve Rainbow Family challenges to Section 261.10(k). Violating Section 10(k) is a habit that Rainbow Family members engage in year after year. There can be no doubt that the Rainbow Family was well aware of Section 261.10(k) when it set up camp at the “Rattlesnake” site. These cases can also give the Court an overview of the Rainbow Family, who they are, where they come from, and why they congregate.

10. The second thing missing from the defendant/appellant’s brief is facts. What is it about Section 261.10(k) that violates the defendant’s First Amendment freedoms? The mere fact that Section 261.10(k) exists, and that he does not like it, does not necessarily mean that it somehow violates his freedom of religion. If his religion truly requires the desecration of thousand year-old archaeological sites, then he should explain. If his religion can’t be practiced without molesting an endangered species habitat, then he should explain. If his religion truly can’t be practiced without ruining a weekend fishing trip of a father and his sons, then he should explain. Otherwise, how does

the permit requirement actually interfere with his right to religion?

11. Finally, the defendant complains that the “flawed trial transcript prejudices the Defendant-Appellants’ ability to perfect this appeal.” However, as the Defendant-Appellant reminds the Court, whether an alleged omission or deficiency in a trial record justifies a new trial is a matter the Court must determine, and the Defendant-Appellant must demonstrate that the omission specifically prejudices his appeal.” United States v. Gillis, 773 F.2d 549 (4th Cir. 1985). In this regard, counsel for the Defendant-Appellant complains that he “can’t even decipher what arguments were made by Defendant-Appellants.” The United States respects the pro-bono effort by opposing counsel, but this does validate his complaint that he is unaware of his client’s arguments at trial. In trying to decipher the audio recordings, he can, and should, easily ask his client to assist in his efforts to hear the audio recording. If the client can’t remember what arguments he or she made at the trial, then such arguments couldn’t have been very important. In his brief, he complains of no problems other than the 261.10(k) argument and concerning the sufficiency of the evidence.

12. Regarding the sufficiency of the evidence, United States v. Johnson, 159 F.3d 892 (4th Cir. 1998) (regarding citations issued at a Rainbow Family gathering in the North Carolina National Forests), the Fourth Circuit has already held 261.10(k) to be constitutionally valid, and, as well, that it requires no mens-rea element. Given that the Defendant-Appellant admits in his brief that he was at the Rattlesnake site for the annual Rainbow Family gathering, and that he was issued a warning when his group reached 75 persons or more. The Court can also take judicial notice, that well over 75 persons were issued citations during the Rainbow Family gathering. And most importantly, at page 132 of the transcript, officer Lynn testified, “. . . the group was over 75 or 74”. On page 130, officer Lynn testified, “. . . the group was over 75.” And, on page 129, officer Lynn

testified, “The morning of the 13th, another count was conducted. There were over 75 again, and that afternoon, we began issuing violations.” Officer Parker testified, on page 151, that he counted “119” people. And on page 167, the Magistrate Judge states:

The evidence is uncontradicted of the number of persons. The evidence is clear that each of the defendants knew of the Rainbow gathering -- before they arrived, went to the gathering to be either a participant or a spectator of it and stayed there to a point beyond warning both verbal and in writing.

WHEREFORE, for the reasons set forth above, and for any other reason the Court may deem appropriate, and because the defendant/appellant’s brief merely concludes without factually explaining how the challenged Forest Service regulation interferes with his First Amendment freedom to worship, the United States respectfully asks this Honorable Court for an Order scheduling a hearing in this matter, and, as well, ultimately denying the relief sought by the defendant/appellant, and, as well, dismissing the appeal and affirming the judgement of the Magistrate Judge.

Respectfully submitted:

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 27th day of August, 2006, service was served by the Court's electronic filing system, to counsel for the defendant/appellant: Patrick S. Cassidy

Respectfully submitted:

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