Eerie Ruling ~ Pigs Ducks & Horses

[The "Allegheny 2" found Guilty of Gathering
[without a Permit ..... The Ruling in Erie PA,
[Reflections from Down on the Animus Farm

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On Wed. 22 October '97 -- after two days of testimony in the Federal District Court in Erie, PA -- Magistrate Judge Susan Paradise Baxter rendered her decision in the joined cases of "U.S. v. Baxter & MacCrimmon [Greenfeather]", on charges that Bill & Joseff had violated the 'Group Use' permit requirement at the August '96 gathering in Allegheny National Forest. *36 CFR §261.10(k)*

The course of the trial is easiest to understand back end first, in light of the final ruling and the criteria that defined it.

Presented here is a close paraphrase of what the judge said (from copious notes of the proceedings), and a few interpretive 'Short Comments' with animal noises at the end:

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ALLEGHENY RULING (Wed. 22 October, approx. 5 PM):

<< On the two citations against Mr. Baxter and Mr. MacCrimmon, it is not my job to decide whether rules and regulations make sense, or whether intentions are good on one side or more good on the other. My job is to apply the law, but not where this would violate rights guaranteed by the Constitution.

<< It is clear that the Federal Register rulemaking had 'You Folks' in mind, by virtue of the original language of the rule publication, and the agency's responses to public comments.
It is also no secret that Rainbows understood what this regulation meant, and shared widely a belief that it violated their First Amendment rights and should not apply to their gatherings.

<< This is not a game, and the matter has come to this court from both sides as a test of whether the permit requirement for 'noncommercial group use' on National Forest lands should stand.

<< At issue here are four key questions:

1. *WAS THE RULE ENFORCED PROPERLY?*
2. *WAS THE REGULATION VIOLATED AT THE AUGUST 96 ALLEGHENY GATHERING?*
3. *DID MR. BAXTER AND MR. MacCRIMMON PERSONALLY VIOLATE THIS REGULATION?*
4. *DOES THE RULE VIOLATE CONSTITUTIONAL RIGHTS OF FREE ASSEMBLY AND SPEECH?*

<< On these questions, this is what I find:

1. *Yes, the rule was enforced correctly by the Forest Service...*

2. *Yes, the regulation was violated in that a group of more than 75 persons occupied National Forest lands without a 'special use authorization'.*

3. Yes, Mr. Baxter & Mr. MacCrimmon were part of the "75"; there was a "Group Use", with various "group activities", and all who were there were in violation.

4. No, there is no showing that the permit requirement infringed free assembly, or limited First Amendment speech or religious exercise.

<< Any regulation affecting expressive activities must meet certain standards, and the Supreme Court has made these standards clear:

<< It is recognized that the National Forests are a traditional forum for such expressive activities, and no regulation may single out one kind or another. This regulation applies to all groups using National Forest lands, and is therefore content-neutral.

<< In the Constitutional view, this regulation is scrutinized in an intermediate way, on three tests --

• The government has a 'substantial interest' in regulating use of the National Forests, and it is valid in this rule...
• It is 'narrowly tailored' in its criteria and discretions; this is a matter of the regulation itself, not its enforcement.
• It allows ample 'alternative channels' for communication and assembly...

<< On these grounds, expressive rights are not violated.

<< Therefore, the Court finds Defendants Baxter and MacCrimmon GUILTY of violating 36 CFR §261.10(k) [formerly '(j)'].

<< For the sentence, this provision authorizes penalties of fine up to $5000 and 6 months imprisonment. I find that each of the Defendants shall pay a fine of $50.

<< Court is adjourned. >>

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/ / SHORT COMMENTS / /
(A Fable of Pigs, Ducks, & Horses)

Don't blame the Judge. She was pretty fair and congenial throughout the proceedings, and she dealt with what was before the court, within the scope of arguments presented and the constraints of her job as Magistrate. Of course, any similarity to language in the Federal Register rule publications is purely coincidental.

The U.S. Attorney was methodical and aggressive in presenting the Government's case. All the Forest Service personnel involved in the Allegheny busts were there, well-prepared as witnesses. The prosecution took up 11 hours of testimony, droningly meticulous in getting chosen facts into the record.

The defense barely filled 2-1 / 2 hours... two outside witnesses (hastily called in by the defendants) took the stand with minutes of preparation and marginal testimony. Then Greenfeather went on, & his lawyer didn't bring up his Congressional Medal of Honor. Overall the attorneys did some astute cross-examination, and made some strong points in the record -- but important things were left out.

Of the four key questions set forth by the judge, no one quibbled about the first two; #3 & #4 were the meat-&-potatoes of the case, and they went together:

The prosecution asserted that Baxter & Greenfeather had acted 'de facto' as "Leaders of the Rainbow Family", and that the Forest Service had rightfully designated them as ones who could be made responsible for signing a permit. This hinged (predictably) on the premise that the Rainbow Family is an unincorporated association or 'Group', with various publications, phone numbers, Web pages, and Councils -- and the ability to delegate its 'Members' as representatives in order to comply. The Prosecutor summed it up in closing arguments exactly as I had predicted, verbatim:

"Your Honor -- If it walks like a duck and talks like a duck, It's a Duck."

The Defense countered throughout that there are no Rainbow Leaders, that Bill & Joseff had participated in the gathering as Individuals -- not as functionaries of any group -- marked only by their willingness to help others & cooperate with officials, and being elder males.

The main line of defense was that the rule had been selectively enforced against these defendants, who were simply exercising their First Amendment rights among many others, and could not assume singular leadership and liability by signing a permit.

They argued that Forest Service enforcement procedures for designating 'Leaders' in a gathering were not part of the regulation, and further that the permit itself was a trap: USFS Officers told Baxter & Greenfeather verbally AND in writing that they would not be held personally liable if they signed, but in fact the "Terms and Conditions" of the permit made them explicitly liable for the gathering as a whole.

The Prosecution parried: All this doesn't matter... the 'Group Use' regulation applies to all "participants and spectators", and the Defendants were certainly one or the other. The Forest Service COULD HAVE cited Everybody, they COULD HAVE brought in the State Police or the National Guard, but they were just trying to be nice guys. (Oink.)

Here's The Rub: Participants in a gathering CANNOT sign a permit because it is a free assembly of unrelated folks, who just choose to go and contribute as they will. However if the "Rainbow Family" is tagged as a "Group" or organized entity before the law, it is able to delegate representatives, and CANNOT SAY that it cannot sign.

Defense attorneys made no objections to Government testimony where such a Group was alleged to exist. (This is not a fact for a witness to state, it is a conclusion of law.) Moreover when a defense attorney also blithely uses the term "Rainbow Family Members" (just like in the North Carolina trial!), he buys into this legal fiction created by the bureaucrats, and undermines the Free Assembly claim.

In short, the Defense failed to disprove the 'Group' allegation by the government, and therefore could not show (1) that gatherings as free assemblies are inherently restrained by the permit requirement, or (2) that First Amendment expression unique to the gathering is affected in turn.

This was hard to watch... Defense attorneys had been briefed carefully in advance on these issues, and the elements needed in a Constitutional case that could define the Right to Gather... but it didn't sink in. They left ambiguous fragments of this logic and supporting facts in the record, not enough to shift the burden of proof or compel acquittal. As for relying heavily on the 'selective enforcement' argument, an ACLU memo last year had warned that this was not a strong strategy, but they did it anyway.

It only goes to show...
You can lead a horse to water,
You can splash it on his hindquarters and dump it on his head,
You can hose it in one ear and watch it fly out the other side,
But you can't make a lawyer think.

Steamin',

scottie addison /

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