

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

MCALLEN GRACE BRETHERN CHURCH, §
et al., §

Plaintiffs, §

vs. §

Civil Action No. 7:07-cv-060

S.M.R. JEWELL, Secretary of the Department §
of the Interior, (in her official capacity), §

Defendant. §

SETTLEMENT AGREEMENT

Parties

“Plaintiffs” shall mean McAllen Grace Brethren Church, including all of its members; Native American New Life Center, including all of its members; San Antonio Indian Fellowship, including all of its members; South Texas Indian Dancers Association, including all of its members; Linda Cleveland; Michael Cleveland; Michael Russell; Veronica Russell; Edith Clark; John Wilburn “Bill” Clark; Carrie Felps; Homer Hinojosa, III; Nancy Hollingworth; Lucian Oden; Xavier Sanchez (Mr. Sanchez passed away prior to the execution of this agreement); and Pastor Robert Soto.¹

“Defendant” shall mean S.M.R. Jewell, the Secretary of the United States Department of the Interior, in her official capacity, as well as all other persons currently or formerly acting on her behalf.

¹ A complete list of the Plaintiffs, as that term is defined herein, is attached as Exhibit A. This Agreement bestows rights or privileges to only persons included on the list.

Plaintiffs and Defendant are collectively referred to herein as the “Parties” and individually as a “Party.”

Recitals

WHEREAS on March 16, 2007, Plaintiffs filed suit against various government officials, including the United States Attorney General, the Secretary of the United States Department of the Interior, the Director of the United States Fish and Wildlife Service, and the United States Attorney for the Southern District of Texas in Civil Action No. 7:07-CV-060, *McAllen Grace Brethren Church, et al. v. U.S. Attorney General, et al.*; In the United States District Court for the Southern District of Texas, McAllen Division (herein, the “Lawsuit”); and

WHEREAS Plaintiffs challenged the Department of the Interior’s interpretation and application of the Migratory Bird Treaty Act (“MBTA”), 16 U.S.C. § 703 *et seq.*, and the Bald and Golden Eagle Protection Act (“Eagle Act”), 16 U.S.C. § 668 *et seq.*, on several grounds, including but not limited to the First Amendment of the United States Constitution, the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*, and the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb *et seq.*; and

WHEREAS on March 28, 2012, Plaintiffs filed an Amended Complaint; and

WHEREAS the Amended Complaint named the Secretary of the United States Department of the Interior, in her official capacity, as the Defendant; and

WHEREAS the Amended Complaint continued to challenge the Department of the Interior’s application of the MBTA and Eagle Act on various grounds, including but not limited to the APA, RFRA and the First Amendment of the United States Constitution; and

WHEREAS on March 14, 2013, the United States District Court for the Southern District

of Texas (the “Court”) granted Defendant’s Motion for Summary Judgment; and

WHEREAS Plaintiffs appealed the Court’s decision; and

WHEREAS on August 20, 2014, the United States Court of Appeals for the Fifth Circuit reversed the Court’s decision and remanded the Lawsuit back to the Court. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014); and

WHEREAS Plaintiffs and Defendant, through their authorized representatives, without any final adjudication of the issues of fact or law with respect to Plaintiffs’ claims in the Lawsuit, have reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of the disputes set forth in the Lawsuit; and

WHEREAS all Parties agree that settlement of this action in this manner is in the public interest and is an appropriate way to resolve the dispute between them; and

WHEREAS Plaintiffs and Defendant desire to enter into this Settlement Agreement (the “Agreement”).

Agreement

NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS FOLLOWS:

1. Defendant agrees that the Plaintiffs identified in Exhibit A may, pursuant to the terms set forth in the Department of the Interior’s February 5, 1975 “Morton Policy” (the “Morton Policy”), and regardless of whether they have a U.S. Fish and Wildlife Service permit, “possess, carry, use, wear, give, loan, or exchange among other Indians, without compensation, all federally protected birds, as well as their parts or feathers.” Morton Policy, attached as Exhibit B. Consistent with the Morton Policy, Plaintiffs may acquire from the wild (without

compensation and without disturbing any birds or nests) naturally molted or fallen feathers or parts; give or loan (without compensation) feathers or parts to other Plaintiffs or members of federally recognized tribes; exchange (without compensation) feathers or parts with other Plaintiffs or members of federally recognized tribes; travel domestically with feathers or parts; travel internationally with feathers or parts if they obtain and comply with necessary permits; and provide (without compensation, except for labor) feathers or parts to other Plaintiffs or craftspersons who are Plaintiffs or members of federally recognized tribes to be fashioned into objects for use in Indian religious or cultural activities.

2. Defendant, pursuant to the terms set forth in the Department of the Interior's Morton Policy, "will continue to enforce against all persons [including Plaintiffs] those Federal laws prohibiting the killing, buying or selling of eagles, migratory birds, or endangered species, as well as those laws prohibiting the buying or selling of the parts or feathers of such birds and animals." Morton Policy, attached as Exhibit B.

3. Notwithstanding any provision in 50 C.F.R. § 22.22 describing who is eligible to obtain a permit pursuant to that section, any and all Plaintiffs are eligible to apply for and receive permits for Indian religious use of eagle feathers and eagle parts, and to receive eagle feathers and eagle parts from the National Eagle Repository, without regard to whether they are members of a federally-recognized tribe as required under 50 C.F.R. § 22.22(a)(5). In applying for a permit, Plaintiffs must comply with all the requirements set forth in the applicable regulations (other than 50 C.F.R. § 22.22(a)(5)). The Department of the Interior will consider each application from any and all Plaintiffs on a case-by-case basis and the applications will be given the same priority (in processing) as other applications received.

4. Paragraph 1 of this Agreement will terminate upon the occurrence of the later of the following:

- a. Five years have passed since the effective date of this Agreement; or
- b. The Department of the Interior replaces or otherwise rescinds the Morton Policy.

5. Paragraph 3 of this Agreement will terminate upon the occurrence of the later of the following:

- a. Five years have passed since the effective date of this Agreement; or
- b. The Department of the Interior promulgates new rules or regulations regarding the availability of permits for Indian religious use of eagle feathers and eagle parts, and/or the availability of eagle feathers and eagle parts from the National Eagle Repository.

6. Defendant agrees that if the Agreement as it relates to Paragraph 3 is terminated, such termination will not affect the validity of permits for Indian religious use that Plaintiffs have already received prior to the date of termination.

7. Defendant agrees to consider a petition under 43 C.F.R. § 14.2 from Plaintiffs to modify existing regulations or issue new regulations concerning the possession of eagle feathers by persons who are not members of federally recognized tribes. In considering the petition, Defendant agrees to issue a notice in the Federal Register requesting public comment on the petition. Defendant agrees to make a decision on the petition within two years from the date it is received.

8. Defendant agrees that Plaintiffs are the prevailing party in this Lawsuit and are entitled to an award of reasonable attorney's fees and costs in this Lawsuit. The Parties will attempt to reach agreement as to the appropriate amount of the fee recovery. If they are unable to do so, the Plaintiffs will file an application with the Court for the recovery of fees. Notwithstanding the Stipulation for Dismissal pursuant to Paragraph 9, the Court shall retain jurisdiction for the purposes of resolving any dispute regarding Plaintiffs' claims for an award of reasonable attorney's fees and costs in this Lawsuit. Defendant reserves all objections and defenses as to the appropriate amount of the fee recovery.

9. Simultaneously with the execution of this Agreement, Plaintiffs and Defendant, by their attorneys, shall execute a Stipulation for Dismissal with Prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure, dismissing the Lawsuit with prejudice. Counsel for Defendant agrees to file the Stipulation with the Court after the complete execution of this Agreement by all Parties. A copy of the Stipulation for Dismissal with Prejudice is attached hereto as Exhibit C.

10. This Agreement contains the entire agreement between the Parties hereto, and Plaintiffs acknowledge and agree that no promise or representation not contained in this Agreement has been made to them by Defendant, and they acknowledge and represent that this Agreement contains the entire understanding between the Parties, and contains all terms and conditions pertaining to the compromise and settlement of the disputes referenced herein. No statement, remark, agreement, or understanding, oral or written, that is not contained herein shall be recognized in or enforced through this Agreement, nor does this Agreement reflect any agreed-upon purpose other than the desire of the Parties to reach a full and final conclusion of the

Lawsuit and to resolve this Lawsuit without the time and expense of further litigation. Accordingly, the Agreement has no precedential value and does not constitute an admission, implied or otherwise, by Plaintiffs or Defendant to any fact, claim, or defense on any issue in this litigation.

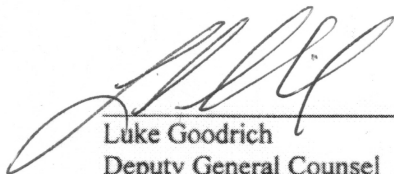
11. This Agreement may be modified by written stipulation among the Parties. In the event that either Party seeks to modify the terms of this Agreement, or in the event of a dispute arising out of or relating to this Agreement, or in the event that either Party believes that the other Party has failed to comply with any term or condition of this Agreement, the Party seeking the modification, raising the dispute or seeking enforcement, shall provide the other Party with written notice of the claim. The Parties agree that they will meet and confer (in-person not required) at the earliest possible time in a good-faith effort to resolve the claim before bringing any matter to a court. If the Parties are unable to resolve the claim within 14 days after the notice (or additional time if the Parties agree), either Party may seek any available relief from the Court. Notwithstanding the Stipulation for Dismissal pursuant to Paragraph 9, the Court shall retain jurisdiction for the purposes of resolving any dispute regarding the modification or enforcement of this Agreement.

12. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that the Defendant take action in contravention of the Administrative Procedure Act, the Anti-Deficiency Act, or any other law. Except as otherwise stated herein, nothing in this Agreement shall be construed to limit or modify the discretion accorded to the Defendant by law. This Agreement shall not be interpreted as extending any rights or privileges to third-party beneficiaries.

13. The Parties agree that this Agreement was negotiated in good faith and it constitutes a settlement of claims that were vigorously contested, denied, and disputed by the Parties. By entering into this Agreement, Plaintiffs and Defendant do not waive any claim or defense.

14. The undersigned representatives of each Party certify that they are fully authorized by the Party or Parties they represent to execute this Agreement.

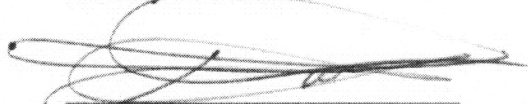
15. This Agreement shall become effective following execution by the undersigned representatives of Plaintiffs and Defendant.



Luke Goodrich
Deputy General Counsel
The Becket Fund for Religious Liberty
1200 New Hampshire Ave. NW, Ste. 700
Washington, DC 20036
T (202) 349-7216

Dated: June 10, 2016

Attorney for Plaintiffs



Rev. Robert Soto
Plaintiff

Dated: June 10, 2016

KENNETH MAGIDSON
United States Attorney



Jimmy A. Rodriguez
Assistant United States Attorney
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Tel: (713) 567-9532
Fax: (713) 718-3303

Dated: June 3, 2016

Attorneys for Defendant

Exhibit A

Individual Plaintiffs

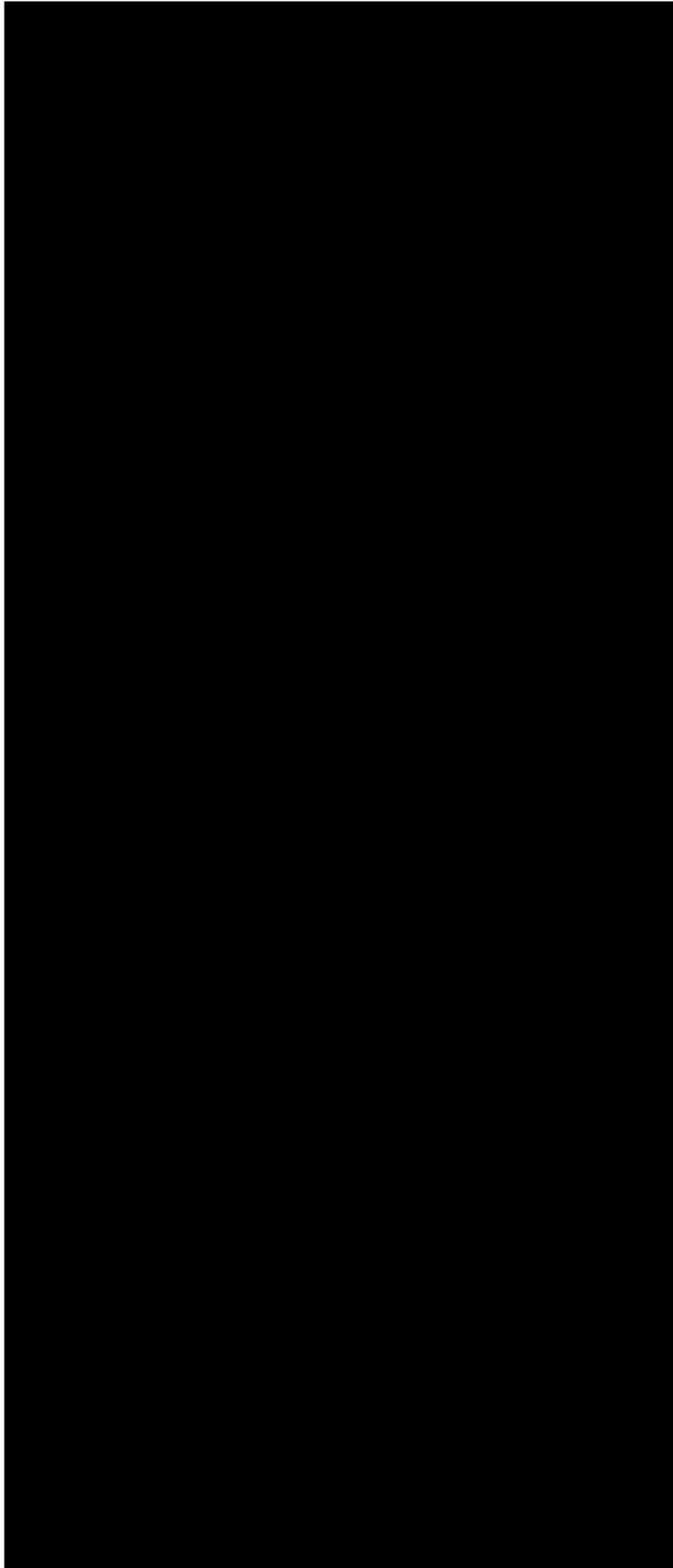
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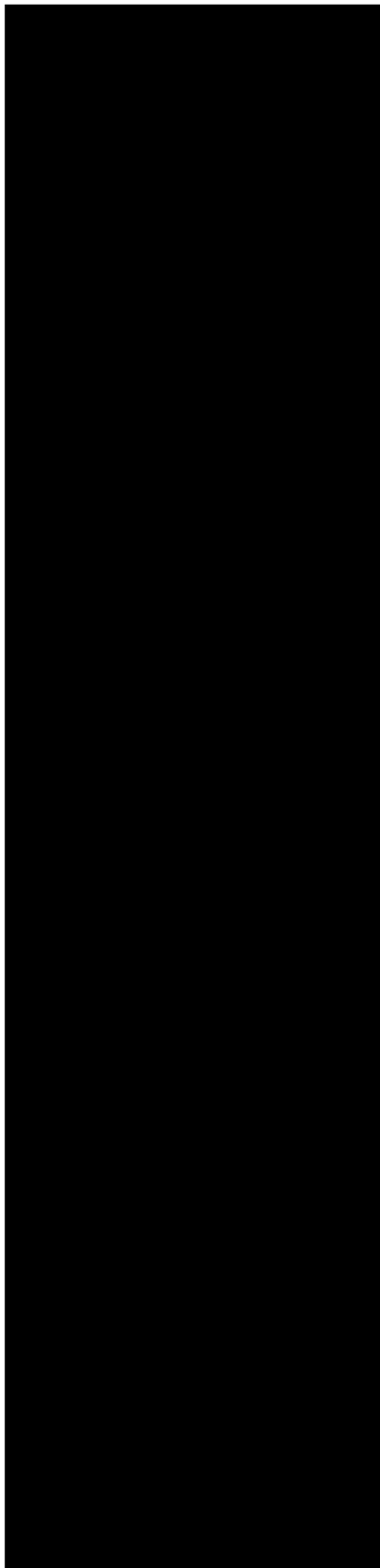
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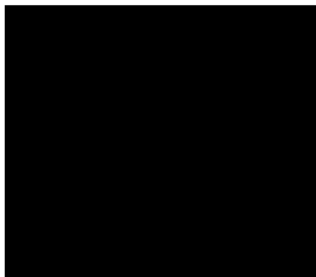
McAllen Grace Brethren Church

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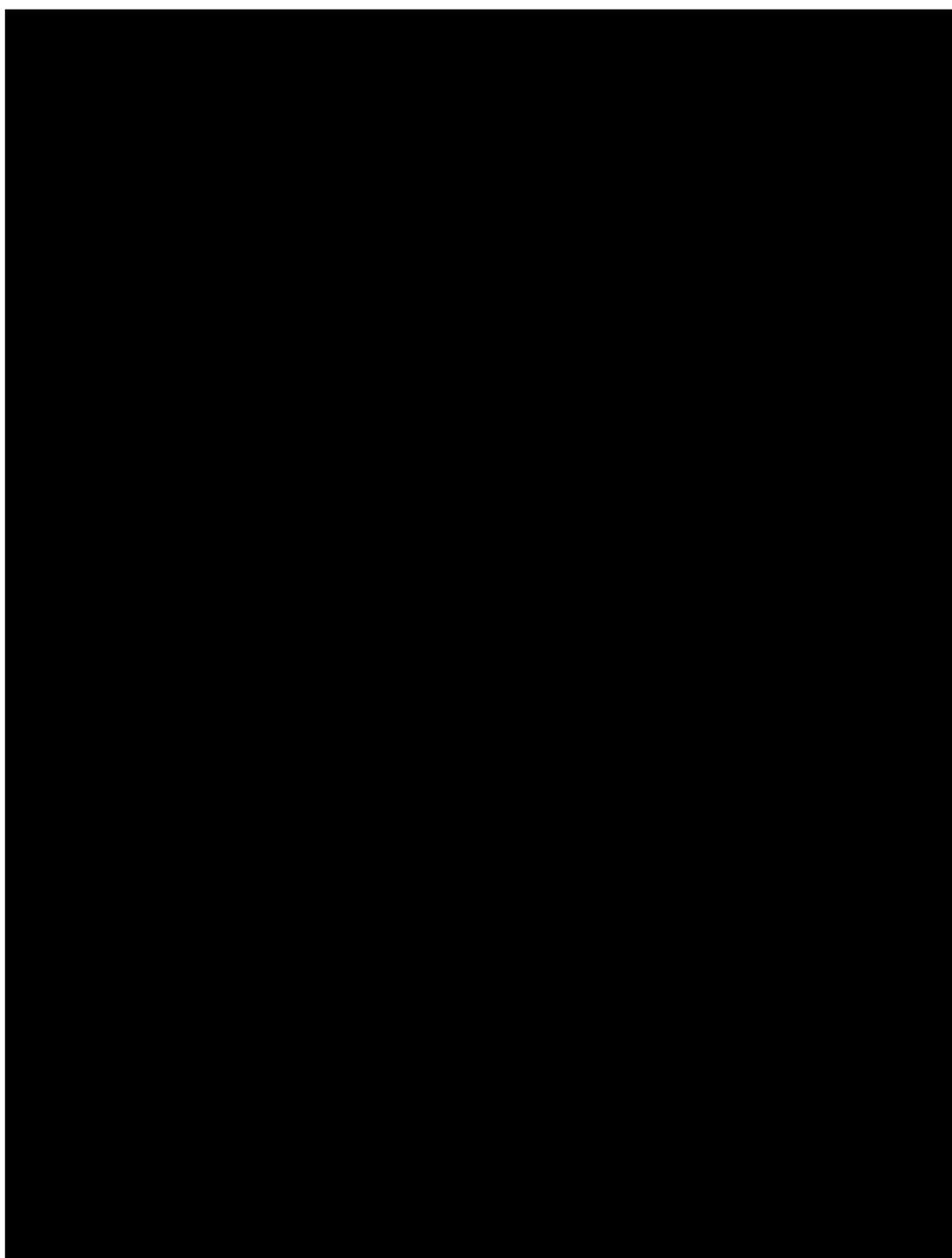
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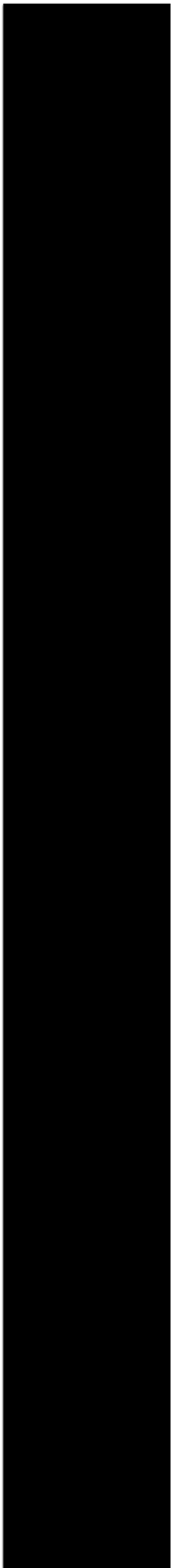
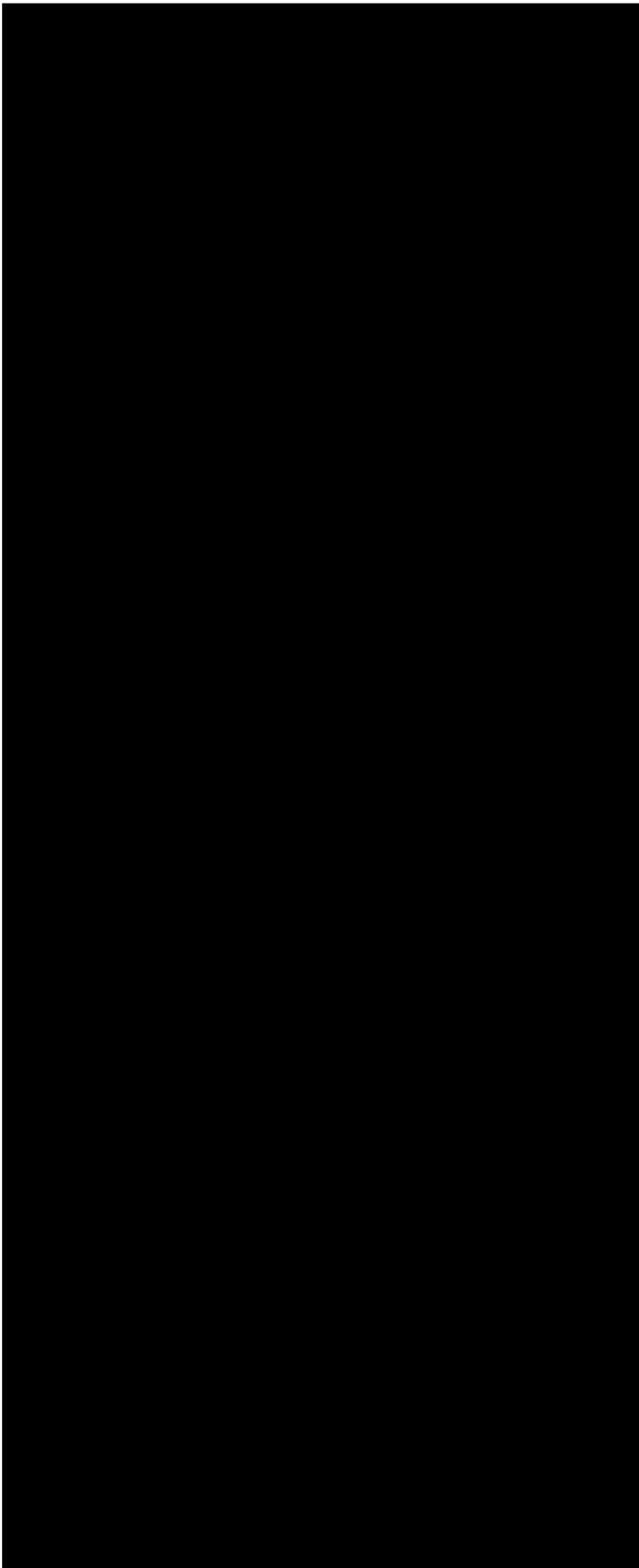






Native American New Life Center

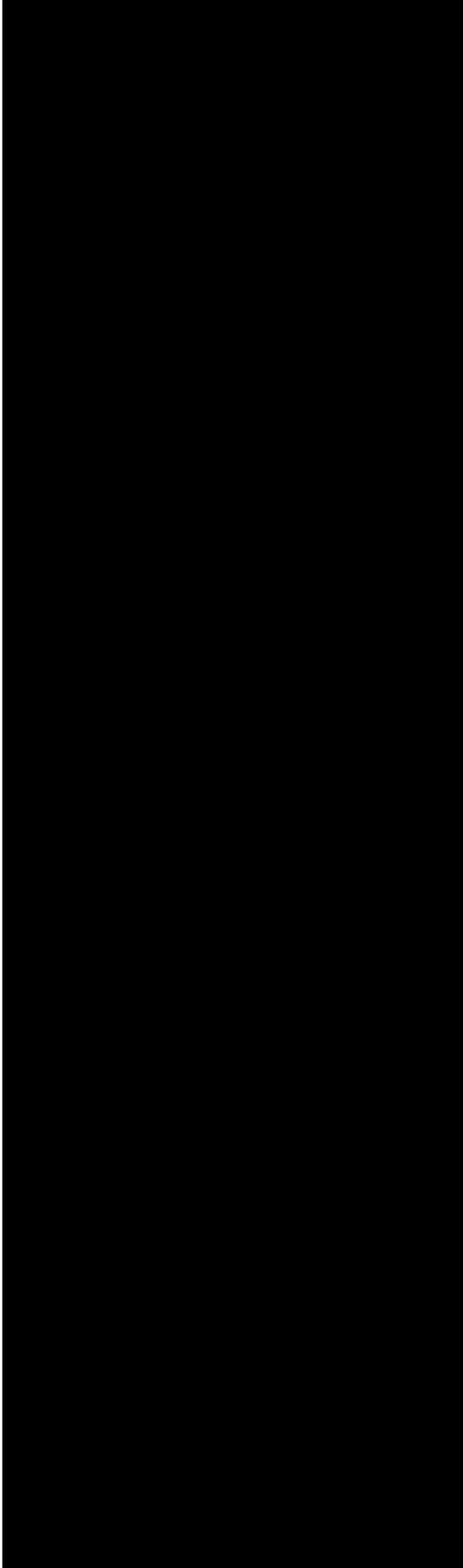






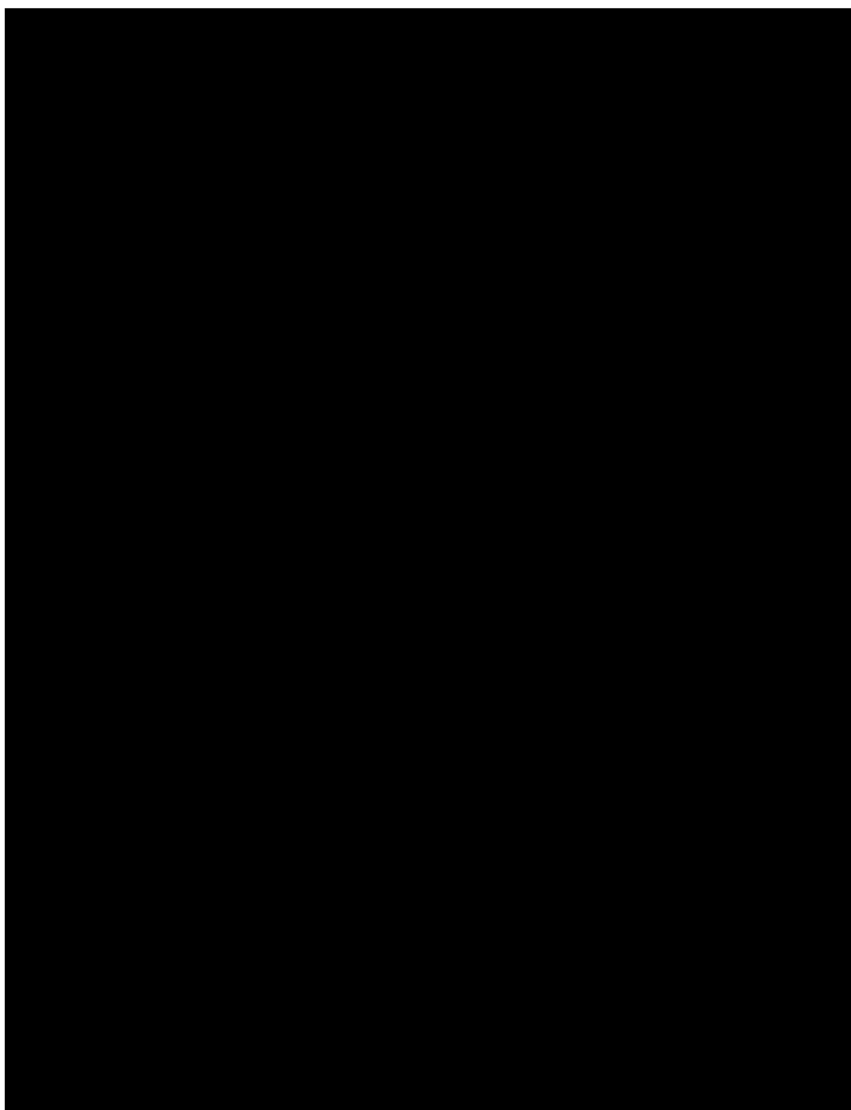
Chief of Chief Christian Church (formerly known as San Antonio Indian Fellowship)







South Texas Indian Dancers Association





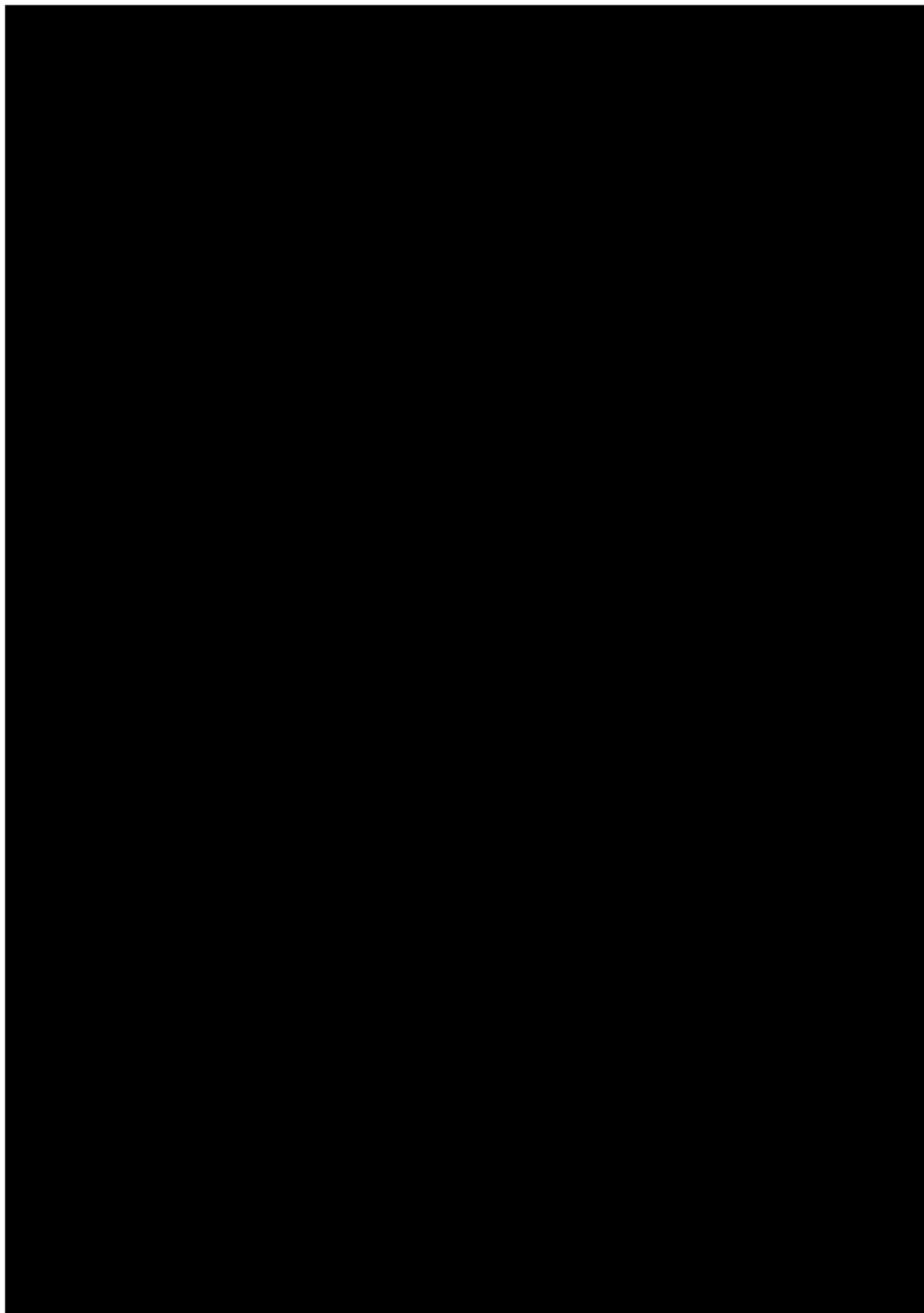


Exhibit B

DEPARTMENT of the INTERIOR

news release

OFFICE OF THE SECRETARY

For Release February 5, 1975

McGarvey 202/343-5634

MORTON ISSUES POLICY STATEMENT
ON INDIAN USE OF BIRD FEATHERS

Secretary of the Interior Rogers C. B. Morton today issued a policy statement concerning Indian cultural and religious use of migratory bird feathers and parts. Following is the text of the statement.

"I am aware that American Indians are presently experiencing uncertainty and confusion over the application of Federal bird protection laws to Indian cultural and religious activities. Apparently, this confusion and concern may have resulted, in part, from this Department's enforcement activities under such laws. This statement is intended to clarify the Department of the Interior's responsibilities and intentions, and to ease the minds of American Indians.

"The Department of the Interior recognizes the unique heritage of American Indian culture. It also recognizes that American Indians have a legitimate interest in expressing their cultural and religious way of life. At the same time, both the Department of the Interior and American Indians share an additional responsibility to conserve wildlife resources, including federally protected birds.

"As a result of meetings between agencies of the Department of the Interior, the Association for American Indian Cultural and Traditional Activities, and others, I can assure American Indians that our policy is to permit them to engage in the following activities without fear of Federal prosecution, harassment, or other interference.

(over)

"1. American Indians may possess, carry, use, wear, give, loan, or exchange among other Indians, without compensation, all federally protected birds, as well as their parts or feathers.

"2. American Indians who wish to possess bird feathers or parts to be worked on by tribal craftsmen for eventual use in Indian religious or cultural activities may transfer such feathers or parts to tribal craftsmen without charge, but such craftsmen may be compensated for their work.

"However, the Department of the Interior will continue to enforce against all persons those Federal laws prohibiting the killing, buying or selling of eagles, migratory birds, or endangered species, as well as those laws prohibiting the buying or selling of the parts or feathers of such birds and animals.

"I encourage American Indians to express their identity and to freely pursue their cultural and religious practices. At the same time, I encourage them to support the purposes of the Federal bird protection laws. There is much work to be accomplished to further clarify the rights and obligations of American Indians with respect to Federal bird protection laws, and special efforts will be made to conduct a two-way education process between Government employees and Indian communities. In addition, we have agreed to work in a spirit of cooperation with the Association for American Indian Cultural and Traditional Activities, and other interested Indian representatives, in order to harmonize the policies, practices, and procedures for enforcement of the Federal bird protection laws with the legitimate needs of Indians. This includes review of Federal regulations, with probable changes where the legitimate needs of American Indians can be legally recognized without harming federally protected birds.

"In this regard, one area of discussion should be the possibility of American Indians sharing with Federal officials the responsibilities of wildlife management and enforcement through the adoption of tribal ordinances designed to conserve federally protected birds.

"In the past, one problem has been that legitimate sources of feathers, which might have been available to the Department for distribution to American Indians, have not been fully utilized. We are presently developing better procedures to collect and distribute eagle feathers from the Fish and Wildlife Service repository at Pocatello, Idaho, where feathers of eagles found dead are stored. In addition, we will make an effort to distribute the feathers and parts of other migratory birds to Indians.

"I hope that this statement will help to take away the uncertainty and confusion presently experienced by American Indians. I hope also that our efforts will encourage tradition, culture, and religious activities among American Indians, while at the same time promoting a mutual effort to protect and conserve federally regulated birds.

x x x

Exhibit C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

MCALLEN GRACE BRETHERN CHURCH, §
et al., §

Plaintiffs, §

vs. §

Civil Action No. 7:07-cv-060

S.M.R. JEWELL, Secretary of the Department §
of the Interior, (in her official capacity), §

Defendant. §

AGREED MOTION TO DISMISS

Plaintiffs McAllen Grace Brethren Church, including all of its members; Native American New Life Center, including all of its members; San Antonio Indian Fellowship, including all of its members; South Texas Indian Dancers Association, including all of its members; Linda Cleveland; Michael Cleveland; Michael Russell; Veronica Russell; Edith Clark; John Wilburn “Bill” Clark; Carrie Felps; Homer Hinojosa, III; Nancy Hollingworth; Lucian Oden; Xavier Sanchez; and Pastor Robert Soto (collectively “Plaintiffs”) and Defendant, S.M.R. Jewell, the Secretary of the United States Department of the Interior, in her official capacity (“Defendant”),¹ through their respective undersigned counsel, hereby respectfully move the Court to approve the Parties’ Stipulated Settlement Agreement and enter the attached Proposed Order. In support of this motion, the Parties would show the Court the following:

1. For the reasons set forth in the Stipulated Settlement Agreement, attached hereto as Exhibit 1, Plaintiffs and Defendant hereby stipulate and agree that the above captioned case be

1 Plaintiffs and Defendant are collectively referred to herein as the “Parties” and individually as a “Party.”

dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1).

2. The Parties agree that the Stipulated Settlement Agreement was negotiated in good faith and constitutes a settlement of claims that were vigorously contested, denied, and disputed by the Parties.

3. By entering into the Stipulated Settlement Agreement the Parties do not waive any claim or defense.

4. The undersigned representatives of each Party certify that they are fully authorized by the Party they represent to agree to the terms and conditions of this Motion and the Stipulated Settlement Agreement.

5. Notwithstanding the dismissal of this action, the Parties hereby stipulate and respectfully request that this Court retain jurisdiction over this lawsuit to enforce the terms of the Stipulated Settlement Agreement and to resolve any motions to modify such terms. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 381, 114 S. Ct. 1673, 1677 (1994).

5. The Parties have agreed in the Stipulated Settlement Agreement that Plaintiffs are the prevailing party and are thus entitled to an award of reasonable attorney's fees and costs in this lawsuit. However, the Parties have not yet reached an agreement as to the amount of attorney's fees and costs to be paid to Plaintiffs. The Parties intend to negotiate a settlement of the fees issue. Pursuant to the Stipulated Settlement Agreement, Plaintiffs reserve the right to file a motion for the award of attorney's fees and costs with the Court if the Parties are unable to reach an agreement as to the amount of attorney's fees and costs to be paid to Plaintiffs.

6. The terms of the Stipulated Settlement Agreement shall become effective upon

entry and approval of the Proposed Order by the Court.

For the foregoing reasons, the Parties request that the Court approve the Stipulated Settlement Agreement and enter the enclosed Proposed Order dismissing this action.

Dated: _____

Respectfully Submitted,

KENNETH MAGIDSON
UNITED STATES ATTORNEY

s/Jimmy A. Rodriguez
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ATTORNEY-IN-CHARGE FOR
PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

MCALLEN GRACE BRETHERN
CHURCH, et al.,

Plaintiffs,

v.

S.M.R. JEWELL, Secretary of the
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Defendant.

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Civil Action No. 7:07-cv-60

ORDER GRANTING AGREED MOTION TO DISMISS

This matter comes before the Court on the parties' Agreed Motion to Dismiss. The Court, having reviewed the motion and the Stipulated Settlement Agreement, FINDS and ORDERS as follows:

1. The Agreed Motion to Dismiss is GRANTED. It is ORDERED that this case is DISMISSED with prejudice. However, this Court will retain jurisdiction over this lawsuit to enforce the terms of the Stipulated Settlement Agreement and to resolve any motions to modify such terms.

2. The attached Stipulated Settlement Agreement is approved and shall become effective upon entry of this Order; and

3. Pursuant to the Stipulated Settlement Agreement and this Order, the Plaintiffs are prevailing parties for the purposes of 28 U.S.C. § 2412(b) and 42 U.S.C. § 1988(b) and are entitled to the recovery of reasonable attorney's fees and costs incurred in this lawsuit. The Court retains jurisdiction over this matter to resolve any fees dispute, and if the parties are unable to reach an agreement as to the amount of attorney's fees and costs to be paid to Plaintiffs,

Plaintiffs may file a motion for the award of attorney's fees and costs with the Court.

Signed this ____ day of _____, 2016.

Ricardo H. Hinojosa
Chief United States District Judge