UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

KIRK HUGHES, et al.,

Plaintiffs,

Vs.

RULE 41 VOLUNTARY STIPULATION OF DISMISSAL SUBJECT TO CONDITIONS 97-CV-6431(CS)

GLENN GOORD, et al.,

Defendants.

The parties, by their attorneys, hereby stipulate and agree as follows:

WHEREAS, Plaintiffs filed this action on September 29, 1997, alleging the systematic deprivation of religious rights of traditional Native American prisoners, and discrimination at facilities of the New York State Department of Correctional Services (hereinafter "DOCS");

WHEREAS, Plaintiffs further alleged that Defendants, acting under color of state law, have violated Plaintiffs' rights by failing to provide Native American prisoners with the opportunity to practice their traditional Native American religion;

WHEREAS, Plaintiffs sought injunctive relief to enjoin Defendants from violating Plaintiffs' right to the free exercise of religion and equal protection of law; and,

WHEREAS, the Defendants have denied that they have violated Plaintiffs' constitutional rights; and,



WHEREAS, counsel for the plaintiffs and defendants, without conceding any infirmity in their claims or defenses, have subsequently engaged in negotiations to resolve the Plaintiffs' claims;

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties as follows:

I. DEFINITIONS

- A. "Native American" shall mean any person who is a descendant of the original inhabitants of the American continents as demonstrated by any of the following: (1) birth certificate; (2) a listing on the tribal registry; (3) a letter of verification from a tribal chief, clan mother or other bona fide Native American authority, (4) documentation from the U.S. Bureau of Indian Affairs or the New York State Department of Education or other reliable governmental records; or (5) subject to the approval of the Division of Ministerial Services and Office of Counsel within the Department of Correctional Services (hereinafter DOCS), any other appropriate documentation.
- B. "Traditional Native American" shall mean a person who follows the traditional religion or "way of life" of their Native American nation.
- C. "Longhouse" shall mean the traditional religion or "way of life" of the Haudenosaunee, who are the Six Nations comprising the Iroquois Confederacy and are made up of the Onondaga, Seneca, Tuscarora, Oneida, Mohawk and Cayuga Nations.

II. Native American Chaplain or Spiritual Leader

A. In order to facilitate Native American spiritual practices in DOCS' facilities, Defendants agree that DOCS will create a half-time Native American chaplain position and continue to use its best efforts to hire a person for such position. The Native American spiritual leader who is hired will be recognized by Native American tribal authorities of the Longhouse as possessing the requisite expertise.

Until such time as a Native American Chaplain is hired, and during any times that the position may become vacant, determinations concerning Native American religious practices shall be made in consultation with approved volunteers or other recognized authorities on Native American Spirituality.

- B. The Native American Chaplain will provide spiritual counseling and guidance to the traditional Native American population, will advise DOCS personnel on questions regarding Native American Spirituality and will coordinate religious observance by traditional Native Americans.
- C. The Native American Chaplain will seek advice and counsel from the spiritual leaders of Native American traditions other than the Longhouse when necessary to serve the needs of such other traditional Native Americans.

III. General Principles

A. Native Americans will be permitted to practice their religion, as set forth herein, in any DOCS facility. Native Americans will be permitted to participate in traditional Native American ceremonies subject to the criteria set forth in Section V herein.

B. Native Americans will be permitted to meet for religious purposes at least once per week provided that in the absence of an approved volunteer, an approved inmate facilitator is present. Native Americans may request permission to meet an additional time per week when the purpose for the additional meeting is related to study, practice of religion or traditional language, or planning of future ceremonies. The Superintendent, after consultation with the Director of Ministerial and Family Services, shall make a determination on such request within 14 days of the request.

The reason(s) justifying any refusal to grant such permission shall be stated in writing. An inmate or group wishing to appeal such a denial may file a grievance with the facility grievance program.

- C. Native American inmates shall have the right to possess Native American religious items subject to the criteria set forth in Section IV.
- D. Subject to the criteria set forth in Section V, traditional Native Americans at every general confinement facility will be permitted to observe the sacred seasonal ceremonies of the Longhouse religion which include: Mid-Winter, Maple Syrup, Corn Planting, Strawberry, Bean Harvest, Green Corn Festival, Harvest Festival and All-Night ceremony. The All-Night ceremony will be celebrated during the same general time of the day that the other permitted seasonal ceremony days are celebrated.
- E. The parties believe that the Longhouse religion of the Six Nations constitutes the traditional religion for the greatest number of Native Americans incarcerated in DOCS facilities. For that reason, reference is made to the Longhouse religion throughout this

Stipulation. DOCS shall make reasonable efforts to accommodate the religious needs of Native Americans who are not members of the Longhouse.

- F. Native Americans will be permitted to request, from their assigned corrections counselor, consideration for transfer, when eligible, to another facility. The practice of religion will not be grounds for denying a transfer request.
- G. Nothing in this stipulation shall be construed as requiring provision of sweat lodges. Notwithstanding the foregoing, consistent with its rules and regulations governing family-tie furloughs, DOCS will permit Native American inmates who are otherwise eligible for temporary release to apply for a family-tie furlough for the primary purpose of allowing the inmate to participate in a sweat lodge ceremony during his or her absence from the facility.

IV. Approved Native American Items

A. Upon the issuance of a permit by the facility chaplain, Native American inmates, other than those confined in disciplinary or administrative segregation Special Housing Units, may possess any items listed in Section in IV-G below (hereinafter "Religious Items") within any DOCS correctional facility. Upon the issuance of a permit, Native American inmates confined in disciplinary or administrative segregation Special Housing Units may possess: one (1) unsealed medicine bag; one (1) rosette; one (1) small pouch of sacred herbs; and on request, one (1) facility issued, disposable ashtray for smudging, to be replaced on a one for one basis. Any depriviation of approved Native American Religious Items for Native American inmates confined in disciplinary

or administrative segregation Special Housing Units shall be subject to the provisions of DOCS Directive 4933. Nothing in this paragraph shall be construed to curtail the Religious Items that Native American inmates are otherwise permitted to posses pursuant to DOCS Directive 4933 when confined in disciplinary or administrative segregation Special Housing Units.

- B. If the facility chaplain is uncertain as to the claimed religious significance of any Religious Items listed below, he or she shall consult with the Native American chaplain.
- C. Each Religious Item shall be examined by the Deputy Superintendent of Security or his designee to determine whether a permit to possess such Religious Item will be issued to a Native American inmate.
- D. If the Deputy Superintendent of Security, or his designee, determines that a a Religious Item exceeds the permitted size or \$50.00 in value, is of an impermissible design, can be used as a weapon, or otherwise constitutes a threat to the safety and security of the facility, the permit shall be denied.
- E. In the event a Native American inmate is denied permission to possess a Religious Item, the inmate shall be informed in writing of the reason for the denial.
- F. In the event a Native American inmate who has been granted such a permit is transferred, the permit will be valid at any other facility, unless there exist overriding safety and security concerns. No permit shall be invalidated without consulting the Director of Ministerial and Family Services. The inmate shall be informed in writing of the reason for the decision to invalidate a permit.

- G. Subject to the provisions set forth above, individual Native Americans may personally possess the following Religious Items:
 - 1) An unsealed medicine bag, no greater than 2" \times 3", with drawstring or leather cord closure, worn under the clothing and completely concealed; may contain natural objects such as pebbles, small animal bones and herbs (as defined in paragraph 2 below) of a small quantity to permit visual inspection of all contents of the bag.

When a correction officer deems it necessary to inspect the contents of a medicine bag, it shall be held open by the inmate, if present, for visual inspection by the correction officer.

If the inmate is not present or if special security concerns exist -- such as the Native American inmate refuses to open the medicine bag; the Native American inmate threatens, assaults or attempts to assault staff or other inmates; or the inmate or the medicine bag poses a threat to the safety and security of the facility --, then the medicine bag may be held open by the chaplain.

If the chaplain is not available to open the bag for visual inspection by the correction officer, the bag shall be secured by the correction officer in an area designated by the Deputy Superintendent until the chaplain is present.

If exigent circumstances exist, however, the superintendent may authorize the search of a bag without a chaplain, provided a lieutenant or higher ranking officer is present when the bag is opened for visual inspection.

Nothing herein shall preclude a correction officer or other security staff from scanning the bag at any time with a metal or other electronic detector.

Pursuant to DOCS' Directive 4938, nothing herein shall preclude the testing for illegal substances if contraband is suspected, provided that a security supervisor of the rank of sergeant or higher approves such testing.

2) Sacred herbs, consisting of sweet grass, sage, cedar, sacred tobacco, kinnick-kinnick from an approved commercial vendor, and calamus root can be possessed by Native American inmates on their person or in their housing location in such limited quantities as are necessary to accommodate religious practices as determined by the facility chaplain. Possession of these herbs by non-Native American inmates is considered

contraband. These herbs, with the exception of kinnick-kinnick, may not generally be available from a commercial vendor and may instead be available only from the Native American tribe or clan. Obtaining such herbs may only be accomplished by the Native American chaplain or the facility chaplain at the request of the Native American group or individual at the expense of such group or individual. Kinnick-kinnick may only be provided from an approved commercial vendor at the expense of such group or individual and may not be obtained from any other source. Any of the six herbs identified herein are subject to processing and inspecting for contraband and testing for illegal substances; thereafter, such herbs shall be stored by the supervising chaplain and dispensed to Native Americans upon request as previously described.

- 3) Rosettes (beaded pendants), attached to a leather or fabric cord, and worn under the clothing and completely concealed. Rosettes will be approved pursuant to guidelines specified in DOCS Directive #4202, "Religious Programs and Practices," Sections (N)(1), (N)(2)(a) and (N)(2)(c).
- 4) A personal smoking pipe, not to exceed six inches in length.
- 5) A small ashtray or shell for smudging, less than three (3) inches in diameter, can be possessed in living quarters only. To be used for ritualistic burning of a small amount of herbs or tobacco to create smoke for ceremonial cleansing ("Smudging"). Smudging must be done in conformance with facility smoking regulations and double-cell housing policies where applicable. Except in the case of designated religious study group meetings or ceremonial festivals, all smudging is to be done by individual Native Americans within their living quarters. In dormitory-style housing units, smudging may only be done within the inmate's cube.
- 6) At such time as DOCS eliminates all indoor smoking from its correctional facilities, smudging and the use of a personal pipe for prayer indoors by Native American inmates shall be permitted as follows:
 - (a) only non-tobacco substances consisting of either sweet grass, sage, cedar, kinnick-kinnick obtained from an approved commercial vendor, or calamus root may be used for smudging.

- (b) only non-tobacco substances consisting of either sweet grass or kinnick-kinnick from an approved commercial vendor may be used for smoking in a personal pipe for prayer.
- (c) smudging and smoking is to be done by individual Native Americans in one of the following locations to be designated by each facility: within their living quarters or within the inmate's cube, in dormitory housing style units or, in another designated location. Individual smudging and smoking will be permitted two times per day for fifteen minutes each time. One fifteen minute period will occur before the morning meal and the second fifteen minute period will occur in the evening, the exact times to be determined by the Superintendent of the facility in which the inmate is housed. With respect to smudging and smoking, the quantity of herbs that may be burned at any one time, shall be as follows:
 - (i) for a shell, a small amount, approximately one tablespoon;
 - (ii) for a pipe, the pipe bowl full;
 - (iii) for a sweet grass braid, approximately one inch.
- 7) Other religious artifacts or symbols such as clan or nature symbols or representations, or additional items needed for ceremonies, including items of ceremonial dress, as approved by the Native American or facility chaplain.

Nothing herein shall be deemed to prohibit the possession of any other religious item that is not considered contraband by the Deputy Superintendent for Security.

- H. All inspections and approvals or denials shall be made within ten business days of request or receipt of the Religious Item at the facility.
- I. All inspections of the Religious Items shall be conducted in such a manner as to respect the sacred nature of the Religious Item.
- J. With respect to a decision to deny permission to possess a Religious item or permit or a decision to invalidate an existing permit, a Native American may seek assistance

in resolving the complaint through the facility Chaplain, the Native American Chaplain, or existing channels, informal or formal, prior to submitting a grievance. If the problem is not resolved to the inmate's satisfaction, then the inmate may file a grievance with the facility grievance program. The item in question will remain secured by the office of the Deputy Superintendent of Security until the inmate receives notice of the final grievance decision, provided a grievance is filed within 14 days of the inmate's receipt of notice of the denial.

- K. In addition to the individual Religious Items listed above, Native American groups in general population may possess the following as community items, to be kept in a secure locker, subject to the written approval of the Deputy Superintendent for Security and the supervising chaplain. Inspection of Native American group lockers and the items they contain shall be subject to the provisions of DOCS' Directive 4910, Section V(D) as in effect at the date of the signing of the agreement.
 - 1. Audio tape player with no recording capabilities.
 - 2. Native American religious and language tapes. Such tapes may be either commercial or non-commercial, and may be received from either a tribal chief, clan mother or other bonafide source. All tapes must be reviewed in their entirety by the supervising chaplain prior to issuance.
 - 3. Ceremonial ribbon shirts; multi-colors are permitted, however a significant portion of the shirt material cannot consist of any solid color not authorized.
 - 4. Drums.
 - 5. Rattles.
 - 6. Large ceremonial pipe for smoking.

- 7. Sacred herbs and tobacco (pursuant to the same rules for individual use).
- 8. Dance bells.
- 9. Feather fans.
- 10. Native American religious and language literature.
- 11. Blanket of multi-color design, so long as a significant portion of the blanket is not of a solid color not authorized.
- 12. Cooking utensils (i.e., hot plates, electric fry pans, cooking pots and pans, coffee pot) for ceremonial use only.
- 13. Other items necessary for group ritual or study, approved by the Native American or facility chaplain.

No food items are to be stored in the locker, except that up to four unopened cans of corn and/or beans previously purchased by the Native American inmate group for use in a ceremony but which were not used may be stored in the locker for use in future ceremonies.

The above listed items can be used by Native American Groups participating in any of the eight approved Native American religious ceremonies.

The above items, except K-12, may be used at the weekly group meeting referred to in the first sentence in Section III(B.). In the event that a second weekly meeting is approved pursuant to the second sentence of Section III(B.), the above items, except K-12, may also be used at that meeting unless the Deputy Superintendent for Security or the Deputy Superintendent for Programs determines that access to one or more of the items may be disruptive or pose a threat to the

weekly group meetings, provided that they relate to the study, practice of religion or traditional language, or planning of future ceremonies.

At such time as DOCS eliminates all indoor smoking from its correctional facilities, smudging and smoking, at weekly group meetings, shall be limited to a cumulative total of fifteen minutes of approved non-tobacco substances.

L. At the request of a Native American group, the facility coordinating chaplain shall maintain, during the three-year period of the Stipulation, the administrative records of the group, provided that the volume of such records does not exceed the equivalent of one-half (½) of a file cabinet drawer.

V. Native American Ceremonies

- A. In General DOCS recognizes that the religious celebrations of the Longhouse religion are not celebrated on specific liturgical dates but instead are celebrated as the cycle of nature dictates. DOCS also recognizes that Native Americans believe that family (as defined in V (D.) below) is important to the religious celebration and for that reason it does not separate religiously from family celebrations and allows the eight sacred seasonal holy days of the Longhouse to be celebrated in a unique way as described herein.
- B. Date and Time of Celebration The day for each celebration shall be selected after consultation between the Native American group at the facility and appropriate facility

- staff. Each ceremony should begin at approximately 8:30 AM and conclude after the celebration of a community meal in the early afternoon at approximately 2:30 PM.
- C. Attendance (Inmates) Inmates whose ethnicity and/or religion is listed as Native American and are approved by the coordinating chaplain, in consultation with the Native American community and/or its advisor or chaplain, shall be permitted to attend a ceremony. Determinations made by the coordinating chaplain shall take precedence.
- D. Attendance (Outside Guests) Native American inmates at the facility, as well as the Native American community, may propose outside Native Americans to be invited guests, subject to the approval of the facility administration. Native American invited guests will be permitted to bring to and later remove from the facility any of the sacred items listed in Section IV above. Native American invited guests will be processed as "family members" in accordance with Department Directive 4022. The names and social security numbers (if available) of invited guests will be provided to the facility at least seventy-two hours prior to a scheduled celebration.
- E. Location The area of the facility selected for the ceremony must contain sufficient space for religious dancing, the preparation of food, and dining. Where feasible, the area should also allow for privacy of the group in the celebration of their rites, provided, however, that nothing herein shall be construed to limit the ability of DOCS' security personnel to monitor the ceremony.
- F. Food DOCS recognizes that Native Americans believe that the community meal is central to the celebration since it represents the sharing of the blessings. The food

for the meal will be provided by the inmates as well as the guests. Inmates will be allowed to purchase food and drink from the commissary or approved outside vendor and bring them to the ceremony. Outside guests will be permitted to bring in prepared foods, which will be processed in the facility package room and transported to the ceremony site. During the ceremony the group will be allowed access to their hot plates, electric frying pans, coffee pots, and pots and pans for use in the preparation as well as re-heating of foods. After the ceremony, outside guests will be permitted to remove food items, subject to inspection.

VI. Notification and Training of Staff

- A. A copy of this Stipulation and any other directives or notices pertaining to Native American religious practices shall be provided to all Superintendents, Deputy Superintendents, counselors, chaplains, and Inmate Grievance Program Supervisors.
- B. In consultation with the Native American Chaplain, the Director of Ministerial and Family Services will prepare literature on Native American spirituality to distribute to all chaplains to assist them in serving the Native American population.
- C. As one component of training, within 30 days of the signing of the Stipulation, a summary of the key provisions relevant to security operations will be prepared by the Deputy Commissioner for Correctional Facilities and read at line-up. Copies of the summary will be posted on employee bulletin boards at each facility.
- D. DOCS will also undertake training to educate appropriate facility personnel on Native American religious items as defined and identified in section IV(G)(1)(3)(4)(5)

and IV(K); on the six herbs identified in section IV(G)(2); and on Native American religious practices, as set forth in this Stipulation.

- E. DOCS agrees to amend the following four directives as follows:
 - (1) Number 4933, to include personally owned items that Native Americans may possess in SHU;
 - (2) Number 4202, to reflect the scheduling of Native American ceremonies and the items that Native Americans may possess at group meetings;
 - (3) Number 4910, to reflect the Native American locker as a religious area;
 - (4) Number 4911, to list Native American items that may be processed through the package room.

Nothing herein shall be construed to incorporate by reference DOCS directives into this Stipulation.

VII. Observation Period

- A. There shall be an observation period of two (2) years from the date the Stipulation is signed by the parties (hereinafter the "Observation Period").
- B. During the Observation Period, defendants will provide plaintiffs' counsel at quarterly intervals, the following records:
 - 1. All written grievances concerning issues relating to Native American religion;
 - 2. All new or revised DOCS forms and statements of policy regarding compliance with the Stipulation.

- A list of inmates received by DOCS during the quarter who have identified themselves as Native American by ethnicity or religion and the facility at which they are confined.
- C. During the Observation Period, plaintiffs' counsel may request at quarterly intervals, a list of all inmates who identify themselves as Native American by ethnicity or religion and the facility at which they are confined. Plaintiffs' counsel may not distribute inmate names, inmate DIN numbers, and inmate location to other inmates.

VIII. Dispute Resolution

- A. If any Native American inmate who practices traditional Native American religion believes that the terms of this Stipulation have not been followed with regard to his or her own circumstances, he or she may attempt to resolve the problem through the facility Chaplain, the Native American Chaplain, or other existing channels, formal or informal prior to submitting a grievance. If the problem is not resolved to his or her satisfaction, he or she may file a grievance with the facility grievance program.
- B. During the Observation Period, if plaintiffs' counsel believes that the terms of the Stipulation are not being followed by defendants, plaintiffs' counsel may request a meeting with counsel for defendants to discuss and attempt to resolve the dispute(s). Counsel for both parties, including counsel for DOCS, shall attend the meeting at a mutually agreeable place and time. Defendants' counsel agree to meet with plaintiffs' counsel as many as, but not exceeding, three (3) times per year during the Observation Period. Nothing said by either party or counsel for either party during those meetings

may be used by the opposing party in any subsequent litigation in this or any other lawsuit.

C. If, after sixty (60) days following any meeting held pursuant to Section VIII(B.) above, plaintiffs' counsel believes that defendants are not in "substantial compliance" with the terms of this Stipulation (as defined herein), plaintiffs' counsel may request a conference with all parties before the Honorable Charles J. Siragusa, United States District Court, concerning the filing of a motion to reinstate this lawsuit, as provided in Section IX(B.) below. Plaintiffs' counsel may request such a conference no earlier than five (5) months from the date this Stipulation is signed by the parties. Defendants shall be considered to be in "substantial compliance" with the terms of this Stipulation unless defendants' failures or omissions to meet the terms of the Stipulation were not minimal or isolated but were substantially and sufficiently frequent and widespread as to be systemic.

IX. Class Action Certification, Dismissal And Reinstatement Of The Complaint

A. Upon the signing of this Stipulation, the plaintiffs will move the Court to certify a class of all Native American inmates. Defendants will stipulate to such a class as defined above. Neither party shall move to certify a subclass. Should the Court deny the motion, the Stipulation shall become null and void. Should the Court grant the motion, the parties will jointly move the Court for entry of an order dismissing this action, pursuant to Fed. R. Civ. P. 23(e) and 41(a)(2), and will attach a copy of this Stipulation to such motion. This dismissal shall be without prejudice to plaintiffs' right

years from the date the Stipulation is signed. Should the Court deny the motion for dismissal, the Stipulation shall become null and void.

B. Following any conference before Judge Siragusa as set forth in Section VIII(C.) above, plaintiffs' counsel may file a motion with the Court for an order reinstating this lawsuit. Plaintiffs may not file such a motion without first requesting a pre-motion conference before Judge Siragusa as provided in Section above VIII(C.), and, if granted by the Court, participating in the conference. The case shall not be reinstated unless the Court finds by clear and convincing evidence that defendants' failures or omissions to meet the terms of the Stipulation were not minimal or isolated but were substantially and sufficiently frequent and widespread as to be systemic.

X. General Provisions

- A. The terms of this Stipulation shall remain in effect for a period of three (3) years from the date that the Stipulation is signed by the parties and shall be binding on the parties, their successors, agents, employees and all persons acting in concert with them. After three years, the terms of this Stipulation shall automatically cease to bind the parties, as well as their successors, agents, employees, assigns and those acting in concert with them.
- B. If any provision of this Stipulation is declared invalid, illegal or unenforceable in any respect, the remaining provisions shall remain in full force and effect, unaffected or impaired.

- C. This Stipulation shall resolve all claims or potential claims for injunctive relief identified in the Complaint dated September 26, 1997 regarding the religious rights of Native Americans inmates. Its terms are not intended to restrict, modify or enhance, in any way, any claim(s) that an individual Native American inmate may have for damages for acts or omissions that are alleged to have occurred before, on or after the date this Stipulation is signed. Any such claims, however, must be commenced by a separate lawsuit. This Stipulation is also not intended to restrict any defenses to any such future claims that may be available to defendants, or the legal requirements, procedures, or standards to be employed in determining any such claims.
- D. Defendants agree to reimburse plaintiffs' counsel \$50,000 in attorney's fees, court costs, and disbursements. Plaintiffs agree to waive any rights or claims to attorney's fees, court costs or disbursements incurred during the two year Observation Period. In the event that plaintiffs' counsel successfully moves to reinstate this lawsuit as provided in Section IX(B.) above, plaintiffs' counsel is not precluded from making a motion to the Court, consistent with and subject to all applicable law, for attorney's fees, court costs and disbursements directly and reasonably incurred in relation to their motion to reinstate the lawsuit, as well as for attorney's fees, court costs and disbursements directly and reasonably incurred in relation to the successful prosecution of the lawsuit. Nothing in this Agreement shall be construed to either provide for or preclude plaintiffs' counsel from recovering attorney's fees, court costs or

disbursements in the event that a state court action is brought to enforce a term or condition of this Agreement.

- E. This Stipulation does not constitute (a) an admission by any defendant of any violation of law or wrongdoing, (b) an admission by any defendant that any standard policy, practice or procedure addressed in this action violated or failed to comply with either the language or the intent of any applicable law, rule or regulation, or (c) an admission by any defendant that its position in this litigation was not substantially justified.
- F. As this Stipulation was entered into based upon the unique religious needs of Native American inmates, this Stipulation shall not in any way be construed as precedent for any other present or future inmate religious groups and organizations.

XI. Notice

Copies of this Stipulation shall be made available upon request in each facility law library.

Dated: Rochester, New York

July 9 , 1999

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