



HUY

11320 Roosevelt
Seattle, WA 98125
206.691.3631

Pronounced "hoyt", Huy means "see you again/we never say goodbye" in the Coast Salish language.

April 19, 2013

HAND DELIVERED & EMAILED

S. James Anaya
UN Special Rapporteur on the Rights of Indigenous Peoples
indigenous@ohchr.org

Re: Letter of Allegation regarding increasing restrictions on indigenous prisoners' religious freedoms in the United States of America

Dear Special Rapporteur Anaya:

Huy respectfully submits this Letter of Allegation requesting an investigation into the pervasive pattern in the United States of increasing restrictions on the religious freedoms of indigenous persons who have been deprived of their liberty, particularly by American state corrections agencies and officers. Huy is a tribally controlled non-profit corporation formed to provide economic, educational, rehabilitative, and religious support for American Indian, Alaska Native and Native Hawaiian prisoners in the Pacific Northwest and throughout the United States. Huy, pronounced "Hoyt" in the Coast Salish Indian Lushootseed language, means: "See you again/we never say goodbye." With that sacred saying in mind vis-à-vis incarcerated American indigenous prisoners throughout the United States, we hereby request your intercession.

Victims and Communities Affected

Indigenous peoples in the United States have the highest incarceration rate of any racial or ethnic group.¹ A 1999 Bureau of Justice Statistics report stated that indigenous peoples are incarcerated at 38% the national rate.² As of 2011, 29,700 indigenous persons were incarcerated in the United States.³ American indigenous prisoners thus form a significant subsection of indigenous peoples in the United States. These American indigenous prisoners depend upon their freedom to engage in traditional religious practices for their rehabilitation, survival, and the ability to maintain their identity as indigenous peoples. Put differently, "for some Native American prison inmates, walking the red road in the white man's iron house is the path to salvation, the way of beauty, and the only road to rehabilitation and survival."⁴ Further, American indigenous governments, communities and societies generally share the penological goals of repressing criminal activity within their jurisdictions and thus preventing habitual criminal offense, and to that end, facilitating their imprisoned indigenous citizens' spiritual rehabilitation – or what Vine Deloria, Jr., called "spiritual problem solving."

Board of Directors:

Frances Charles, Lower Elwah Klallam
Brian Cladoosby, Swinomish
Francis Cullooyah, Kalispel
Gabe Galanda, Round Valley

Claudia Kauffman, Nez Perce
Winona Stevens, Ho Chunk
Eldon Vail, Past Department of Corrections Secretary

Circumstances of Violations and Perpetrators

A pattern of restricting American indigenous prisoners' religious freedoms is currently occurring throughout the United States. In recent years, states have issued new regulations curtailing the ability of American indigenous prisoners to possess religious items, participate in religious ceremonies, and otherwise engage in traditional practices. Further, changes in regulations continue to move forward absent meaningful consultation with indigenous peoples.

- **California:** On February 21, 2013, the Department of Corrections issued an “emergency” regulation significantly limiting prisoners’ religious property.⁵ Effective immediately, prisoners no longer have access to sacred medicines like kinninnick, copal, and osha root, cloth for prayer ties, beads, pipes and pipe bags, and numerous other traditional items. The process for getting religious items approved was also made significantly more burdensome. Because the regulations constituted an emergency regulatory action, they went into effect immediately, without any consultation whatsoever with American indigenous peoples or opportunity for public comment.
- **Texas:** Prison authorities recently changed regulations for an American indigenous prisoners’ unit, significantly restricting ceremonial participation. American indigenous prisoners are no longer allowed to participate directly in pipe ceremonies, smudge indoors, keep locks of hair from deceased relatives, or perform important ceremonies such as the Wiping Away the Tears ceremony.⁶ Texas prison guards are also known to engage in overt racism toward indigenous prisoners. The media reports that on January 27, 2013, prison guards searched an indigenous prisoner’s cell, handling his medicine bag. When the prisoner stated that the guards were not supposed to touch his sacred items, a guard said “I don’t give a shit,” and that “being an Indian didn’t make him special.”⁷
- **Montana:** American indigenous prisoners in Montana are currently challenging en masse strip searches conducted prior to sweat lodge ceremonies as well as the confiscation or prohibition of smudge tobacco, antlers, herbs, and other sacred materials.⁸ The state of Montana issued an investigatory report in 2009 confirming almost all of the allegations as well as describing the derogatory treatment of indigenous prisoners by guards.⁹
- **South Dakota:** American indigenous peoples comprise 27 percent of the South Dakota prison population, the highest proportion of any state in the country.¹⁰ On October 19, 2009, the Department of Corrections extended a ban on tobacco to indigenous religious uses. Indigenous prisoners were no longer allowed to use tobacco in sweat lodge ceremonies, pipe ceremonies, or for prayer ties and flags. When a federal district court held the ban violated federal law, prison authorities were still unable to agree with prisoners on an accommodation, forcing the court to issue a remedial order.¹¹ South Dakota has appealed the case to the Eighth Circuit Court of Appeals.
- **Washington:** In 2010, the Washington Department of Corrections barred almost all American indigenous prisoners’ religious practices, banned tobacco, reclassified sacred medicines such as sage and sweet grass as non-religious, prohibited foods for traditional meals such as frybread and buffalo, disallowed children from attending summer prison pow wows, and altered regulations so that certain religious items could no longer be securely stored. After ten tribes petitioned the governor, the Department of Corrections

reversed course, consulting with tribal leaders about reforms and reaching an accommodation to restore American indigenous prisoners' religious rights.¹² Events in Washington demonstrate both the larger pattern of rising restrictions on indigenous prisoners' rights as well as the importance of consultation with American indigenous peoples concerning administrative measures that affect them. That state-tribal consultation and reform effort is what gave rise to Huy.

Actions by American State Authorities

The United States is failing to fulfill its duty to protect the religious freedoms of American indigenous prisoners. The situations described above are part of an increasingly pervasive pattern of human rights abuses currently occurring in the United States in violation of both domestic and international law.

The UN Declaration on the Rights of Indigenous Peoples, affirms in Article 12 that “[i]ndigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; [and] the right to the use and control of their ceremonial objects.” Article 31 affirms “the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.” Article 2 provides that indigenous peoples “have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.” Additionally, Article 18 articulates “the right to participate in decision-making in matters that would affect their rights,” and Article 19 provides that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative measures that may affect them.”

The International Covenant on Civil and Political Rights protects the right to freedom of religion in Article 18(1), including the “freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” Article 27 further states that ethnic and religious minorities “shall not be denied the right, in community with other members of their group, to enjoy their own culture, [or] to profess and practise their own religion.” Article 18(2) provides that “[f]reedom to manifest one’s religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Human Rights Committee General Comment No. 22, para. 8 further clarifies that “[p]ersons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their right to manifest their religion or belief to the fullest extent compatible with the specific nature of the restraint.”

Domestically, the First Amendment of the U.S. Constitution enshrines the right to the free exercise of religion. The United States’ policy, as articulated in the American Indian Religious Freedom Act of 1978 (AIRFA), 42 U.S.C. § 1996, is to “protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions” of indigenous communities. With respect to prisoners, the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, prohibits prison authorities from substantially burdening an inmate’s religious exercise unless in furtherance of a compelling governmental interest and accomplished by the least restrictive means. As the United

States Supreme Court has recognized, prisoners “do not forfeit all constitutional protections by reason of their conviction and confinement in prison.” *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

Although protection for indigenous prisoners’ religious freedoms have been formally enshrined in domestic law, these measures have proved insufficient to deter state agencies from imposing significant burdens on indigenous prisoners’ exercise of religion and in the absence of consultation with indigenous peoples. In addition to states’ unduly restrictive regulations, U.S. courts have failed in numerous instances to provide effective remedies to indigenous peoples. In *Lyng v. Northwest Cemetery*, the Supreme Court held that AIRFA “had no teeth in it,” barring claims to be brought under the statute. 485 U.S. 439 (1988). In applying RLUIPA, courts in numerous instances have failed to protect American indigenous prisoners’ rights, finding that restrictions either did not constitute a substantial burden or that the state had both a compelling reason and had employed the least restrictive means.¹³ Further, the length and cost of litigation in the U.S. judicial system means that courts are often not effective means of protecting indigenous prisoners against present or immanent human rights violations.

National Native American Bar Association Resolution

On April 10, 2013, the National Native American Bar Association (NNABA), which, since 1973, has worked to promote issues important to the Native American community at large, passed Resolution #2013-13, titled, “Supporting the Free Exercise of Indigenous Religion by American Indian, Alaska Native and Native Hawaiian Prisoners in Domestic Detention Facilities.” Resolution #2013-13, which is enclosed herewith, reciting various of the above-mentioned international and domestic laws, including American indigenous governments’ own laws and policies, and the customs, traditions and practices of the citizens of those governments and societies. NNABA found that “the United States, states, and American indigenous governments generally share common penological goals of repressing criminal activity within their jurisdictions, and facilitating all incarcerated American citizens’ rehabilitation in order to prevent habitual criminal offense.” NNABA further found: “notwithstanding the above-referenced international, federal, state, and American indigenous government laws and norms, the inherent rights of incarcerated American Indigenous Peoples’ freedom to believe, express and exercise the traditional religions, in various traditional indigenous religious manners, are too frequently violated by federal, state and local government actors in the United States.”

NNABA, therefore, resolved to “commend[] and support[] federally and state incarcerated American Indigenous Peoples’ freedom to believe, express and exercise traditional indigenous religion. . . . [and to] denounce[] and oppose[] any unduly burdensome or patently illegal federal, state or local government restriction upon incarcerated American Indigenous Peoples’ freedom to believe, express and exercise traditional indigenous religion, including any such restriction that does not advance the shared penological goals of federal, state and American indigenous governments.” NNABA further called upon “the United States, all fifty American states and the District of Columbia – including federal and state executive, agency, legislative, corrections and judicial officials and employees – to:

- (a) Take all reasonable and any least restrictive steps to commend, support and facilitate incarcerated American Indigenous Peoples’ freedom to believe, express and exercise traditional indigenous religion,

(b) Denounce or cease any unduly burdensome or patently illegal or illegitimate federal, state or local government restriction upon incarcerated American Indigenous Peoples' freedom to believe, express and exercise traditional indigenous religion, and

(c) Explore how federal, state and American indigenous governments can jointly develop and advance shared penological goals in regard to incarcerated American Indigenous Peoples.

NNABA finally resolved to transmit Resolution #2013-13 to, *inter alia*, the United Nations Special Rapporteur on the Rights of Indigenous Peoples, in request that you join the clarion call described immediately above. Huy hereby joins with NNABA in that request.

Action Before International Bodies

At this time, we have sought no action before international bodies. We respectfully request that you investigate the current pattern of increased restrictions on the religious freedoms of American indigenous persons who have been, and are increasingly being, deprived of their liberty in the United States. We urge you to encourage the United States and its agents, particularly state correctional agencies and officers, to respect American indigenous prisoners' human rights, to refrain from violating those rights, to correct any current or impending violations, and to engage in meaningful consultation with American indigenous peoples concerning prison administrative regulations, which affect a significant proportion of the country's American indigenous population. Please let us know if we can provide you with any further information.

In respect and gratitude,



Gabriel S. Galanda
Chairman, Huy Board
P.O. Box 15146
Seattle, WA 98115
206-691-3631
gabe@galandabroadman.com

¹ Margaret Severson and Christine Wilson Duclos, "American Indian Suicides in Jail: Can Risk Screening Be Culturally Sensitive?" U.S. Department of Justice (2005), <https://www.ncjrs.gov/pdffiles1/nij/207326.pdf>.

² Lawrence A. Greenfeld and Steven K. Smith, "American Indians and Crime," U.S. Department of Justice (1999), <http://bjs.gov/content/pub/pdf/aic.pdf>.

³ Todd D. Minton, "Jails in Indian Country, 2011," U.S. Department of Justice (2012), <http://bjs.gov/content/pub/pdf/jic11.pdf>.

⁴ Suzanne J. Crawford & Dennis F. Kelley, *American Indian Religious Traditions: An Encyclopedia* 774 (2005).

⁵ State of California Office of Administrative Law, Notice of Approval of Emergency Regulatory Action, http://www.oal.ca.gov/res/docs/pdf/emergency_postings/2013-0206-01EON_App.pdf.

⁶ Appellant's Opening Brief, *Chance v. Texas Department of Criminal Justice*, No. 12-41015 (January 14, 2013), <http://turtletalk.files.wordpress.com/2013/01/chance-opening-brief-filed.pdf>.

⁷ Brian Daffron, "Inmate's Religious Rights Allegedly Violated Within Texas Prison System," *Indian Country Today* (March 8, 2013), <http://indiancountrytodaymedianetwork.com/2013/03/08/inmates-religious-rights-allegedly-violated-within-texas-prison-system-148058>.

⁸ *Knows His Gun v. Montana*, 866 F.Supp.2d 1235 (D. Mont. 2012), http://www.narf.org/nill/bulletins/dct/documents/knows_his_gun.html.

⁹ Montana Department of Corrections Investigation Team, "Investigation into Complaints from Native American Inmates at the Crossroads Correctional Center, Shelby, Montana," May 14, 2009, Part 1: <http://www.aclumontana.org/images/stories/documents/montanaprisonproject/crossroadsdocinvestigation1.pdf>, Part 2: <http://www.aclumontana.org/images/stories/documents/montanaprisonproject/crossroadsdocinvestigation2.pdf>.

¹⁰ *Native Am. Council of Tribes v. Weber*, No. Civ. 09-4182, 2012 WL 4119652 (D.S.D. Sept. 19, 2012), <http://turtletalk.files.wordpress.com/2013/01/dct-remedial-order.pdf>.

¹¹ *Id.*; Remedial Order, *Native Am. Council of Tribes v. Weber*, Civ. 09-4182-KES (D. S.D. 2013), <http://turtletalk.files.wordpress.com/2013/01/dct-remedial-order.pdf>.

¹² Gabriel S. Galanda, "Native American Prisoners Obtain Religious Freedom," *King County Bar Association Bar Bulletin* (July 2012), <https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=07&Year=2012&AID=article1.htm>.

¹³ See, e.g., *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008) (allowing Missouri prison to deny sweat lodge access for security reasons despite other facilities' use of sweat lodges); *Haight v. Thompson*, 2013 WL 1092969 (W.D. Ky. 2013) (holding prisoners failed to state a claim based on denial of sweat lodge ceremonies and pow wow foods); *Hyde v. Fisher*, 203 P.3d 712 (Idaho Ct. App. 2009) (holding Indigenous prisoners could be denied sweats due in part to possibility of violence if Indigenous prisoners were given special treatment).