

**Subject:** Notice of Change to Regulations (NCR 13-01); American Indigenous Prisoners' Religious Liberty

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**From:** Margaret Hirschak (sent by <margarethirschak@gmail.com>)

**To:** RPMB@cdcr.ca.gov

**CC:** verlin.deerinwater@usdoj.gov, Patricia Ferguson, Mary Smith, Linda.Benally@pinnaclewest.com, Gabe Galanda, tweathers@vandelaw.com, Jennifer Williams, Margaret Hirschak



May 4, 2013

California Department of Corrections and Rehabilitation  
Regulation and Policy Management Branch  
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**Re: Notice of Change to Regulations (NCR 13-01)  
American Indigenous Prisoners' Religious Liberty**

To Whom It May Concern:

The National Native American Bar Association (NNABA) writes to voice our opposition to the proposed amendments to Section 3190(b) of the California Code of Regulations, Title 15, Crime Prevention and Corrections regarding inmate religious property, and related restrictions on sweatlodge ceremonies. The proposed regulation substantially burdens Native American prisoners' exercise of religion, in violation of federal, state, and international law.

NNABA, founded in 1973, serves as the national association for Native American attorneys, judges, law professors and law students. NNABA works to promote issues important to the Native American community and to improve professional opportunities for Native American lawyers. NNABA is extremely concerned about the proposed regulation's effects on American indigenous prisoners as well as the broader communities to which they will return, particularly tribal communities. NNABA keenly appreciates federal, state and tribal penological goals of repressing criminal activity and facilitating rehabilitation to prevent habitual criminal offense. The free exercise of religion is essential to achieving these inter-governmental and societal goals with respect to Native American prisoners, who depend on traditional religious practices for their rehabilitation and survival.

The proposed regulation, already in force on a so-called "emergency" basis, includes an unduly restrictive Religious Property Matrix. Native American prisoners are no longer allowed to possess previously permitted items including, but not limited to, sacred medicines such as kinnikinnick, copal, and osha root as well as sacred items like cloth for prayer ties, beads or beading supplies, pipe or pipe bags, drums or other instruments, water dippers, leather, and teeth. None of these items present any threat to prison security or to the orderly operation of penal institutions. Further, the Matrix is only amendable a maximum of twice a year by the Wardens Advisory Group/Religious Review

Committee in accordance with the rulemaking requirements of the Administrative Procedures Act. Thus, the process for getting an item approved is much more burdensome for Native American prisoners because local religious review committees are no longer empowered to approve religious items.

Native American prisoners' sweatlodge ceremonies also appear to have been curtailed. In some facilities they have been reduced from occurring every weekend to only one or two times per month. That restriction, in particular, presents a potentially disastrous impediment to those Native American prisoners' spiritual rehabilitation, which we fear will only exacerbate recidivism.

The proposed regulation violates the Free Exercise Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the federal Religious Land Use and Institutionalized Persons Act, and Article I § 7 of the California Constitution. Additionally, the regulation violates international law protecting Native American peoples' religious freedoms, as articulated in the United Nations Declaration on the Rights of Indigenous Peoples, endorsed by the United States in 2010, and the International Covenant on Civil and Political Rights, which the United States ratified in 1992.

We urge you to reject the proposed regulation and immediately restore Native American prisoners' ability to possess previously permitted religious property items and to fully participate in sweatlodge ceremonies as before. Future regulations should, at a minimum, include all previously permitted items of Native American religious property and ceremonies, as well as a flexible mechanism empowered to approve requests for inadvertently omitted items.

Finally, we urge you to engage California tribal governments in meaningful consultation prior to drafting or implementing future religious freedoms regulations that impact Native American prisoners. We regret that the proposed amendments to Section 3190(b) and any other new regulations were devised without any tribal consultation whatsoever. Notwithstanding, we stand ready to partner with the Department to explore possibilities for joint development and advancement of our shared penological goals in regard to incarcerated Native Americans.

Thank you for your time and consideration of our stated concerns.

Sincerely,



Patricia Ferguson-Bohnee  
Immediate Past President  
National Native American Bar Association

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