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

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California Department of Corrections and Rehabilitation
Regulation and Policy Management Branch
P.O. Box 942883
Sacramento, CA 94283-0001
RPMB@cdcr.ca.gov

Re: Notice of Change to Regulations (NCR 13-01)

To Whom It May Concern:

On behalf of Native American prisoners housed by the California Department of Corrections (CDRC), Huy writes to oppose the proposed amendments to Section 3190(b) of the California Code of Regulations, Title 15, Crime Prevention and Corrections regarding inmate religious property. We also write to voice our concern about related restrictions on Native American prisoners' sweatlodge ceremonies.

Huy, pronounced "Hoyt" in the Coast Salish Indian Lushootseed language, means: "See you again/we never say goodbye." 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's activities include a recent appearance as "friend of the court" in the Fifth Circuit Court of Appeals case, *Chance v. Texas Department of Criminal Justice*, No. 12-41015 (5th Cir. 2012). Huy coordinates our legal advocacy with private law firms; advocacy groups like the American Civil Liberties Union (ACLU) and National Native American Bar Association (NNABA); and in California, federally-recognized tribal governments therein, the Stanford Law School Religious Liberty Clinic, California Indian Legal Services (CILS), and local ACLU chapters – all of which are copied below with this opposition letter. We understand that at least NNABA, CILS, and two tribes – the Round Valley and Pit River Tribes – have already voiced opposition to CDCR's the proposed amendments to Section 3190(b).

Huy also opposes the proposed regulations, which have imposed an immediate and substantial burden on Native American prisoners' religious freedoms, because they violate federal, state, and international law and are contrary to the penological interest of rehabilitating Native American prisoners. We urge you to immediately forgo this unlawful rulemaking and thereby or otherwise restore those Native American prisoners' rights that existed within CDCR contours prior to your "emergency" regulation of February 2013.

The Importance of Free Exercise of Religion to Native American Prisoners

Native American communities generally share with the state of California the penological goal of repressing criminal activity and facilitating rehabilitation to prevent habitual criminal offense. Native American prisoners' ability to freely exercise their traditional religious practices is critical to this rehabilitation as well as their 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."[1]

Traditional religious practices that further Native American peoples' rehabilitation include, without limitation, the practice of sweatlodge, talking circle, blessing way, Change of Seasons, pipe, drumming and pow wow ceremonies; and the related use of sacred traditional items such as beadwork, pipes, feathers, hides, bones and teeth, prayer fans, hand-drums and sticks, rattles and medicine bags, and sacred traditional medicines including sage, sweet grass, cedar, copal, bitter root, osha root, kinnikinnick, and tobacco. These traditional religious practices facilitate Native American peoples' spiritual rehabilitation, or what Native American theologian and scholar Vine Deloria, Jr. called "spiritual problem solving."

The Proposed Regulations Impose a Substantial Burden on Native American Prisoners

The proposed regulations, already in force as emergency regulations, have imposed an immediate and substantial burden on Native American prisoners' exercise of religion. The regulations both unduly restrict the religious property Native American prisoners are allowed to possess as well as greatly increase the burden on prisoners seeking approval for religious property items that have been prohibited.

Previous regulations allowed prisoners to possess "religious artifacts," which were broadly defined as "any bag, cross, medallion, totem, bible, pipe, *or any other item in which the possessor places religious or spiritual significance*." 15 C.C.R. § 3000 (emphasis added). Based on the previous regulations, the Department Operations Manual (DOM) included an Authorized Personal Property Schedule (APPS) that allowed inmates to possess "Religious items (As approved by the local religious review committees…)." Cal. Dept. of Corrections and Rehabilitation Operations Manual (2013) § 54030.17.5 [hereinafter DOM].

The DOM defined religious items broadly, stating that "[r]eligious artifacts are those items which American Indians wear on religious/ceremonial occasions and include their tribal designations, personal and religious totems and items which have spiritual significance in their lives." DOM § 101060.10. Religious items included, but were not limited to, chokers, eagle feathers, headbands, wristbands, and medicine bags. *Id.* Additionally, personal religious items allowed for sweat lodge ceremonies included, but were not limited to, sacred pipes, pipe bags, kinnikinnick, eagle feathers, sage, sweet grass, buffalo or deer skulls, antlers, lava or river rocks, water, non-metallic dippers, and non-metallic buckets. DOM § 101060.9.1. Further, the DOM stated that "[c]ustody staff shall consult institutional chaplains and spiritual leaders whenever possible when considering the disapproval of religious items." DOM § 54040.10.9.

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

The Soledad Correctional Training Facility's DOM Supplement #021 (2012) indicates the breadth of religious property items Native American prisoners were previously allowed to possess. Items included a medicine bag; prayer fans and feathers; assorted religious beading materials including beads, a loom, porcupine quills, thread, and beading needles; jewelry making materials including hooks and clasps; ceremonial wristbands, headbands, and chokers; sinew; leather in various sizes and colors; animal pelts, skins, furs, or hides; various hand instruments including clapper sticks, rattles, hand drums, and drum sticks; herbs including but not limited to sage, sweet grass, cedar, copal, bitter root, and osha root; fabric squares for prayer ties; and sacred pipes and pipe bags. Soledad Prison orders detailing prisoners' allowable religious property items under these regulations authorized an even wider variety of items, including kinnikinnick, gourd water dippers, and coyote and bear teeth.

In contrast, the proposed regulations have severely restricted permissible religious property items. The proposed regulations remove religious items from the APPS, instead promulgating a separate Religious Property Matrix. The new regulations retain the broad definition of religious items in § 3000, including "item[s] in which the possessor places religious or spiritual significance." However, the Matrix itself states that "[i]nmates are only permitted personal religious items listed in this Matrix" and then lists only 24 permitted types of items for all religions. Important herbs such as kinninnick, copal, and osha root are now prohibited as are cloth for prayer ties, beads or beading supplies, pipes or pipe bags, drums or other instruments, water dippers, leather, teeth, or other items.

Furthermore, the Matrix is only amendable a maximum of twice a year and must be amended by the Wardens Advisory Group/Religious Review Committee in accordance with the rulemaking requirements of the Administrative Procedures Act. Thus, not only do the proposed regulations create a limited and unduly restrictive list of approved items, the process by which prisoners must get excluded items approved is much more burdensome because local religious review committees may no longer approve specific items.

Huy is also extremely concerned with information indicating that CDCR facilities have been drastically curtailing Native American prisoners' sweatlodge ceremonies. In some facilities, sweatlodge ceremonies have been reduced from occurring every weekend to only one or two times per month. This restriction presents a potentially disastrous impediment to Native American prisoners' spiritual rehabilitation.

The Proposed Regulations Violate Federal and State Law

The proposed regulations violate 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 § 4 of the California Constitution, which protects the "free exercise of religion without discrimination."

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). With respect to Native American exercise of religion, it is the policy of the United States, as articulated in the American Indian Religious Freedom Act of 1978, to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions." 42 U.S.C. § 1996.

In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA). 42 U.S.C. § 2000cc *et seq*. The Supreme Court, in upholding RLUIPA, recognized that Congress intended "to accord religious exercise heightened protection from government-imposed burdens." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). Congress had, over the course of three years, documented that "'frivolous or arbitrary' barriers impeded institutionalized persons' religious exercise." *Id.* at 716. As the Supreme Court observed, "RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Id.* at 721.

RLUIPA states that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the government establishes that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a)(1)–(2). RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc-5(7)(A). The statute further states that it "shall be construed in favor of a broad protection of religious exercise." § 2000cc-3(g).

The Ninth Circuit has explained that a substantial burden on religious exercise exists where there is "a significantly great restriction or onus upon such exercise" or where there is "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005) (quotations omitted); see also *Shakur v. Schriro*, 514 F.3d 878, 888 (9th Cir. 2008). Various types of policies may impose a substantial burden. Perhaps the clearest situation, however, is that "an outright ban on a particular religious exercise is a substantial burden on that religious exercise." *Greene v. Solano County Jail*, 513 F.3d 982, 988 (9th Cir. 2008).

When the government has imposed a substantial burden on religious exercise, it must demonstrate that the burden is justified by a compelling interest. Courts have been reluctant to view cost or convenience as a compelling interest. See *Rouser v. White*, 630 F.Supp.2d 1165, 1185 (E.D. Cal. 2009). Although security is a compelling interest, the Ninth Circuit has made clear that "no longer can prison officials justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison." *Greene*, 513 F.3d at 989. Rather, the government must establish that a particular regulation is the least restrictive means of achieving this interest. *Id.*; *Warsoldier*, 418 F.3d at 997.

For the government to establish it has used the least restrictive means, it must "demonstrate[] that it has actually considered and rejected the efficacy of less restrictive measure before adopting the challenged practice." *Warsoldier*, 418 F.3d at 999; *see also Greene*, 513 F.3d at 989. In evaluating regulations, the Ninth Circuit has looked to other state and federal systems, stating that "the failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means." *Id.* at 1000; see also *Shakur*, 514 F.3d at 890 (comparing Arizona regulations to less restrictive Washington State regulations). Additionally, the Ninth Circuit has stated that "RLUIPA tasks courts with deciding, on a case-by-case basis, whether the particular restrictions an institution imposes on the religious liberty of its inmates are justified. Given the diversity of courthouse holding facilities and inmate

religious practices, such tailored adjudication accommodates the balance of religious freedom and institutional order." *Khatib v. Orange County*, 639 F.3d 898, 906 (9th Cir. 2011).

As detailed above, the proposed regulations place a substantial burden on Native American prisoners' religious exercise by banning outright important Native American religious property items. The prohibition of these items inhibits Native American prisoners from engaging in personal religious practices as well as group religious practices, such as pipe ceremonies. The deprivation of these previously allowed items is exactly the type of "frivolous or arbitrary" barrier to religious exercise that RLUIPA was designed to prevent.

The CDCR has stated that the purposes of the new regulations include standardizing allowable religious property items, complying with existing court mandates, reducing potential inmate litigation, and ensuring security and safety. However, standardization of permissible religious property across a variety of institutions with a range of security levels and holding prisoners with a variety of religious practices contravenes the case-by-case analysis and the balance between "religious freedom and institutional order" envisioned by the Ninth Circuit in *Khatib*. Additionally, courts have not mandated a standardized and unduly restrictive Religious Property Matrix, and the new regulations threaten to embroil the CDCR in costly litigation as prisoners attempt to restore access to their religious property.

Further, the proposed regulations and the restrictive Religious Property Matrix are not the least restrictive means available of achieving governmental interests that are compelling, such as security. Prisoners are no longer permitted numerous items they were previously allowed to possess, such as osha root and cloth for prayer ties. There is no evidence that omitted items posed a security risk, and the fact that they were previously allowed indicates that the CDCR is using means that are more restrictive than necessary. There seems to have been no significant effort to consider alternatives by surveying California institutions and including the breadth of previously permitted Native American religious property items on the proposed Matrix.

Nor does it appear that the CDCR even bothered to consult with California tribal governments prior to drafting or implementing the "emergency" regulations, which unquestionably affect tribal communities. Cal. Executive Order B-10-11 (Sept. 19, 2011) ("it is the policy of this Administration that every state agency and department subject to my executive control shall encourage communication and consultation with California Indian Tribes . . . to discuss state policies that may affect tribal communities.") (emphasis added). *See generally Quechan Tribe v. U.S. Dep't of Interior*, 755 F.Supp.2d 1104 (S.D. Cal. 2010).

Additionally, the Matrix is far more restrictive than regulations of other states. For instance, Washington State's religious property matrix includes 40 categories of allowable items, including pipes, hand drums, 31 types of herbs, and numerous other items prohibited by the CDCR's proposed regulations. DOC 560.200. The CDCR's level of standardization is also more restrictive than other states have found necessary. For instance, Washington has a process that allows prisoners to request items not on the state's religious property matrix. *Id.* This is of particular concern to Native American prisoners who use different items for their religious practice depending on their particular tribe, location, and tradition. In sum, the proposed regulations violate RLUIPA by imposing a substantial burden on Native American prisoners while failing to use the least restrictive means for meeting any compelling government interest.

The Proposed Regulations Violate International Law

The proposed regulations also violate Native American prisoners' human rights under well-established international law. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which the United States endorsed in 2010, 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" including "the right to the use and control of their ceremonial objects." 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." Furthermore, Article 18 articulates the right of indigenous peoples "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 or administrative measures that may affect them."

The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, 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 [a person's] religion or belief in worship, observance, practise 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." The ICCPR acknowledges that there are limits on free exercise, stating in Article 18(2) that "[f]reedom to manifest one's own 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." The Human Rights Committee, which monitors implementation of the ICCPR, clarified in General Comment No. 22 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."

The CDCR's extremely restrictive proposed regulations thus violate Native American prisoners' rights to religious freedom and equality under international law. Additionally, by imposing proposed changes as emergency regulations, the CDCR has failed to engage Native American peoples in meaningful consultation prior to implementing administrative measures that affect them. On April 19, 2013, Huy alerted the United Nations Special Rapporteur on the Rights of Indigenous Peoples to the problem of increasing restrictions on indigenous prisoners' religious freedoms, highlighting California's proposed regulations and requesting his intervention. California's proposed regulations and curtailment of sweatlodge ceremonies are also featured in Huy's report to the United Nations Human Rights Committee, which will be reviewing United States compliance with the ICCPR this October.

Reasonable Alternatives

Huy strongly urges the CDCR to immediately halt the violations of Native American prisoners' rights to the free exercise of religion that the emergency regulations and increased sweatlodge restrictions have inflicted. The proposed regulations must be rejected because they violate RLUIPA, federal policy, and international law and are contrary to the penological interest of rehabilitating Native American prisoners.

Huy urges the CDCR to immediately restore the previous regulations governing inmate religious property and rescind actions increasing restrictions on sweatlodge ceremonies. At a minimum, any future list of permissible religious property items should include all items of Native American religious property that have been permitted under the previous regulations as well a flexible mechanism that is empowered to approve prisoners' religious property requests for items that have inadvertently been omitted.

Finally, Huy urges the CDCR to engage California tribal governments in meaningful consultation prior to drafting or implementing future regulations affecting Native American prisoners' religious freedoms. To that end, we urge CDCR to contact the Washington State Department of Corrections to learn how meaningful state-tribal consultation and collaboration since 2010, has largely cured a strikingly similar set of illegalities in state corrections policy regarding Native American prisoners' religious property and ceremony. We are cautiously optimistic that this unfortunate situation can be remedied – and better yet, that CDCR Native American prisoners' ability to freely exercise their traditional religious practices as a mode of spiritual rehabilitation can be ensured without compromising prison security and safety.

Sincerely,

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