

SENT VIA ELECTRONIC MAIL

March 12, 2021

Stephen Sinclair, Secretary
Washington State Department of Corrections
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James Key, Superintendent
Airway Heights Corrections Center
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Re: Action Requested to Increase Access to Native American Religious Activities at Airway Heights Corrections Center

Dear Secretary Sinclair and Superintendent Key:

The ACLU of Washington, along with Huy and Galanda Broadman, PLLC, request that Washington State Department of Corrections (DOC) modify current restrictions on Native American religious ceremony due to the harmful impact on incarcerated Native American individuals' religious freedom. Specifically, we request Airway Heights Corrections Center (AHCC) to provide for immediate access to Native American religious expression, including sweat lodge, smudging, talking circles, drum ceremony, and pipe ceremony, with the least restrictive COVID-19 precautions necessary, as other DOC facilities are doing. Please provide your response to this request by Friday, March 26, 2021.

DOC purported to provide "modified" access to Native American religious programs as recent as fall 2020, but many Native American inmates have been denied access even to those modified services. Across DOC prison facilities, according to DOC's own claims, Native Americans should—at the very least—be able to access the following modified services:

- Gatherings in the sweat lodge areas with the use of fire, outside of the inipi, with mask-wearing and social distancing requirements;
- Pipe ceremonies, provided that only the pipe carrier hold the pipe at all times with no passing between individuals;
- Tobacco use in fire during pipe ceremonies.

Other DOC prison facilities have provided access to the modified Native American religious practices, in alignment and compliance with federal law and DOC policy. For example, Native American populations at Clallam Bay Corrections Center (CBCC) and Olympic Corrections Center (OCC) have been able to participate in modified sweats since the beginning of this year.



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Several Native Americans incarcerated at AHCC, however, report having been regularly denied access to participate in Native American religious practices. This occurs despite AHCC's providing access to other faith-based religious programs. The DOC and AHCC response thus far has cited COVID-19 precautions as the reason for delay. However, COVID-19 precaution restrictions are being applied to Native American ceremonies with disproportionately high severity, in contrast to other religious worship activities that are allowed, thus unfairly depriving access for adherents of Native American religions. This deprivation has resulted in many incarcerated Native American individuals being unable to worship for nearly a year. We are concerned that current AHCC practices violate the First Amendment, the Religious Land Use and Incarcerated Persons Act of 2000 (RLUIPA), and DOC's own Religious Programs Policy. We appreciate your attention and efforts to remedy these deficiencies.

Religious freedom is one of our country's most fundamental rights. The First Amendment Free Exercise Clause protects incarcerated people's rights to observe and practice religion by prohibiting government from any conduct "prohibiting the free exercise [of religion]." *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Mayweathers v. Newland*, 258 F.3d 930, 938 (9th Cir. 2001). Similarly, RLUIPA, 42 U.S.C. § 2000cc-1, was enacted to secure redress for incarcerated individuals in state facilities who encounter undue barriers to their religious observances. *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005). RLUIPA balances prisoners' rights to practice religion in a state prison alongside the government's interests. In doing so, RLUIPA ensures that no government shall impose a substantial burden on the religious exercise of a person confined to an institution unless the government can demonstrate that the burden both furthers a compelling government interest and is the least restrictive means of furthering that compelling interest.

Indeed, DOC's own policy recognizes the importance of religious freedom. "The Department acknowledges the inherent and constitutionally protected rights of incarcerated offenders to believe, express, and exercise the religion of their choice." State of Wash. Dept. of Corr. Policy 560.200, Religious Programs (last updated 2014). DOC policy further states "The Department will provide religious as well as cultural opportunities for offenders within available resources, while maintaining facility security, safety, health, and orderly operations . . . Restriction of a religious activity must be related to legitimate facility safety and security concerns." *Id.* Regarding Native American religious practices, the policy ensures "Native American sweats may occur 2 times per month, resources permitting, in addition to quarterly Change of Season sweats." *Id.*

At AHCC, though, Native American inmates are being denied religious opportunity. AHCC has access to the resources necessary to make modifications to balance religious freedom with institutional COVID-19 safety but it appears to simply choose not to do so.¹ At various points, AHCC has restricted access to Native American religious services during points at which they were designated

¹ Because AHCC has systematically denied access to religious ceremony for Native American inmates, we are concerned that COVID-19 is not the purpose for the restrictions imposed during 2020 and 2021. Indeed, AHCC's record of denying Native Americans religious access spans many years prior to the COVID-19 pandemic.

as an “Outbreak Status Facility,” yet appears to have not done enough to resolve access to those services once the Outbreak Status designation was lifted. Internal DOC memos reveal COVID-19 strategies to resume Native American religious services, such as mask-wearing protocol, social distancing, cleaning, sanitizing, and disinfecting, yet none of these strategies were employed sufficiently to ensure access to modified services.

For many people in prison, access to spirituality is fundamental to their wellbeing. This is deeply true for Native Americans in prison. Recently, journalist Frank Hopper (Tlingit) spoke with a current DOC inmate at Washington Corrections Center (WCC) about how the deprivation of services like sweat lodge and drum meetings has affected the incarcerated Native population. “It’s pretty bad . . . you just took a building block or foundation block away from a lot of us. Or you just took the string that was holding us together. It’s like we’re a string of beads and you took the string and now everything’s going any old way at once.”²

The COVID-19 pandemic is undeniably devastating, and DOC rightfully should take precautions to protect incarcerated individuals and staff. We agree that protecting against uncontrolled spread of the virus is a compelling government interest. However, COVID-19 precaution restrictions must be applied with equal force across religious practices to ensure each discreet religious program’s adherents can enjoy access with the least restrictive means necessary. Current AHCC practices restrict Native American religious ceremonies at a rate and severity far higher than other religious practices with no proven compelling purpose. Continuing to impose restrictions that limit access to Native American religious programs while lifting restrictions on other similarly situated religious programs cannot possibly fulfill DOC’s legal requirement to ensure religious freedom with the least restrictive modifications necessary to achieve COVID-19 safety.

We are confident DOC and AHCC can amend their practices to align with federal law and internal policy without imposing a substantial burden on Native American religious freedom. We are prepared to discuss these issues with you further. Please advise as to when incarcerated Native American individuals can expect to enjoy fair access to worship and ceremony, and when they can resume the religious activities they have been denied for a full year.

Sincerely,

American Civil Liberties Union of Washington

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² Frank Hopper, *The Pandemic in Prison: How COVID Robbed Native Inmates of Vital Cultural and Spiritual Support* by Frank Hopper, Last Real Indians, Mar. 2, 2021, https://lastrealindians.com/news/2021/3/2/the-pandemic-in-prison-how-covid-robbed-native-inmates-of-vital-cultural-and-spiritual-support-by-frank-hopper?fbclid=IwAR2yBcXM36REdiAivmVUTnKvLcuzN_vghLavQ4wFY83c8Flif7tzMbkoet4.

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