

Legal Protections for Native Spiritual Practices in Prison

NATIVE AMERICAN RIGHTS FUND¹

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Please note that the information in this document is meant to provide only a general understanding of the law and is for educational purposes only. It does not constitute legal advice, either generally or with regard to any particular matter.

Your rights in prison are restricted, but many still exist—particularly where your religious practices are concerned. This document will help you understand these rights and the laws that protect them.

Federal law in particular provides protection for your right to practice your Native religion in prison. Generally speaking, you may practice your religion unless doing so presents security, safety, health, or other serious concerns to the prison or fellow inmates. Using legal terminology, the burden a prison places on the practice of religion must be in furtherance of a “compelling government interest.” Moreover, a prison can further such an interest only by the “least restrictive means”—in other words, the prison must show there are no alternative ways to satisfy its concerns that are less burdensome on your religious practice.

If a prison violates your rights to practice your faith, you may be able to seek relief in court. Before pursuing any legal action, however, you must normally go through the full internal grievance process available in your institution. If you fail to do so, your lawsuit faces dismissal.

In this document, you will find multiple tools: (1) **Overview of the Law**—a summary of the federal laws that may protect your Native spiritual practice (note, there may be additional state or other legal protections available); (2) **Key Questions and Answers**—answers to questions you may have about these laws as they concern Native practices; (3) **Application to Select Native Practices**—addressing how the laws are applied to some specific practices; and (4) **Legal Procedure for Protecting Your Rights**—general information about the procedures to challenge prison limitations on religious practice.

Overview of the Law

Federal Law protects your religious practice in two ways: (1) under the U.S. Constitution and (2) under statutes enacted specifically to guard religious liberty. Some states may also have additional legal protections, which this document does not address.

Constitutional Protections

The First Amendment to the U.S. Constitution might be the most famous protection for religious practice in America, but it is typically not your best source of rights in prison.² Even if

¹ This guide was prepared with the help of the Stanford Law School Religious Liberty Clinic.

² U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

a regulation at your prison burdens your Native religious practice, it is likely to be upheld by courts against a First Amendment challenge so long as it is “reasonably related to legitimate penological interests.”³ This is a low threshold for a prison to satisfy—all it really requires is for the prison to cite a concern, such as institutional order or security, and courts commonly defer to prison officials under this standard.

Statutory Protections

You typically have stronger protections for your religious practices under federal statutes, which are individual laws passed by Congress. Depending on whether you are in a state or federal institution, there are two primary laws that protect your right to exercise religion while incarcerated. If you are in a state or local prison, the Religious Land Use and Institutionalized Persons Act (RLUIPA) protects your rights;⁴ if you are in a federal prison, the Religious Freedom Restoration Act (RFRA) protects your rights.⁵ Both statutes prevent the government from substantially burdening your religious practice unless it has a compelling reason to do so in your particular case.⁶ In addition, the prison may substantially burden or hinder your religious practice only when it has no other, less restrictive alternatives available.⁷

RLUIPA provides as follows:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that imposition of the burden on that person—

- (1) is in furtherance of a compelling governmental interest; and*
- (2) is the least restrictive means of furthering that compelling governmental interest.*

RFRA provides as follows:

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest; and*
- (2) is the least restrictive means of furthering that compelling governmental interest.*

As can be seen above, the two statutory tests are essentially identical.

³ *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

⁴ 42 U.S.C. § 2000cc-1.

⁵ 42 U.S.C. § 2000bb-1.

⁶ *Holt v. Hobbs*, 135 S.Ct. 853, 859 (2015).

⁷ *Id.*

Key Questions and Answers

Does my Native spiritual practice qualify as “religious exercise” and “sincerely held”?

To receive the protections of the federal laws, you must first have beliefs that are both “religious” and “sincerely held.”⁸ Native spiritual practices are almost always accepted as sufficiently religious under the law. Indeed, in a broader context, the federal government has stated that it “shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”⁹

You must, however, also show to prison officials that you *personally* believe in the spiritual practice at issue. Courts find beliefs to be “sincerely held” when they are consistently followed. But even if you haven’t always faithfully adhered to your practice, a court may still find you are sincere.¹⁰ Sincerity can become more difficult to prove if you have only recently adopted a new practice or if there are circumstances suggesting that you want the particular benefit at issue for reasons wholly unrelated to religion. For example, if prison officials believe religious practices are used to disguise illicit activity, they may question your sincerity.¹¹

Do I have to be a member of a federally recognized tribe?

No. Unlike some federal legal protections that are reserved for members of federally recognized tribes, protections for Native spiritual practices by prison inmates are personal and do not depend on federal tribal recognition or membership. Courts instead consider only whether your religious practice is sincerely held, as described above.

When can the prison restrict my Native spiritual practice?

You, of course, have the right to fully believe in your Native religion, but the government may, in some circumstances, limit the way your belief is practiced. The courts give great respect to a prison’s “compelling” interest in security, safety, and prisoner health. So, for example, if your Native practice threatens the security of guards or other inmates, the prison may be justified in restricting you from engaging in that practice. Even in that situation, however, the prison must also show its restriction on your religious practice is the least restrictive method of ensuring safety and security. If the prison can somehow accommodate your religious practice and still maintain the safety of the facility, for example, courts will require prisons to respect your

⁸ See, e.g., *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007); see also *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008).

⁹ 42 U.S.C. § 1996.

¹⁰ See *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988) (finding “the fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere”).

¹¹ *Holt*, 135 S.Ct. at 867.

practice. But remember: if a prison allows a religious practice, it may revoke the right to that practice if a prisoner abuses it in a way that undermines security, safety, or prisoner health.

The policies of other prisons can be useful information to include in your request for a religious accommodation. If a majority of prisons accommodate a certain practice, for example, the government will have a difficult time maintaining that its rule restricting that practice is the least restrictive means of furthering its compelling interest. However, each prison is allowed to implement different policies—that is, the law does not typically require prisons to maintain exactly the same policies. Thus, you should research the applicable policies in other prisons, but do not rely exclusively on this argument when making your case for accommodation.

What do I need to include in my request for a religious accommodation?

To obtain a religious accommodation, two things must be true.¹² First, you need to show you have a sincerely held religious belief. The belief does not have to be mainstream or central to your religion. Second, you need to show the prison substantially burdens your religion through a policy or practice that makes it difficult to engage in your spiritual practice, or forces you to do something contrary to your religious beliefs. If you can show these two elements, the government's restriction must be necessary to serve a compelling government interest in the least restrictive way possible.¹³

It is often difficult to overcome a prison's asserted interests in safety and security.¹⁴ It is typically better to look at whether the government's policies restricting your religious practice are the least restrictive means to achieve its compelling government interest. For instance, if the government denies your access to a sweat lodge because doing so requires lockdowns to transport you, you can point out that lockdowns are a common occurrence in your prison.¹⁵ Also, you can suggest alternative methods the government can use to further its compelling interest without burdening your religious practice. For example, if the prison states that a prohibition on tobacco is necessary to protect asthmatic prisoners, you can offer to use ceremonial tobacco outdoors, where the smoke cannot reach other prisoners. If you can find a less restrictive alternative to a complete prohibition, the prison may be required to allow you to practice your religion.

In the next section, you will find examples of cases in which courts have ruled on important Native practices.

¹² *Id.* at 862.

¹³ *Id.* at 863.

¹⁴ See James D. Nelson, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2068-69 (2009).

¹⁵ See *Yellowbear v. Lampert*, 741 F.3d 48, 60 (10th Cir. 2014).

Application to Select Native Practices

RFRA and RLUIPA, which are discussed above, require courts to perform an “individualized inquiry” for each prisoner who claims the policies or actions of prison officials interfere with religious practice. In other words, whether the burden on religious practice is permissible depends on the facts and circumstances of each case. For example, even if a particular practice in a maximum-security prison is deemed too threatening to prison security, it may not pose the same type of threat in a minimum-security prison.

Ceremonial Tobacco Use

Many Native Americans use tobacco for spiritual, ceremonial, or medicinal purposes. Because of the importance of tobacco to Native religious practices, most federal—and many state and local—correctional facilities permit ceremonial tobacco in some form.¹⁶ Prisons have made these accommodations even where they otherwise have tobacco-free or smoke-free policies in place.¹⁷

Prisons have implemented smoke-free and tobacco-free policies because of health concerns related to smoke and tobacco use. Some prisons have refused to allow any accommodations for tobacco use for Native American inmates because of such concerns. But Native American inmates have succeeded in being permitted to use tobacco despite outright bans.¹⁸ For example, South Dakota reversed its ban on tobacco use for Native American prisoners in 2013.¹⁹ And although the state does not permit unrestricted use of tobacco, it began to allow smoking and ceremonial mixtures with small quantities of tobacco.

¹⁶ Public Health Law Center, *Tobacco Behind Bars: Policy Options for the Adult Correctional Population* 8 (2012).

¹⁷ For example, South Dakota does not permit inmates to use or possess tobacco except for religious purposes. S.D. Dep’t of Corr., Policy 1.3.C.7, Tobacco Products and Electronic Cigarettes – Use and Possession (2015).

¹⁸ See Ken Bradley, *In South Dakota Prisons, Indian Inmates Get to Smoke—For Religious Reasons*, Reuters (Feb. 20, 2013), <http://tmsnrt.rs/21LhiU3>; Gabriel S. Galanda, *Native American Prisoners Obtain Religious Freedom*, King County Bar Ass’n (July 2012), <http://bit.ly/1Qz3yAV>; see also *Cryer v. Mass. Dep’t of Corr.*, 763 F. Supp. 2d 237, 243-48 (D. Mass. 2011) (suggesting a total ban on tobacco might have imposed a substantial burden on the Native American plaintiff and that the ban might not be the least restrictive means of furthering the prison’s interest in security). *But see Adams v. Mosley*, Civil Action No. 2:05cv352-MHT, 2008 WL 4369246, at *12 (M.D. Ala. Sept. 25, 2008) (allowing a prison’s total ban on tobacco, because the Native American plaintiff “presented no evidence showing that the prohibition against tobacco use during worship activities is anything more than an inconvenience or incidental burden”).

¹⁹ Bradley, *supra* note 18.

Hair Length

Most state prisons, as well as federal prisons, either allow long hair or provide religious exemptions to hair length policies.²⁰ Check your prison's policy because you might already be allowed to maintain your hair in accordance with your Native American beliefs.

Federal courts are presently divided on the legal obligation to allow long hair for religious reasons; this means the law will vary depending on where you are. As of January 2016, ten state prison systems maintain bans on long hair without any religious exemptions: Alabama, Florida, Georgia, Idaho, Indiana, Louisiana, Mississippi, South Carolina, Texas, and Virginia.²¹ Prison officials have largely cited security concerns as the reason to restrict hair length, and some courts have been deferential to such claims by prison officials.²²

Other courts, however, have found that restrictions on hair length do not further security interests. For example, in 2005, a federal appeals court held that the California state prison system did not adequately show that short hair was the appropriate means of furthering security interests. Because the inmate was housed at a minimum-security prison, where inmates had a greater degree of freedom, the court held that the ban on long hair was not the least restrictive alternative to achieve the government's interest in prison security. The court noted that a majority of other prisons, as well as women's prisons, allowed long hair. Thus, the state's claim that short hair was necessary for security was unpersuasive.²³

Inmates filed an application to the Supreme Court in 2015 to resolve this issue.²⁴ If the Supreme Court decides to review the case, the subsequent ruling may standardize the approach courts throughout the country take in reviewing prison policies restricting religious hair length practices. You can follow the case, *Knight v. Thompson*, to get the latest information regarding this issue.

Smudging

Smudging ceremonies necessarily produce smoke, and some prisons have implemented outright bans on smudging in indoor locations—including individual prison cells—because the smoke from the ceremony can trigger fire alarms or create health risks for other prisoners and guards in the prison. Courts have generally upheld these bans.²⁵

²⁰ *Knight v. Thompson*, 797 F.3d 934, 938 n.2 (11th Cir. 2015).

²¹ See Brief for The Sikh Coalition as Amicus Curiae Supporting Petitioners at 15 nn.8 & 9, *Knight v. Thompson*, (U.S. Mar. 4, 2016) (No. 15-999).

²² See *id.*; *Thunderhorse v. Pierce*, 364 F. App'x 141, 146 (5th Cir. 2010).

²³ *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005).

²⁴ *Knight v. Thompson*, 797 F.3d 934 (11th Cir. 2015), *petition for cert. filed*, (U.S. Feb. 2, 2016) (No. 15-999).

²⁵ See, e.g., *Chance v. Tex. Dep't of Criminal Justice*, 730 F.3d 404, 417 (5th Cir. 2013); *Hodgson v. Fabian*, 378 F. App'x 592, 593-94 (8th Cir. 2010) (per curiam); *Cubero v. Burton*, No. 96-1494, 1996 WL 508624, at *1-2 (7th Cir. Sept. 3, 1996); *Smith v. Beauclair*, No. CV-03-222-C-EJL, 2006 WL 2348073, at *9 (D. Idaho Aug. 11, 2006).

However, complete bans on *all* smudging may not be the least restrictive means of advancing the prison's interests in safety or prisoner health. At the very least, some courts have indicated that allowing smudging ceremonies in outdoor locations is a reasonable accommodation of Native religious practice.²⁶

A case from Idaho provides a useful example. In *Hyde v. Fisher*,²⁷ a Native American inmate complained that his prison violated RLUIPA by not permitting any smudging whatsoever, either indoors or outdoors. The prison claimed the policy furthered its interest in maintaining safety. The Court of Appeals of Idaho, however, disagreed with the prison. Among other things, the court held the prison could maintain its interest in safety by directing the smudging ceremony outdoors.

Sweat Lodges

Sweat lodges are important in many Native American religious traditions because of their role in providing purification. Many prisons understand that maintaining sweat lodges can have calming influences on prisoners, and that they can make for a more orderly prison. As such, several states allow for sweat lodges.²⁸ You should check whether your prison already allows sweat lodges or whether it would be willing to do so.

Those prisons that forbid sweat lodges generally justify their policies on security and safety grounds.²⁹ For example, in *Fowler v. Crawford*, a federal appeals court upheld a Missouri prison policy that banned sweat lodges, finding that “serious safety and security concerns arise when inmates at a maximum security prison are provided ready access to (1) burning embers and hot coals, (2) blunt instruments such as split wood and large scalding rocks, [and] (3) sharper objects such as shovels and deer antlers.”³⁰ The *Fowler* court explained that safety and security concerns are particularly acute in maximum-security prisons.³¹ Ultimately, whether a sweat lodge is permitted may depend on the security level of the institution. Another factor that influences prison officials to ban sweat lodges is the lack of supervision within the lodge.³²

²⁶ See *Chance*, 730 F.3d at 417 (“Because [the prison] still permits Smudging outdoors and has offered uncontroverted evidence demonstrating the reasonableness of its determination to ban indoor Smudging, we conclude that its Smudging policy is the least restrictive means of achieving its compelling interests.”); *Hyde v. Fisher*, 203 P.3d 712, 729-30 (Idaho 2009).

²⁷ *Hyde*, 203 P.3d 712.

²⁸ See, e.g., *Cubero v. Burton*, 96 F.3d 1450, 1450 (7th Cir. 1996) (Wisconsin); *Allen v. Toombs*, 827 F.2d 563, 565 n.5 (9th Cir. 1987) (Oregon); *Brown v. Schuetzle*, 368 F. Supp. 2d 1009, 1011-12 (D.N.D. 2005) (North Dakota); *Youngbear v. Thalacker*, 174 F. Supp. 2d 902, 912 (N.D. Iowa 2011) (Iowa); *Indian Inmates v. Gunter*, 660 F. Supp. 394, 398 (D. Neb. 1987) (Nebraska); *Mathes v. Carlson*, 534 F. Supp. 226, 228 (W.D. Mo. 1982) (Missouri).

²⁹ See, e.g., *Fowler v. Crawford*, 534 F.3d 931, 939 (8th Cir. 2008); *Hamilton v. Schriro*, 74 F.3d 1545, 1555-56 (8th Cir. 1996).

³⁰ *Fowler*, 534 F.3d at 939.

³¹ See also *Schriro*, 74 F.3d at 1555-56; *Hyde*, 203 P.3d 712.

³² *Fowler*, 534 F.3d at 939; *Hyde*, 203 P.3d at 728-29.

Use of Animal Parts

Animal parts are also often a major component of Native religious practice. The use of animal parts in a prison setting, however, can present security concerns for prison officials. Animal hides, for example, can be used to more easily scale barbed-wire fence while talons and animal claws can be used as weapons.³³ Prisons, therefore, routinely ban these items.³⁴

But some prisons allow prisoners to keep smaller animal parts that pose a lower security risk. Some prisons, for example, allow small bones and necklaces with animal teeth.³⁵ Perhaps most importantly, prisons have allowed Native American inmates to keep eagle feathers, provided inmates have first demonstrated they are part of a federally recognized tribe (in keeping with federal law limiting the possession of feathers).³⁶

The varied prison policies concerning the use of animal parts reveal the difficulty of predicting whether you will be allowed to keep a particular animal part in prison. As a Texas federal appeals court noted in *Chance v. Texas Department of Criminal Justice*, “the availability of a less restrictive means is a subject that demands a fact-intensive inquiry.”³⁷ In other words, prisons may accommodate animal parts on a case-by-case basis.

Legal Procedure for Protecting Your Rights

If you feel that your prison has violated your right to practice your Native religion, you must go through important procedural steps before filing a lawsuit in court. Most importantly, a federal law called the Prison Litigation Reform Act³⁸ requires that you first try to resolve your complaint through your prison’s grievance procedures.³⁹ This step is called “exhausting your remedies.” Absent exhaustion, you face an almost certain risk of having your lawsuit dismissed.

Each prison’s grievance procedure is different, but the basics are fairly standard. First, you will have to file a written description of your complaint with the prison. This description should include each claim you eventually want to raise in court, and should mention each person who would be named as someone who denied your religious accommodation in an eventual

³³ *Haight v. Thompson*, No. 5:11-CV-00118, 2013 WL 1092969, at *24 (W.D. Ky. Mar. 15, 2013) (“Animal claws and talons hold a sacred significance for many Native Americans. However, the potential for use as weapons makes them generally inappropriate for possession in a correctional setting.”).

³⁴ *Morrison v. Garraghty*, 239 F.3d 648, 660 (4th Cir. 2001).

³⁵ *Chance v. Tex. Dep’t of Crim. Justice*, 730 F.3d 404, 418 (5th Cir. 2013); *Cryer v. Clark*, No. 09-10238-PBS, 2009 WL 6345768, at *6 (D. Mass. July 9, 2009).

³⁶ See *Phillippi v. Skolnik*, No. 3:11-cv-00272-LRH-VPC, 2013 WL 5372352, at *13 n.20 (D. Nev. Sept. 24, 2013); *Smith v. Frank*, No. 07-C-83, 2009 WL 750272, at *3 (E.D. Wis. Mar. 20, 2009); *Means v. Lampert*, No. CIV-06-1137-HE, 2008 WL 4899227, at *6 (W.D. Ok. Nov. 12, 2008); see also *ACLU Secures Religious Freedom for American Indians at Wyoming Prison*, ACLU (July 30, 2008), <http://bit.ly/24GPjUq> (discussing a settlement involving the Wyoming State Penitentiary that allows Native American inmates to keep four eagle feathers within their cells and additional feathers in storage).

³⁷ 730 F.3d 404, 418 (5th Cir. 2013) (citation and internal quotation marks omitted).

³⁸ 42 U.S.C. § 1997e(a).

³⁹ See ACLU, *Know Your Rights* 1 (2011), available at <http://bit.ly/21OnlDT>.

lawsuit. Next, if the prison still refuses to allow you to practice your faith even after it reviews your complaint, there may be an internal appeals process that allows you to ask the prison to reconsider its decision. Although the number of levels of appeals at each prison may vary, it is crucial that you appeal your grievance through each level that is available at your prison. Only after you exhaust your remedies at your prison will a court be able to hear your claim. And if you miss internal deadlines or fail to fulfill internal requirements, you may need to start again from scratch; there also may be waiting periods after requests that fail to follow the applicable grievance procedures.

Neither exhausting your remedies nor filing a lawsuit in court requires that you act as a lawyer or that you hire a lawyer. Although legal expertise is strongly recommended, prisoners are allowed to represent themselves “pro se,” meaning that they are allowed to handle their cases on their own. This might seem like a difficult task, but many courts—through the court’s clerk’s office—routinely help pro se prisoner litigants.⁴⁰ Your prison law library may offer resources to help you in this process.

For more information about your religious rights in prison, take a look at the following resources:

- ACLU, KNOW YOUR RIGHTS—FREEDOM OF RELIGION (2012), *available at* <https://www.aclu.org/prisoners-rights/know-your-rights-freedom-religion-november-2012>.
- COLUMBIA HUMAN RIGHTS L. REV., *Chapter 27: Religious Freedom in Prison*, in *A JAILHOUSE LAWYER’S MANUAL* (9th ed. 2011), *available at* <http://www3.law.columbia.edu/hrlr/jlm/chapter-27.pdf>.
- DONNA SIENSTRA, JARED BATAILLON & JASON A. CANTONE, *ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURTS AND CHIEF JUDGES* (2011), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/\\$file/proseusdc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/$file/proseusdc.pdf).
- PRISON LAW OFFICE, *HOW TO FILE AN ADMINISTRATIVE APPEAL* (Oct. 2015), *available at* <http://prisonlaw.com/wp-content/uploads/2015/09/AdminAppealsOct2015v3.pdf>.

⁴⁰ Donna Sienstra, et al., *Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Courts and Chief Judges* 1 (2011), *available at* <http://1.usa.gov/1Qrbp5V>.