

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

JAN 28 2008

JIMMY KINSLOW,
Plaintiff,

MATTHEW J. DYKMAN
CLERK

vs.

No. CIV-07-1164 MV/RLP

NEW MEXICO CORRECTIONS DEPT., et al.,
Defendants.

MOTION FOR PRELIMINARY INJUNCTION
WITH INCORPORATED MEMORANDUM OF LAW

Plaintiff, Jimmy Kinslow, pro se, moves this Court, pursuant to Rule 65, Federal Rules of Civil Procedure, for a preliminary injunction ordering defendants to immediately begin obeying the clear legislative terms of state statute §§ 33-10-1 to 33-10-4, NMSA 1978, entitled the Native American Counseling Act, and the clear terms of NMCD Policy CD-101100 to 101101, and allow plaintiff with weekly access to the Institution's Sweat Lodge while providing him with the necessary quantities of the items and materials he needs in order to freely exercise his sincere religious beliefs.

In support of this Motion, plaintiff relies upon his Verified Complaint, true copies of § 33-10-1 et seq., and NMCD Policy CD-101100 et seq., and his Affidavit. Each of the items upon which plaintiff relies is being filed simultaneously with this Motion.

Plaintiff contends that absent injunctive relief he will continue to be denied his fundamental constitutional right to freely express his sincere religious beliefs while defendants attempt to delay and drag out this action, that he will continue to suffer irreparable injury with the interim denial of his fundamental First Amendment rights, that given the clear, uncontested facts of this case there is more than a substantial likelihood that he will ultimately prevail on the merits, that there is a greater injustice to him if the injunction is denied, than harm to the defendants if it is granted, and that granting the requested relief will not disserve the public interest.

STATEMENT OF FACTS

Plaintiff, Jimmy Kinslow, is a Native American prisoner of the Potawatomi Tribe in the custody of the New Mexico Corrections Department (NMCD), currently confined at the Southern New Mexico Correctional Facility (SNMCF) at Las Cruces, NM. (Ver. Comp. at 4 and 13). After requesting access to the Sweat Lodge in order to freely exercise his sincere religious beliefs he was first denied access based upon his assumed racial identity, made to prove his Native American racial descent, and then continued to be denied access to the institution's Sweat Lodge based upon his Administrative Segregation placement. (Ver. Comp. at 15 thru 26). Due to the NMCD's no smoking policy the Sweat Lodge area is the only place where plaintiff can freely exercise his sincere religious beliefs. (Ver. Comp. at 27).

Even after his release from Ad. Seg. into Level III General Population defendants continued to deny Mr. Kinslow with access to the Sweat Lodge. (Ver. Comp. at 28 thru 36). After resolution of his Institutional Grievance defendants grudgingly began allowing Mr. Kinslow access to the Sweat Lodge, but punitively restricted his access to only once-per-month and have consistently denied him sufficient quantities of those items and materials essential to the exercise of his sincere religious beliefs, rituals and ceremonies. (Ver. Comp. at 37 thru 47).

State law mandatorily requires defendants to permit Mr. Kinslow access on a regular basis to the institution's Sweat Lodge "for at least six consecutive hours per week." (EXHIBIT 1, § 33-10-4(B)(3)). State law requires defendants to allow Mr. Kinslow access to those items and materials essential to the free expression of his sincere religious beliefs, rituals and ceremonies, in the required quantities necessary to perform his religious practices. (EXHIBIT 1, § 33-10-4(B)(2)). Official NMCD Policy requires defendants to permit Mr. Kinslow with regular weekly access to the Sweat Lodge for at least six consecutive hours. (EXHIBIT 2, CD-101101(J)(1), page 6). Official NMCD Policy requires defendants to allow Mr. Kinslow sufficient quantities of those items and materials while at the Sweat Lodge necessary and essential to the exercise of his traditional Native American religious beliefs. (EXHIBIT 2, CD-101101(B)(1-8), page 2). Defendants continue to refuse to follow the clear and mandatory legislative intent under the published state law (§ 33-10-1 et seq.), or to even follow their very own officially published NMCD Policy requirements and guidelines, in Mr. Kinslow's case.

Mr. Kinslow has repeatedly used the established inmate grievance process seeking resolution of this denial of free exercise of religion, albeit without any noticable success. (Ver. Comp. at 25 and 32-36). Plaintiff has also written literally dozens of letters and Requests to defendants requesting reconsideration of their refusal to obey their statutory and policy obligations without success. Only injunctive relief can provide a meaningful remedy for the plaintiff while he waits a resolution of the case where a permanent injunction has been requested. (Ver. Comp. at 52 and 61).

ARGUMENT

The NMCD defendants are not granted any sort of special legislative dispensation or authority giving them the right or authority to ignore the clear, mandatory statutory requirements under state law or the mandatory provisions of their own policies when it comes to permitting Native American prisoners the right to freely exercise their sincere religious beliefs. A statute, rule or regulation creates a clear liberty or property interest (or "entitlement") if it limits the discretion of prison officials in the way that § 33-10-1 et seq., NMSA 1978, and NMCD Policy CD-101100 et seq. does. See, Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 462 (1989); Olin v. Wakinekona, 461 U.S. 238, 250 (1983); Meachum v. Fane, 427 U.S. 215, 226-27 (1976).

A preliminary injunction is granted to prevent a party from suffering irreparable harm and to maintain the status quo while they await final disposition of the case. Rule 65(b), F.R.Civ.P. Mr. Kinslow has, does today and will in the foreseeable future be denied his "free exercise" rights to practice the religion of his choice, which is secured under the First Amendment, and has been enforced repeatedly by the Supreme Court and lower tribunals.

A preliminary injunction should issue if Mr. Kinslow can successfully demonstrate:

- (1) a substantial likelihood that he will ultimately prevail on the merits;
- (2) that he will suffer irreparable injury if the injunction is not granted;

(3) that the threatened harm to the plaintiff outweighs the potential harm to the opposing party; and

(4) that the injunction, if issued, would not be adverse to the public interest.

Elrod v. Burns, 427 U.S. 347, 373 (1976).

A. A SUBSTANTIAL LIKELIHOOD EXISTS THAT PLAINTIFF WILL PREVAIL ON THE MERITS

The First Amendment to the Constitution protects the "free exercise" of religion, and the Supreme Court has held that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972).

The Legislature for the State of New Mexico recognized this affirmative obligation placed upon them by the Federal Constitution and Supreme Court precedent, and they responded in the cases for Native American prisoners (who in the past has unquestionably faced severe religious restrictions and outright governmental bans and prohibition preventing the practices of their traditional religious beliefs), by enacting the statute § 33-10-1 et seq., NMSA 1978, entitled the "Native American Counseling Act." This is an Act which applies solely to New Mexico prison officials and state prisoners who chose to practice their traditional Native American religious beliefs, and it places mandatory, non-discretionary legal affirmative duties and obligations upon the NMCD defendants that they must obey in order to reasonably accommodate the religious needs for Native American prisoners confined in penal institutions statewide in New Mexico. (EXHIBIT 1, § 33-10-1 et seq.).

The NMCD recognized and acknowledged its mandatory legal duties to accommodate the religious needs of Native American prisoners placed upon them by the above legislative actions, and to be in compliance with § 33-10-1 et seq., NMSA 1978, they drafted NMCD Policies CD-101100 and CD-101101. (EXHIBIT 2).

The "facts" are unquestionable and are not in dispute. Despite the mandatory provisions of § 33-10-1 et seq. and CD-101100 et seq., the NMCD defendants have to this day, and still do, refuse

to permit Mr. Kinslow with weekly access to the Sweat Lodge for the required minimum of six consecutive hours, instead allowing him access to the Sweat Lodge once-a-month if he is lucky, and when at his monthly access to the Sweat Lodge the NMCD defendants has every single time refused Mr. Kinslow the necessary QUANTITY of the items and materials he needs which are essential for him to be able to freely exercise his sincere religious beliefs, rituals and ceremonies. (See, EXHIBIT 3, Affidavit of Jimmy Kinslow).

That the NMCD defendants are not following the clear mandates of state law and their own policies when it comes to allowing Mr. Kinslow proper religious access is beyond question. Defendants has not denied it in their responses to grievances and plaintiff's letters. Therefore, it stands to reason that these facts presents a strong prima facie showing of a clear violation of the Free Exercise Clause of the First Amendment which is very doubtful that defendants will be able to overcome. And with each passing day that Mr. Kinslow is denied his basic, fundamental religious freedoms he faces continued and increasing irreparable injury.

By granting the requested preliminary injunction Mr. Kinslow IS NOT asking the Court to grant him any special privilege or right, he is simply asking the Court to order the defendants to obey the letter of the law until the case is finally resolved. Plaintiff simply wishes to be able to regularly worship and pray to the Creator during the time this case is litigated which the law says he is entitled to be able to do on a weekly basis. Under the above undisputed facts, there is a more than substantial likelihood that Mr. Kinslow will ultimately prevail on the merits.

B. PLAINTIFF WILL CONTINUE TO SUFFER IRREPARABLE INJURY ABSENT INJUNCTIVE RELIEF

Defendants persist in refusing to provide Mr. Kinslow with the religious access to which he is entitled to under the law and the NMCD's own published policies, despite the numerous prisoner grievances and letters from the plaintiff. Absent intervention by the Court, it is a clear certainty that Mr. Kinslow will continue to needlessly suffer these unjustified and unreasonable infringements upon his religious "free exercise" rights secured under the First Amendment and state law. No after-the-fact monetary remedy can cure the plaintiff's injury; money damages will not buy back the missed prayers, rituals, ceremonies and communion with the Creator.

The loss of First Amendment freedoms, for even MINIMAL periods of time, constitutes "irreparable injury" for purposes of entitlement to injunctive relief. See, Gentala v. City of Tucson, 213 F.3d 1055 (9th Cir. 2000) and the cases cited therein.

Additionally, the U.S. Supreme Court has ruled that, as a matter of law, the continuing deprivation of constitutional rights constitutes "irreparable harm." Elrod v. Burns, 427 U.S. 347, 373 (1976).

C. THE HARM TO THE PLAINTIFF FAR OUTWEIGHS ANY HARM WHICH THE INJUNCTION MAY CAUSE

The harm being done to the plaintiff is clear. On the other hand, defendants can show no legally recognizable harm whatsoever to themselves or others if they are required to follow the clear legislative mandates set under § 33-10-1 et seq., NMSA 1978, and their own published policies under CD-101100 et seq., and allow Mr. Kinslow with weekly access to the sweat lodge area to pray, and allow him the necessary quantities of the items and materials he needs in order to perform prayers, rituals and ceremonies consistent with his traditional Native American beliefs. There will be no monetary costs to defendants, plaintiff supplies all of his material requirements at his own costs and through donations from the Native American community. Therefore "cost" cannot be a consideration to legitimize defendants continued unconstitutional conduct.

Plaintiff has no other adequate remedy at law. He has suffered and will continue to suffer irreparable injury absent injunctive relief. On the other hand, requiring defendants to begin obeying the terms of § 33-10-1 et seq. will not harm defendants.

D. PUBLIC INTERESTS

There simply can be no question of any harm to the defendants or to the public by insuring that the defendants comply with the mandates of state law § 33-10-1 et seq., NMSA 1978, and their own published policies. To the contrary, it is clearly in the public's interest that their prison officials not believe themselves to be above the law and the Constitution. Duran v. Anaya, 642 F.Supp. 510, 527 (D.N.M. 1986) (respect for law, particularly by officials responsible for the administration of the correctional system, is in itself a matter of the highest public interest.).

E. POSTING OF SECURITY IS NOT REQUIRED
UNDER THESE SPECIFIC FACTS

The relief sought will not impose any monetary loss upon the defendants, therefore, posting of security is not required. See, U.S. v. State of Oregon, 675 F.Supp. 1249, 1253 (D.Or. 1987) and the cases cited therein.

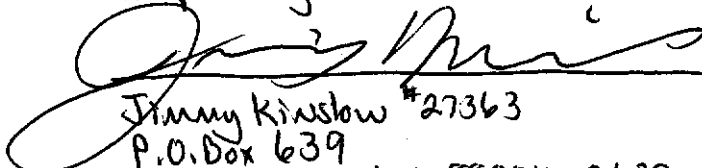
CONCLUSION

Overall, there is a substantial likelihood that plaintiff will prevail on the merits; that he will continue to suffer irreparable injury if an injunction is denied; that granting the injunction is unlikely to cause injury to others; and that the public interest can only be advanced by granting the injunction. Plaintiff is indigent, and there are no financial consequences to defendants should the issuance of a preliminary injunction later be reversed, so no bond for security should be required.

WHEREFORE, for the foregoing reasons, Plaintiff respectfully requests that this Court:

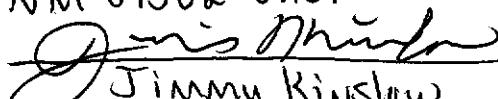
- (1) Promptly schedule a hearing;
- (2) Issue a writ requiring Plaintiff's attendance at the hearing;
- (3) Issue a Preliminary Injunction ordering Defendants to forthwith comply with the statutory requirements of § 33-10-1 et seq., NMSA 1978, and allow plaintiff with weekly access to the Sweat Lodge for a minimum six consecutive hours, and allow plaintiff the necessary quantities of all the items and materials he needs in order to perform his religious ceremonies authorized under statute and policy;
- (4) Waive the posting of bond for security; and
- (5) Grant such other relief as may be equitable and just.

Respectfully submitted


Jimmy Kinslow #27363
P.O. Box 639
Las Cruces, NM 88004-0639

CERTIFICATE OF SERVICE

I hereby certify that on this the 25th day of January, 2008, that I mailed a true copy of the foregoing to Defendants Counsel at P.O. Box 27116, Santa Fe, NM 87502-0116.


Jimmy Kinslow

33-2-11. Corrections department powers; complaints. (1990)

A. The corrections department has the power and the duty to examine and inquire into all matters connected with the government, discipline and police of the corrections facilities and the punishment and treatment of the prisoners; the department, shall inspect the corrections facilities and listen to any complaints of oppression or misconduct on the part of the warden or any of the other employees under him; and for that purpose, the secretary of corrections has the power to issue subpoenas and compel attendance of witnesses and to administer oaths.

B. No court of this state shall acquire subject-matter jurisdiction over any complaint, petition, grievance or civil action filed by any inmate of the corrections department with regard to any cause of action pursuant to state law that is substantially related to the inmate's incarceration by the corrections department until the inmate exhausts the corrections department's internal grievance procedure. Upon exhaustion of this administrative remedy, the first judicial proceeding shall be a de novo hearing, unless otherwise provided by law.

C. In any action brought by an inmate of the corrections department pursuant to Section 1979 of the Revised Statutes of the United States, 42 U.S.C. Section 1983, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue the case for a period of ninety days for the purpose of exhaustion by the inmate of any available plain, speedy and effective administrative remedies, but the exhaustion of those remedies shall not be required unless the court has determined, or the attorney general of the United States has certified, that the administrative remedies are in substantial compliance with the minimum acceptable standards adopted under 42 U.S.C. Section 1997e(b).

33-10-1. Short title. (1983)

This act [33-10-1 to 33-10-4 NMSA 1978] may be cited as the "Native American Counseling Act".

33-10-2. Purpose [of Native American Counseling Act] (1983)

It is the purpose of the Native American Counseling Act [33-10-1 to 33-10-4 NMSA 1978] to provide a program of counseling for native Americans confined in penal institutions in New Mexico, to teach good work habits and develop motivation through work; to develop and instill cultural pride and improve the self-image of native Americans; to develop an understanding of the cultural differences between native Americans and other ethnic groups and assist the native American in relating and adjusting to such differences; to train the native American and his family to develop attitudes of mutual trust, mutual respect and an interdependence based on mutual understanding; to increase the availability of Indian spiritual leaders for teaching native Americans in the areas of Indian history, cultural sensitivity and Indian religion; and to generally involve native Americans in those aspects of the penal system that will assist in their rehabilitation and adjustment to a fuller life after their release from confinement.

33-10-3. Definitions. (1993)

As used in the Native American Counseling Act [33-10-1 to 33-10-4 NMSA 1978]:

A. "native American" means any person who is descended from or is a member of an American Indian tribe, pueblo or band or is a native Hawaiian or Alaskan native; and

B. "native American religion" means any religion or religious belief that is practiced by a native American, the origin and interpretation of which is from a traditional native American culture or community, and includes the native American church.

33-10-4. Freedom of worship. (1993)

A. Native American religions shall be afforded by the corrections department the same standing and respect as Judeo-Christian religions. The practice of native American religion shall be permitted at each state corrections facility, including women's corrections facilities, to the extent that it does not threaten the reasonable security of the corrections facility.

B. Upon the request of any native American inmate or group of native American inmates, a state corrections facility shall permit access on a regular basis, for at least six consecutive hours per week, to:

(1) native American spiritual advisers;

(2) items and materials used in religious ceremonies provided by the inmate or a spiritual advisor, including cedar, corn husks, corn pollen, eagle and other feathers, sage, sweet grass, tobacco, willow, drums, gourds, lava rock, medicine bundles, bags or pouches, pipes, staffs and other traditional items and materials, except that the sacramental use of peyote by an inmate while incarcerated is prohibited in conformance with the religious and spiritual beliefs and policies of the Native American church; and

(3) a sweat lodge on the grounds of the corrections facility.

C. A secure place at the site of worship in which to store the items and materials used to conduct the religious ceremonies shall be provided. Any native American inmate may possess items and materials used in religious ceremonies as defined in Section 2 Subsection B of this Act [Subsection B of this section] as long as this possession does not threaten the reasonable security of the corrections facility.

D. Native American spiritual advisers shall be afforded by the administration of a state corrections facility the same stature, respect and inmate contact as is afforded the clergy of any Judeo-Christian religion.

E. No native American inmate shall be required to cut his hair if it conflicts with his traditional native American religious beliefs.

28-22-1. Short title. (2000)

Sections 1 through 5 [28-22-1 to 28-22-5 NMSA 1978] of this act may be cited as the "New Mexico Religious Freedom Restoration Act".

History

History: Laws 2000 (2nd S.S.), ch. 17, § 1.

28-22-2. Definitions. (2000)

As used in the New Mexico Religious Freedom Restoration Act [28-22-1 to 28-22-5 NMSA 1978]:

A. "free exercise of religion" means an act or a refusal to act that is substantially motivated by religious belief; and

B. "government agency" means the state or any of its political subdivisions, institutions, departments, agencies, commissions, committees, boards, councils, bureaus or authorities.

28-22-3. Religious freedom protected; exceptions. (2000)

A government agency shall not restrict a person's free exercise of religion unless:

A. the restriction is in the form of a rule of general applicability and does not directly discriminate against religion or among religions; and

B. the application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

History

28-22-4. Private remedies. (2000)

A. A person whose free exercise of religion has been restricted by a violation of the New Mexico Religious Freedom Restoration Act [28-22-1 to 28-22-5 NMSA 1978] may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government agency, including:

(1) injunctive or declaratory relief against a government agency that violates or proposes to violate the provisions of the New Mexico Religious Freedom Restoration Act; and

(2) damages pursuant to the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978], reasonable attorney fees and costs.

B. Immunity from liability of the government agency and its employees is waived for an action brought

pursuant to this section.

History

28-22-5. Construction of act. (2000)

Nothing in the New Mexico Religious Freedom Restoration Act [28-22-1 to 28-22-5 NMSA 1978] authorizes a government agency to burden a person's free exercise of religion. The protection of the free exercise of religion granted in that act is in addition to the protections granted by federal law and the state and federal constitutions. The New Mexico Religious Freedom Restoration Act does not affect the grant of benefits or tax exemptions to religious organizations nor does it impair any other exemptions granted by law.

25 USC § 1301. Definitions


For purposes of this subchapter, the term

- (1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
- (2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
- (3) "Indian court" means any Indian tribal court or court of Indian offense; and
- (4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

§ 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall

- (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
- (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
- (3) subject any person for the same offense to be twice put in jeopardy;
- (4) compel any person in any criminal case to be a witness against himself;
- (5) take any private property for a public use without just compensation;
- (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
- (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and [1] a fine of \$5,000, or both;
- (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

 CD-101100	NEW MEXICO CORRECTIONS DEPARTMENT	ISSUE DATE: 01/03/84 EFFECTIVE DATE: 01/03/84 REVIEW/REVISED: 01/04/07
	TITLE: Native American Counseling Act	

AUTHORITY:

- A. Laws of 1978, U. S. Congress, HJR 738.
- B. Religious Land Use and Institutionalized Persons Act of 2000, 42 USCA §2000cc to—5.
- C. Native American Counseling Act, NMSA 1978, Section 33-10-1 through -4, as amended.
- D. Policy CD-010100.

REFERENCE:

- A. ACA Standard 2-CO-5E-01, *Manual of Standards for the Administration of Correctional Agencies*, 2nd Edition.
- B. ACA Standards 4-4517, 4-4520, and 4-4521, *Manual of Standards for Adult Correctional Institutions*, 4th Edition.
- C. Public Law 103-141, Religious Freedom Restoration Act.

PURPOSES:

- A. To assist Native American inmates in their spiritual development and growth by encouraging participation in Native American Religious Programs.
- B. To establish policy and procedures for developing and operating Native American Religious Programs within correctional institutions, in accordance with the requirements of the Native American Counseling Act (NMSA 1978, Sections 33-10-1 through 4) and other applicable laws and standards.
- C. To provide guidance to Corrections Department employees (including administrators, officers, staff, and chaplains) and volunteers, in making informed decisions concerning Native American religious practices, so that both Native American religious beliefs and practices, and the reasonable security needs and requirements of the correctional environment, may be accommodated.

FORMS:

Native American Heritage/Verification Report Form (CD-101101.1)

ATTACHMENTS:

Request/Approval for Medicine Bundles, Bag or Pouches Attachment (CD-101101.A)

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APPLICABILITY:

★ All Native American inmates and all Corrections Department employees, especially chaplains and those employees and volunteers who are involved in the management and operation of religious programs.

DEFINITIONS:

- A. Native American Religion: Any bona fide religion or religious belief that is practiced by a Native American (as hereinafter defined), the origin and interpretation of which is from a traditional Native American culture or community, including the Native American Church.
- B. Native American Spiritual Advisor: Spiritual leader who is generally recognized by his/her tribe or community, who is guided by wisdom, experience and traditional knowledge (e.g., of herbs, chants, prayers and songs), who can assure the authenticity and integrity of religious observances, and who can provide the ceremonial setting necessary for purification and spiritual healing.
- C. Native American Programs Coordinator: A Native American Spiritual Advisor who is employed by the Corrections Department and whose job is to oversee the development and operation of Native American Religious Programs (as hereinafter defined) within its institutions, and to assist the Corrections Department in carrying out the intents and purposes of the Native American Counseling Act (NMSA 1978, Sections 33-10-1 through 4) and other applicable laws and standards.
- D. Inmate Spiritual Leader: A Native American inmate who has sufficient traditional knowledge and training to allow him/her to perform some or all of the ritual and ceremonial functions of a Native American Spiritual Advisor.
- E. Native American: Any person who is a descendent from or is a member of an American Indian tribe, pueblo or band or is a native Hawaiian or Alaskan native.
- F. Documentation of Native American Heritage: Evidence which has been verified and authenticated, and which is determined to be satisfactory and sufficient to establish that the inmate is descended from or is a member of an American Indian tribe, pueblo or band; or is a Native Hawaiian or Alaskan Native, in accordance with the terms and conditions of Procedure CD-101101, adopted pursuant to this Policy.

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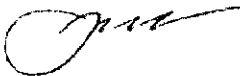
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POLICIES:

- A. Native American Religious Programs (group and/or individual) shall be afforded to Native American men and women inmates at correctional facilities that are Security Level I, II, III or IV, consistent with reasonable security requirements. Inmates at correctional facilities that are Security Level V or VI will normally not be allowed to participate in group or congregate Native American Religious Programs (such as Sweat Lodge Ceremony).


However, such inmates may be afforded individual access to a Native American Spiritual Advisor, with the Spiritual Advisor providing any required congregate or personal religious items, if approved by the Warden.

- B. The Corrections Department will employ a Native American Programs Coordinator.
- C. The Corrections Department through its Native American Programs Coordinator and chaplains shall make reasonable efforts to recruit and provide for Native American Spiritual Advisors who, on a volunteer basis, will provide religious services and guidance to Native American inmates who are confined in correctional institutions.
- D. Only those persons who have submitted satisfactory and sufficient Documentation of Native American Heritage to the Corrections Department shall be allowed to participate in Native American Religious Programs or to have personal religious items (as herein defined) in their possession.
- E. Native American inmates of the Corrections Department shall be afforded the right to observe the American Indian Religious Holy Days of September 24th and 25th by being excused from their institutional work or other program assignment.



Joe R. Williams, Secretary of Corrections
New Mexico Corrections Department

01/04/07
Date

 CD-101101	NEW MEXICO CORRECTIONS DEPARTMENT	ISSUE DATE: 01/03/84 EFFECTIVE DATE: 01/03/84 REVIEW/REVISED: 01/04/07
	TITLE: Native American Counseling Act	

AUTHORITY:

Policy CD-101100

PROCEDURES:**A. Native American Religious Programs:**

Native American spiritual life is founded upon and based in rituals and traditions, rather than writings. Ceremonies are therefore the primary vehicles of religious expression. One of the fundamental precepts of Native American spirituality, which underlies all forms of religious expression, is a belief in the interconnectedness of all natural things and all forms of life, with primary importance being attached to Mother Earth.

1. Sweat Lodge Ceremony. This ceremony utilizes the elements of earth, water, fire and air to teach and restore physical, mental, emotional and spiritual health and holistic well being to the practitioner.
2. Talking Circle Ceremony. During the Talking Circle Ceremony, an eagle feather/staff is passed from person to person around the circle. Possession of the eagle feather gives the participant the time, space and opportunity to speak. He/she may unburden him/herself by describing problems, relating negative or traumatic experiences, or simply speaking about issues of interest or concern. Speaking out helps the participant to develop a better understanding of him/herself, cleanse the emotions, and thereby begin the healing process. Other participants benefit when thoughts and feelings are expressed openly and honestly in the safe and supportive container of the ceremony.
3. Blessing Way Ceremony. Is performed for a specific person and a specific issue. It helps to induce an holistic healing in that the participant is touched at all levels of his/her being: physical, mental, emotional and spiritual. During this ceremony, the elements, the four cardinal Directions, the related teachings, and the energies of the Native American Spiritual Advisor him/herself are used, along with medicinal herbs, to cleanse and bless the participant.

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4. Pipe Ceremony. Pipes are used during both private and group ceremonies. The pipe is a symbol of both male and female, both balance and harmony. It is used to facilitate prayer and communication with the Great Spirit/Creator and with the spirit helpers who gave Native Americans this ceremony. A Native American Spiritual Advisor presides over this ceremony and chants the prayer in which the spirit helpers are asked for assistance.

5. Smudging or Traditional Cleansing Ceremony. Smudging is the burning of certain herbs to create a cleansing smoke bath, which is then used to purify people, ceremonial and ritual space, and ceremonial tools and objects. The principle herbs used are sage, cedar or juniper, lavender and sweet grass.

B. Congregate Religious Items:

Depending upon local tribal traditions, certain items are required for the traditional rituals and ceremonies that are the primary vehicles of communal Native American religious expression. These items shall be referred to as "Congregate Religious Items." "Congregate Religious Items" includes, but is not limited to, the following:

1. Sweat Lodge: The Sweat Lodge and its grounds are the sacred ceremonial setting for communal prayer, spiritual healing and purification.
2. Pipe
3. Water drum
4. Ceremonial drum
5. Rattle
6. Staff
7. Tobacco
8. Herbs and other materials, including: cedar, sage, sweet grass, corn pollen, cornhusks, eagle and other feathers, willow and lava rock
9. Peyote: The possession or sacramental use of peyote by any inmate of the Corrections Department is strictly prohibited.

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C. Personal Religious Items:

Depending upon local tribal traditions, certain things are required for the traditional rituals and ceremonies that are the primary vehicles of individual Native American religious expression. A Request/Approval for Medicine Bundles, Bag or Pouches Attachment (CD-101101.A) must be submitted for and approved prior to obtaining any of the following:

1. Medicine Pouch or Bag: A Medicine Pouch or Bag is worn around the neck and generally contains some or all of the following: corn pollen, corn meal, sage, cedar, and tobacco. (Eagle Talons and Antlers are prohibited.)
2. Spiritual Bundle: A Spiritual Bundle is kept in the inmate's cell and generally contains some or all of the following: prayer pipe, drum, Eagle/Hawk feathers, pieces of animal skin, small amounts of sacred herbs (usually cedar, sage, sweet grass, tobacco, corn pollen and corn meal), small stones (usually crystal and turquoise), sea shell, religious medallion and corn husks.

D. Religious Holy Days--American Indian Days--September 24th and 25th:

These holy days were established by the Federal Government. They are reserved for prayer and are intended to be days free from work. Since there are so many different tribes, with each tribe observing different holy days, it is difficult to establish common religious holy days. However, a large number of tribes do celebrate Solstice and Equinox. Accordingly, the Federal Government has set aside September 24th and 25th in symbolic recognition of all Native American holy days.

E. Congregate Religious Items:

Congregate Religious Items (including a Sweat Lodge) shall be afforded to Native American men and women inmates at correctional facilities that are Security Level I, II, III or IV, consistent with reasonable security requirements.

F. Possession of Personal Religious Items:

A Request/Approval for Medicine Bundles, Bag or Pouches Attachment (CD-101101.A) must be completed, approved, and carried or stored along with any of the following:

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1. **Medicine Bundles:** Native American inmates at correctional facilities that are Security Level I, II, III or IV, may be afforded the right to acquire and keep personal Medicine Bundles in their possession with approval from the Warden.
2. **Medicine Pouches or Bags:** Native American inmate's at all correctional facilities, including facilities that are Security Level V and Level VI, may be afforded the right to acquire and keep personal Medicine Pouches or Bags with approval from the Warden.

Denial of any authorization to possess any of the above shall be documented in writing by the Warden on the Request/Approval for Medicine Bundles, Bag or Pouches.

G. Information and Record Keeping:

1. Each institution within the Corrections Department shall provide the Native American Programs Coordinator with relevant information on all inmates wishing to participate in Native American Religious Programs.
2. Once an inmate has submitted satisfactory and sufficient Documentation of Native American Heritage, and once the Native American Programs Coordinator has verified and authenticated such documentation and information, the Native American Programs Coordinator shall issue a **Native American Heritage/Verification Report Form (CD-101101.1)** stating that such inmate's Native American Heritage has been established for purposes of this policy. A copy of this report shall then be placed in each inmate's file.
3. The names of all inmates who have been issued a Memorandum of Native American Heritage shall be kept on a roster at Central Office, and such information shall be entered as part of the inmates' electronic record on the Corrections Department CMIS-Offender Management System.

H. Concerning Status as a "Native American":

1. All questions concerning an inmate's status as a "Native American" for purposes of Policy CD-101100 and this Procedure, all questions concerning the authenticity or sufficiency of an inmate's Documentation of Native American Heritage, and generally, all questions regarding the eligibility of any inmate to participate in Native American Religious Programs shall be referred to the Native American Programs Coordinator.
2. A "Native American" is an inmate who has provided "Documentation of Native American Heritage" to the Corrections Department, as follows:

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- a. Generally, an inmate who submits a tribal census or enrollment number will be presumed to have provided satisfactory and sufficient "Documentation of Native American Heritage" so as to qualify as a "Native American" for purposes of Policy CD-101100 and these Procedures, and so as to be immediately—and permanently-- eligible to participate in available Native American Religious Programming.
 - b. In the rare instance in which an inmate wishes to be considered a "Native American" for purposes of this policy, but is ineligible for, or otherwise unable to obtain, a tribal census or enrollment number, such inmate may qualify him/herself as a "Native American" by submitting other evidence in lieu of a tribal census or enrollment number. Such evidence may include, but is not limited to, the following: affidavits from tribal members attesting to the inmate's Native American lineage.
 - c. An inmate, who submits satisfactory and sufficient evidence in lieu of a valid tribal census or enrollment number in accordance with the provisions of Policy CD-101100 and these Procedures, will—at the conclusion of the review and approval procedure--also qualify for permanent status as a "Native American" and be eligible to participate in available Native American Religious Programming.
3. Documentation of Native American Heritage in the form of a Tribal Census or Enrollment number shall be submitted to the Corrections Department through the institutional Chaplain or Deputy Warden for Programs, or through the Native American Programs Coordinator. Documentation of Native American Heritage in the form of Evidence in Lieu of Valid Tribal Census or Enrollment Number shall be submitted to the Corrections Department through the Native American Programs Coordinator.

I. Participation:

Participation in Native American Religious Programs shall be restricted to Native Americans inmates who have submitted satisfactory and sufficient Documentation of Native American Heritage to the Corrections Department, in accordance with the provisions of Corrections Department Policy CD-101100 and these Procedures.

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J. Sweat Lodge:

1. Custody Level I, II, III and IV: Native American inmates who are classified as Custody Level I, II, III or IV and who are housed at a correctional facility that is designated Custody Level I, II, II or IV will normally have access to the Sweat Lodge for participation in group or congregate Native American Religious Programs on a regular weekly basis, for at least six consecutive hours.
2. Custody Level IV and V: Native American inmates who are classified Custody Level V or VI, or who are housed at a correctional institution designated as Security level V or VI, will normally not be allowed access to the Sweat Lodge for participation in group or congregate Native American Religious Programs.
3. However, Native American inmates who are classified Custody Level V or VI may be allowed to participate in group or congregate Native American Religious Programs in the Sweat Lodge to the extent allowed by Corrections Department policy (CD-143000) regarding Level V and Level VI inmates.
4. Further, such inmates may be provided with access to a Native American Spiritual Advisor, on an individual basis, with the spiritual advisor providing any materials needed if approved by the Warden.

K. Congregate Religious Items (Including Sweat Lodge):

1. Sweat Lodge ceremonies are generally conducted on a weekly basis in a correctional setting. Inmates, Inmate Spiritual Leaders, Native American Spiritual Advisors, the Native American Program Coordinator and any other visitors participating in sweat ceremonies are required to wear appropriate outerwear such as shorts.
2. A secure storage place will be provided by the institution within the Sweat Lodge for the storage of Congregate Religious Items in a manner consistent with the reasonable security needs of the institution. In the alternative, pending the preparation of a secure storage place within the Sweat Lodge, Congregate Religious Items may be stored in the Chapel. Congregate Religious Items must be readily accessible and available for use in Native American Religious Programs whenever such programs are scheduled.
3. When not otherwise in use, ceremonial instruments such as feathers, pipe, water drum, rattle and staff shall ordinarily be secured in the storage facility located in the Sweat Lodge.

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4. The Native American Spiritual Advisor, the institutional Chaplain, the institutional Deputy Warden for Programs (where appropriate) and the Inmate Spiritual Leaders shall coordinate efforts to assure that an adequate supply of herbs and other materials such as cedar, sage, sweet grass, corn pollen, and corn husks is at all times on hand in the storage facility located in the Sweat Lodge.
5. The Native American Spiritual Advisor or institution's chaplain, the institution's Deputy Warden for Programs (where appropriate) and the Inmate Spiritual Leaders shall coordinate efforts to assure that an adequate supply of lava rocks, kindling and chopped wood is at all times on hand. Similarly, each institution shall arrange for a convenient source of water for dousing the heated rocks during Sweat Lodge.
6. Each institution shall provide and properly maintain a portable chemical toilet for the use of Native American Religious Programs participants, which portable chemical toilet shall be set up within or immediately adjacent to the Sweat Lodge.
7. Native American inmates will be periodically allowed access to the Sweat Lodge to remove ashes, weeds and other debris.
8. The grounds in and around the Sweat Lodge have been blessed and consecrated through ritual and ceremony. At each correctional facility, the grounds of the Sweat Lodge should be treated with the same respect accorded to the Chapel. The grounds should be fenced and secured so as to prevent casual entry by non-Native Americans. Further, if correctional staff is required to enter the grounds in accordance with the reasonable security needs of the facility, they should proceed respectfully and refrain from attempting to enter the lodge itself.
9. Because of the large variety of tribal beliefs and traditions represented in the inmate population, it is difficult to anticipate all the issues, questions and concerns that that could arise. Accordingly, all questions concerning the status of an item as a "Congregate Religious Item" (meaning its legitimacy, authenticity, permissibility, appropriateness, or proper care, etc.) shall, in accordance with Policy CD-101100 and this Procedure, be referred to the Native American Programs Coordinator who shall review and resolve such questions and make appropriate dispositions thereof.

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L. Spiritual Advisors:

1. Qualifications: All Native American Spiritual Advisors will provide written and/or oral proof of knowledge and training to the Corrections Department. It will be the responsibility of the Native American Programs Coordinator, in cooperation with the institutional Chaplain, to verify and authenticate such information.
2. Background Check: All Native American Spiritual Advisors will be required to have an NCIC background check.
3. Orientation: Native American Spiritual Advisors and any assistants will be required to attend the mandatory orientation for all volunteers.
4. Status: Native American Spiritual Advisors shall be afforded the same status as the clergy of any other recognized religion, and should receive the same professional courtesy and access to inmates that is afforded to ordained clergy. When Native American Spiritual Advisors visit the institution, they will generally have a number of sacred religious items with them. These sacred articles, such as a medicine bundle and small drum, to name a few, should ordinarily not be handled by staff. The sanctity of the religious articles is honored in the same way one honors the sanctity of sacred objects in any house of worship. It is recommended that they be visually inspected. Botanicals may be tested. In order to expedite entrance procedures, Chaplains are encouraged to request in writing approval from security to allow the Chaplain to visually inspect the sacred items. Advance notice of appropriate inspection procedures will be given to the Spiritual Advisor.
5. Inspection of Native American Spiritual Advisor's Sacred Bundle: The Native American Programs Coordinator and the Chaplains are encouraged to request approval from security ahead of time for them to visually inspect, in the front lobby of the institution, the sacred items carried by a Native American Spiritual Advisor. The security concerns of the institution will dictate, however, whether or not the sacred items need to be x-rayed.

M. Spiritual Leaders:

If the congregation of Native American Religion practitioners at a particular institution has organized itself formally as a club with articles and bylaws, then Inmate Spiritual Leaders shall be those qualified persons who have been elected as Spiritual Leaders in accordance with the provisions of the club's articles and bylaws.

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N. Authorization, Approval and Inspection of Personal Religious Items:

1. Authorization: A Native American inmate may possess Personal Religious Items (Medicine Pouch or Bag, and Medicine Bundle) as defined in Corrections Department Policy CD-101100, and as further provided in this Procedure.
2. Approved Request: A Native American inmate who desires to carry his/her Medicine Pouch or Bag, and/or to keep a Medicine Bundle in his/her cell shall have in his/her possession, at all times, an approved written "Request for Personal Religious Items" (in the form attached hereto), signed by the Native American Programs Coordinator or the institution's chaplain, and the institution's Deputy Warden of Programs.
3. Custodian: The contents of a Medicine Pouch/Bag or Medicine Bundle have great spiritual significance. They have been carefully selected and blessed through ritual and ceremony for the specific use and benefit of the particular individual who is their "custodian".

In summary, a Medicine Pouch/Bag or Medicine Bundle will be desecrated if:

- a. it is opened without the Custodian's (the wearer's or carrier's) permission
 - b. it is touched by anyone other than an Elder or its Custodian
 - c. it is touched or viewed by a female correctional officer, female duty officer or shift commander.
4. In a male institution the search of Medicine Pouches/Bags and Medicine Bundles shall be conducted, as follows:
- a. A male shift commander or duty officer shall conduct any search of Medicine Pouches/Bags or Medicine Bundles.
 - b. The male shift commander or duty officer shall not open the Pouch/Bag or Bundle or rifle through its contents.
 - c. Rather, the male shift commander or duty officer shall ask the Custodian to open his/her Pouch/Bag or Bundle and allow the officer to view its contents without touching them.

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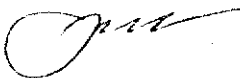
- d. During this visual inspection, the male shift commander or duty officer shall have the custodian use a metal rod to probe the pouch/bag to ensure that there isn't any contraband contained within, if the male shift commander or duty officer determines that the Pouch/Bag or Bundle contains some item of contraband; the male shift commander or duty officer shall have the Custodian close and secure the Pouch/Bag or Bundle, and deliver it over to the male shift commander or duty officer. The male shift commander or duty officer shall deliver it promptly and directly to the Native American Programs Coordinator for disposition in accordance with the further provisions of Policy CD-101100 and this Procedure.
5. In the female institution, only a female shaman may inspect the pouch/bag or bundle.
6. Because of the large variety of tribal beliefs and traditions represented in the inmate population, it is difficult to anticipate all the issues, questions and concerns that that could arise. Accordingly, all questions concerning the status of an item as a "Personal Religious Item" (meaning its legitimacy, authenticity, permissibility, appropriateness, or proper care, etc.) shall, in accordance with Policy CD-101100 and this Procedure, be referred to the Native American Programs Coordinator who shall review and resolve such questions and make appropriate recommendations.

O. Sacred Pipes and Tobacco:

Many Native American practitioners incorporate the use of tobacco and the Sacred Pipe into their prayer rituals. While it is possible for a practitioner to keep his/her personal pipe in his/her cell, and to keep a small amount of tobacco in his/her Medicine Pouch/Bag or Spiritual Bundle, the lighting of pipes and smoking of tobacco is not permitted in housing units. Accordingly, the lighting of pipes and smoking of tobacco is restricted to the Sweat Lodge or to other specially designated areas.

P. Hair Length:

No Native American shall be required to cut his hair if so doing would conflict with the religious exercise of his sincerely held traditional Native American religious beliefs after he has requested and is granted a hair exemption, based on religious considerations, from the Chaplain, Unit Manager, and Deputy Warden.



Joe R. Williams, Secretary of Corrections
New Mexico Corrections Department

01/04/07

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JIMMY KINSLOW,
Plaintiff,

vs.

No. CIV-07-1164 MV/RLP

NEW MEXICO CORRECTIONS DEPT., etal,
Defendants.

AFFIDAVIT OF JIMMY KINSLOW

The undersigned, Jimmy Kinslow, under the penalties for perjury set forth under 28 U.S.C. § 1746, hereby states as follows:

1. I am the plaintiff in this case, I am over the age of 21, and the facts set forth herein are known to me personally and I could competently testify to these facts were I to be called as a witness at the hearing for my motion for preliminary injunction, for which I make this affidavit.

2. That I am a Native American prisoner confined at the Southern New Mexico Correctional Facility at Las Cruces, New Mexico.

3. That for the entire time I spent in Ad. Seg. status at SNMCF, between November 4, 2004 until January 23, 2007, I was never allowed to have access to the Sweat Lodge in order to practice my religion.

4. That due to the no smoking policy, the Sweat Lodge is the only place I can perform the rituals and ceremonies essential to the practice of my Native American religion.

5. That from January 23, 2007 until July 27, 2007 after my release to Level III General Population that I was denied access to the Sweat Lodge in order to freely practice my sincere religious beliefs.

6. That from July 27, 2007 to January 18, 2008, that I have only been allowed access to the sweat lodge seven (7) times, or once a month, when by state law and NMCD Policy I am eligible for and entitled to weekly access for six consecutive hours.

7. That for every time I am given access to the Sweat Lodge for these seven times I am denied sufficient quantities of the Sacred Plant Tobacco needed in order to conduct Prayer Pipe Ceremonies, Sweat Lodge Ceremonies and to make sufficient Prayer Pipes.

8. That Tobacco is a Sacred Plant, absolutely necessary to conduct Potawatomi Prayers and ceremonies, it is irreplaceable, and without it my Prayers cannot be carried into the Spirit World.

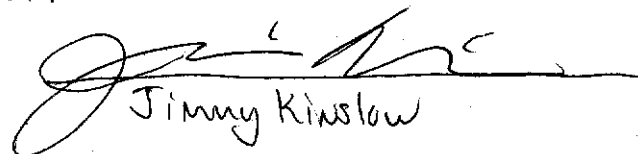
9. That I am only requesting sufficient quantities of the Sacred Plant Tobacco (between 1/2 oz to 1 oz) for use at the Sweat Lodge, not to be brought back to the Unit.

10. That monthly access to the Sweat Lodge is completely inadequate to meet my sincere religious needs to Pray and commune with the Creator.

11. That all my attempts to resolve this issue by grievances and letters to defendants has failed, and I am still denied weekly access to the Sweat Lodge and denied the necessary quantities needed in order to conduct my religious ceremonies when I am allowed to go once a month.

12. My spiritual development is being seriously curtailed and stunted with only monthly access to the only place I can conduct prayers.

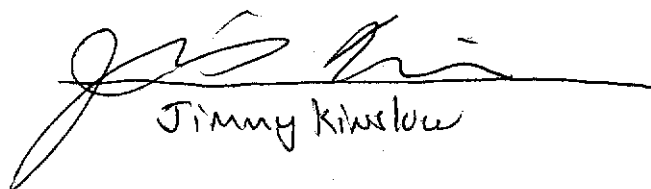
FURTHER AFFIANT SAYETH NOT.


Jimmy Kinslow

CERTIFICATION

Under the penalty for perjury established under 28 U.S.C. § 1746, I certify that the foregoing is true and correct.

DATED: January 22, 2008.

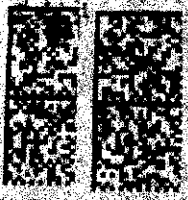

Jimmy Kinslow

Jimmy Kioslow #22363
SNMCF, Unit 2BD-109
P.O. Box 639
Las Cruces, NM 88004-0639

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At Albuquerque NM
JAN 28 2008
MATTHEW J. DYKMAN
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