

**COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION  
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**EXAMINATION OF THE UNITED STATES 7TH, 8TH AND 9TH PERIODIC  
REPORTS OF JUNE 2013**

**ALTERNATIVE REPORT REGARDING RACIAL DISCRIMINATION BY THE  
UNITED STATES CRIMINAL JUSTICE SYSTEM AGAINST INDIGENOUS  
PEOPLES IN THE UNITED STATES AND THE CASE OF LEONARD PELTIER**

Submitted jointly by the International Leonard Peltier Defense Committee,\* International Indian Treaty Council,\*\* Indigenous World Association,\*\*\* National Native American Prisoners Rights Coalition, Native Village of Chickaloon Chief Gary Harrison and Na Koa Ikaika Ka Lahui Hawaii

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\*Established in 2013, the International Leonard Peltier Defense Committee (formerly the Leonard Peltier Defense Offense Committee) engages in public education, media relations and political advocacy on behalf of Leonard Peltier as well for as reform of the US criminal justice system and abolishment of the death penalty

\*\* IITC is an Indigenous Peoples Non-Governmental Organization in General Consultative Status to the UN Economic and Social Council. See attached for a list of IITC affiliated Tribal Nations, governments, organizations, Networks, Organizations, societies and communities based in the United States

\*\*\* IWA is an Indigenous Peoples Non-Governmental Organization in Special Consultative Status with the UN Economic and Social Council

## **I. Executive Summary**

There are more than 560 federally-recognized American Indian Tribes in the United States and an American Indian/Alaska Native population of approximately 4 million persons. About half of this population lives on reservations and the others live off-reservation, primarily in urban areas.

As a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the United States of America must undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, including Indigenous Peoples, to equality before the law. The violations addressed in this report are particularly relevant to the specific rights affirmed in ICERD Article 5 (a), (b) (d) vii and (e) 5.

Prohibitions against discrimination are also contained in the United Nations (UN) Declaration on the Rights of Indigenous Peoples and the International Covenant on Civil and Political Rights (ICCPR).

The Fourteenth Amendment to the United States Constitution addresses equal protection of the laws and limits the actions of state and local officials, as well as those acting on their behalf. The amendment includes the Due Process and Equal Protection Clauses. The Due Process Clause prohibits state and local government officials from depriving persons of life, liberty, or property without legislative authorization. This clause has also been used by the federal judiciary to make most of the Bill of Rights applicable to the states, as well as to recognize substantive and procedural requirements that state laws must satisfy. The Equal Protection Clause requires each state to provide equal protection under the law to all people within its jurisdiction.

Despite such protections, available data on victimization, prosecution, sentencing and imprisonment in the U.S. shows continuing discriminatory disparities between Indigenous Peoples and people of other races, colors, and national or ethnic origins.

Indigenous Peoples in the United States (American Indians/Native Americans, Hawaiian Natives and Alaska Natives) endure the highest incarceration rate of any racial or ethnic group, 38 percent higher than the overall national rate. Available statistics indicate that rates for Native youth are even higher. In addition, American Indians/Native Americans, Hawaiian Natives and Alaska Natives receive proportionately higher sentences for the same crimes, and are consistently denied equality of freedom of religious and spiritual practice while incarcerated.

The case of Leonard Peltier — incarcerated since 1976 in relation to the deaths of two Federal Bureau of Investigation (FBI) agents during a shoot-out on the Pine Ridge Indian Reservation in South Dakota, U.S.A — is a glaring example of such discrimination. It demonstrates the failure of the US criminal justice system to provide real justice for Native Peoples as well as the government-generated environment of racism that consistently leads to unjust convictions.

This Alternative Report contains extensive information and documentation regarding gross and continuing racial discrimination, injustice and human rights violations suffered by Indigenous Peoples of the United States in violation of the ICERD, in particular Article 5. The co-submitters recommend that the Committee, in its Concluding Observations, call upon the U.S. to

take effective measures to address these violations of the ICERD. In particular we offer the following requests and recommendations:

1. That the CERD question the United States on the gross disparities presented in this report , and recommend that it take effective measures to remedy the disproportionate rates of incarceration, sentencing as well as the lack of disaggregated data regarding the incarceration of Native Americans at the state and federal levels.
2. That CERD question the United States about the continued 39-year imprisonment of Leonard Peltier, particularly regarding denials of a new trial and unjustified denials of parole, and recommend that he be granted clemency as a demonstration of good faith, justice and reconciliation with Native Peoples in that country.

## II. Examples of Racial Discrimination Against Indigenous Peoples (American Indians/Native Americans, Hawaiian Natives and Alaska Natives) by the Criminal Justice System in the United States

### A. Victimization

Indian reservations across the United States have grappled for years with chronic rates of crime, higher than all but a handful of the most violent cities in the U.S. The country's 310 Indian reservations have violent crime rates that are more than two and a half times higher than the national average, according to data compiled by the U.S. Justice Department.

**TABLE 7**  
Rate of violent victimization, by demographic characteristics of victims, 2003, 2011, and 2012

Demographic characteristics of victims	Violent crime <sup>a</sup>			Serious violent crime <sup>b</sup>		
	2003	2011	2012	2003	2011	2012
Total	32.1	22.6	26.1	10.0	7.2	8.0
Sex						
Male	34.6	25.5	29.1	10.2	7.7	9.4
Female	29.7	19.8	23.3	9.9	6.7	6.6
Race/Hispanic origin						
White <sup>c</sup>	32.3	21.6	25.2	9.4	6.5	6.8
Black/African American <sup>c</sup>	35.9	26.4	34.2 ‡	12.8	10.8	11.3
Hispanic/Latino	26.6	23.9	24.5	9.7	7.2	9.3
American Indian/Alaska Native <sup>c</sup>	85.2	45.4	46.9	35.2	12.6!	26.2!
Asian/Native Hawaiian/other Pacific Islander <sup>c</sup>	9.9	11.2	16.4	5.1	2.5!	9.1 †
Two or more races <sup>c</sup>	140.7	65.0	42.8	47.8	26.2	9.5! †
Age						
12–17	78.3	37.7	48.4 ‡	22.7	8.8	9.9
18–24	63.8	49.1	41.0	23.7	16.3	14.7
25–34	39.0	26.5	34.2 ‡	11.9	9.6	10.9
35–49	23.1	21.9	29.1 †	7.1	7.0	9.5
50–64	16.3	13.1	15.0	4.2	4.3	4.6
65 or older	3.1	4.4	5.7	0.9	1.7	1.6
Marital status						
Never married	57.7	35.5	40.7	18.2	11.7	11.9
Married	14.2	11.0	13.5	3.2	3.7	3.9
Widowed	7.8	3.8	8.3 †	1.2	0.7!	2.6 ‡
Divorced	44.6	37.8	37.0	17.0	9.2	10.9
Separated	100.9	73.0	83.1	47.8	26.4	39.5

Note: Victimization rates per 1,000 persons age 12 or older. See appendix table 11 for standard errors.

† Significant change from 2011 to 2012 at the 95% confidence level.

‡ Significant change from 2011 to 2012 at the 90% confidence level.

! Interpret with caution. Estimate based on 10 or fewer sample cases, or coefficient of variation is greater than 50%.

<sup>a</sup>Includes rape or sexual assault, robbery, aggravated assault, and simple assault.

<sup>b</sup>Includes rape or sexual assault, robbery, and aggravated assault.

<sup>c</sup>Excludes persons of Hispanic or Latino origin.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 2003, 2011, and 2012.

According to the Bureau of Justice Statistics (BJS), U.S. Justice Department, rates of violent victimization for both males and females are higher for Native Americans than for all other races. One root cause of this violent crime rate is a justice system that forces tribal governments to rely on distant federal — and in some cases, state — officials to investigate and prosecute serious crimes, in general, and most of those committed by non-Indians, in particular. Outside law enforcement has simply proven ineffective and in many cases discriminatory and racist.

## ***B. Hate Crimes***

It is difficult to determine whether the actual number of hate crimes carried out against Native Americans is increasing or decreasing in the United States due to lack of disaggregated data and consistent underreporting. According to FBI statistics for 2009, the most recent year for which full data has been released, the number of hate crimes reported by state and local law enforcement agencies to the FBI was down slightly in 2009 from 2008. But hate crimes are notoriously under-reported, which makes small changes in statistics a less than reliable indicator.

In addition to reluctance by many victims to report hate crimes, some law enforcement agencies do not report crime data at all to the FBI, or do not effectively report separately on hate crimes. Hate crimes are defined differently from state to state, which also affects reporting to the FBI. Finally, because a hate crime by definition involves a conclusion as to the motive of the perpetrator, many crimes in which the perpetrator cannot be found, or his motive cannot be established based on the facts of the incident itself, are not reported as hate crimes. What seems certain is that assaults motivated by hatred and racism are often more violent and more likely to result in serious injury to the victim than other types of assaults.

During his six-year term on the U.S. Civil Rights Commission, Chairman Arlan Melendez of the Reno Sparks Indian Colony saw more than his share of racism, discrimination and hate crimes against Native Americans. “We know from hearings in Montana, New Mexico and South Dakota that hate crimes are continuing to happen against Native Americans, mostly in border towns near our reservations,” he said.

Melendez cited a 2011 report developed by the U.S. Civil Rights Commission that compiled testimony about hate crimes from hundreds of American Indians.<sup>1</sup> The report followed up on the 2005 U.S. Department of Justice report that showed the overall violent crime rate among American Indians and Alaska Natives was 100 per 1,000 persons, meaning that one out of 10 American Indians has been a victim of violence. The study also found that “American Indians are more likely than people of other races to experience violence at the hands of someone of a different race,” with 70 percent of reported violent attacks committed by non-Indians.

A large-scale study of hate crimes conducted by Barbara Perry in 2008, University of Ontario, indicated that only 10 percent of hate crimes against Natives are reported to law enforcement authorities. She conducted interviews with nearly 300 American Indians in border towns, with a special focus on the Four Corners region of the U.S. Southwest, the Great Lakes, and the Northern Plains. In all of these locales, she found that bias-related crime oppresses and

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<sup>1</sup> "Discrimination Against Native Americans in Border Towns," U.S. Commission on Civil Rights. 22 March 2011. [http://www.usccr.gov/pubs/BorderTowns\\_03-22-11.pdf](http://www.usccr.gov/pubs/BorderTowns_03-22-11.pdf).

segregates Native Americans. She also found that the low reporting rate was largely due to “historical and contemporary experience with the police, and the perception they do not take Native American victimization seriously.”<sup>2</sup>

In her 2007 book “Anti-Indianism in Modern America,” Native American Studies professor Elizabeth Cook-Lynn said, “There has been little attempt by legal authorities or anyone else to understand the phenomenon of racially motivated violence in these communities. The first step is to acknowledge that anti-Indian hate crime is America’s essential cancer and that it is a mortal illness, as devastating as anti-Semitism has been to other parts of the world.”<sup>3</sup>

### ***C. Racial Profiling***

The U.S. Supreme Court has held that racial profiling violates the constitutional requirement that all persons be accorded equal protection of the law. “Racial Profiling” refers to the discriminatory practice by law enforcement officials of targeting individuals for suspicion of crime based on the individual’s race, ethnicity, religion or national origin. Criminal profiling, generally, as practiced by police, is the reliance on a group of characteristics they believe to be associated with crime. Examples of racial profiling are the use of race to determine which drivers to stop for minor traffic violations or the use of race to determine which pedestrians to search for illegal contraband.

Any definition of racial profiling must include, in addition to racially or ethnically discriminatory acts, “discriminatory omissions” on the part of law enforcement i.e., failure to enforce laws and to protect and serve Indigenous Peoples.

Empirical evidence confirms the existence of racial profiling on America’s roadways. At the national level, the U.S. Department of Justice’s BJS reports that for the year 2005, the most recent data available, “[p]olice actions taken during a traffic stops were not uniform across racial and ethnic categories.”<sup>4</sup>

Indigenous Peoples refer to “DWI” or “Driving While Indian” and often complain about stops and searches by local police and sheriffs on roads leading to and from reservations. In South Dakota, widespread reports of racial profiling led to hearings before the state legislature, where Indians testified about their being stopped and searched not only based on race, but also on religious articles hanging from rearview mirrors and regional license plates that identified them as living on reservations.<sup>5</sup>

### ***D. Violence Against Indigenous Women***

Violence against Native women has reached epidemic proportions in the U.S. Indigenous

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<sup>2</sup> Silent Victims: Hate Crimes Against Native Americans, Barbara Perry, published by University of Arizona Press, 2008

<sup>3</sup> Taliman, Valerie. "Natives Targeted Most for Hate Crimes," Indian Country Today. 27 June 2011.

<sup>4</sup> “Contacts Between Police and the Public, 2005,” U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Special Report, <http://bjs.ojp.usdoj.gov/content/pub/ascii/cpp05.txt>.

<sup>5</sup> Racial Profiling: Definition, American Civil Liberties Union, November 23, 2005

women are 10 times more likely to be murdered than other Americans, for example. They are raped or sexually assaulted at a rate four times the national average, with more than one in three having either been raped or experienced an attempted rape. <sup>6</sup>

Reauthorization of the Violence Against Women Act in 2013 recognized that the U.S. has a federal trust responsibility to assist Tribal governments in safeguarding the lives of Indian women. While the legislation broadened Nation's jurisdiction as regards non-Indian offenders, it only permits tribal jurisdiction over non-Indians with significant connections to the tribal community and only over a tightly defined set of crimes: domestic violence, dating violence, and violations of enforceable protection orders.

<b>Key Statistics on Victimization: Indigenous Women <sup>7</sup></b>
<ul style="list-style-type: none"> <li>• 61% of American Indian and Alaska Native women (or 3 out of 5) have been assaulted in their lifetimes *</li> <li>• 34% of American Indian and Alaska Native women will be raped in their lifetimes *</li> <li>• 39% of American Indian and Alaska Native women will be subjected to violence by an intimate partner in their lifetimes **</li> <li>• 59% of assaults against Native women occur at or near a private residence ***</li> <li>• 59% of American Indian women in 2010 were married to non-Native men ****</li> <li>• 46% of people living on reservations in 2010 were non-Natives (single race) ****</li> <li>• U.S. Attorneys declined to prosecute nearly 52% of violent crimes that occur in Indian country; and 67% of cases declined were sexual abuse related cases *****</li> <li>• On some reservations, Native women are murdered at more than ten times the national average *****</li> </ul>
<p>* Tjaden, P., &amp; Thoennes, N. (2000). Findings from the National Violence against Women Survey.</p> <p>** Centers for Disease Control. (2008). Adverse health conditions and health risk behaviors associated with intimate partner violence.</p> <p>*** Bachman, R., et al. (2008). Violence against American Indian and Alaska Native women and the criminal justice response: What is known.</p> <p>**** U.S. Census Bureau, Census 2010.</p> <p>***** U.S. Government Accountability Office. (2010). U.S. Department of Justice Declinations of Indian Country Criminal Matters.</p> <p>***** Statement of Associate Attorney General Perrelli before the Committee on Indian Affairs on Violence Against Native American Women citing a National Institute of Justice Funded Analysis of Death Certificates. (July 14, 2011).</p>

### ***E. Discrimination in Prosecutions on Behalf of Indigenous Victims***

According to a 2003 study commissioned by the U.S. Sentencing Commission, Indian offenses amount to less than 5 percent of the overall federal caseload, but constitute a significant portion of the violent crime in federal court. "Over 80 percent of manslaughter cases and over 60

<sup>6</sup> National Congress of American Indians Policy Research Center. Policy Insights Brief: Statistics on Violence Against Native Women.

February 2013.

<sup>7</sup> Ibid.

percent of sexual abuse cases arise from Indian jurisdiction and nearly half of all the murders and assaults arise from Indian jurisdiction," said the report.

The question of whether or not to charge individuals who commit violent crimes against Indigenous Peoples is left to the discretion of prosecutors. Federal data show an alarming pattern of "discriminatory omission" on the part of U.S. Attorneys:

- The U.S. Justice Department, which along with agents of the FBI generally have jurisdiction for the most serious crimes on reservations, files charges in only about half of Indian Country murder investigations.
- Federal data also show that U.S. Attorneys turn down nearly two-thirds of sexual assault cases on reservations.
- In 2011, federal prosecutors in the U.S. declined to file charges in 52 percent of cases involving the most serious crimes committed on Indian reservations.<sup>8</sup>

In another example of blatant discrimination carried out under U.S. federal law, Alaska, with an official 16% Native population was alone among the U.S. states to be exempted from the provisions of the Tribal Law and Order Act as well as the Violence Against Women Reauthorization Act of 2013.<sup>9</sup> This is despite the fact that according to a survey by the Alaska Federation of Native the rate of sexual violence in rural villages in Alaska is as much as 12 times the national rate.<sup>10</sup>

#### ***F. Lack of Equal Access to Justice Indigenous Defendants***

In 1883, the U.S. Supreme Court ruled that the Dakota Territory court had no jurisdiction in a case in which a member of the Lakota nation killed a fellow member on tribal land. The decision overturned a death sentence and effectively gave exclusive jurisdiction for crimes to tribes. Congress, uncomfortable with the decision, passed the Major Crimes Act in 1885, taking away the tribes' authority; serious crimes committed by Indians on reservations could be prosecuted only by the federal government.

Today, criminal jurisdiction on Indian reservations is allocated among federal, state and tribal courts. Jurisdiction over particular cases depends in general upon three factors: the nature of the offense, whether any jurisdiction has been conferred on the state, and whether the perpetrator or victim is an Indian.

The right of defendants to legal counsel is guaranteed by the U.S. Constitution. But due to a little-known quirk in federal law, Native Americans aren't assured this protection. That's because under U.S. law, tribes are considered sovereign nations and are not subject to all

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<sup>8</sup> Williams, Timothy. "Higher Crime, Fewer Charges on Indian Land" New York Times, 20 Feb 2012. <http://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html?pagewanted=all&r=0>.

<sup>9</sup> Although Alaska has 229 of the 566 federally recognized tribes in the US, in 1971 the US Government passed the Alaska Native Claims Settlement Act under which State-chartered "Native corporations" hold legal title to most Native lands in Alaska, rather than the federally-recognized Indian Nations or Alaska Native villages).

<sup>10</sup> "For Native American Women, Scourge of Rape, Rare Justice" New York Times, May 22, 2012.

privileges afforded by the Bill of Rights.

In creating the Indian Civil Rights Act of 1968, Congress gave individual tribal members some protections, such as the right to a speedy trial and the right to a trial by jury. But it didn't provide the right to counsel for defendants too poor to hire attorneys. Under the recently signed Tribal Law and Order Act, the right to counsel is largely left to the discretion of tribes.

Without an absolute right to legal counsel, the likelihood that accused persons prosecuted in tribal court will represent themselves is increased and many defendants may plead guilty and thereby unknowingly risk exposure to additional charges at the federal and state levels. In some instances, they may be subject to two trials, sentences and punishments for the same crime.

Unlike elsewhere in the U.S., in Indian Country, charging a defendant in both federal and tribal court is not a violation of Double Jeopardy. The U.S. Supreme Court has held that the source of the power to punish offenders is an inherent part of tribal sovereignty and not a grant of federal power. Consequently, when two prosecutions are by separate sovereigns (the Navajo Nation and the United States, for example), the subsequent federal prosecution does not violate the defendant's right against double jeopardy (*United States v. Wheeler*, 435 U.S. 313. 1978).<sup>11</sup>

This current jurisdiction scheme makes distinctions based on the race of the defendant and is a form of racial discrimination as defined by Article 1(1) of the Convention.

### ***G. Racial Disparities in Sentencing***

Due to the criminal jurisdictional scheme in Indian country, Indian offenders of major crimes are prosecuted in federal court, under the Major Crimes Act, and subject to the federal Sentencing Guidelines. If non-Indian offenders commit the same crime they are typically subject to prosecution and sentencing by the state authorities in state court. This differing sentencing scheme for Indians versus non-Indians has a disparate impact on Native American defendants, as state criminal sentences are typically lower than federal criminal sentences.<sup>12</sup>

Native Americans who end up being prosecuted for serious crimes face a federal system that has become tougher in recent years. Since the 1980s, Congress has been toughening federal penalties by adding mandatory minimum sentences — often more severe than those handed out by states.

As a result, American Indians, especially the million or so living on tribal land, can face harsher punishments than non-Indians for what are effectively local crimes. And there is no parole in the federal system, so defendants there must serve a minimum of 85 percent of a sentence. The result is there are situations where tribal members have served life sentences in the federal system when the crimes they committed would have resulted in as little as two-and-a half-years served had they occurred in state jurisdiction.

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<sup>11</sup> Tribal Law and Policy Institute. General Guide to Criminal Jurisdiction in Indian Country. <http://www.tribal-institute.org/lists/jurisdiction.htm>

<sup>12</sup> *United States v. Jerry Paul*, 929 F. Supp. 1406, 1407-1408 (D.N.M. 1996).

A study by the Office of Hawaiian Affairs commissioned by the Hawaiian Legislature in 2008 showed “the disproportionate representation of Native Hawaiians in the criminal justice system accumulates at each stage...[and] that Native Hawaiians are sentenced to more days in prison and received a longer term of probation than most other racial or ethnic groups.”<sup>13</sup>

Incarceration and sentencing disparities violate Indian defendants’ “right to equal treatment before the tribunals and all other organs administering justice of the laws,” pursuant to Article 5(a) of the Convention. Indian defendants typically receive longer sentences under the Federal Sentencing Guidelines than a non-Indian would receive in state court for the same crimes.

#### ***H. Racial Disparities in Rates of Imprisonment***

**Native peoples in the United States endure the highest incarceration rate of any racial or ethnic group -- 38 percent higher than the national rate.**<sup>14</sup>

Currently, there are over 4,000 American Indians serving time in the federal prison system. That is more, proportionately, than any other racial group. According to census and Federal Bureau of Prisons (BOP) data, tribal members living on reservations are incarcerated at a rate of more than 249 per 100,000 residents. The next group is African-Americans, who are imprisoned at a rate of 198 per 100,000.

Available data show that especially in U.S. states with relatively large Indian populations, American Indians, Alaska Natives and Hawaiian Natives are incarcerated disproportionately to their representation in the population. For example:

- Alaska Natives comprise about 15 percent of the state’s population (according to the 2010 U.S. Census). However, 36 percent of the offender population in 2011 was Alaska Native.<sup>15</sup>
- A report by the Hawaii Advisory Committee to the United States Commission on Civil Rights, based on information and testimony received from numerous sources including officials of the state criminal justice system, concluded that although Native Hawaiians are approximately 20 percent of the state’s population, they comprise more than 40 percent of the state’s prison population.<sup>16</sup>
- Native Americans comprise 7 percent of the total population in Oklahoma (according to the 2010 U.S. Census). At the end of 2012, there were 24,546 adult offenders who were incarcerated that state. Native Americans accounted for nearly 10 percent of the total prison population.<sup>17</sup>

#### ***I. Disproportionate Rates of Juvenile Confinement***

Native American juveniles represent 2 to 3 percent of youth arrests in categories such as theft

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<sup>13</sup> S.B. 986 26<sup>th</sup> Legis. 2011, Regs. Sess. Haw. 2011.

<sup>14</sup> Indian Country Today, May 29, 2014, “Defending the Religious Rights of Native Prisoners, Gabriel Galinda

<sup>15</sup> “Alaska Correctional Populations 2011,” Alaska Justice Forum 29(3-4), Fall 2012/Winter 2013.

<sup>16</sup> “Is There an Uneven Administration of Justice of Native Hawaiians in Hawai’i?”, A report of the Hawaii Advisory Committee to the United States Commission on Civil Rights, September, 2011

<sup>17</sup> Executive Communications Office. Oklahoma Department of Corrections 2013 Annual Report. 2013.

and alcohol possession. Similarly, they are committed to adult incarceration at a rate 1.84 times that of whites and are placed under the jurisdiction of the criminal justice system at a rate 2.4 times that of whites. In four states with substantial Native American populations, they represent from 29 to 42 percent of juveniles held in secure confinement. While at first glance these numbers are bad enough, what makes them even harsher is the fact that the Native American population is a relatively young one: according to the Indian Health Service, in 2008 the median age of the Native American population was 28.0 years versus 35.3 years for the U.S. population as a whole. As a result, these issues impact a relatively larger portion of the total Native American population<sup>18</sup>

American Indian youth are grossly over-represented in state and federal juvenile justice systems and secure confinement. Incarcerated Indian youth are much more likely to be subjected to the harshest treatment in the most restrictive environments and less likely to have received the help they need from other systems. American Indian/Alaska Native youth are 50 percent more likely than whites to receive the most punitive measures. Pepper spray, restraint and isolation appear to be grossly and disproportionately applied to Indian youth, who have no recourse, no alternatives and few advocates.<sup>19</sup>

Once again, challenges in obtaining disaggregated data make accurate assessment of disparities difficult. But data that does exist suggest similar, and in some areas, far greater disparities for Native America youth than for adults.

In 26 states, Native American youth are disproportionately placed in secure confinement in comparison to their population. For example, in four states (South Dakota, Alaska, North Dakota, Montana), Native youth account for anywhere from 29 to 42 percent of youth in secure confinement. Nationwide, the average rate of new commitments to adult state prison for Native American youth is almost twice (1.84 times) that the rate for White youth. In the states with enough Native Americans to facilitate comparisons, Native American youth were committed to adult prison from 1.3 to 18.1 times the rate of Whites.<sup>20</sup>

In testimony to the Hawaii Advisory Committee to the United States Commission on Civil Rights in 2011, Meda Chasney-Lind (professor of criminology at the University of Hawaii in Manoa) reported that 58 percent of boys and 49 percent of girls housed at Hawaii's only juvenile justice center are Native Hawaiian (the total Native population of Hawaii is between 6 and 20 percent depending on definition).<sup>21</sup>

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<sup>18</sup> Winters, Robert. "The Quiet Crisis in Native American Juvenile Justice," The Corrections Connection. June 2014. <http://www.corrections.com/news/article/36513-the-quiet-crisis-in-native-american-juvenile-justice>.

<sup>19</sup> Cross, Terry L. "Native Americans and Juvenile Justice: A Hidden Tragedy," Poverty & Race, November/December 2008.

<sup>20</sup> Ibid.

<sup>21</sup> "Is There an Uneven Administration of Justice of Native Hawaiians in Hawai'i?", A report of the Hawaii Advisory Committee to the United States Commission on Civil Rights, September 2011.

prisoners across the country and has testified on numerous occasions before Congress and the United Nations addressing the rights of Native American prisoners.

In 2010, Mr. Foster was an invited expert presenter at the United Nations Permanent Forum on Indigenous Issues (UNPFII) International Expert Group Meeting (EGM) on Indigenous Children and Youth in Detention, Custody, Foster-Care and Adoption March 4 -5, 2010, British Columbia, Canada. The report of the EGM [E/C.19/2010/CRP. 8], presented to the 9<sup>th</sup> session of the UNPFII in April 2010, contained the following testimony presented by Mr. Foster regarding youth incarceration in the United States.

“Indigenous youth are disproportionately represented in juvenile detention systems across the U.S., and these numbers are especially high in some states with larger populations of Indigenous Peoples. Our ancestors were free, but colonization in all its forms has made many of us feel ashamed of who we are. This affects many of our youth today. They are angry, act out, and misuse drugs and alcohol. In the U.S., some states like Montana, South Dakota and Alaska have as many as 30 to 40 percent Native Americans in their prison system and perhaps more, since accurate data is not available, especially for youth in prison. We have seen that Native America youth and young adults tend to receive longer sentences for the same offenses and many are held in facilities far away from their families and communities. This breaks their spirits by breaking their cultural ties to their families and Nations. The experience of confining in isolation or “warehousing” of the young Native Americans is a human rights violation and is inhumane. The incarceration of Native young people affects families, clans, and entire communities because of the close knit ties in the Indian world.”<sup>22</sup>

***J. Racial Discrimination Resulting in Denial of Religious and Cultural Rights of Indigenous Prisoners in violation of Article 5 (d) vii and (e)vi of ICERD***

Mr. Foster has provided extensive documentation and testimony over many years to U.N. and federal processes regarding the denial of Indigenous Peoples' freedom of religious and cultural practice in the United States. His testimony led to former Special Rapporteur on the Question of Religious Intolerance Mr. Abdelfattah Amor's conclusions with regard to the denial of Indigenous prisoners' rights to practice their spirituality in United States prisons in the report to the U.N. Commission on Human Rights on his country visit to the United States in January and February 1999 [E/CN.4/1999/58/Add.18]. His final recommendations to the United States included:

84. Concerning the religious rights of Native American prisoners, apart from the recommendation made in the section on legal issues, the Special Rapporteur recommends that the positive and practical action taken in many federal prisons (fully compatible with security requirements, e.g. ending the practice of cutting their hair) should become general throughout the United States prison system and that steps should be taken to ensure, particularly through training, and perhaps through penalties for prison officers and

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<sup>22</sup> International Expert Group Meeting (EGM) on Indigenous Children and Youth in Detention, Custody, Foster-Care and Adoption”, March 4 -5, 2010 [E/C.19/2010/CRP. 8, para. 15]

governors, that these rights are not treated as privileges that can be granted or refused at the whim of an authority or official.<sup>23</sup>

United States lack of implementation of Special Rapporteur Amor's recommendations addressing ongoing discrimination against Indigenous Peoples' religious and spiritual beliefs and practices are also presented in other reports submitted to this session of the CERD by Indigenous Peoples. This issue was addressed again when U.N. Special Rapporteur on the Rights of Indigenous Peoples James Anaya visited the United States 14 years later in April-May 2012. During SR Anaya's visit to Tucson, Arizona, on April 26, 2012, Mr. Foster presented testimony addressing the continued discriminatory denials of these rights:

Over the past 30 years, I have visited 96 state and federal correctional facilities throughout the United States and provided spiritual counseling to approximately 2,000 Indigenous men and women. I have observed the extreme racism and discrimination toward their religious and spiritual beliefs and practices which make it difficult for Native prisoners to participate in traditional ceremonies in a consistent manner, if at all. I have both witnessed and experienced harassment, interference, indifference, intimidation, and discrimination with regard to our Native traditional beliefs and our right to worship in a traditional manner as practiced by our ancestors. Prison officials have refused to allow Native ceremonies to be offered as last rites to death row prisoners, for example. Officials claim that ceremonies will be used as a means for escape or that singing and drumming is disruptive to the security of an institution. Tobacco has been restricted for ceremonies with the assertion that prisons are "smoke free environments."

Mr. Foster provided the following additional observations regarding the current state of discrimination regarding religious practice of Native Americans in U.S. prisons for this report:

"The extreme racism and blatant discrimination that exists in the U.S. criminal justice system have made it very difficult for the civil rights and human rights of the Native peoples to be recognized or affirmed. Native peoples have been denied their inherent right to practice their traditional native religious and spiritual beliefs; numerous lawsuits have been litigated to resolve these violations. Numerous state legislations have been introduced in Arizona, New Mexico, Colorado, Utah and Minnesota. And federal legislation was introduced in U.S. Congress in 1992 and 1994 to allow Native Americans the right to practice their religion without discrimination. The lack of compliance and enforcement of these statutes continues to result in discrimination and denials of human rights for Native Americans.

Denial of access to traditional religious and spiritual ceremonies and services is a violation of human and constitutional rights and is tantamount to a denial of opportunity for recovery and spiritual healing. The ICERD must apply equally to Indigenous

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<sup>23</sup> Report by Mr. Abdelfattah Amor, Special Rapporteur on the question of religious intolerance, in accordance with Commission on Human Rights resolution 1998/18, Addendum, Visit to the United States of America, Conclusions and Recommendations, para 84, E/CN.4/1999/58/Add.1, 9 December 1998

prisoners. In point of fact, under law, American Indigenous prisoners are entitled to worship using tobacco and other sacred medicines, in sacred spaces within prison walls, and through rites like sweat lodge ceremony.”

In June 2013, the National Congress of American Indians (NCAI) passed a Resolution (attached) that “calls upon the United States, all fifty American states and the District of Columbia . . . to take all reasonable steps to commend, support and facilitate incarcerated American Indigenous Peoples’ inherent rights to believe, express, and exercise traditional indigenous religion.”

In recent years, legal actions have been brought in Federal courts including the U.S. District Court for Hawaii in a case arising in Arizona, the Fifth Circuit Court of Appeals in Texas, and the U.S. Supreme Court in a case out of Alabama, challenging various states’ deprivation of Native prisoners’ religious rights. These included denial of the rights to hold ceremonies, possess sacred items used for prayer and purification, and right to wear unshorn hair.

A recent example is the case of Sharp vs GEO, heard in U.S. Federal District Court on January 29, 2014 in which a group of Native American prisoners brought suit against a private prison under contract with the State of Arizona for its confiscation of a ceremonial water drum under the pretext that it “could be used as weapon”. Although the Arizona State courts decided in favor of the Department of Corrections, the Federal District Court decided in favor of the Native Americans and called for reinstatement of the water drum and other sacred ceremonial and prayer items. It must be stressed that most Native American prisoners do not have access to resources or pro bono legal counsel to be able to fight these kinds of cases to positive resolutions, as was possible in this case.

In June 2013, the Special Rapporteur on the Rights of Indigenous Peoples, joined by the United Nations Special Rapporteur on Freedom of Religion or Belief, wrote the U.S. State Department (attached) requesting that within 60 days the federal government respond to the allegations and “provide any additional information it deems relevant to the situation.” These Special Rapporteurs posed a series of questions, including:

“What measures exist to ensure the protection of the religious freedoms of Native American prisoners in state and local prisons? Specifically, what legal, policy or programmatic actions, if any, have federal and state government authorities taken to ensure that Native American prisoners are able to engage in religious ceremonies and traditional practices as well as have access to religious items in state and local prisons?”

Almost a year later, the State Department has not responded to the Special Rapporteurs’ inquiry.

On April 18, 2014, NCAI President Brian Cladoosby wrote U.S. Secretary of State John Kerry about the “increasing number of state-level regulations that restrict the religious freedoms of Native American prisoners, including their participation in religious ceremonies and possession of religious items.” To date, the U.S. Secretary has also failed to respond.

“The United States’ continued silence in response to these inquiries from a number of respected sources is indicative of its own and its subsidiary states’ disregard for the right of American

Indian prisoners to freely exercise their religion, as well their rights to effective remedies when state correctional agencies and officers violate their guaranteed rights.”<sup>24</sup>

### **III. The Case of Leonard Peltier**

The case of Leonard Peltier is emblematic of the treatment of many Native Americans in the United States today. For better or for worse, he is an icon and representative of an open sore of racism against Indians by the justice system of United States. His case reflects many of the forms of racial discrimination addressed above, including lack of access to justice and disproportionate sentencing.

Mr. Peltier was a member of the American Indian Movement (AIM) which promoted and asserted the rights of Indigenous Nations — their sovereignty and rights to land under treaties entered into by the Indigenous Peoples and the government of the United States in 1861 and 1868. In spite of those treaties, the United States had by 1974 stolen the Sacred Black Hills, initially exploiting gold deposits and later natural energy resources.

The early 1970s were a time of terror and oppression for the Lakota, Nakota and Dakota Nations due at least in part to racist attitudes of local and federal officials and the illicit and often deadly tactics of the FBI. The FBI targeted AIM members and leaders because they instilled what the United States federal government considered a dangerous sense of unified resistance among Indigenous Peoples.

The Pine Ridge Reservation in South Dakota “exceeds 4,500 square miles without any public transportation. Its one library and bank are located in the white settlement areas. Less than one percent of the land is cultivated by Native Americans, while more than half the acreage is used by whites for grazing... By 1973 about 70 percent of those at Pine Ridge were unemployed... the life expectancy was 44 years, 30 years less than that of white persons... While the BIA (Bureau of Indian Affairs) and other federal agencies billed American tax payers over \$8,000 a year per Oglala Sioux family at Pine Ridge, the medium income there remained at less than \$2,000.”<sup>25</sup>

This quote of Norman Zigrossi, then FBI Assistant Special Agent in charge in Rapid City, South Dakota, exemplifies the racist attitude of many of the FBI agents assigned to the reservation:

“...the American Indians are a “conquered nation... and when you're conquered, the people you're conquered by dictate your future.” Consequently, the FBI must function as a “colonial police force.”<sup>26</sup>

From 1973 to 1976, Indigenous People on the Pine Ridge Indian Reservation in South Dakota were victims of beatings, drive-by shootings, and stabbings carried out by the local vigilantes.

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<sup>24</sup> Galanda, Gabriel. "Defending the Religious Rights of Native Prisoners," Indian Country Today. 29 May 2014. <http://indiancountrytodaymedianetwork.com/2014/05/29/defending-religious-rights-native-prisoners>.

<sup>25</sup> Hinds, Lennox. "Illusions of Justice: Human Rights Violations in the United States". Iowa City: University of Iowa, 1978. pp. 270-271.

<sup>26</sup> Weir, David and Lowell Bergman, "The Killing of Anna Mae Aquash," Rolling Stone. 7 April 1977. p. 52.

Leonard Peltier as well as other AIM members answered the call of the Lakota Elders to come to Pine Ridge to defend the community against this onslaught. Peltier and other Indigenous activists were forced into a defensive posture to protect not only their lives, but also the lives of others who were present — elders, women, and children. Heavily armed, the FBI's primary purpose on the reservation became the eradication of AIM and AIM supporters.

During this "Reign of Terror," at least 64 local Native Americans were murdered. Pine Ridge reservation had the highest per capita murder rate in the United States. "Using only documented political deaths, the yearly murder rate on the reservation between March 1, 1973 and March 1, 1976, was 170 per 100,000. By comparison, Detroit, Michigan (at the time, the murder capital of the United States), had a rate of 20.2 per 100,000."<sup>27</sup>

William F. Muldrow of the U.S. Civil Rights Commission twice reported on abuses that occurred at Pine Ridge. In July 1975, in fact, Commissioner Arthur Fleming formally requested that the then Attorney General Edward Levi investigate alleged improper FBI activities on the reservation. No investigation was ever conducted. Indeed, Levi never responded to Mr. Fleming's request.

On April 24, 1975, government documents show, the FBI completed a chilling study on its preparedness to conduct "paramilitary operations" on the Pine Ridge Reservation. By late May, a build-up of FBI personnel occurred in and around the reservation, mostly Special Weapons and Tactics (SWAT-) trained agents. The FBI also began training a 10-man BIA SWAT team.

On June 16, the FBI again supplemented its manpower by ordering special agents into South Dakota for a temporary 60-day period. The build up of FBI agents, possibly as many as 60, on or near the Pine Ridge Reservation, and the presence of a SWAT unit (which spent a considerable amount of its time "practicing assaults on houses") added to an already very tense situation.

On June 26, 1975, FBI agents Coler and Williams entered the Jumping Bull Ranch. They allegedly sought to arrest a young Indian man accused of stealing a pair of cowboy boots. For an unknown reason a shootout occurred. When the firefight was over, the two agents and an Indian man were dead.

The Jay Treaty, ratified by the U.S. and Canada, provides that American Indians be allowed to cross the U.S.-Canadian border at will. Well after the shootings, Mr. Peltier legally crossed the border into Canada. At the request of the U.S. government, he was arrested in British Columbia in February 1976.

Government documents obtained under the U.S. Freedom of Information Act show that, without any evidence at all, the FBI decided from the beginning of its investigation to "lock Peltier into the case". U.S. prosecutors knowingly presented false statements to a Canadian court to extradite Mr. Peltier to the U.S. The statements were signed by a woman who was forced by FBI agents to say she was an eyewitness. The government has long since admitted that the woman

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<sup>27</sup> Johansen and Maestas. Wasichu: The Continuing Indian Wars. 1979. pp. 83-84.

was not present during the shootings.

Meanwhile, in Cedar Rapids, Iowa the jury in the trial of Leonard's co-defendants found that the Indian activists had a right to be on the Pine Ridge Indian Reservation and were not engaged in unlawful activity. There was no evidence that they either provoked an assault or were the aggressors in one. In light of the terror on the Pine Ridge Reservation during the previous three years, the history of misconduct on the part of the FBI in cases involving Indian activists, and the reckless behavior of the agents on June 26, 1975, the jury decided that Mr. Peltier's co-defendants were not guilty by reason of self-defense. Had Leonard been tried with his co-defendants, he also would have been acquitted.

Unhappy with the outcome of that trial, prosecutors set the stage for Mr. Peltier's conviction. His trial was moved to an area known for its anti-Indian sentiment — Fargo, North Dakota, where the FBI spread rumors and exacerbated the already widespread racist fears of the white community. The trial judge had a reputation for ruling against Indians, and a juror is known to have made racist comments during Mr. Peltier's trial.

FBI documents prove that the prosecution went so far as to manufacture the so-called murder weapon. A test showed that the gun and the shell casings entered into evidence didn't match, but the FBI hid this fact from the jury. During the trial, the judge most often ruled in favor of the prosecution and the jury never heard the majority of the evidence that had been presented at the Cedar Rapids trial. Robbed of the ability to adequately defend himself, Mr. Peltier was convicted and sentenced to two life terms.

According to court records, the United States Attorney who prosecuted the case has twice since admitted that no one knows who fired the fatal shots. Although the courts have acknowledged evidence of government misconduct — including forcing witnesses to lie and hiding ballistics evidence reflecting his innocence — Mr. Peltier has been denied a new trial.

A model prisoner, Mr. Peltier has also been denied parole on the basis that he has not shown remorse for his crime even though he maintains his innocence and notwithstanding that a showing of remorse is not called for by federal parole guidelines.<sup>28</sup> From the time of Mr. Peltier's conviction in 1977 until the mid-1990s, according to the BJS, U.S. Department of Justice, the average length of imprisonment served for homicide in the United States ranged from 94 to 99.8 months (about 8 years).

Mr. Peltier has been designated a political prisoner by Amnesty International, which has

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<sup>28</sup> “The granting of parole to an eligible prisoner rests in the discretion of the U.S. Parole Commission. As prerequisites to a grant of parole, the Commission must determine that the prisoner has *substantially observed the rules of the institution* or institutions in which he has been confined; and upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, *must determine that release would not depreciate the seriousness of his offense or promote disrespect for the law, and that release would not jeopardize the public welfare (i.e., that there is a reasonable probability that, if released, the prisoner would live and remain at liberty without violating the law or the conditions of his parole)*”. See, U.S. Department of Justice Parole Commission Rules and Procedures Manual, §2.18 GRANTING OF PAROLE, <http://www.justice.gov/uspc/resources.html> (visited June 20, 2014): Mr. Peltier has amply demonstrated his compliance with these standards at each and every parole hearing.

repeatedly called for Mr. Peltier's unconditional release. The late Nelson Mandela, the late Mother Theresa, Archbishop Emeritus Desmond Tutu, 55 Members of the U.S. Congress and others — including a judge who sat as a member of the Court in two of Mr. Peltier's appeals — have all called for his immediate release.

In October of 2011, the National Congress of American Indians passed a historic, unanimous resolution (appended) in support of executive clemency for Leonard Peltier:

“Mr. Peltier has already served a major portion of his sentence and is being unnecessarily held in prison despite the fact that his continued imprisonment does little to serve even the principal purposes of punishment.”

Over 600 pages of documentation on the Peltier case were received and entered by Secretariat of the Working Group for Indigenous Populations in 1995 and repeated appeals have been brought to the U.N. on his behalf since Peltier's imprisonment. U.N. luminaries such as Kenneth Deer (former Chair/Rapporteur of the U.N. Workshop on Indigenous Media); Dr. Miguel Alfonso Martinez (former Chair, U.N. Working Group on Indigenous Populations); and Mary Robinson (former U.N. High Commissioner for Human Rights) have written to the President of the United States urging Peltier's release.

The Human Rights Council (HRC) Working Group on the Universal Periodic Review (UPR) reviewed the US on 5 November 2010. In 2011, the Working Group's recommendations included that the United States of America “end the unjust incarceration of political prisoners, including Leonard Peltier”.<sup>29</sup> The U.S. rejected this recommendation without explanation.

In 2012, the United Nations Special Rapporteur on the Rights of Indigenous Peoples James Anaya, in the report on his country visit to the United States presented to the U.N. Human Rights Council, addressed the continued incarceration of Leonard Peltier as one of the “open wounds of historical events” in the United States: He noted that:

“Pleas for presidential consideration of clemency...have not borne fruit. This further depletes the already diminished faith in the criminal justice system felt by many Indigenous Peoples...”<sup>30</sup>

Professor Anaya's Conclusions and Recommendations stated that:

“Other measures of reconciliation should include efforts to identify and heal particular sources of open wounds. And hence, for example, promised reparations should be provided to the descendants of the Sands Creek massacre, and new or renewed consideration should be given to clemency for Leonard Peltier.”<sup>31</sup>

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<sup>29</sup> Report of the Working Group on the Universal Periodic Review. United States of America. Human Rights Council. United Nations General Assembly. 4 January 2011.

<sup>30</sup> "The situation of indigenous peoples in the United States of American," Report of the United Nations Special Rapporteur on the rights of indigenous peoples, Professor James Anaya, [https://docs.google.com/gview?url=http://unsr.jamesanaya.org/docs/countries/2012-report-usa-a-hrc-21-47-add1\\_en.pdf](https://docs.google.com/gview?url=http://unsr.jamesanaya.org/docs/countries/2012-report-usa-a-hrc-21-47-add1_en.pdf), 30 August 2012, para. 49.

<sup>31</sup> Ibid para. 91

In 2014, the International Indian Treaty Council, at a consultation coordinated by the US State Department in preparation for the next US UPR review in 2015, recommended that the United States reconsider its rejection of its first UPR recommendation #154 regarding ending the incarceration of Leonard Peltier.<sup>32</sup>

It is clear to many Native Americans, as well many non-native human rights advocates, that Leonard Peltier has been subjected to discriminatory treatment and disproportionate imprisonment by the United States constituting violations of ICERD, as well rights afforded by the Universal Declaration of Human Rights, UN Declaration on the Rights of Indigenous Peoples, International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

#### **IV. *Conclusions and Recommendations***

The above information and documentation presents examples of pervasive and continuing racial discrimination suffered by Indigenous Peoples in the United States in violation of the ICERD, in particular Article 5. The Co-submitters of this Alternative Report therefore make the following requests and recommendations to the Committee:

1. That the CERD question the United States on these gross disparities and recommend that it take effective measures to remedy them, particularly the high rates of incarceration, disproportionate sentencing and the lack of disaggregated data regarding the incarceration of Native Americans at the state and federal levels.
2. That CERD question the United States about the continued imprisonment of Leonard Peltier, particularly regarding the denials of a new trial and the continued and unjustified denials of parole, and recommend that he be granted clemency as a demonstration of good faith, justice and reconciliation with Native Peoples in that country.

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<sup>32</sup> "The United Nations Declaration on the Rights of Indigenous Peoples, Treaties and the Right to Free, Prior and Informed Consent: A Framework for Restitution and Redress of Treaty Violations in the United States." Submission for the Consultation with Indigenous Nations, Peoples and Tribes in preparation for United Nations Human Rights Council's 2nd Universal Periodic Review of the United States. International Indian Treaty Council. 24 April 2014.



# NATIONAL CONGRESS OF AMERICAN INDIANS

## The National Congress of American Indians Resolution #REN-13-005

### **TITLE: Ensuring the Protection of Native Prisoners' Inherent Rights to Practice their Traditional Religions**

#### EXECUTIVE COMMITTEE

##### PRESIDENT

**Jefferson Keel**

*Chickasaw Nation*

##### FIRST VICE-PRESIDENT

**Juana Majel Dixon**

*Pawnee Band of Mission Indians*

##### RECORDING SECRETARY

**Edward Thomas**

*Central Council of Tlingit & Haida Indian Tribes of Alaska*

##### TREASURER

**W. Ron Allen**

*Jamestown S'Klallam Tribe*

#### REGIONAL VICE-PRESIDENTS

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**Mike Williams**

*Akiak Native Community*

##### EASTERN OKLAHOMA

**S. Joe Crittenden**

*Cherokee Nation*

##### GREAT PLAINS

**Robert Shepherd**

*Sisseton Wahpeton*

##### MIDWEST

**Matthew Wesaw**

*Pokagon Band of Potawatomi*

##### NORTHEAST

**Lance Gumbs**

*Shinnecock Indian Nation*

##### NORTHWEST

**Fawn Sharp**

*Quinault Indian Nation*

##### PACIFIC

**Don Arnold**

*Scots Valley Band of Pomo Indians*

##### ROCKY MOUNTAIN

**Ivan Posey**

*Shoshone Tribe*

##### SOUTHEAST

**Larry Townsend**

*Lumbee Tribe*

##### SOUTHERN PLAINS

**George Thurman**

*Sac and Fox Nation*

##### SOUTHWEST

**Joe Garcia**

*Ohkay Owingib*

##### WESTERN

**Ned Norris, Jr**

*Tobacco O'odham Nation*

#### EXECUTIVE DIRECTOR

**Jacqueline Johnson Pata**

*Tlingit*

#### NCAI HEADQUARTERS

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**WHEREAS**, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

**WHEREAS**, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

**WHEREAS**, American Indians, Alaska Natives, and Native Hawaiians in the United States (collectively “Native Americans” or “Indian people”) are under the supervision of the adult correctional systems at a rate higher than their presence in the U.S. population, which includes probation, parole, or in custody of tribal, state, or federal incarceration facilities; and

**WHEREAS**, incarcerated Native Americans depend upon their freedom to engage in traditional indigenous religious practices for their rehabilitation, survival, and the ability to maintain their identity, which for many Indian people is a proper and necessary road to rehabilitation; and

**WHEREAS**, Native governments, communities, and societies generally share the penological goals of repressing criminal activity within their jurisdictions and self-determination in facilitating spiritual rehabilitation of their citizens, and those traditional religious practices that assist Indian peoples’ rehabilitation are unique to each Native group and many Native governments have developed laws and policies that affirm and support traditional Native religious rights and expressions; and

**WHEREAS**, numerous U.S. domestic laws and international laws developed at the United Nations have affirmed the traditional religious rights of incarcerated Native peoples’ and have affirmed Native peoples’ overall freedom to believe, express, and exercise their traditional religious and cultural practices; and

**WHEREAS**, the United Nations Declaration on the Rights of Indigenous Peoples provides that States such as the United States “shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual

property taken without their free, prior and informed consent or in violation of their laws, traditions and customs”.

**WHEREAS**, the inherent rights of incarcerated Indian peoples’ freedom to believe, express, and exercise traditional indigenous religion, are too frequently violated by federal, state, and local government actors in the United States, and this has been reference in NCAI Resolution #SD-02-091; and

**THEREFORE BE IT RESOLVED**, that NCAI denounces and opposes any federal, state or local government restrictions placed upon incarcerated Native Peoples’ inherent rights to believe, express, and exercise their traditional religions and practices, and Resolution #REN-12-005 replaces Resolution #SD-02-091; and

**BE IT FURTHER RESOLVED**, that NCAI calls upon the United States, all fifty American states and the District of Columbia – including federal and state executive, agency, legislative, corrections, and judicial officials and employees – to: (a) take all reasonable steps to commend, support, and facilitate incarcerated American Indigenous Peoples’ inherent rights to believe, express, and exercise traditional indigenous religion, (b) Denounce or cease any unduly inappropriate or illegal federal, state, or local government restriction upon incarcerated American Indigenous Peoples’ inherent rights to believe, express, and exercise traditional indigenous religion, and (c) Explore how federal, state, and American indigenous governments can jointly develop and advance shared penological goals in regard to incarcerated American Indigenous Peoples; and

**BE IT FURTHER RESOLVED**, that NCAI calls upon the United Nations Special Rapporteur on the Rights of Indigenous Peoples S. James Anaya, for an investigation into the pervasive pattern in the United States of increasing state and local restrictions on the religious freedoms of incarcerated Native peoples in the United States; and

**BE IT FURTHER RESOLVED** that this Resolution shall be immediately transmitted to the United States Attorney General and the Assistant Attorney General for the U.S. Department of Justice Civil Rights Division, the United States Ambassador-at-Large for International Religious Freedoms, relevant Congressional Committees, and the Presidents of the American Correctional Association and American Association of State Correctional Administrators; and

**BE IT FINALLY RESOLVED**, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

### CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2013 Midyear Session of the National Congress of American Indians, held at the Atlantis Casino from June 24 - 27, 2013 in Reno, Nevada with a quorum present.

  
President

**ATTEST:**

  
Recording Secretary



# NATIONAL CONGRESS OF AMERICAN INDIANS

## The National Congress of American Indians Resolution #PDX-11-082

**TITLE: To Secure through Prudent Means an Award of Executive Clemency for Leonard Peltier**

### EXECUTIVE COMMITTEE

#### PRESIDENT

Jefferson Keel  
Chickasaw Nation

#### FIRST VICE-PRESIDENT

Juana Majel Dixon  
Pauma Band of Mission Indians

#### RECORDING SECRETARY

Edward Thomas  
Central Council of Tlingit & Haida  
Indian Tribes of Alaska

#### TREASURER

W. Ron Allen  
Jamestown S'Klallam Tribe

### REGIONAL VICE-PRESIDENTS

#### ALASKA

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Indian Tribes of Alaska

#### EASTERN OKLAHOMA

S. Joe Crittenden  
Cherokee Nation

#### GREAT PLAINS

Robert Shepherd  
Sisseton Wahpeton

#### MIDWEST

Matthew Wesaw  
Pokagon Band of Potawatomi

#### NORTHEAST

Lance Gumba  
Shinnecock Indian Nation

#### NORTHWEST

Fawn Sharp  
Quinault Indian Nation

#### PACIFIC

Don Arnold  
Scotts Valley Band of Pomo Indians

#### ROCKY MOUNTAIN

Scott Russell  
Crow Tribe

#### SOUTHEAST

Larry Townsend  
Lumbee Tribe

#### SOUTHERN PLAINS

Robert Tippeconnie  
Comanche Nation

#### SOUTHWEST

Joe Garcia  
Ohkay Owingeh

#### WESTERN

Ned Norris, Jr.  
Tohono O'odham Nation

#### EXECUTIVE DIRECTOR

Jacqueline Johnson Pata  
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**WHEREAS**, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

**WHEREAS**, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

**WHEREAS**, Leonard Peltier was convicted and sentenced to two consecutive life terms in connection with the shooting deaths of two agents of the Federal Bureau of Investigation (FBI); and

**WHEREAS**, appellate courts have repeatedly acknowledged evidence of U.S. government misconduct—including knowingly presenting false statements to a Canadian court to extradite Mr. Peltier to the United States, forcing witnesses to lie at trial, and hiding ballistics evidence reflecting Mr. Peltier's innocence from the jury; and

**WHEREAS**, according to official court records, the United States prosecutor in the Peltier case has twice admitted that no one knows who fired the fatal shots; and

**WHEREAS**, Leonard Peltier has maintained his innocence, yet expressed remorse for the loss of life for the federal agents and the young American Indian man killed on June 25, 1975; and

**WHEREAS**, Leonard Peltier is an accomplished author and artist and is renowned for his humanitarian achievements for which, in 2009, he was nominated for the Nobel Peace Prize for the sixth consecutive year; and for which he has been awarded the Human Rights Commission of Spain International Human Rights Prize (1986); North Star Frederick Douglas Award (1993); Federation of Labour (Ontario, Canada) Humanist of the Year Award (2003); Silver Arrow Award for Lifetime Achievement (2004); First Red Nation Humanitarian Award (2009); Kwame Ture Lifetime Achievement Award (2010); Fighters for Justice Award (2010); and Mario Benedetti Foundation (Uruguay) - First International Human Rights Prize (2011); and

**WHEREAS**, Leonard Peltier has fulfilled his federal sentencing guideline requirements and maintained a clean prison record for 15+ years yet, on August 21, 2009, the U.S. Parole Commission denied his application for parole; and

**WHEREAS**, Leonard Peltier is a great-grandfather who is 67 years old and in poor health, and at risk for premature death due to his harsh living environment; and

**WHEREAS**, Leonard Peltier's unjust imprisonment has been recognized by national and international human rights organizations, luminaries and dignitaries, 55 Members of the U.S. Congress and others—including a judge who sat as a member of the court in two of Peltier's appeals—who have all called for his immediate release; and

**WHEREAS**, the NCAI previously has adopted resolutions requesting Executive Clemency for Leonard Peltier and, in 1999, supported the Assembly of First Nations in the same; and

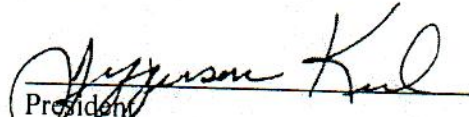
**WHEREAS**, the NCAI acknowledges that the authority to grant clemency belongs only to the President of the United States (under Article II, Section 2 of the U.S. Constitution) and, while an unconditional commutation of Mr. Peltier's sentence is most desirable, supports consideration of conditions of release including releasing Leonard Peltier on house arrest or into the custody of the Turtle Mountain Band of Chippewa Indians, a sovereign nation.

**NOW THEREFORE BE IT RESOLVED**, that the NCAI welcomes the opportunity to directly develop a strategy with members of his legal defense team, as well as the Turtle Mountain Band of Chippewa Indians, to secure Leonard Peltier's freedom; and plan and coordinate a meeting with President Barack Obama and/or members of his Administration to secure a grant of Executive Clemency to Leonard Peltier on constitutional and overriding human rights and compassionate grounds; and

**BE IT FURTHER RESOLVED**, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

#### CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2011 Annual Session of the National Congress of American Indians, held at the Oregon Convention Center in Portland, Oregon on October 30 – November 4, 2011, with a quorum present.

  
President

**ATTEST:**

  
Recording Secretary

**NATIONS UNIES**  
**HAUT COMMISSARIAT DES NATIONS UNIES**  
**AUX DROITS DE L'HOMME**

**PROCEDURES SPECIALES DU**  
**CONSEIL DES DROITS DE L'HOMME**

**UNITED NATIONS**  
**OFFICE OF THE UNITED NATIONS**  
**HIGH COMMISSIONER FOR HUMAN RIGHTS**

**SPECIAL PROCEDURES OF THE**  
**HUMAN RIGHTS COUNCIL**

**Mandate of the Special Rapporteur on the rights of indigenous peoples.**

REFERENCE: AL G/SO 214 (56-23) Indigenous (2001-8)  
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5 June 2013

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on freedom of religion or belief and Special Rapporteur on the rights of indigenous peoples pursuant to Human Rights Council resolution 22/20 and 15/14.

In this connection, we would like to bring to the attention of your Excellency's Government allegations received concerning the alleged **increasing number of state-level regulations that restrict the religious freedoms of Native American prisoners, including their participation in religious ceremonies and possession of religious items.**

According to the information received:

Indigenous peoples in the United States face high rates of imprisonment with an approximate 29,700 Native Americans incarcerated in prisons across the country as of 2011. According to a 1999 Bureau of Justice Statistics report, Native Americans are incarcerated at a rate that is reportedly 38 percent above the national rate. Data from 2009 indicates that Native Americans account for less than 1 per cent of the general population but make up 4 per cent of the population under correctional supervision. Approximately 50 per cent of Native American prisoners are housed in state correctional facilities while 12 per cent of incarcerated Native Americans are held in federal prisons. The remaining Native American inmates are housed in local jails or correctional facilities in Indian jurisdictions.

Many Native American inmates have maintained close links to tribal cultural traditions and communities incarcerated and often return to Indian reservations or similar Indian areas upon their release. Reportedly, while in prison, a significant number of Native Americans rely upon their freedom to carry out traditional religious practices for rehabilitation purposes and as a means to maintain their identity as members of indigenous peoples. Equally, Native American

communities value traditional cultural and religious practices as a means to assist indigenous prisoners so that they may be culturally viable community members and able to contribute to the overall well-being of the tribe or nation upon their release from correctional or detention facilities.

However, numerous recent regulations in state correctional facilities have allegedly restricted Native American prisoners from engaging in traditional religious practices and possessing religious items. It is further alleged that the majority of these regulations are modified or created without meaningful consultation with Native Americans beyond processes for general public comment.

By way of example, on 21 February 2013, the California Department of Corrections issued an “emergency” regulation that denies prisoners access to items that are considered to be sacred medicines for many Native Americans, including kinninnick, copal, and osha root. Other traditional items prohibited under the emergency measure reportedly include cloth for prayer ties, pipes and pipe bags. In addition, the emergency regulation allegedly makes the approval process for religious items more burdensome. These emergency restrictions have also reportedly been incorporated into proposed regulations currently considered to amend Section 3190(b) of the California Code of Regulations, Title 15, concerning prisoners’ religious property. The proposed regulations have been subject to public comment and Native American groups have recently voiced opposition to the permanent implementation of the proposed restrictive regulations.

It has also been alleged that some California Department of Corrections and Rehabilitation facilities have significantly curtailed indigenous sweat lodge ceremonies. It is reported that Native American prisoners were previously able to carry out sweat lodge ceremonies on a weekly basis in facilities throughout the state. However, new restrictions in certain facilities have limited these ceremonies to once or twice per month, which severely undermines Native American prisoners’ ability to use this practice for spiritual rehabilitation purposes.

According to the information received, the Texas Department of Criminal Justice has recently amended its policies regarding religious practices within a unit dedicated to housing Native American inmates. Allegedly, the policy modifications have resulted in burdensome restrictions now applying to the Sacred Pipe Ceremony, which many indigenous peoples consider a form of prayer, and the Wiping Away the Tears ceremony, which involves Native American adherents congregating together to worship on holy days. It is also reported that “smudging” – a practice that involves passing smoke over one’s body or a prayer site for cleansing and purifying purposes – was previously allowed indoors but is now prohibited. Additionally, the modifications in the policies implemented by the Texas Department of Criminal Justice allegedly

restrict Native American prisoners from possessing locks of hair from deceased relatives, a ritual related to the mourning of loved ones.

In the state of South Dakota, in 2009, the state Department of Corrections extended a general ban on tobacco to include Native American religious practices. This allegedly resulted in Native Americans not being able to use tobacco for important religious ceremonies or in connection with prayer ties and flags. In 2012, the United States District Court of South Dakota, Southern Division, held that the South Dakota tobacco ban infringed on indigenous prisoners' religious rights. Specifically, the tobacco ban was found to be in violation of the Religious Land Use and Institutionalized Persons Act, a federal law that protects confined persons against Government imposed substantial burdens on their religious exercise unless the Government is furthering a compelling governmental interest and uses the least restrictive means to do so. However, it is reported that the state of South Dakota has appealed the case to the United States Eighth Court of Appeals.

Allegations received regarding Native Americans incarcerated in Montana suggest that indigenous inmates in that state have been subject to strip searches prior to sweat lodge ceremonies. Additionally, items essential to Native American religious exercise including herbs, antlers, and smudge tobacco have been confiscated or prohibited in Montana correctional facilities.

On the other hand, information has also been received regarding the positive effects of consultation procedures with indigenous peoples concerning restrictions that affect the religious practices of Native American inmates in Washington State. After several tribes petitioned the state governor, consultations with indigenous peoples were carried out that resulted in accommodation by the Department of Corrections to help reverse course on restrictions placed by the Washington State Department of Corrections in 2010 that allegedly restricted Native Americans' prisoners' religious rights. The restrictions that were reversed reportedly banned nearly all Native American prisoners' religious practices and the use of tobacco; reclassified various sacred items as non-religious; prohibited traditional foods; and restricted children from attending prison pow wows.

In light of the above, we would like to draw the attention of your Excellency's Government to article 12 of the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly on 13 September 2007 and endorsed by the United States on 16 December 2010. Article 12 establishes that "[i]ndigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies" as well as "the right to the use and control of their ceremonial objects ...". In this connection, article 31 of the Declaration affirms that "[i]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions ...". Similarly, we would like to also draw your Excellency's Government's attention to article 18 of the

Declaration that establishes that “[i]ndigenous peoples have the right to participate in decision-making in matters which would affect their rights ...”

It also bears mention that on 8 June 1992 the United States ratified the International Covenant on Civil and Political Rights, which in its article 18 protects the right to freedom of religion. More specifically, article 18(3) affirms that a person’s “religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Moreover, article 27 states that ethnic and religious minorities “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion”. Of particular relevance to the situation of Native American prisoners is the Human Rights Committee General Comment No. 22, paragraph 8, which states that “[p]ersons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint.”

In light of this information, we would be grateful if your Excellency’s Government could inform us if the above allegations are accurate and provide any additional information it deems relevant to the situation described in this communication. Specifically, we would be grateful if you could provide responses to the following questions:

1. What measures exist to ensure the protection of the religious freedoms of Native American prisoners in state and local prisons? Specifically, what legal, policy or programmatic actions, if any, have federal and state Government authorities taken to ensure that Native American prisoners are able to engage in religious ceremonies and traditional practices as well as have access to religious items in state and local prisons?
2. What measures, if any, have been taken to ensure that Native American religious practices, and items used in those practices, are fairly considered in the development of institutional policies and regulations related to the operation, safety and security of state and local correctional facilities?
3. Do regulations exist at the federal or state level that require consultation with Native American peoples, and prisoners specifically, regarding possible restrictions on their religious practices in correctional facilities? If such policies exist, what measures are being taken to ensure that they are being implemented?

We would appreciate a response within 60 days. We undertake to ensure that your Excellency’s Government’s response is duly taken into account in our evaluation of this situation and that it is accurately reflected in the report we will submit to the Human Rights Council for consideration or in any other public statement we may make in relation to this situation.

Please accept, Excellency, the assurances of our highest consideration.

Heiner Bielefeldt  
Special Rapporteur on freedom of religion or belief

James Anaya  
Special Rapporteur on the rights of indigenous peoples



# International Indian Treaty Council

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## FOR IMMEDIATE RELEASE

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## United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, makes historic visit to American Indian Political Prisoner Leonard Peltier

**San Francisco, Jan. 24, 2014:** Today James Anaya, United Nations (UN) Special Rapporteur on the Rights of Indigenous Peoples, made a historic visit to American Indian political prisoner Leonard Peltier, Turtle Mountain Ojibway, in the United States (US) Federal Penitentiary in Coleman, Florida. He was accompanied by Leonard "Lenny" Foster, member of the Board of Directors of the International Indian Treaty Council (IITC) and representative of the National Native American Prisoners Rights Coalition.

Leonard Peltier was convicted in 1977 for "aiding and abetting" in the deaths of two FBI agents during a fire fight on the Pine Ridge Indian Reservation in South Dakota in 1975. Two other defendants were acquitted based on self-defense. Although the US courts as well as Amnesty International have acknowledged government misconduct, including forcing witnesses to lie and hiding ballistics evidence indicating his innocence, Mr. Peltier was denied a new trial on a legal technicality. The late Nelson Mandela and Mother Theresa, former UN High Commissioner for Human Rights Mary Robinson, 55 Members of the US Congress, the National Congress of American Indians, Assembly of First Nations, the US Human Rights Network and many others -- including a judge who sat as a member of the Court in two of Mr. Peltier's appeals -- have called for his release.

Lenny Foster confirmed that "the visit today by Special Rapporteur James Anaya to Leonard Peltier in prison is very significant and historic for us and we thank him for working with IITC to make this possible. This will support efforts for Executive Clemency for Leonard Peltier and promote reconciliation and justice in this case."

In April and May 2012, UN Special Rapporteur Anaya carried out an official visit to the US to examine the human rights situation of Indigenous Peoples in this country. After visiting and hearing testimony from Indigenous Nations, Peoples, organizations and communities around the US he issued a report "The situation of indigenous peoples in the United States of America" [A/HRC/21/47/Add.1]. It was presented to the UN Human Rights Council in September 2012 and contained observations regarding the case of Leonard Peltier:

**"A more recent incident that continues to spark feelings of injustice among indigenous peoples around the United States is the well-known case of Leonard Peltier... After a trial that has been criticized by many as involving numerous due process problems, Mr. Peltier was sentenced to two life sentences for murder, and has been denied parole on various occasions. Pleas for presidential consideration of clemency by notable individuals and institutions have not borne fruit. This further depletes the already diminished faith in the criminal justice system felt by many indigenous peoples throughout the country."**

Special Rapporteur Anaya's recommendations to the US government included the following:

**"Other measures of reconciliation should include efforts to identify and heal particular sources of open wounds. And hence, for example, promised reparations should be provided to the descendants of the Sand Creek massacre, and new or renewed consideration should be given to clemency for Leonard Peltier."**

For more information about the case of Leonard Peltier and the current campaign for Executive Clemency contact the Leonard Peltier Defense Committee: [LPsupport@whoisleonardpeltier.info](mailto:LPsupport@whoisleonardpeltier.info) or (505) 301-5423.

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**International Indian Treaty Council (IITC) Affiliates in Lands and Territories currently part of or under the jurisdiction of the United States:**

**Indigenous Tribal and Traditional Nation Governments:** Pit River Tribe (California), Wintu Nation of California, Redding Rancheria (California), Tule River Nation (California), Muwekma Ohlone Nation (California), Coyote Valley Pomo Nation (California), Round Valley Pomo Nation (California), Independent Seminole Nation of Florida (Florida), Native Village of Venetie Tribal Government/Arctic Village Traditional Council (Alaska), Chickaloon Village Traditional Council/Chickaloon Native Village (Alaska), Stevens Village Traditional Council (Alaska), Native Village of Eklutna (Alaska).

**Indigenous Organizations, Networks, Communities and Societies:** National Native American Prisoners' Rights Coalition, White Clay Society/Blackfoot Confederacy (Montana), Indigenous Environmental Network (National), Columbia River Traditional Peoples (Washington/Oregon), Rural Coalition Native American Task Force (Minnesota), Yoemem Tekia Foundation, Pascua Yaqui Nation (Arizona), Tohono O'odham Nation Traditional community (Arizona), Oklahoma Region Indigenous Environmental Network (Oklahoma), Wanblee Wakpeh Oyate (South Dakota), IEN Youth Council, Cactus Valley/Red Willow Springs Big Mountain Sovereign Dineh Community (Arizona), Leonard Peltier Defense Committee, Eagle and Condor Indigenous Peoples' Alliance (Oklahoma), Seminole Sovereignty Protection Initiative (Oklahoma) Mundo Maya (California), Los Angeles Indigenous Peoples Alliance (California) American Indian Treaty Council Information Center (Minnesota), Vallejo Inter-Tribal Council (California), Three Fires Ojibwe Cultural and Education Society (Minnesota), California Indian Environmental Alliance (CIEA), Wicapi Koyaka Tiospaye (South Dakota), Indigenous Peoples Working Group on Toxics (National), North-South Indigenous Network Against Pesticides (multi-regional based in US), the International Indian Women's Environmental and Reproductive Health Network (multi-regional based in US) and United Confederation of Taino People: Borikén (Puerto Rico/United States), Kiskeia, (Dominican Republic), Barbados, Guyana (Arawaks), Bimini (United States), Jittoa Bat Natika Weria (Yaqui Nation, US and Mexico).