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The Navajo Nation

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DEPARTMENT OF JUSTICE

**IN THE SUPREME COURT
OF THE NAVAJO NATION**

In the Matter of:

PETITION TO AMEND)
RULES 1.1 AND 3-10 OF)
THE NAVAJO RULES OF)
CRIMINAL PROCEDURE)

No. SC-SP-01-18

PETITION

Pursuant to 7 N.N.C. § 601(A), the Navajo Nation Department of Justice through the Attorney General, Ethel Branch, Esq., and Chief Prosecutor, Gertrude Lee, Esq., petitions the Court to amend the Navajo Rules of Criminal Procedure.

The Navajo Nation Supreme Court is vested with the authority to adopt rules of procedure. See 7 N.N.C. § 601(A). Section 601(A) also outlines a framework the Court should follow, including providing public notice, and consulting with the Attorney General, Chief Legislative Counsel, and the President of the Navajo Nation Bar Association.

Since June 24, 2016, a workgroup of key Navajo Nation criminal justice stakeholders, including members of the Navajo Nation Judiciary, prosecutors, defense attorneys, law enforcement and experts on fundamental law have been meeting on a regular basis to draft updates to the Navajo Nation Criminal Code (Title 17), and other related laws, including the Navajo Rules of Criminal Procedure (the “Rules”).

In almost every workgroup meeting since June 2016, critical procedural issues governed by the Rules of Criminal Procedure have been identified as key contributors to overburdening the

Navajo Nation criminal justice system. Additionally, the current Rules are greatly outdated as they have not been revised or updated since 1990. Moreover, our current rules exemplify a foreign system from a time when many of our rules and laws imitated those of state or federal systems; since their implementation Navajo Nation jurisprudence has evolved, and our rules need to reflect that evolution in the interests of our Navajo people. In April 2016, the work group met for a two-day session to start the process of reviewing the Navajo Rules of Criminal Procedure and create the first set of proposed amendments. The proposed changes are attached. Exhibit A is an underlined version of the proposed changes. Navajo Nation Law Enforcement support the proposed changes. See Exhibit B.

DISCUSSION

Rule 1.1 and Rule 3

The proposed change to Rule 1.1 simplifies the language of Rule 1.1(d) as it relates to arrest. The purpose of adding Rule 1.1(e) is to clarify how the rules apply when a special prosecutor has been appointed. The proposed amendment to Rule 3(b) clarifies the sentence and tracks the language already contained in the rule.

Rule 4

The proposed change to Rule 4(a) clarifies the paper size of complaints filed with the Court. The amendment to Rule 4(b) seeks to take into account the advances in technology where it is now possible to clearly sign criminal complaints electronically. For example, Adobe is frequently used by many businesses to electronically sign documents, or it is used to put signed documents in PDF format. This is particularly helpful to the Navajo Nation where Prosecutors work in remote districts and may not be able to sign original complaints located in districts hundreds of miles away.

Rule 5

The proposed changes to Rule 5 require the Navajo Nation and defense counsel to make a good faith effort to work out differences in a way that promotes *k'e* and *nabik'iyati*'. Under the proposed changes, the parties would be required to reach out to one another before filing certain types of motions. Doing so will clearly indicate to the court whether the parties have come to an agreement by filing an unopposed motion and stipulated order versus situations where the parties cannot come to a resolution. This will give the Court a better idea which issues have been resolved and which have not by the title of the pleading and a statement within the motion indicating whether or not concurrence was sought by the moving party. Requiring the parties to make a good faith effort to seek concurrence may also result in issues being resolved between the parties without having to resort to filing a motion at all. This is an approach to motions practice which conforms to the Navajo concepts of *k'e* and *nabik'iyati*'.

Rule 6

The purpose of the amendments to Rule 6 is to reduce the need to cross reference the Rules of Civil Procedure. Rule 6 specifically relates to service of motions and other pleadings. The corresponding rule from the Rules of Civil Procedure that discusses service and filing of pleadings and other Papers is Rule 5 of the Rules of Civil Procedure. The proposed amendment includes the language from Rule 5 of the Rules of Civil Procedure and additional language to allow for service by electronic means.

Rule 7

The proposed amendments to Rule 7 seek to address overburdening the system with multiple criminal complaints for one incident. With the proposed changes to this rule, one criminal complaint could be filed per incident listing all the charges associated with that incident

on one complaint. Rather than having separate criminal case files and case numbers associated with different charges, there would be one criminal complaint per incident listing all the criminal charges as counts. This change would greatly reduce the amount of paper expended creating separate files for each criminal charge and decrease confusion with scheduling hearings. Additionally, nearly all other jurisdictions (state, federal, and tribal) allow for joinder of offenses by listing all criminal counts associated with one incident on one criminal complaint. Doing so gives the Defendant a clear idea of what charges he is facing for one particular incident versus having to contend with multiple criminal cases for one incident. This change would also reduce double jeopardy concerns by clearly indicating what criminal charges are being considered for one incident on a single complaint. The proposed amendment to Rule 7 would make our public safety system more efficient and clear to Defendants, defense counsel, the Judiciary, Prosecutors, and law enforcement. Furthermore, there is a mechanism to challenge joinder by including the option to file a motion for severance.

Rule 8

The proposed amendments to Rule 8 seek to indicate what should be included on a criminal complaint. It also seeks to clarify when a criminal complaint can be dismissed because of a defect, error or omission.

Rule 9

The proposed amendment to Rule 9 seeks to address how the service requirements of Rule 9 have overburdened the Navajo Nation Department of Public Safety by providing more avenues for service of a summons.

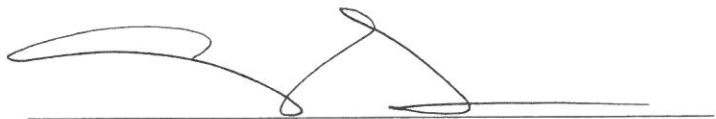
Rule 10

The proposed amendment to Rule 10 seeks to expand the circumstances in which the Navajo Nation can seek an arrest warrant for an individual. The four additional circumstances being proposed largely focus on suspects who pose a threat to the community or have demonstrated they are likely to evade law enforcement.

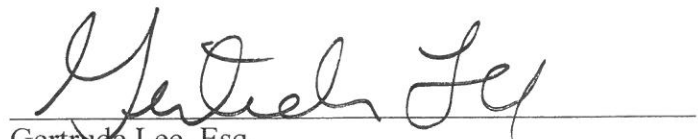
CONCLUSION

The Navajo Nation Department of Justice believes that the proposed changes will help to clarify and streamline the Navajo Rules of Criminal of Procedure. Therefore, Petitioners respectfully request that the Court specify a date and time to consult with the appropriate individuals pursuant to 7 N.N.C. §601(A), provide public notice of the proposed changes and hearing set to consider the Petition, and adopt the proposed changes at a public hearing.

RESPECTFULLY SUBMITTED this 3rd day of January 2018.



Ethel Branch, Esq.
Attorney General
Navajo Nation



Gertrude Lee, Esq.
Chief Prosecutor
Navajo Nation

Navajo Rules of Criminal Procedure Cite as Nav. R. Cr. P.

These rules were approved by the Supreme Court of the Navajo Nation in Order No. SCO-5-90 on October 4, 1990; and by the Judiciary Committee of the Navajo Nation Council in Resolution JCO-15-90 on October 11, 1990. The rules became effective on November 1, 1990.

I. SCOPE OF RULES AND DEFINITIONS

RULE 1. Scope.

These Rules govern the procedure in all criminal proceedings in the District Courts of the Navajo Nation and shall be known as the Navajo Rules of Criminal Procedure and may be cited as Nav. R. Cr. P. In all situations not provided for by rule or statute, the court may regulate the course of proceedings in any lawful manner not inconsistent with these Rules or any applicable statute.

Rule 1.1 Definitions and Terms.

1.1(a) **Counsel.** The term “counsel” as used in these Rules shall include all members of the Navajo Nation Bar Association and any other authorized representative of a party.

1.1(b) **Conformed Copy.** A conformed copy is a copy of a pleading, which shows the court stamp placed upon the original at the time of filing.

1.1(c) **Pronoun Usage.** Whenever a masculine or feminine pronoun is used it shall be deemed to include both males and females.

1.1(d) **Warrants of Arrest.** Warrants to arrest are any writs signed by a judge directing the ~~attachment of a body~~ arrest and include bench warrants and warrants to apprehend.

1.1(e) **Prosecutor.** The term “prosecutor” as used in these Rules shall include any special prosecutors appointed pursuant to § 2022 of Subchapter 6 of Title 17 of the Navajo Nation Code.

RULE 2. Construction and Purpose.

2(a) **Construction.** These Rules shall be construed consistently with the laws of the Navajo Nation.

2(b) **Purpose.** These Rules are intended to provide for the just determination of criminal proceedings. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

RULE 3. Computation of Time.

3(a) **Time Periods.** In computing any period of time under these Rules, by order of

EXHIBIT

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court or by any applicable law, the day of the act or event from which the designated period of time begins to run is not to be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a court holiday in which event the period runs until the end of the next business day which is not a Saturday, Sunday, or a court holiday.

3(b) Time Periods for Service by Mail. Whenever a party has a right or is required to take some action within a prescribed period of time after service of a notice or other paper and such service is allowed and made by mail, five (5) days shall be added to the prescribed period of time.

RULE 4. Size of Paper; Copies; Conformed Copies

4(a) **Paper Size.** All pleadings and other papers, except including traffic citations, filed in any proceeding governed by these Rules shall be on paper measuring 8-1/2 x 11 inches.

4(b) **Signed Original.** A party filing any document with the court shall submit a manually or electronically signed original.

4(c) **Conformed Copies.** A party desiring copies for any purpose shall submit such a copy or copies to the court. A party desiring to be mailed a conformed copy shall provide the court with a self-addressed stamped envelope at the time the request for a conformed copy is made.

II. GENERAL RULES OF PLEADING.

RULE 5. Pleadings.

5(a) **Form.** Every pleading shall have a caption identifying the court, the title of the action, the type of pleading and the case number(s) or space therefore, and space for the clerk's stamp and other certifications.

5(b) **Motions.** All applications and petitions to the court shall be by written motion, unless made in open court during a hearing or trial. Each motion shall state the grounds and shall set forth the relief or order sought:

(1) Motions containing factual allegations may be supported by affidavit or statement.

(2) Procedural motions based upon these Rules may cite the enabling authority in the body of the motion, and further supporting papers shall not be required.

(3) Motions raising issues of law shall be supported by memoranda of law or briefs.

~~5(c)~~ **Communicating with Opposing Counsel.** The moving party shall make a good-faith effort to contact the opposing party to determine whether the motion will be opposed. If the motion will not be opposed, a proposed order shall be filed with the motion.

~~5(d)~~ **Opposed Motions.** The motion shall state that concurrence of opposing counsel was requested or shall state why no such request was made. The moving party may file with any opposed motion a brief or supporting points with citations and authorities. Affidavits, statements, depositions or other documentary evidence may be filed in support of the motion. The moving party is not required to confer with opposing counsel for the following types of motions:

- (1) motion to dismiss;
- (2) motion to suppress evidence;
- (3) motion for new trial;
- (4) motion for judgment notwithstanding the verdict; or
- (5) motion to modify a sentence.

~~5(e)(c)~~ **Prohibited Ex Parte Communications.** Ex parte communications and private hearings with the court meetings with judges are prohibited and ex parte written communications shall be returned to the sender by the clerk of the court as though not filed.

RULE 6. Service and Filing.

~~6(a)~~ **Manner.** Unless otherwise specified in these Rules, the manner and sufficiency of service of motions and all other pleadings and documents shall be governed by the Rules of Civil Procedure.

~~6(a)~~ **Service: When Required.** Except as otherwise provided in these Rules, every pleading, order, motion, notice, and every other paper filed subsequent to the original complaint shall be served upon all the parties.

~~6(b)~~ **Service; How Made; Certificate of Service.** If a party is represented by counsel, the service shall be made upon counsel unless the court orders otherwise. All pleadings and every paper filed with the court shall contain a certificate of service

showing the date and manner of service.

(1) **Service by Mail.** Service by mail upon counsel or upon a party shall be made by delivering a copy to such person or, by mailing it to the person's last known address. The parties shall be required to keep an updated and serviceable address on file with the court. Service by mail is complete upon mailing.

(2) **Electronic Service.** If the parties consent to service by electronic means, a party is in compliance with the service requirement under these rules by serving an electronic copy to the consenting party by verifiable electronic means. The parties shall be required to keep an updated electronic means of communication on file with the court, such as electronic mail.

6(c) **Filing of Pleadings.** A copy of any pleadings, including supporting documents, filed with the court shall be served upon all parties within five (5) days after the filing, unless the court orders otherwise.

6(d) **Filing of Letters or Statements.** A copy of any letters or statements submitted to the court shall be served upon all parties by the clerk within five (5) days after receipt, unless the court orders otherwise.

6(e) **Service After Conviction.** After the time for appeal from a conviction has expired or a conviction has become final after appeal, service of a motion, petition, complaint or other pleading required to be served and requesting modification, vacation, or enforcement of that conviction, shall be served pursuant to Rule 6(b).

6(f) **Filing with the Court Defined.** The filing of pleadings with the court under these Rules shall be made by filing them with the clerk of the court. Filing is complete after the pleadings have been stamped by the clerk with the court's stamp and the date and time of filing endorsed thereon and initialed by the clerk

6(b)(g) **Notice of Orders.** Immediately after the signing by the judge of any order in a criminal case, other than in open court, the clerk shall serve a copy upon all parties.

RULE 7. — No Joinder.

7(a) — **No Joinder of Offenses.** No defendant shall be charged with more than one count on the same complaint. A defendant shall be charged one count per complaint even if the crimes charged are of similar character, or are based on the same act or on a series of acts, which are part of a single scheme.

7(b) — **No Joinder of Defendants.** Only one defendant shall be charged in one complaint even if more than one defendant is alleged to have taken part in the same act or series of acts constituting the crime charged.

RULE 7. Joinder; severance.

7(a) **Joinder of offenses.** Two or more offenses shall be joined in one complaint, with each offense stated in a separate count, if the offenses:

- (1) are of the same or similar character, or
- (2) are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan.

7(b) **Joinder of defendants.** A separate complaint shall be filed for each defendant. Two or more defendants may be joined for trial on motion of a party:

(1) when each of the defendants is charged with accountability for each offense included;

(2) when all of the defendants are charged with conspiracy and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy (defendant is not subject to prosecution for an offense he or she is not charged with in the complaint); or

(3) when, even if conspiracy is not charged and not all of the defendants are charged in each count, the several offenses charged:

(A) were part of a common scheme or plan; or

(B) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of others.

7(c) **Motion for severance.** If it appears that a defendant or the Navajo Nation is prejudiced by a joinder of offenses or of defendants by the filing of a statement of joinder for trial, the court may order separate trials of offenses, grant a severance of defendants, or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance, the court may order the prosecutor to deliver to the court for inspection in camera any statements or confessions made by the defendants which the prosecution intends to introduce in evidence at the trial.

III. PRELIMINARY PROCEEDINGS

RULE 8. Criminal Complaint.

8(a) **Commencement of Criminal Proceedings.** A criminal proceeding is commenced by the prosecutor filing with the court a complaint in the name of the Navajo Nation.

8(b) **Contents of Criminal Complaint.** The criminal complaint shall contain the following:

(1) The identity of the defendant, which shall include as much of the following as can be reasonably ascertained:

(A) The defendant's name or, if his name is unknown, any name or description by which he can be identified with reasonable certainty;

(B) The defendant's census number, if any;

(C) The defendant's physical address, if known;

(D) The defendant's mailing address, if known;

(E) The defendant's birthdate, if known.

(2) The essential facts, including jurisdictional facts, constituting the offense.

(3) The statutory name of the offense.

(4) The section(s) of the Navajo ~~Fri~~ Tribal Nation Code the defendant is alleged to have violated.

(5) The signature of the prosecutor and complainant.

8(c) **Unnecessary Allegations.** Any unnecessary allegations contained in a complaint shall be deemed surplusage and disregarded.

~~8(d) **Incomplete or Defective Complaint.** A complaint that does not meet the requirements set forth in this Rule shall be subject to dismissal on the court's own motion or on the motion of the defendant. Such dismissal based upon an error, omission, or defect in the complaint may be without prejudice, or the prosecution may be given leave to amend the complaint.~~

8(d) **Defects, errors, and omissions.** A complaint shall not be dismissed, nor shall the trial, conviction, or other proceeding be stayed, or in any manner affected, because of any defect, error, or omission therein which does not prejudice the substantive rights of the defendant upon the merits. The court may at any time prior to a verdict cause the complaint to be amended in respect to any such defect, error, or omission, as long as no additional or different offense is charged and if substantive rights of the defendant are not prejudiced.

RULE 9 Criminal Summons: Form

9(a) **Content of Summons.** Upon the filing of a criminal complaint the clerk may issue a criminal summons to the defendant(s) to appear. The summons shall be signed by

the clerk of the issuing court and shall be attached to the complaint. It shall contain the following:

- (1) The name of the defendant, or sufficient description to identify the defendant with reasonable certainty;
- (2) The description of the offense(s) charged;
- (3) Notice that at arraignment, the defendant will be expected to enter a plea to the offense(s) charged;
- (4) A recommendation that defendant consult with legal counsel before arraignment;
- (5) Notice that failure to appear at the arraignment will result in issuance of a warrant for the defendant's arrest.

9(b) **Failure to Appear.** If a defendant fails to appear in person at the time and place specified on the summons, the court may issue a Warrant for Arrest.

9(c) Service and Return of Summons.

(1) ~~———— A criminal summons shall be served by a police officer of the Navajo Nation or a designee of the Executive Director of the Navajo Nation Department of Public Safety, which may include a non-officer employee, or a private contractor.~~

The summons may be served by a Navajo Nation peace officer, a designee of the Executive Director of the Navajo Division of Public Safety, the Ramah Chief of Police, or a special appointee made by the presiding judge who is over 18 years of age and is not a witness or a party to the action. The summons may be served by giving a copy to the defendant or a person over the age of 18 residing within the defendant's usual place of abode. Personal service may also be accomplished by mailing a copy to the defendant's last known address by certified mail, return receipt requested. If the address of the defendant is within the Navajo Nation, it shall be mailed not less than 10 days prior to the time the defendant is required to appear before the Navajo Nation District Court. Service by mail shall be complete upon return of the receipt signed by the defendant.

(2) A criminal summons shall be served within the territorial jurisdiction of the Navajo Nation.

(3) ~~———— A criminal summons shall be served upon the defendant by delivering a copy to the defendant personally.~~

(4)(3) Notice to the court is required when service is completed. If the person officer serving the criminal summons is unable to find serve the defendant, he or she shall make due return of service not later than fifteen (15) days after he or she receives it. His or her return shall state the reasons he or she was unable to serve the

summons.

RULE 10 Arrest Warrant upon Complaint

10(a) Application for Arrest Warrant. If it appears from the complaint that there is probable cause to believe that an offense was committed, and the defendant has committed it, an arrest warrant shall be issued upon written application of the prosecutor. The application must show one or more of the following circumstances:

(1) Defendant has failed to appear for arraignment or failed to respond to a criminal summons;

(2) Defendant is on probation for a prior offense;

(3) Probable cause to believe that the defendant will not obey a criminal summons;

(4) Probable cause to believe that the defendant will leave the jurisdiction of the Navajo Nation;

(5) The defendant has confirmed active warrants in any jurisdiction;

(6) The nature of the offense poses a threat to the health, safety and welfare of the victim or the community;

(7) The offense is related to an escape from lawful custody or resistance of lawful arrest; or

(8) The defendant has other criminal matters pending at the time the offense was alleged to have occurred.

10(b) Contents of Warrant. The arrest warrant shall be signed by the issuing judge and it shall contain the following:

(1) Name of the defendant, or sufficient description to identify the defendant with reasonable certainty;

(2) Description of the offense(s) charged;

(3) A statement that the defendant is to be arrested, ~~and~~ detained, and brought before the judge without unnecessary delay;

(4) Pending arraignment the judge may set bond and endorse the amount on the warrant;

(5) An arrest warrant shall not be invalidated nor shall any person in

custody thereon be discharged, because of a defect in form. The warrant may be amended to remedy the defect in form.

10(c) Execution and Return of Warrant for Arrest.

(1) **By whom.** The warrant shall be directed to, and may be executed by, all ~~pelee~~ peace officers ~~in~~ of the Navajo Nation, including state officers and deputies with Navajo commissions. Officers with Navajo commissions can execute only tribal warrants within Navajo territorial jurisdiction.

(2) **Manner of Execution.** A warrant shall be executed by arresting the defendant. If the officer does not have the warrant in his possession at the time of the arrest, he shall inform the defendant of the offense(s) charged and of the fact that a warrant has been issued and shall ~~show~~ serve the warrant to the defendant as soon as possible.

(3) **Return.** Return of the warrant shall be made to the issuing court.

**IN THE SUPREME COURT
OF THE NAVAJO NATION**

In the Matter of:

PETITION TO AMEND
RULES 1.1 AND 3-10 OF
THE NAVAJO RULES OF
CRIMINAL PROCEDURE

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No. ~~8E~~ _____ SP-SC-01-18

**AFFIDAVIT IN SUPPORT OF
PROPOSED RULE AMENDMENTS**

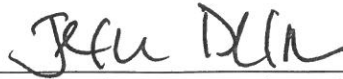
We, Jesse Delmar, Phillip Francisco and Darren Soland, submit the following in support of the proposed rule amendments and in support of the Petition to Amend Rules 1.1 and 3-10 of the Navajo Rules of Criminal Procedure:

1. Jesse Delmar is the Executive Director of the Navajo Nation Department of Public Safety.
2. Phillip Francisco is the Navajo Nation Chief of Police.
3. Darren Soland is the Ramah Navajo Law Enforcement Chief of Police.
4. Collectively, we have 80 years of professional experience in law enforcement.
5. We, personally and through our delegated staff, participated in the workgroup that met regularly to discuss and draft updates to the Navajo Nation Criminal Code and Navajo Rules of Criminal Procedure.
6. We have had the opportunity to fully review the final draft of the proposed amendments, and are in support of these changes.
7. We believe that the proposed amendments streamline the delivery of law enforcement and community caretaking in the Navajo Nation, and that their implementation will address some of the unnecessary and unworkable administrative concerns in our current rules.
8. We support the proposed amendments that the Attorney General and Chief Prosecutor have offered to the Court for approval.

EXHIBIT

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9. We understand that we may also each provide separate, specific written commentary about the proposed rules during the public comment provided by statute. However, we wish to express our unified support for the proposed amendments in this document, to be attached to the Petition submitted to the Supreme Court of the Navajo Nation.



Jesse Delmar, Executive Director
Navajo Nation Department of Public Safety


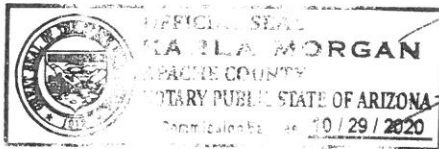
State of Arizona
County of Apache

This instrument was acknowledged before me on January 3, 2018 by Jesse Delmar.



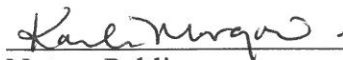
Notary Public

My commission expires: 10.29.2020


Phillip Francisco, Chief of Police
Navajo Nation Police Department


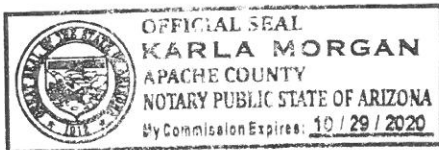
State of Arizona
County of Apache

This instrument was acknowledged before me on January 3, 2018 by Phillip Francisco.



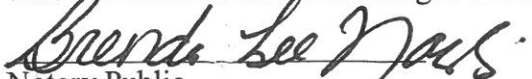
Notary Public

My commission expires: 10.29.2020


Darren Soland, Chief of Police
Ramah Navajo Law Enforcement

State of New Mexico
County of Cibola

This instrument was acknowledged before me on January 2, 2018 by Darren Soland.



Notary Public

My commission expires: 03/23/2018