

## NAVAJO PEACEMAKING OUTLINE

July 11, 2020

Most of the information referenced below is from The Peacemaking Plan of Operations (approved in 2012 and amended in 2013), “The Cornstalk Philosophy of Learning” by the Judicial Branch Peacemaking Program, and case law.

### I. Overview

*Hózhóji Naat’aah* is Diné Traditional Peacemaking.

People with legal training frequently confuse Peacemaking with Anglo-American alternative dispute resolution. It is not ADR. Peacemaking embodies Navajo cultural values on many levels. Diné traditional law treats all participants as equal, and each is equally connected to and responsible to work together to find a solution that is respectful of all. All participants gain mutual understanding of each other’s perspectives, the harms caused by a behavior or problem, their ability to contribute to a solution, and their responsibility to restore harmonious relationships.

The journey of peacemaking from Chaos to *Hózhó* (harmony, peace, balance) has roots that go far back in history, predating modern court.

It is engagement in which *hóochxó’anáhóót’i’* (disharmony/problem) confronted by a leader (*hózhóóji naat’aanii*), who brings in skills to the *naachid* (gathering).

Peacemaking draws on the Diné Thought Process, which involves an understanding of wholistic life process.

- *Nitsáhakees* (Thinking)
- *Nahat’á* (Planning Together)
- *Iná* (Executing the Plan, Living the Plan, restoring Life Ways)
- *Sihasin* (Reflecting on the Result, working together to modify the Plan if necessary)

Recent judicial and legislative acts did not establish Peacemaking, but merely recognized this deep rooted tradition, including the Judicial Conference of Navajo judges’ creation of the Navajo Peacemaking Courts in 1982; codification of the Peacemaking Division in 2001 (Res. CO-76-01), amendment to Peacemaking Program in 2003 (Res. CO-72-03), and the Peacemaking Plan of Operation of 2012 (revised in 2013).

Peacemaking, the Diné traditional method of dispute resolution, is available through the Peacemaking Program. Its purpose is to promote family harmony consistent with Navajo Nation statutes and *Diné bi beehaz’aannii*. The benefit of decision-making by the parties themselves, with guidance from a principled leader, have long been known to the Diné. For centuries, before the advent of the modern adversarial system of litigation, this was

the only dispute resolution used on our sovereign soil. *Ashkii v. Kayenta Family Court*, SC-CV-28-13 (Nav. Sup. Ct. August 19, 2013).

## II. *Nitsáhakees* (Thinking)

This is the first step in Diné Thought Process. It is a 360-degree view of the problem that creates common understanding of it for all participants. It's the step that paves the way to *Nahat'á* (Planning), or in this case the actual peacemaking.

### A. The Problem

The journey to peacemaking begins in a place of chaos, *hóochxo' / anáhóót'i*, whether within an individual or between human beings.

It begins with all persons affected by the *hóochxo' / anáhóót'i* (disharmony/problem) coming together to share their experiences and perspectives to achieve mutual understanding of the problem and its impact through direct sharing, as guided by the Peacemaker.

All chaos that disrupts inner and outer harmonious life are called *naayéé'* or monsters.

*Naayéé'* prevents a person from living a full life and is the cause of chaos within a person and between human beings.

Peacemaking is about *hózhó náhásdlíj'* (restoring harmony).

The goal is to restore *hózhó* (harmony, beauty, balance) within an individual or between human beings.

*Hózhó* is restored through *nályééh*. *Nályééh* means reparations but never damages when used traditionally. The gestures of *nályééh*, *k'é ná'ásdlíj*, *k'é níjísdlíj* and *k'eedí'nééh* are made when people engage or communicate to correct a wrong. It is the achievement of what is given to heal and adjust the relationship.

The goal of peacemaking is to build consensus to achieve and maintain lasting healing in the sense of *Sa'ah Naghéi Bik'eh Hózhóón*.

### B. The Actors

1. *Hózhóóji naat'áanii* or Peacemaker; and
2. Troubled decision-maker(s) who, because they have agreed to participate and will ultimately point the way in grappling with *naayéé'*, are called "*naalchidí*."

## C. The Tools of Peacemaking Services

### 1. Diné Traditional Peacemaking (*Hózhóji Naat'aah*)

A gathering lead by the Peacemaker to confront the *hóochxó' / anáhóót'i* for the purpose of restoring *hózhó* using principles of *Diné bi beenahaz'áanii*. Through both engagement and stories and teachings, the Peacemaker dispenses knowledge that opens the door to transformative healing based on open and respectful dialogue, personal accountability, and resolution of damaged feelings.

### 2. Diné Family Group Conferencing (*Álchíní BáNdazhnit'á*)

*Álchíní báNdazhnit'á* is an extension of peacemaking in response to the requirements of the *Álchíní Bi Beehaz' áanii* Act of 2011, which called upon the Navajo Nation “to seek out culturally appropriate methods for prevention, intervention and treatment of family disharmony” and “to facilitate family harmony using measures consistent with Navajo Nation statutes and *Diné bi beehaz'áanii*.”

### 3. Life Value Engagements (*Nábináhaazláago Átch'í' yáti'*)

Unlike peacemaking, Life Value Engagements do not include both sides in a dispute. In engagements, individuals or groups meet with a Peacemaker or traditional teacher in order to learn how to address a problem through opening up to *hózhó*. The individuals or groups learn to identify the problem as it relates to their own personal accountability and willingness to grapple with *hóochxó' / anáhóót'i* and serve themselves, their families and their community by taking the first steps toward *hózhó*.

“Parties must be fully informed of their options, especially in family cases where traditional methods are the preferred proceedings to be employed... .” *Ashkii v. Kayenta Family Court*, SC-CV-28-13 (Nav. Sup. Ct. August 19, 2013).

## D. Peacemaking as the Preferred Option

1. Judges are obligated to “apply Navajo concepts and procedures of justice, including the principles of maintaining harmony establishing order, respecting freedom, and talking things out in free discussion.” NAVAJO NATION CODE OF JUDICIAL CONDUCT, Cannon 1 (1991). In matters of dispute, Navajo courts have a duty to determine which methods, including Diné traditional methods, should be used.... *Ashkii v. Kayenta Family Court*, SC-CV-28-13 (Nav. Sup. Ct. August 19, 2013).

Also required by the *Diné bi beehaz'aanii* Act, 1 N.N.C. 200 *et seq.*

By various provision of the Criminal Code, Peacemaking is also an option for sentencing recommendations.

## 2. Distinguishing Formal Court Procedure from Traditional Peacemaking.

The difference between formal court proceedings and Diné Traditional Peacemaking must be observed. In formal court proceedings, a judge cannot dispense with the formal rules of procedure and turn a hearing into a Peacemaking session. *Manning v. Abeyta*, 9 Nav. R. 514 (Nav. Sup. Ct. 2011).

Referral to Peacemaking is more appropriate during the pretrial phase under Rule 16 of the Navajo Rules of Civil Procedure. *Manning v. Abeyta*, 9 Nav. R. 514 (Nav. Sup. Ct. 2011).

4. The Program accepts court referrals for services in any matter pursuant to both statutory and common law authorities. Individuals and families may also self-refer by requesting Peacemaking Program services.

Examples include, but are not limited, to:

### a. Any Pretrial Matter

Courts must explain options to litigants in civil proceedings, especially in family cases where traditional methods of peacemaking are preferred to be employed pursuant to Rule 16 of the Rules of Civil Procedure. *Manning v. Abeyta*, 9 Nav. R. 514 (Nav. Sup. Ct. 2011).

### b. Criminal

After defendant pleaded guilty, the trial court transferred case to peacemaking to recommend sentence for nályééh sentence then incorporated the peacemaking agreement into a binding order. *Navajo Nation v. Boone*, 8 Nav. R. 777 (Kay. Dist. Ct. 2002).

### c. Child Custody

For the sake and well-being of the children, the Court urges the parents and their counsels to resolve this matter amicably and outside these adversarial proceedings, and present an agreement to the family court. If no agreement is reached upon remand, the family court should consider its option of referring the matter to the Peacemaking Program prior to exercising other judicial proceedings toward final disposition. *Grass v. Yazzie*, 9 Nav. R. 320 (Nav. Sup. Ct. 2010).

The importance of using a cultural approach whenever permissible, whether in our courts or in peacemaking, cannot be overstated. We have rule-based and traditional Diné dispute resolution methods in our courts. We encourage the use of traditional methods, especially in family matters. The family is the core of Navajo society. We have stated: “The eternal fire burning in the center of the hogan is testament that the family is central to Navajo culture and will remain so in perpetuity.” *Manning v. Abeyta*, 9 Nav. R. 514 (Nav. Sup. Ct. 2011).

Courts should encourage parties to consider peacemaking to resolve custody disputes before rendering judgment. *Ashkii v. Kayenta Family Court*, SC-CV-28-13 (Nav. Sup. Ct. August 19, 2013).

d. Probate

Use of peacemaking to resolve probate disputes is recommended allowing the family to consider custom, family desires, and actual possession and control of the property since decedent’s passing, and to solve the on-the-ground concerns and problems, with decedent’s wishes in mind, to reach an agreement all can abide by. *In re Estate of Kindle*, 9 Nav. R. 29 (Nav. Sup. Ct. 2006).

e. Oral Will

The existence or not of an oral will should be decided by family members on their own or in peacemaking. *In re Estate of Howard*, 7 Nav. R. 262 (Nav. Sup. Ct. 1997).

f. Land Disputes

*In re Grazing Permit No. 12-1445*, 8 Nav. R. 815 (Ship. Fam Ct 2004).

III. *Nahat’á* (Planning Together)

Focuses on developing a common understanding of the disharmony and problem, and coming to voluntary agreements in resolution. This step focuses on the actual Peacemaking session. Everyone except certain observers are allowed to speak, and everyone is mutually responsible to identify solutions. Everyone accepts appropriate responsibility to participate in or support the solution.

Diné Traditional Peacemaking (*Hózhóji Naat’aah*) as a means to move from chaos to *hózhó*.

A. Confrontation is vital in order to dispel *hóochxó'/anáhóót'i'*. Peacemakers are skilled in drawing out the self-reflection and honesty in communications that are necessary for individual or group healing.

## B. Peacemaker Tools

1. Engagement; and
2. Stories and Teachings.

## C. The Participants

1. *Hózhóójí naat'áanii* or Peacemaker. Peacemakers are selected based on their respect in their communities and their personal skills in managing constructive confrontation as well as their knowledge of Navajo traditions and teachings.
2. Troubled decision-makers who, because they have agreed to participate and will ultimately point the way in grappling with *naayéé'*, are called "*naalchidí.*"
3. Family members, workmates, friends or others affected by the *naayéé'* or knowledgeable about the *hóochxó'/anáhóót'i'* who may contribute to the talking-out but do not make the ultimate decision. They attend with the permission of the group. Because of their presence and desire to contribute, they are called "*atah naaldeehí.*"
4. Observers, who attend with the permission of the group, but may not speak or gesture. They are called "*ha'a sí dí.*"

Who cannot participate:

Describes role of peacemaking program as a traditional alternative to court probate, where a lawyer or advocate is prohibited from participating. *In re Quiet Title to Livestock Grazing Permit No. 8-487*, 9 Nav. R. 548 (Nav. Sup. Ct. 2011).

Peacemaking Plan of Operation has since clarified that a lawyer or advocate is prevented from participating in their *official* legal capacity.

## C. Personal Accountability

*Bee K'éndzísdlíí'* also means an individual has the personal responsibility to acknowledge his or her role in the context that produced harm, and to share equal responsibility to resolve the problem and make things right.

The principle of *bee k'éndzísdlíí'* applies to both the offender and the individual harmed in that both must face the consequences of his or her conduct and will be

held accountable. *Wauneka v. Navajo Department of Law Enforcement*, 9 Nav. R. 476 (Nav. Sup. Ct. 2011).

#### D. Consent

Peacemaking is consensual. This is essential to a successful outcome, because resolutions are rooted in personal responsibility to carry out the agreed-upon solution.

Because participation in peacemaking probate process is voluntary, no attorney fee awarded for refusal to participate in peacemaking though refusal prolonged litigation. *In re Quiet Title to Livestock Grazing Permit No. 8-487*, 9 Nav. R. 548 (Nav. Sup. Ct. 2011).

[I]n today's society, a court session cannot be turned into a peacemaking session without warning and consent. *Manning v. Abeyta*, 9 Nav. R. 514 (Nav. Sup. Ct. 2011).

Peacemaking is premised upon participation by all those affected, including victims. Furthermore, consensus of all the participants is critical to resolution of the dispute, concern or issue. With full voluntary participation (*t'áá altso athil ká'ijéé'go*) and consensus, a resolution is reached with all participants giving their sacred word (*hazaad jidísingo*) that they will abide by the decision. The resolution (guided by *Diné bi beenahaz'áanii*), in turn, is the basis for restoring harmony (*bee hózhó náhodoodleel*). *Hózhó* is established if all who participated are committed to the agreement and consider it as the final agreement from which the parties can proceed to live in harmony again. Finality is established when all participants agree that all of the concerns or issues have been comprehensively resolved in the agreement (*ná bináheezláago bee t'áá lahji' algha' deet'á*). *Navajo Nation v. Kelly*, 9 Nav. R. 49 (Nav. Sup. Ct. 2006).

#### E. Process of Learning

A session would begin with an opening prayer, introductions, instructions, stating the *hóochxo' / anáhóót'i'*, discussion of *hóochxo' / anáhóót'i'*, life value engagement, catharsis and opening up to *hózhó*, acceptance of *hózhó*, discussion of *nályééh*, and closing prayer often accompanied by everyone eating together.

#### F. Ceremonies

Ceremonies in which *na'nitin* (traditional teachings), prayers, songs, and offerings are included are often used before or at the close of a peacemaking.

#### G. Reparations

The word *nályééh* has been used by adversarial courts to describe restitution, reparations and damages. However, like very many Navajo words translated into English, the above use of *nályééh* is far from its root meaning, and certainly very far from how *nályééh* is used in peacemaking. *Nályééh* in peacemaking is used with *k'é ná'ásdlíí* and *k'é níjísdlíí* which means gestures of peaceful engagement toward restored relations.

*Nályééh* means reparations but never damages when used traditionally. It is sometimes said that *hózhó* is restored through *nályééh*. Laying blame plays no part in *nályééh* and apologies are not normally made nor required. It is not uncommon to have gestures of *nályééh*, *k'é ná'ásdlíí*, *k'é níjísdlíí*, *k'eedí'nééh* by both sides.

[I]f parties are willing to meet in a peacemaking setting, the [Navajo Nation Labor] Commission may include such a remedy calculated to achieve balance and harmony for the parties, and require voluntary talking out and apologies in such a setting with the proviso that statements made therein may not be used in any subsequent litigation. *Wauneka v. Navajo Department of Law Enforcement*, 9 Nav. R. 476 (Nav. Sup. Ct. 2011).

#### H. *Diné bi beenahaz'áanii* Concepts in *Hózhóji Naat'aah*

Principles of *Diné bi beenahaz'áanii* are applicable. These principles that are the living culture of the Diné Life Way are conveyed primarily through verbal narratives. The principles of *Diné bi beenahaz'áanii* applicable for the conduct of a peacemaking session are complex and voluminous in that they are the value structure of a way of life.

A *very few* principles are:

1. *K'é* - what binds people together in mutual respect  
*K'é* in essence is the foundation and key to having personal awareness of self, your parents, extended family and people around you, and thinking of everyone respectfully. *K'e* creates unity by defining a person's responsibilities to self, family, clan, and community.
2. *K'éí* – clan or kinship
3. *Ná bináhaazláo* - providing parties with a sense of completeness or comprehensiveness. It also means fairness and doing whatever is necessary in bringing in all perspectives of a harm or issue, solving a problem or coming to a comprehensive solution.
4. *Baa yáti'* means the opportunity to speak, or talking things out.

#### I. Peacemaking must foster (among other things):



### 1. Talking things out

Sharing perspectives, ideas, and the effects of a problem is the core of the peacemaking process. Everyone who is affected has an important perspective. Peacemaking sessions invite all concerned to talk out their experience and feelings. The sanctity of this process and its importance is protected.

Statements made during peacemaking are privileged. *Hosteen v. Tapaha*, 7 Nav. R. 532 (Ship. Dist. Ct. 1997).

### 2. Fundamental Fairness (notice, opportunity to be heard, etc.)

Since all affected persons must participate voluntarily, successful peacemaking must be conducted at a time and place agreed upon by everyone. Respect for all participants means the process must treat everyone with equal opportunity and access to the discussion. Navajo traditional due process is based in respect, not in rules.

Peacemaking may be used as a probate substitute since Navajo law favors settlement and compromise among heirs, so long as all heirs involved; due process rights of access to courts, widespread poverty, and shortage of affordable legal services; and peacemaking complies with fundamental principles of due process, so long as all necessary parties receive notice and no attempt to defraud creditors. *In re Estate of Kindle*, 8 Nav. R. 150 (Nav. Sup. Ct. 2001).

### 3. Each as Equals

Peacemaking should be thought of as “horizontal justice,” in which all the participants are true equals. Vertical justice, which relies on hierarchies and power, has no place in Navajo traditional justice. Recognizes all participants as equals in the law (*Diné bi beenahaz'áanii*), not just before the law. For a comprehensive discussion, see: Robert Yazzie, *Life Comes From It: Navajo Justice Concepts*, 24 N.M.L.Rev. 175 (1994) available at: <http://digistalrepository.unm.edu.nmlr/vol24/iss2/3>

Traditional Navajo justice methods rely upon adjusting the differences of equals, in mediation and the free discussion of problems, to resolve them by consent. It does not rely upon a superior decision-maker, who imposes decisions upon others. It does not use coercion or force, and is instead based upon an agreed need for harmony in the community. *Manning v. Abeyta*, 9 Nav. R. 514 (Nav. Sup. Ct. 2011).

### 4. Comprehensive

The goal of Peacemaking is healing. All issues that impede this outcome must be addressed in a comprehensive peacemaking process to rid the disharmony or problem entirely.

Under the Diné principle of *ná bináheezláago bee t'áá lahjí algha' deet'á*, disputes are to be addressed in a comprehensive manner so as to achieve finality. *In re Quiet Title to Livestock Grazing Permit No. 8-487 of Francis*, 9 Nav. R. 548 (Nav. Sup. Ct. 2011).

#### IV. *Iiná* (Executing the Plan and Restoring the LifeWay)

This stage focuses on “living” or executing the Plan (i.e., Peacemaking Agreement) that was devised in the *Nahat'á* phase.

##### A. The Peacemaking Agreement

The resolution of the disharmony or problem and the decision of shared action is sometimes reduced to writing in the Peacemaking Agreement. Written agreements are used when necessary for court referrals but are not the traditional method. The participant(s) receive copies of the agreement when one is created. If peacemaking was done pursuant to a referral, the Program will submit an outcome summary to the referrer and attach a copy of the agreement.

B. The agreement, whether written or not, is a sacred promise under the Diné concept of words are sacred.

C. Courts *may* adopt the peacemaking agreement and enter judgment as outlined in the agreement. *E.g., In re Grazing Permit No. 12-1445*, 8 Nav. R. 815 (Ship. Fam Ct 2004) (civil); *Navajo Nation v. Boone*, 8 Nav. R. 777 (Kay. Dist. Ct. 2002) (criminal).

D. Peacemaking agreements do not have to be incorporated into court orders to be enforceable. *Benally v. Benally*, 8 Nav. R. 796 (Kay. Fam. Ct. 2003).

Courts and participants have greater understanding of the significance of traditional methods now, and Peacemaking solutions are frequently not incorporated into court orders. Incorporating Peacemaking agreements are sometimes necessary for the convenience of the parties when some formal record is necessary for other purposes, such as child custody or to memorialize the steward of land for grazing leases and other purposes. The Peacemaking resolution is reached with all participants giving their sacred word that they will abide by the decision and binding the parties to solutions made during the session.

##### E. *Diné bi beenahaz'áanii* Concepts

Self-realization (*ádaa'ákozhnidzin* and *ádaa'áhozhniidzji'*) is required to execute the Peacemaking Agreement. Recognizing one's part in the healing process and carrying out one's responsibilities out of *K'é* allows the purpose of the agreement to be realized and relations to be restored. *K'é* is the foundation of personal awareness of self and their sacred relationship to others and nature, defining their pathway in life. *K'é* results in a network of community commitment to changes that improve the outcome for all involved.

V. *Sihasin* (Reflecting on the Result, working together to modify the Plan if necessary)

Also referred to some as the “reflection” part of the Diné Thought Process. It focuses on the desired result of harmony and maintaining the result.

A. The desired result of the *Sihasin* phase is *hózhó*.

B. Circular Results To Be Expected

Although *hózhó* is the desired result, it takes work. Individuals are subject to slips and falls for that is part of being human. Life is circular and repeated use of the Diné Thought Process should be anticipated.

C. *Diné bi beenahaz'áanii* Concepts

Self-empowerment through the teaching of *t'ááhó ájít'éigo* is required to maintain lasting healing.

*T'ááhó ájít'éigo* – a traditional teaching embracing empowerment of the mind and body, to encourage individuals to be self-sufficient or self-determined through personal growth and development.

Honoring the Peacemaking Agreement to maintain *hózhó*, or a state of lasting healing into the future requires both continuous personal accountability and self-determination.

D. Unfortunately, even after Peacemaking Agreements are devised, discord may re-surface requiring a return to the Diné Thought Process, or even resulting in an appeal. Examples of appellate rulings include the following:

Peacemaking agreements do not have to be incorporated into court orders to be enforceable. *Benally v. Benally*, 8 Nav. R. 796 (Kay. Fam. Ct. 2003).

The acceptance of the Peacemaking Agreement does not preclude the judge from subsequent independent review and findings from that of peacemaker *if it is in the interest of justice*. *Begay v. Frank*, 7 Nav. R. 519 (Ship. Dist. Ct. 1997)(emphasis added).

When court is to recognize peacemaking agreement, the judge is the gatekeeper whose role is to make certain that the law is followed; in order for judge to issue an order, judge must make certain that the peacemaking session fulfilled all criteria required by law. *In re Estate of Kindle*, 9 Nav. R. 29 (Nav. Sup. Ct. 2006)(dissent).

Trial court may enter probate order upon peacemaking agreement if court has jurisdiction, all necessary parties have actual knowledge of proposed judgment and agree to it or agree to submit case to peacemaker, judgment contains complete agreement of all parties and there is sufficient information regarding full agreement so future disputes will not arise, and proposed judgment is otherwise proper and enforceable. *In re Estate of Kindle*, 8 Nav. R. 150 (Nav. Sup. Ct. 2001).

Order dismissing probate action on res judicata in favor of peacemaking agreement was reversed because not all necessary parties had actual knowledge of prior peacemaking agreement and the parties in probate action were not the same or in privity with parties in peacemaking action. *In re Estate of Kindle*, 8 Nav. R. 150 (Nav. Sup. Ct. 2001).