

LEGISLATIVE SUMMARY SHEET

Tracking No. 0180-22

DATE: September 13, 2022

TITLE OF RESOLUTION: AN ACTION RELATING TO RESOURCES AND DEVELOPMENT, LAW AND ORDER, BUDGET AND FINANCE, AND NAABIK'ÍYÁTI' COMMITTEES AND THE NAVAJO NATION COUNCIL; AUTHORIZING THE ATTORNEY GENERAL TO ADVANCE FIXED COST LITIGATION ACCOUNT FUNDS TO SUPPORT THE LEGAL FEES ATTRIBUTABLE TO THE *INDIVIDUAL* FEDERAL TORTS CLAIMS ACT CASES FILED BY APPROXIMATELY 300 INDIVIDUAL TRIBAL MEMBERS FOR MONEY DAMAGES CAUSED BY THE GOLD KING MINE SPILL; WAIVING 2 N.N.C. §§1961 (B) AND 1964 (B)

PURPOSE: This resolution, if approved, will authorize the Attorney General to advance Fixed Cost Litigation Account funds to the attorneys representing individual Navajo farmers' Federal Torts Claims Act ("FTCA") litigations against the U.S. The advanced funds will be reimbursed if the individual farmers are awarded attorney fees in their FTCA cases.

This written summary does not address recommended amendments as may be provided by the standing committee. The Office of Legislative Counsel requests each committee member to review the proposed resolution in detail.

5-DAY BILL HOLD PERIOD: Johnson
Website Posting Time/Date: _____
Posting End Date: 10-03-22
Eligible for Action: 10-04-22

Resources & Development Committee
Thence
Law & Order Committee
Thence
Budget & Finance Committee
Thence
Naabik'íyáti' Committee
Thence
Navajo Nation Council

PROPOSED STANDING COMMITTEE RESOLUTION
24th NAVAJO NATION COUNCIL - Fourth Year, 2022
INTRODUCED BY

(Sponsor)

TRACKING NO. 0180-22

AN ACTION

RELATING TO RESOURCES AND DEVELOPMENT, LAW AND ORDER,
BUDGET AND FINANCE, AND NAABIK'ÍYÁTI' COMMITTEES AND THE
NAVAJO NATION COUNCIL; AUTHORIZING THE ATTORNEY GENERAL TO
ADVANCE FIXED COST LITIGATION ACCOUNT FUNDS TO SUPPORT THE
LEGAL FEES ATTRIBUTABLE TO THE *INDIVIDUAL* FEDERAL TORTS
CLAIMS ACT CASES FILED BY APPROXIMATELY 300 INDIVIDUAL TRIBAL
MEMBERS FOR MONEY DAMAGES CAUSED BY THE GOLD KING MINE
SPILL; WAIVING 2 N.N.C. §§1961 (B) AND 1964 (B)

BE IT ENACTED:

SECTION ONE. AUTHORITY.

- A. The Navajo Nation Council is the governing body of the Navajo Nation and is empowered to enact positive law of the Navajo Nation. 2 N.N.C. §§ 102(A) and 164(A).
- B. The Resources and Development Committee is a standing committee of the Navajo Nation Council and is empowered to exercise oversight over water, land, environment, environmental protection, and agriculture, among other matters, and to make recommendations to the Navajo Nation Council for final approval of

1 resolutions requiring Navajo Nation Council approval to accomplish or impact the
2 Committee purposes. 2 N.N.C. §§ 500(A) and (C) and 501(B)(4)(f).

3 C. The Budget and Finance Committee is a standing committee of the Navajo Nation
4 Council and is empowered to review and recommend to the Navajo Nation Council
5 the budgeting, appropriation, investment, and management of all funds. 2 N.N.C. §
6 301(B)(2).

7 D. The Law and Order Committee is a standing committee of the Navajo Nation Council
8 and is empowered with oversight authority over the Navajo Nation Department of
9 Justice. 2 N.N.C. §§ 600(A) and 601(B)(14).

10 E. The Naabik'íyátf' Committee is a standing committee of the Navajo Nation Council
11 and is empowered to review all proposed legislation which requires final action by
12 the Navajo Nation Council. 2 N.N.C. § 164(A)(9).

13 14 **SECTION TWO. FINDINGS.**

15 A. On August 5, 2015, the United States Environmental Protection Agency ("U.S.
16 EPA") and its contractors triggered a blowout of the Gold King Mine near Silverton,
17 CO, while excavating the mine in preparation for a possible cleanup.

18 B. The blowout released at least three million gallons of toxic acid mine wastewater into
19 Cement Creek, a tributary of the Animas River which flows into the San Juan River
20 and through the Navajo Nation. At least 880,000 pounds of heavy metals poured out
21 and coursed through downstream waterways, including approximately two hundred
22 miles of the San Juan River.

23 C. Prior to the spill, the San Juan River provided water to many Navajo farmers and
24 ranchers for irrigation of crops, livestock drinking water, and personal drinking water.
25 The San Juan River is and remains not only an important water resource for
26 agricultural use, but also of great cultural significance for the Diné people.

27 D. As a result of the spill, water utilities were forced to shut down intake valves, and
28 farmers stopped drawing from the rivers as the plume moved downstream. One of
29 the Navajo people's most important sources of water for life and livelihood was
30 poisoned with some of the worst contaminants known to man, including lead and

1 arsenic. The impact of this environmental disaster cannot be overstated. On August
2 8, 2015, the Navajo Nation declared a State of Emergency for the San Juan River
3 valley.

4 E. In the months immediately after the spill, the U.S. EPA publicly acknowledged its
5 fault. Additionally, two different Congressional committees found the U.S. EPA to be
6 at fault for the spill.

7 F. On August 16, 2016, the Navajo Nation filed a lawsuit against the U.S. EPA and its
8 contractors, as well as several mining companies, in the US District Court for the
9 District of New Mexico (*Navajo Nation v. USEPA, et al.*, No. 1:16-cv-00931
10 (D.N.M.)). The lawsuit seeks recovery for damages to the Navajo Nation caused by
11 the August 2015 spill, as well as reimbursement for costs spent responding to the
12 spill. The Navajo Nation's case was eventually consolidated into *In re Gold King*
13 *Mine Release in San Juan County, Colorado on August 5, 2015*, 1:18-md-02824
14 (D.N.M.) (the "Consolidated Case") with similar suits brought by the States of New
15 Mexico and Utah.

16 G. In September 2016, the U.S. EPA designated the Gold King Mine and 47 other
17 mining sites in the area a Superfund cleanup district. The U.S. EPA worked with
18 Navajo Nation Department of Emergency Management to provide alternative
19 drinking, agricultural, and livestock water and feed.

20 H. In December 2016, the Nation submitted an administrative claim to the U.S. EPA
21 under the Federal Tort Claims Act, a prerequisite to suing the United States in tort, in
22 the amount of approximately \$160 million.

23 I. In addition, Federal Tort Claims Act ("FTCA") claims on behalf of approximately
24 300 individual Navajo tribal members remain pending in *Allen et al. v. United States,*
25 *et al.*, 1:18-CV-00744 (D.N.M.). These claims for individual monetary damages were
26 filed in a separate 2018 lawsuit by the Egolf Ferlic Martinez & Harwood Law Firm ("Egolf
27 Ferlic"), and are also coordinated into the Consolidated Case, *In re Gold King*
28 *Mine Release in San Juan County, Colorado on August 5, 2015*, 1:18-md-02824
29 (D.N.M.).

- 1 J. The Egolf Ferlic Law Firm has informed the Navajo Nation Department of Justice
2 (“NNDOJ”) that it has entered into contingency contracts with the individual Navajo
3 tribal members who are plaintiffs in *Allen et al. v. United States, et al.*. Under the
4 contingency contracts, Egolf Ferlic’s fees are deferred and will not be paid if and
5 until the individual tribal member receives an FTCA award.
- 6 K. Since 2018, the Egolf Ferlic Law Firm has not received any attorney fees for the
7 approximately 300 individual FTCA claims the firm has filed in *Allen et al. v. United*
8 *States, et al.*, on behalf of individual tribal members. Egolf Ferlic has approached
9 NNDOJ about advancing the attorney fees necessary for Egolf Ferlic to continue to
10 aggressively litigate *Allen et al. v. United States, et al.*.
- 11 L. The statutory “purpose of the Department of Justice is to provide legal services to the
12 Navajo Nation government.” 2 N.N.C. § 1961 (B). The Navajo Nation Attorney
13 General is similarly restricted and only has statutory authority to “render legal
14 services to the Navajo Nation government, including its Chapters, branches, and
15 entities, subject to available resources, as may be required.” 2 N.N.C. §1964 (B).
16 NNDOJ and/or the Attorney General do not have statutory authority to fund the
17 attorney fees for litigation brought by individuals, including the litigations brought by
18 the individual tribal members represented by Egolf Ferlic.
- 19 M. The Navajo Nation Council has determined that it is in the best interests of the
20 Navajo People and Navajo communities to provide the Attorney General with a one-
21 time authorization to utilize the Fixed Cost Litigation Account (“FCLA”) to advance
22 attorney fees to the Egolf Ferlic Law Firm for the benefit and continued
23 representation of the individual tribal member litigations. Such authorization shall be
24 subject to the Attorney General’s discretion, the availability of FCLA funds, and to
25 Egolf Ferlic being legally obligated to reimburse the FCLA for the advanced funds.

26
27 **SECTION THREE. WAIVING 2 N.N.C. §§ 1961 (B) AND 1964 (B) AS**
28 **NECESSARY FOR THE ATTORNEY GENERAL TO ADVANCE FIXED COST**
29 **LITIGATION ACCOUNT FUNDS TO THE EGOLF FERLIC LAW FIRM**
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1 The Navajo Nation hereby waives 2 N.N.C. §1961 (B) and 2 N.N.C. § 1964 (B) to the
2 extent necessary to authorize the Attorney General to utilize the Fixed Cost Litigation
3 Account to advance funds to the Egolf Ferlic Law Firm to continue to litigate *Allen et al.*
4 *v. United States, et al.*.

5
6 **SECTION FOUR. AUTHORIZING THE ATTORNEY GENERAL TO ADVANCE**
7 **FIXED COST LITIGATION ACCOUNT FUNDS TO THE EGOLF FERLIC LAW**
8 **FIRM**

9 The Attorney General is hereby authorized, under his/her discretion, to advance Fixed
10 Cost Litigation Account funds to the Egolf Ferlic Law Firm subject to availability of
11 FCLA funds and Egolf Ferlic agreeing to the following conditions:

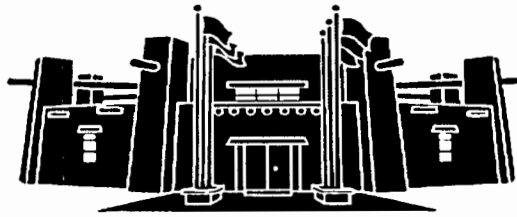
- 12 A. Egolf Ferlic shall only use the advanced funds to litigate *Allen et al. v. United*
13 *States, et al.* and any appeals thereof; and
14 B. Prior to the disbursement of any FCLA funds, Egolf Ferlic shall enter a legally
15 binding agreement to reimburse the FCLA from any and all attorney fees awarded
16 in *Allen et al. v. United States, et al.*.

17
18 **SECTION FIVE. SAVINGS CLAUSE.**

19 Should any provision(s) of this Action be determined invalid by the Navajo Nation
20 Supreme Court or the District Courts of the Navajo Nation, without appeal to the Navajo
21 Nation Supreme Court, the remainder of the Act shall remain the law of the Navajo
22 Nation.

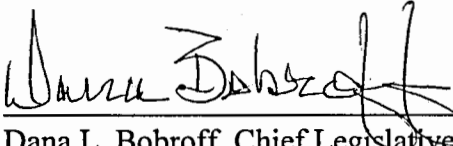
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24 **SECTION SIX. EFFECTIVE DATE.**

25 This Action is effective upon its approval pursuant to 2 N.N.C. § 221(B).
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MEMORANDUM

TO: Honorable Ricky Nez
Navajo Nation Council

FROM: 
Dana L. Bobroff, Chief Legislative Counsel
Office of Legislative Counsel

DATE: September 13, 2022

SUBJECT: **AN ACTION RELATING TO RESOURCES AND DEVELOPMENT, LAW AND ORDER, BUDGET AND FINANCE, AND NAABIK'ÍYÁTI' COMMITTEES AND THE NAVAJO NATION COUNCIL; AUTHORIZING THE ATTORNEY GENERAL TO ADVANCE FIXED COST LITIGATION ACCOUNT FUNDS TO SUPPORT THE LEGAL FEES ATTRIBUTABLE TO THE *INDIVIDUAL* FEDERAL TORTS CLAIMS ACT CASES FILED BY APPROXIMATELY 300 INDIVIDUAL TRIBAL MEMBERS FOR MONEY DAMAGES CAUSED BY THE GOLD KING MINE SPILL; WAIVING 2 N.N.C. §§1961 (B) AND 1964 (B)**

I have prepared the above-referenced proposed resolution and associated legislative summary sheet pursuant to your request for legislative drafting. Based on existing law and review of documents submitted, the resolution as drafted is legally sufficient. As with any action of government however, it can be subject to review by the courts in the event of proper challenge.

The Office of Legislative Counsel confirms the appropriate standing committee(s) based on the standing committees powers outlined in 2 N.N.C. §§301, 401, 501, 601 and 701. Nevertheless, "the Speaker of the Navajo Nation Council shall introduce [the proposed resolution] into the legislative process by assigning it to the respective oversight committee(s) of the Navajo Nation Council having authority over the matters for proper consideration." 2 N.N.C. §164(A)(5).

Please ensure that his particular resolution request is precisely what you want. You are encouraged to review the proposed resolution to ensure that it is drafted to your satisfaction.