TITLE: An Action Relating to the Budget and Finance Committee; As recommended by the Navajo Nation Investment Committee, authorizing the Controller, on behalf of the Navajo Nation, to consent to Navajo Nation Gaming Enterprise’s (NNGE) request for the Navajo Nation to waive section 5.9 of the Gaming Loan Agreement between the Nation and NNGE and to forbear from enforcing certain covenants under the Gaming Loan Agreement and the Síhasin Fund Loan Agreement from March 17, 2020 through October 30, 2020

Date posted: May 29, 2020 at 12:54PM

Digital comments may be e-mailed to comments@navajo-nsn.gov

Written comments may be mailed to:

Executive Director
Office of Legislative Services
P.O. Box 3390
Window Rock, AZ 86515
(928) 871-7586

Comments may be made in the form of chapter resolutions, letters, position papers, etc. Please include your name, position title, address for written comments; a valid e-mail address is required. Anonymous comments will not be included in the Legislation packet.

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DATE: May 26, 2020

TITLE OF RESOLUTION: AN ACTION RELATING TO THE BUDGET AND FINANCE COMMITTEE; AS RECOMMENDED BY THE NAVAJO NATION INVESTMENT COMMITTEE, AUTHORIZING THE CONTROLLER, ON BEHALF OF THE NAVAJO NATION, TO CONSENT TO NAVAJO NATION GAMING ENTERPRISE’S (NGE) REQUEST FOR THE NAVAJO NATION TO WAIVE SECTION 5.9 OF THE GAMING LOAN AGREEMENT BETWEEN THE NATION AND NNGE AND TO FORBEAR FROM ENFORCING CERTAIN COVENANTS UNDER THE GAMING LOAN AGREEMENT AND THE SÍHASIN FUND LOAN AGREEMENT FROM MARCH 17, 2020 THROUGH OCTOBER 30, 2020

PURPOSE: The purpose of this resolution is to authorize the Controller to forbear from enforcing section 5.9 of the loan agreement between the Navajo Nation Gaming Enterprise and the Navajo Nation.

This written summary does not address recommended amendments as may be provided by the standing committees. The Office of Legislative Counsel requests each Council Delegate to review each proposed resolution in detail.
PROPOSED STANDING COMMITTEE RESOLUTION
24th NAVAJO NATION COUNCIL – FIRST YEAR, 2019

INTRODUCED BY

(Primary Sponsor)

TRACKING NO. 0127-20

AN ACTION
RELATING TO THE BUDGET AND FINANCE COMMITTEE;
AS RECOMMENDED BY THE NAVAJO NATION INVESTMENT COMMITTEE,
AUTHORIZING THE CONTROLLER, ON BEHALF OF THE NAVAJO NATION,
TO CONSENT TO NAVAJO NATION GAMING ENTERPRISE'S (NNGE) REQUEST
FOR THE NAVAJO NATION TO WAIVE SECTION 5.9
OF THE GAMING LOAN AGREEMENT BETWEEN THE NATION AND NNGE
AND TO FORBEAR FROM ENFORCING CERTAIN COVENANTS UNDER THE
GAMING LOAN AGREEMENT AND THE SÍHASÍN FUND LOAN AGREEMENT
FROM MARCH 17, 2020 THROUGH OCTOBER 30, 2020

BE IT ENACTED:

SECTION ONE. AUTHORITY
A. The Budget and Finance Committee of the Navajo Nation Council (the “Budget and
Finance Committee”) is empowered with the authority to exercise oversight in the areas
including, but not limited to, budget, finance, investment, bonds, contracting, insurance,
audits, accounting, taxes, loans, and Chapter budget and finance, for the purpose of
coordinating, overseeing, and regulating the fiscal, financial, investment, contracting, and
audit policies of the Navajo Nation pursuant to 2 N.N.C. § 300(C)(1); and to promulgate
rules and regulations related to contracting, investments, and financial matters pursuant to
2 N.N.C. § 301(B)(1).

B. The Navajo Nation created the Navajo Nation Investment Committee (the “Investment
Committee”) pursuant to Resolution No. CAU-39-73, and the Budget and Finance
Committee approved and adopted the investment policies for all Navajo Nation financial
resources (the “Master Investment Policy”) pursuant to Resolution No. BFD-45-18.

C. The Investment Committee is an advisory group to the Budget and Finance Committee in
the management of the Nation’s investment program and is responsible for recommending
to the Budget and Finance Committee the approval of the selection of investment managers
and custodians recommended by the Investment Consultant, subject to the approval of each
investment manager contract and each custodian contract by the Budget and Finance
Committee, pursuant to the Master Investment Policy, § 4.3(d).

SECTION TWO. FINDINGS

A. The Budget and Finance Committee previously passed Resolution No. BFN-39-17, which
approved and authorized the execution of the Second Amended, Restated and Consolidated
Loan Agreement between the Navajo Nation, as Lender, and Navajo Nation Gaming
Enterprise (“NNGE”), as Borrower, executed on May 18, 2018 and effective as of
December 1, 2017 (the “Loan Agreement,” attached hereto as Exhibit A) for the Nation’s
direct investment of $208,759,393 in NNGE to restructure NNGE’s gaming loan; and

B. The Budget and Finance Committee previously passed Resolution No. BFD-42, which
approved and authorized the execution of that certain loan agreement between the Navajo
Nation and NNGE for a loan in the principal amount of $4,000,000 from the Sihasin Fund
for the Twin Arrows Travel Center, dated May 23, 2018 between the Navajo Nation, as
Lender, and NNGE, as Borrower (the “Sihasin Loan Agreement,” attached hereto as
Exhibit B, and together with the Loan Agreement, the “Loan Agreements”); and

C. The Loan Agreement at Section 1.6 grants the Controller the authority to act on behalf of
the Navajo Nation to grant or deny any approvals, waivers, consents, amendments,
modifications, or other functions to be performed by the Navajo Nation under the Loan Agreement; and

D. The Loan Agreement at Section 3.1 requires NNGE to pay to the Navajo Nation principal and interest ("debt service payments") according to a schedule with debt service payments due quarterly while the loan remains outstanding; and

E. The Loan Agreement at Section 5.9 requires NNGE to set aside net gaming revenues for annual transfers to the Gaming Distribution Fund and the Fire Rock Permanent Facility Reserve Account; and

F. In particular, Section 5.9 of the Loan Agreement requires that NNGE (i) pay to the Navajo Nation a Gaming Distribution Fund Payment, which consists of net gaming revenues after NNGE has met the financial performance goals described in the annual budget submitted to the Navajo Nation pursuant to Section 7.1(c) of the Loan Agreement, and to the extent monies are available after payment of Operation Expenses as defined therein (ii) fund a sinking fund from twenty-five percent of excess revenues after payment of Operation Expenses, the Gaming Distribution Fund Payment, and after the Fire Rock Permanent Facility Account is fully funded (iii) fund a Fire Rock Permanent Facility Reserve Account in amounts sufficient, as determined by NNGE, to reserve funds for the construction, development, infrastructure and operation of a permanent gaming facility within the Gallup, New Mexico geographic area; and

G. Under Section 5.9.4 of the Loan Agreement, the payments or distributions under Section 5.9 are due on June 30 of each year; and

H. The Loan Agreement at Section 6.13 provides that NNGE shall not, unless the Navajo Nation consents, fail to conduct gaming at its casinos for more than ten consecutive days if such failure could reasonably be expected to have a material adverse effect; and

I. The Sihasin Loan Agreement at Section 1.6 grants the Controller the authority to act on behalf of the Navajo Nation as the lender to grant or deny any approvals, waivers, consents, amendments, modifications or other functions to be performed by the Navajo Nation under the Sihasin Loan Agreement; and
J. The Sihasin Loan Agreement at Section 6.10, provides that NNGE shall not fail to continuously operate the Sihasin Fund Project as described in the Sihasin Loan Agreement, and


L. On March 17, 2020, NNGE temporarily closed its facilities. See Exhibit 2 to Investment Committee Resolution No. NNICAP-07-20, attached hereto as Exhibit C; and

M. NNGE, by letter dated April 10, 2020 to Controller Pearline Kirk from NNGE Interim CEO Brian Parrish, attached as Exhibit 1 to Investment Committee Resolution No. NNICAP-07-20, attached hereto as Exhibit C, requested that the Nation consent to a waiver through December 31, 2020 of NNGE’s obligations under Section 5.9 of the Loan Agreement due to the temporary closure of NNGE’s casinos and associated lack of revenues. NNGE’s letter requests:

1. Relief from the required Gaming Distribution Fund Payment of $5 million for 2019 and allow for NNGE usage of those funds; and

2. Relief from required set asides of $2.4 million for the Fire Rock Permanent Facility Reserve Account for 2019 and allow for usage of currently set aside funds of $10.5
million in the Fire Rock Permanent Facility Reserve Account; and

3. NNGE will use the funds designated for the Gaming Distribution Fund Payment first and the funds for the Fire Rock Permanent Facility Reserve Account second.

N. Further, by letter dated April 10, 2020, to President Jonathan Nez and Controller Pearline Kirk from NNGE Interim CEO Brian Parrish, attached as Exhibit 2 to Investment Committee Resolution No. NNICAP-07-20, attached hereto as Exhibit C, NNGE provided Notice of a Potential Material Adverse Effect due to the temporary closure of NNGE facilities due to COVID-19 from March 17, 2020 until at least April 30, 2020, which notice is required under Section 7.1(g) of the Loan Agreement and Section 7.1(f) of the Sihasin Loan Agreement; and

O. In addition, by letter dated April 10, 2020, to Controller Pearline Kirk from NNGE Interim CEO Brian Parrish, attached as Exhibit 3 to Investment Committee Resolution No. NNICAP-07-20, attached hereto as Exhibit C, NNGE stated that NNGE is seeking a waiver of all Events of Default under the Loan Agreements that arise or relate to the closure of the NNGE casinos and notice thereof through October 30, 2020 as well as a waiver of the Navajo Nation’s right to pursue remedies with respect to any Event of Default that arises during that same time frame; and

P. The Investment Committee passed Resolution No. NNICAP-07-20, attached hereto as Exhibit C, which approved and recommended to the Budget and Finance Committee the consent to a waiver through December 31, 2020 of NNGE’s 2019 payment obligations under Section 5.9 of the Loan Agreement as follows:

1. Waive NNGE’s obligation to make the Gaming Distribution Fund Payment of $5 million for 2019, provided the quarterly debt service payment due June 30, 2020 will be paid from the $5 million within the Gaming Distribution Fund Payment unless the closure extends beyond June 8, 2020; and

2. Waive NNGE’s obligation to pay set asides of $2.4 million for the Fire Rock Permanent Facility Reserve Account for 2019 and allow for usage of currently set aside funds of $10.5 million for the Fire Rock Permanent Facility Reserve Funds.
provided NNGE uses the $2.4 million and $10.5 million set-asides to cover fixed expenses during shut-down and ramp up; and

3. Consent to such waiver of payments provided further that NNGE and the Office of the Controller will quantify any other available funding sources (i.e. CARES Act) to cover debt service, the Gaming Distribution Fund Payment, and set-asides, if applicable, as soon as practical if a closure continues beyond June 8, 2020.

Q. In response to NNGE’s request and in keeping with the recommendation provided by Investment Committee Resolution No. NNICAP-07-20, attached hereto as Exhibit B, and also taking into account NNGE’s request for relief from certain covenants and other requirements of the Loan Agreements, the Controller wishes to exercise her authority to grant certain relief to NNGE; however, due to the importance of this matter, including revenue loss to the Navajo Nation and a reduction in the Fire Rock Permanent Facility Reserve Account, the Controller now seeks the concurrence of the Budget and Finance Committee with her determination to act on behalf of the Navajo Nation as follows:

1. To suspend and defer all payment requirements under Section 5.9 of the Loan Agreement from March 17, 2019 through December 31, 2020 and to forebear from exercising any remedies with respect to the payments required under Section 5.9 during that time frame; provided, however, that NNGE shall pay the June 30, 2020 debt service payment due under Article 3 of the Loan Agreement from the monies that would have gone to the Gaming Distribution Fund Payment unless the closure continues beyond June 8, 2020; and

2. To allow NNGE to use the $5 million that would have gone toward the Gaming Distribution Fund Payment, the $2.4 million that would have gone to Fire Rock Permanent Facility Reserve Fund and $10.5 million that is currently set aside for the Fire Rock Permanent Facility to cover fixed expenses during shut-down and ramp up, provided that NNGE uses the Gaming Distribution Fund Payment monies first and the Fire Rock Permanent Facility Reserve Funds second; and

3. To reserve the right to require NNGE to make the Section 5.9 Gaming Distribution Fund Payment of $5 million, the Fire Rock Permanent Facility Reserve Funds Payment of $2.4 million and to replenish any funds used from the Fire Rock
Permanent Facility Reserve Account from monies that may become available, including but not limited to funds from federal sources such as the CARES Act; and

4. To forbear from enforcing the NNNGE covenants under Sections 6.13 of the Loan Agreement and Section 16.10 of the Sihasin Loan Agreement to continually operate its Casinos and the Sihasin Fund Project for the duration of the time period from March 17, 2020 through October 30, 2020 (the “Forbearance Period”); and

5. To consider granting forbearance with respect to any other specific covenants or loan requirements that may be violated that arise or relate to the closure of the Casinos and the Sihasin Fund Project during the Forbearance Period; and

6. If the closure continues beyond June 8, 2020, to require NNNGE to promptly meet with the Controller to discuss how NNNGE will make quarterly debt service payments due on September 30, 2020 and thereafter, taking into account all monies that may become available to NNNGE, including but not limited to funds from federal sources such as the CARES Act.

R. The Budget and Finance Committee now considers the recommendation of the Investment Committee and the reports of the Controller and NNNGE presented during this meeting, and finds it is in the best interests of the Nation (1) to accept the Investment Committee’s direction to provide NNNGE with certain relief from payment requirements of Section 5.9 of the Loan Agreement and (2) to grant further relief by forbearing from exercising during the Forbearance Period any remedies in connection with the Section 5.9 payment requirements and the specific covenants referenced above.

SECTION THREE. APPROVAL

A. The Budget and Finance Committee hereby concurs with the determination of the Controller to take the following actions in response to the requests from NNNGE:

1. With respect to NNNGE’s request to waive certain requirements of Section 5.9 as set forth in its letter dated April 10, 2020, attached as Exhibit 1 to Investment Committee Resolution No. NNICAP-07-20, attached hereto as Exhibit C:

a. To suspend and defer all payment requirements under Section 5.9 of the Loan Agreement for the

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Agreement from March 17, 2019 through December 31, 2020 and to forebear from exercising any remedies with respect to the payments required under Section 5.9 during that time frame; provided, however, that NNGE shall pay the June 30, 2020 debt service payment due under Article 3 of the Loan Agreement from the monies that would have gone to the Gaming Distribution Fund Payment unless the closure continues beyond June 8, 2020; and

b. To allow NNGE to use the $5 million that would have gone toward the Gaming Distribution Fund Payment for debt service payment, and to allow NNGE to use the $2.4 million that would have gone to Fire Rock Permanent Facility Reserve Fund and $10.5 million that is currently set aside for the Fire Rock Permanent Facility for fixed expenses during shut-down and ramp up; and

c. To reserve the right, at the sole discretion of the Controller, to require NNGE to make the Section 5.9 Gaming Distribution Fund Payment of $5 million, the Fire Rock Permanent Facility Reserve Funds Payment of $2.4 million and to replenish any funds used from the Fire Rock Permanent Facility Reserve Account from future revenues or from monies that may become available, including but not limited to funds from federal sources such as the CARES Act.

d. If the closure continues beyond June 8, 2020, to require NNGE to promptly meet with the Controller to discuss how NNGE will make quarterly debt service payments due on September 30, 2020 and thereafter, taking into account all monies that may become available to NNGE, including but not limited to funds from federal sources such as the CARES Act.

2. With respect to NNGE’s request for a waiver of certain covenants, events of default and remedies as set forth in in its letter dated April 10, 2020, attached as Exhibit 3 to Investment Committee Resolution No. NNICAP-07-20, attached hereto as Exhibit C:

a. To forbear from enforcing the NNGE covenants under Sections 6.13 of the Loan Agreement and Section 16.10 of the Sfhasin Loan Agreement to continually operate its Casinos and the Sfhasin Fund Project respectively for the duration of the Forbearance Period, which is from March 17, 2020 through
October 30, 2020; and

b. To consider granting forbearance with respect to any other specific covenants or loan requirements that may be violated that arise or relate to the closure of the Casinos during the Forbearance Period; and

c. To extend the Forbearance Period, at the sole discretion of the Controller, if in her judgment the current COVID-19 crisis so warrants.

B. The Budget and Finance Committee further approves and delegates authority to the Controller to take any reasonable and necessary actions consistent with the intent of this Legislation and to effectuate the purposes of this Legislation.