TITLE: An Action Relating to the Resources and Development, Budget and Finance, and Naabik’íyáti’ Committees and the Navajo Nation Council; Approving a Limited Waiver of Sovereign Immunity of the Navajo Nation to Authorize the Navajo Nation to Register and Sell Offset Credits for Carbon Sequestration Under the California Cap and Trade Program Administered by the California Air Resources Board, and to Provide the Courts of the State of California Subject Matter and Equitable Jurisdiction Over the Navajo Nation for the Sole Purpose of Enforcing the Navajo Nation’s Obligations with Respect to its Participation in the California Cap and Trade Program; Approving the Carbon Development and Marketing Agreement and Authorizing the Navajo Nation President to Sign the Same

Date posted: October 05, 2021 at 4:11PM

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

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DATE: October 4, 2021

TITLE OF RESOLUTION: PROPOSED NAVAJO NATION COUNCIL RESOLUTION; AN ACTION RELATING TO THE RESOURCES AND DEVELOPMENT, BUDGET AND FINANCE, AND NAABIK’ÍYÁTI’ COMMITTEES AND THE NAVAJO NATION COUNCIL; APPROVING A LIMITED WAIVER OF SOVEREIGN IMMUNITY OF THE NAVAJO NATION TO AUTHORIZE THE NAVAJO NATION TO REGISTER AND SELL OFFSET CREDITS FOR CARBON SEQUESTRATION UNDER THE CALIFORNIA CAP AND TRADE PROGRAM ADMINISTERED BY THE CALIFORNIA AIR RESOURCES BOARD, AND TO PROVIDE THE COURTS OF THE STATE OF CALIFORNIA SUBJECT MATTER AND EQUITABLE JURISDICTION OVER THE NAVAJO NATION FOR THE SOLE PURPOSE OF ENFORCING THE NAVAJO NATION’S OBLIGATIONS WITH RESPECT TO ITS PARTICIPATION IN THE CALIFORNIA CAP AND TRADE PROGRAM; APPROVING THE CARBON DEVELOPMENT AND MARKETING AGREEMENT AND AUTHORIZING THE NAVAJO NATION PRESIDENT TO SIGN THE SAME

PURPOSE: The purpose of this legislation to approve a limited waiver of sovereign immunity of the Navajo Nation to authorize the Navajo Nation to register and sell offset credits for carbon sequestration under the California Cap and Trade Program administered by the California Air Resources Board, and to provide the courts of the State Of California subject matter and equitable jurisdiction over the Navajo Nation for the sole purpose of enforcing the Navajo Nation's obligations with respect to its participation in the California Cap and Trade Program; approving the Carbon Development And Marketing Agreement and authorizing the Navajo Nation President to sign the same.

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 NAVAJO NATION COUNCIL RESOLUTION
24th NAVAJO NATION COUNCIL – Third Year, 2021

INTRODUCED BY

(Prime Sponsor)

TRACKING NO. 0208-21

AN ACTION

RELATING TO THE RESOURCES AND DEVELOPMENT, BUDGET AND
FINANCE, AND NAABIK'ÍYÁTÉ' COMMITTEES AND THE NAVAJO NATION
COUNCIL; APPROVING A LIMITED WAIVER OF SOVEREIGN IMMUNITY OF
THE NAVAJO NATION TO AUTHORIZE THE NAVAJO NATION TO REGISTER
AND SELL OFFSET CREDITS FOR CARBON SEQUESTRATION UNDER THE
CALIFORNIA CAP AND TRADE PROGRAM ADMINISTERED BY THE
CALIFORNIA AIR RESOURCES BOARD, AND TO PROVIDE THE COURTS OF
THE STATE OF CALIFORNIA SUBJECT MATTER AND EQUITABLE
JURISDICTION OVER THE NAVAJO NATION FOR THE SOLE PURPOSE OF
ENFORCING THE NAVAJO NATION'S OBLIGATIONS WITH RESPECT TO ITS
PARTICIPATION IN THE CALIFORNIA CAP AND TRADE PROGRAM;
APPROVING THE CARBON DEVELOPMENT AND MARKETING AGREEMENT
AND AUTHORIZING THE NAVAJO NATION PRESIDENT TO SIGN THE SAME

BE IT ENACTED:

SECTION ONE. AUTHORITY

A. The Navajo Nation Council is the governing body of the Navajo Nation. 1 N.N.C. § 102(A).
B. The Navajo Nation Council is authorized to approve a limited waiver of the Navajo Nation's sovereign immunity. 1 N.N.C. § 554.

C. The Resources and Development Committee of the Navajo Nation Council is a standing committee of the Navajo Nation Council and is authorized to make recommendations to the Navajo Nation Council for approval of legislation within the Committee's purpose. 2 N.N.C. § 500(A) and 501(B)(4).

D. The Resources and Development Committee of the Navajo Nation Council has oversight authority over the Division of Natural Resources, Forestry Department, the Navajo Nation's forest natural resources, and has oversight authority on the Navajo Nation regarding alterations of the natural state of the Nation's forestry resource. 2 N.N.C. § 500.

E. The Budget and Finance Committee of the Navajo Nation Council is a standing committee of the Navajo Nation Council and is established for the purpose of recommending to the Navajo Nation Council the adoption of resolutions designed to strengthen the fiscal and financial position of the Navajo Nation and to promote the efficient use of the fiscal and financial resources of the Navajo Nation. 2 N.N.C. § 300 (A) and (C)(3).

F. The Naabik’iyáti’ Committee of the Navajo Nation Council is a standing committee of the Navajo Nation Council and recommends legislation to Navajo Nation Council on matters within the Committee's jurisdiction. 2 N.N.C. § 700(A) and 701(A)(3).

SECTION TWO. FINDINGS

A. The Navajo Nation is a sovereign nation which is immune from suit. 1 N.N.C. § 553 (A).

B. The jurisdiction and powers of the courts of the Navajo Nation, particularly with regard to suits against the Navajo Nation, are derived from and limited by the Navajo Nation Council as the governing body of the Navajo Nation. 1 N.N.C. § 553(C).

C. The Navajo Nation sovereign immunity can be waived for lawsuits filed in the Navajo Nation courts for matters authorized by explicit resolutions of the Navajo Nation Council. 1 N.N.C. §§ 554 (B), (C), and (K).

E. The Navajo Nation desires to utilize its commercial forest natural resource to create a carbon sequestration project from which the Nation will be able to register and sell carbon offset credits.

F. The Navajo Nation Forestry Department, Division of Natural Resources, has procured the Nation's carbon sequestration credits sales manager and agent, Bluesource, L.L.C, through the competitive procurement process required by Navajo Nation law. The Navajo Nation has negotiated an acceptable Carbon Development and Marketing Agreement with Bluesource, L.L.C to bring this project to reality as soon as possible. A copy of the Carbon Development Marketing Agreement (CDMA) is attached hereto and incorporated herein as Exhibit 1. The Navajo Nation's participation in the Cap-and-Trade Program will not interfere in the current uses of the Navajo Nation Commercial Forest that the Navajo Nation has authorized. Moreover, this proposed use of the Navajo Nation Commercial Forest is authorized by the Navajo Nation's 10-year Forest Management Plan in that sales of timber will occur over the life of the Navajo Nation's participation in the Cap-and-Trade Program.

G. To authorize the Navajo Nation to be subject to the civil subject matter and equitable jurisdiction of the State of California, California Air Resources Board, for purposes of participation in the California Cap-and-Trade Program administered by the California Air Resources Board (CARB), the Navajo Nation Council must authorize a limited waiver of the Navajo Nation's sovereign immunity. (California Code of Regulations, Title 17, Section 95975(1).)

H. The applicable California regulation regarding a tribe's limited waiver of sovereign immunity specifically requires in relevant part:

   (1) The governing body of the Tribe must enter into a limited waiver of sovereign immunity with [C]ARB related to its participation in the requirements of the Cap-and-Trade Program for the duration required by the applicable Compliance Offset Protocol(s). This waiver must include a consent to suit by the State of California, Air Resources Board, in the courts
of the State of California, with respect to any action in law or equity commenced by the State of California, Air Resources Board to enforce the obligations of the Tribe with respect to its participation in the Cap-and-Trade Program, irrespective of the form of relief sought, whether monetary or otherwise, except for purposes of relief under this limited waiver, Tribes shall be treated in the same manner as a California public entity under California Government Code sections 818 and 818.8.

(2) The Tribe must provide (C)ARB with documentation demonstrating that the limited waiver of sovereign immunity entered into pursuant to section 95975(l) (1) has been properly adopted in accordance with the Tribe's Constitution or other organic law, by-laws and ordinances, and applicable federal laws. (California Code of Regulations, Title 17, Section 95975 (l) (1) and (2). (edits supplied)

I. Under the California Cap and Trade Program, which is authorized by the California Global Warming Solutions Act of 2006, CARB issues "ARB Offset Credits" to qualifying projects that reduce or sequester greenhouse gases. California, through CARB, allows forests located throughout the United States to be utilized to generate carbon sequestration credits for sale on the CARB regulated market. In order to participate in the Cap-and-Trade Program, the Navajo Nation is required to qualify and certify its commercial forest through forest inventory, harvesting practices, and management so as to ensure that the carbon sequestered from the air is not re-released over the lives of each of the carbon credits. The purpose of the limited waiver of sovereign immunity is to ensure these conditions are enforceable by CARB.

J. The Navajo Division of Natural Resources Navajo Forestry Department's Forest Manager Memorandum dated May 5, 2021, attached as Exhibit 2, provides a summary of the Forest Carbon Offset Project.

SECTION THREE. APPROVAL OF LIMITED WAIVER OF SOVEREIGN IMMUNITY
A. The Navajo Nation Council hereby authorizes a limited waiver of sovereign immunity of the Navajo Nation for the limited purpose of satisfying the requirements of the CARB program as follows:

The Navajo Nation hereby expressly waives any and all defenses based on tribal sovereign immunity from suit with respect to any action in law or equity commenced by the State of California, Air Resources Board, to enforce the obligations of the Navajo Nation with respect to its participation in the Cap and Trade Program, for the duration required in the Compliance Offset Protocol for the U.S. Forest Projects (adopted June 25, 2015), and irrespective of the form of relief sought, whether monetary or otherwise, including the submission or replacement, as applicable of valid CARB offset credits or other approved compliance instruments as required by the Cap and Trade Program, including in Sections 95983 (c) and 95985. The Navajo Nation, for purposes of this limited waiver, shall be treated in the same manner as a California public entity under California Government Code sections 818 and 818.8. The Navajo Nation consents to the jurisdiction and venue in the courts of the State of California for the limited purpose expressed herein and does not waive any aspect of its sovereign immunity with respect to actions commenced by third parties other than the State of California, Air Resources Board.

B. Nothing about the Navajo Nation's Forest Project, including without limitation any attestations to the CARB, shall confer upon any other agency of the State of California or any other state government, or any state, county, or other subdivision, any general civil regulatory authority over the Navajo Nation or the Navajo Nation's reservation or commercial forest, including without limitation those acres that the Navajo Nation has placed into the Project.

SECTION FOUR. AUTHORIZING PRESIDENT AND DIVISION OF NATURAL RESOURCES EXECUTIVE DIRECTOR TO INITIATE AND COMPLETE
REQUIREMENTS FOR THE NAVAJO NATION'S PARTICIPATION IN THE CALIFORNIA CAP-AND-TRADE PROGRAM

The Navajo Nation Council authorizes the President of the Navajo Nation and the Division of Natural Resources Executive Director to initiate and complete the requirements for the Navajo Nation's participation in the California Cap-and-Trade Program.

SECTION FIVE. APPROVING THE CARBON DEVELOPMENT AND MARKETING AGREEMENT AND AUTHORIZING THE PRESIDENT TO SIGN THE SAME

The Navajo Nation Council hereby approves the Carbon Development and Marketing Agreement in the form of or substantially similar to the form of Exhibit 1 as attached, and authorizes the President of the Navajo Nation to execute the same.