

THE NAVAJO NATION
LEGISLATIVE BRANCH
INTERNET PUBLIC REVIEW PUBLICATION



LEGISLATION NO: _0040-22_

SPONSOR: Rickie Nez

TITLE: An Act Relating to Resources and Development, Health, Education and Human Services, Law and Order, Budget and Finance, and Naabik'iyáti' Committees and the Navajo Nation Council; Establishing the San Juan River Mitigation Fund; Directing that Monies Received from In Re: Gold King Mine Release In San Juan County, Colorado, on August 5, 2015, NO. 1:18-md-02824 (D.N.M.) and Underlying and Related Actions Be Deposited in the San Juan River Mitigation Fund After Reimbursement of Litigation Costs

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LEGISLATIVE SUMMARY SHEET

Tracking No. 0040-22

DATE: February 17, 2022

TITLE OF RESOLUTION: AN ACT RELATING TO RESOURCES AND DEVELOPMENT, HEALTH, EDUCATION AND HUMAN SERVICES, LAW AND ORDER, BUDGET AND FINANCE, AND NAABIK'ÍYÁTI' COMMITTEES AND THE NAVAJO NATION COUNCIL; ESTABLISHING THE SAN JUAN RIVER MITIGATION FUND; DIRECTING THAT MONIES RECEIVED FROM *IN RE: GOLD KING MINE RELEASE IN SAN JUAN COUNTY, COLORADO, ON AUGUST 5, 2015*, NO. 1:18-md-02824 (D.N.M.) AND UNDERLYING AND RELATED ACTIONS BE DEPOSITED IN THE SAN JUAN RIVER MITIGATION FUND AFTER REIMBURSEMENT OF LITIGATION COSTS

PURPOSE: This resolution, if approved, will establish the San Juan River Mitigation Fund as a depository for the litigation and settlement funds stemming from the numerous Gold King Mine litigations. The resolution also set forth the process and criteria for expenditures from the Fund.

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: 02-27-22

Eligible for Action: 02-28-22

Resources & Development Committee

Thence

Health Education & Human Services Committee

Thence

Law & Order Committee

Thence

Budget & Finance Committee

Thence

Naabik'iyáti' Committee

Thence

Navajo Nation Council

PROPOSED NAVAJO NATION COUNCIL RESOLUTION

24th NAVAJO NATION COUNCIL – Fourth Year, 2022

INTRODUCED BY

(Prime Sponsor)

TRACKING NO. 0040-22

AN ACT

RELATING TO RESOURCES AND DEVELOPMENT, HEALTH, EDUCATION AND HUMAN SERVICES, LAW AND ORDER, BUDGET AND FINANCE, AND NAABIK'ÍYÁTI' COMMITTEES AND THE NAVAJO NATION COUNCIL; ESTABLISHING THE SAN JUAN RIVER MITIGATION FUND; DIRECTING THAT MONIES RECEIVED FROM *IN RE: GOLD KING MINE RELEASE IN SAN JUAN COUNTY, COLORADO, ON AUGUST 5, 2015, NO. 1:18-md-02824 (D.N.M.)* AND UNDERLYING AND RELATED ACTIONS BE DEPOSITED IN THE SAN JUAN RIVER MITIGATION FUND AFTER REIMBURSEMENT OF LITIGATION COSTS

BE IT ENACTED:

SECTION ONE. AUTHORITY.

A. The Navajo Nation Council is the governing body of the Navajo Nation and empowered to enact positive law of the Navajo Nation. 2 N.N.C. §§ 102(A) and 164(A). The Council also has the statutory authority to designate deposit of additional revenues. 12 N.N.C. § 820(K) (“Funds received in excess of the initial or current revenue projection shall be deposited into the General Fund Unreserved, Undesignated Fund Balance unless otherwise designated by the Navajo Nation Council.”).

- 1 B. The Health, Education and Human Services Committee is a standing committee of the
2 Navajo Nation Council and is empowered to review and recommend resolutions
3 relating to social services, health, environmental health, education, veterans and
4 veterans' services, employment and labor. 2 N.N.C. §§ 400(A) and 401(b)(6)(a).
- 5 C. The Resources and Development Committee is a standing committee of the Navajo
6 Nation Council and is empowered to exercise oversight over water, land, environment,
7 environmental protection, and agriculture, among other matters, and to make
8 recommendations to the Navajo Nation Council for final approval of resolutions
9 requiring Navajo Nation Council approval to accomplish or impact the Committee
10 purposes. 2 N.N.C. §§ 500(A) and (C) and 501(B)(4)(f).
- 11 D. The Budget and Finance Committee of the Navajo Nation Council is empowered to
12 review and recommend to the Navajo Nation Council the budgeting, appropriation,
13 investment, and management of all funds and to approve Fund Management Plans
14 pursuant to the recommendations of the appropriate oversight committee and affected
15 Division or Branch. 2 N.N.C. §§ 301(B)(2) and (14).
- 16 E. The Law and Order Committee is a standing committee of the Navajo Nation Council
17 and is empowered with the authority to review and make recommendations to the
18 Navajo Nation Council on amendments to and enactments in the Navajo Nation Code.
19 2 N.N.C. §§ 600(A), and 601(B)(14).
- 20 F. The Naabik'íyátf' Committee of the Navajo Nation Council is empowered to review
21 all proposed legislation which requires final action by the Navajo Nation Council. 2
22 N.N.C. § 164(A)(9).
- 23 G. The Navajo Nation Environmental Protection Agency, a regulatory agency within the
24 Executive Branch of the Navajo Nation Government, is responsible for the protection
25 of public health and the Navajo Nation environment. RDCMY-44-17. This includes
26 the prevention, reduction, and elimination of pollution of the waters of the Navajo
27 Nation, and the restoration, preservation, and enhancement of land and water resources
28 within the Navajo Nation. 4 N.N.C. § 1303.

29
30 **SECTION TWO. FINDINGS.**

- 1 A. On August 5, 2015, the United States Environmental Protection Agency (“U.S. EPA”)
2 and its contractors triggered a blowout of the Gold King Mine near Silverton, CO, while
3 excavating the mine in preparation for a possible cleanup.
- 4 B. The blowout released at least three million gallons of toxic acid mine wastewater into
5 Cement Creek, a tributary of the Animas River which flows into the San Juan River
6 and through the Navajo Nation. At least 880,000 pounds of heavy metals poured out
7 and coursed through downstream waterways, including approximately two hundred
8 miles of the San Juan River.
- 9 C. Prior to the spill, the San Juan River provided water to many Navajo farmers and
10 ranchers for irrigation of crops, livestock drinking water, and personal drinking water.
11 The San Juan River is and remains not only an important water resource for agricultural
12 use, but also of great cultural significance for the Diné people.
- 13 D. As a result of the spill, water utilities were forced to shut down intake valves, and
14 farmers stopped drawing from the rivers as the plume moved downstream. One of the
15 Navajo people’s most important sources of water for life and livelihood was poisoned
16 with some of the worst contaminants known to man, including lead and arsenic. The
17 impact of this environmental disaster cannot be overstated. On August 8, 2015, the
18 Navajo Nation declared a State of Emergency for the San Juan River valley.
- 19 E. In addition, the Navajo Nation Environmental Protection Agency (“NN EPA”)
20 conducted water quality monitoring and ecological restoration activities including,
21 among other things, sediment sampling and a fish tissue contaminant study to
22 understand contaminant levels and potential human health risks associated with the
23 spill.
- 24 F. NN EPA also developed a report on livestock and irrigation water quality standards,
25 tracked metal sources through ongoing studies, created a communication strategy,
26 assessed and stored analytical water quality data, and assisted the U.S. EPA and the
27 U.S. Geological Survey with other technical studies.
- 28 G. In the months immediately after the spill, the U.S. EPA publicly acknowledged its fault.
29 Additionally, two different Congressional committees found the U.S. EPA to be at fault
30 for the spill.

- 1 H. On August 16, 2016, the Navajo Nation filed a lawsuit against the U.S. EPA and its
2 contractors, as well as several mining companies, in the US District Court for the
3 District of New Mexico (*Navajo Nation v. USEPA, et al.*, No. 1:16-cv-00931
4 (D.N.M.)). The lawsuit seeks recovery for damages caused by the August 2015 spill,
5 as well as reimbursement for costs spent responding to the spill. The Navajo Nation's
6 case was eventually consolidated into *In re Gold King Mine Release in San Juan
7 County, Colorado on August 5, 2015, 1:18-md-02824* (D.N.M.) (the "Consolidated
8 Case") with similar suits brought by the States of New Mexico and Utah.
- 9 I. In September 2016, the U.S. EPA designated the Gold King Mine and 47 other mining
10 sites in the area a Superfund cleanup district. The U.S. EPA worked with Navajo
11 Nation Department of Emergency Management to provide alternative drinking,
12 agricultural, and livestock water and feed.
- 13 J. In December 2016, the Nation submitted an administrative claim to the U.S. EPA under
14 the Federal Tort Claims Act, a prerequisite to suing the United States in tort, in the
15 amount of approximately \$160 million.
- 16 K. In addition, claims on behalf of approximately 300 individual Navajo tribal members
17 remain pending in *Allen et al. v. United States, et al.*, 1:18-CV-00744 (D.N.M.). These
18 claims were filed in a separate 2018 lawsuit by the Egolf Ferlic Martinez & Harwood
19 Law Firm, and are also coordinated into the Consolidated Case, *In re Gold King Mine
20 Release in San Juan County, Colorado on August 5, 2015, 1:18-md-02824* (D.N.M.).
- 21 L. On May 11, 2018, the Nation filed a First Amended Complaint to the Consolidated
22 Case adding the United States as a named defendant.
- 23 M. In January 2021, the Nation announced that it had reached a settlement in the
24 Consolidated Case with the defendant mining companies, Kinross Gold Corp., Kinross
25 Gold U.S.A., Inc., and Sunnyside Gold Corp., a subsidiary of Canada's Kinross Gold,
26 in the amount of ten million dollars (\$10,000,000) million to resolve claims from the
27 2015 spill. (Which case was settled or partially settled?)
- 28 N. The Nation's lawsuit against the remaining Defendants of the Consolidated Case
29 including the U.S. EPA and its contractors who caused the spill remains ongoing.
30

1 SECTION THREE. ESTABLISHING THE NAVAJO NATION SAN JUAN
2 RIVER MITIGATION FUND.

3 The Navajo Nation hereby establishes the Navajo Nation San Juan River Mitigation Fund
4 and approves its enabling legislation as follows:

5 _____
6
7 Title 12. Fiscal Matters

8 Chapter 29. Navajo Nation San Juan River Mitigation Fund

9
10 § 2901. Establishment

11 There is established the “Navajo Nation San Juan River Mitigation Fund”, hereinafter
12 referred to as “Fund”.

- 13 A. The Navajo Nation Council hereby designates that any and all net proceeds and
14 earnings awarded to the Navajo Nation by or through the litigation captioned *In re:*
15 *Gold King Mine Release in San Juan County, Colorado, on August 5, 2015*, No. 1:18-
16 md-02824 (D.N.M.), or any of its underlying or related actions, including but not
17 limited to *Navajo Nation v. USEPA, et al.*, No. 1:16-cv-00931 (D.N.M.) and *New*
18 *Mexico v. USEPA, et al.*, No. 1:16-cv-00465 (D.N.M.), shall be deposited into the Fund
19 after the Fixed Cost Litigation Account has been reimbursed for the actual costs of said
20 litigation(s), as calculated and attested to by the Attorney General of the Navajo Nation.
- 21 B. The Navajo Nation Council may make additional appropriations to the Fund from any
22 other sources of revenue, including directed donations, that become available to the
23 Navajo Nation.
- 24 C. Any money deposited in or appropriated to the Fund, regardless of source, including
25 earnings thereon, shall be used only as provided herein.
- 26 D. The Fund shall be a continuing account and shall not lapse on an annual basis pursuant
27 to 12 N.N.C. § 820(N).

28
29 § 2902. Purpose
30

1 A. The purpose(s) of this Fund are to finance environmental technical studies, water
2 quality monitoring activities, and/or preventative and corrective measures, all of
3 which are necessary to address potential contamination and related issues in the San
4 Juan River, and implement a NNEPA communication strategy.

5 B. Expenditures from the Fund shall not be subject to or limited by 12 N.N.C. § 810(F) of
6 the Appropriations Act, 12 N.N.C. § 1310(F) of the Bond Financing Act, or the Capital
7 Improvement Project Guidelines, Policies, and Procedures approved through
8 TCDCJY-77-99.

9
10 **§ 2903. Reimbursement of Litigation Costs**

11 A. The Navajo Nation Department of Justice shall be reimbursed for the actual litigation
12 costs and expenses expended in *In re: Gold King Mine Release in San Juan County,*
13 *Colorado, on August 5, 2015, No. 1:18-md-02824 (D.N.M.) and any underlying and*
14 *related actions, including but not limited to *Navajo Nation v. USEPA, et al.*, No. 1:16-*
15 *cv-00931 (D.N.M.), *New Mexico v. USEPA, et al.*, No. 1:16-cv-00465 (D.N.M.), and*
16 *Allen et al. v. United States, et al.*, 1:18-CV-00744 (D.N.M.), as calculated and attested
17 to by the Attorney General, from any and all settlements and awards stemming from
18 such litigation.

19 B. All monies awarded to the Department of Justice in Section 5(A) of this Act shall be
20 deposited into the Fixed Cost Litigation Account, prior to any monies being deposited
21 into the Fund.

22
23 **§ 2904. Investment of the Fund**

24 All monies deposited in the Fund shall be subject to the Master Investment Policies, as
25 amended, and invested as soon as practical in accordance with the degree of care exercised
26 by reasonable and prudent managers of investments intended to produce maximum growth
27 of the investments with a high degree of safety necessary to fulfill the purposes and
28 objectives of the Fund.

29
30 **§ 2905 Definition of Fund Principal and Income**

1 A. "Fund Principal" shall consist of all deposits made to the Fund pursuant to Section 3 of
2 this Act.

3 B. "Fund Income" shall consist of all earnings (interest, dividends, etc.) generated and
4 realized through the investment of the Fund Principal. Realized Fund Income shall be
5 added to the Fund Principal after Fund management and administration expenses, as
6 set forth in this Act, have been deducted.

7
8 **§ 2906. Expenditure of the Fund**

9 A. The Fund Principal and Income shall only be expended pursuant to an annual or multi-
10 year expenditure plan recommended by the Executive Director of the Navajo Nation
11 Environmental Protection Agency and approved by the Resource and Development and
12 Budget and Finance Committees by resolution.

13 B. Any changes or modifications to an approved expenditure plan shall be approved by
14 the Resource and Development Committee and Budget and Finance Committee by
15 resolution upon the recommendation of the Executive Director of the Navajo Nation
16 Environmental Protection Agency.

17 C. Any Fund amounts, whether Fund Principal or Fund Income, not included in an
18 expenditure plan, shall remain invested as set forth herein.

19
20 **§ 2907. Annual Audit**

21 The Fund shall be audited annually by independent auditors and within 180 days of the end
22 of each fiscal year. An audit report shall be distributed to the members of the Navajo
23 Nation Council and the Navajo Nation President and Vice-President.

24
25 **§ 2908. Expenses**

26 All expenses directly with the administration and management of the Fund shall be paid
27 from the Fund Income. Such expenses shall include investment advisory and management
28 fees, audit costs, and other related expenses, all pursuant to duly approved contracts for
29 such services.

1 **§ 2909. Amendments**

2 Any section(s) herein may be amended by a two-thirds (2/3) majority vote of the full
3 membership of the Navajo Nation Council and approval of the President of the Navajo
4 Nation.

5
6 **§ 2910. Termination**

7 The Fund shall expire and terminate when all Fund Principal and Fund Income have been
8 expended.

9 _____
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11 **SECTION FOUR. CODIFICATION.**

12 The provisions of this Act which amend or adopt new sections of the Navajo Nation Code
13 shall be codified by the Office of Legislative Counsel. The Office of Legislative Counsel
14 shall incorporate such amended provisions in the next codification of the Navajo Nation
15 Code.

16
17 **SECTION FIVE. SAVINGS CLAUSE.**

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

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22 **SECTION SIX. EFFECTIVE DATE.**

23 This Act is effective upon its approval pursuant to 2 N.N.C. § 221(B).
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