

RESOLUTION OF THE
NAABIK'ÍYÁTI' STANDING COMMITTEE OF THE

23rd NAVAJO NATION COUNCIL -- Fourth Year, 2018

AN ACTION

RELATING TO RESOURCES AND DEVELOPMENT AND NAABIK'ÍYÁTI' COMMITTEES; SUPPORTING THE NAVAJO AGRICULTURAL PRODUCTS INDUSTRY'S REQUEST TO PETITION THE SECRETARY OF THE INTERIOR FOR REIMBURSEMENT TO THE NAVAJO AGRICULTURAL PRODUCTS INDUSTRY FOR OPERATION AND MAINTENANCE COSTS OF THE NAVAJO INDIAN IRRIGATION PROJECT

WHEREAS:

- A. The Resources and Development Committee of the Navajo Nation Council is the legislative oversight authority for the Navajo Agricultural Products Industry. 2 N.N.C. § 500, 5 N.N.C. § 1604.
- B. The Navajo Nation established the Naabik'íyáti' Committee as a Navajo Nation Council standing committee. 2 N.N.C. § 700.
- C. The Naabik'íyáti' Committee has the power to "coordinate with all committees, Chapters, branches and entities concerned with all Navajo appearances and testimony before Congressional committees, departments of the United States government, state legislatures and departments and county and local governments." 2 N.N.C. § 701(A)(8).
- D. Navajo Agricultural Products Industry is an enterprise of the Navajo Nation charged with operating a commercial farm on land held in trust by the United States for the Navajo Nation under federal legislation authorizing the Navajo Indian Irrigation Project (NIIP). 5 N.N.C. § 1602; Public Law 87-483, signed on June 13, 1962, amended by Public Law 91-416 on September 25, 1970; NIIP authorized by Acts of Congress approved April 11, 1956 (70 Stat. 105); June 13, 1962 (76 Stat. 96); and August 4, 1977 (91 Stat. 565).
- E. The Navajo Agricultural Products Industry was originally established.. primarily to plan, develop, and promote the use of agricultural, water and related resources for the use of Navajo Agricultural Products Industry and the Navajo Indian Irrigation Project resulting in a profit to Navajo Agricultural Products Industry and to prevent waste of valuable resources.

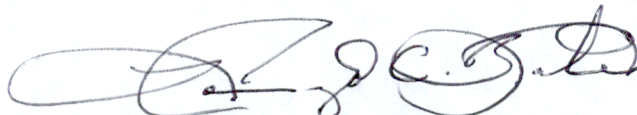
- F. Public Law 87-483 passed by Congress on June 13, 1962 authorized "the Secretary of the Interior to construct, operate, and maintain the Navajo Indian Irrigation Project and the initial stage of the San Juan-Chama project as participating projects of the Colorado River Storage Project, and for other purposes." The authorization was amended September 25, 1970, by Public Law 91-416. To date the construction of the San Juan-Chama Project is completed while construction of the Navajo Indian Irrigation Project is only approximately 70% complete.
- G. The United States agreed to provide for the Operation and Maintenance of the Navajo Indian Irrigation Project during the construction period until the Navajo Nation assumed full ownership and control over the Navajo Indian Irrigation Project upon the project's completion and the 1962 Act contemplated that the San Juan-Chama Project and the Navajo Indian Irrigation Project would be constructed and completed by 1976; but only the San Juan-Chama Project was completed on scheduled in 1971 and the Navajo Indian Irrigation Project remains incomplete today.
- H. The Navajo Nation authorized the Navajo Agricultural Products Industry to contract under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 et seq. (P.L. 93-638, as amended) to include the remaining construction of the Navajo Indian Irrigation Project and to otherwise support Navajo Agricultural Products Industry's efforts to develop Blocks 9, 10, and 11 of the Navajo Indian Irrigation Project at the sole cost and expense of the United States. See NABID-82-15.
- I. Due to the United States failure to complete the Navajo Indian Irrigation Project pursuant to the 1962 Act, the Navajo Agriculture Products Industry management requests the current and incoming Navajo Nation leadership direct the Navajo Nation Department of Justice to review and evaluate the viability of a claim against the United States regarding the failure to comply with the 1962 Act.
- J. The Navajo Agricultural Products Industry Board of Directors' request the Navajo Nation to petition the Secretary of the Interior to reimburse the Navajo Agricultural Products Industry for all funds spent to cover the annual shortfall for the operation and maintenance of the Navajo Indian Irrigation Project. NAPI Board of Directors Resolution, BDD-33-18 attached as **Exhibit A**.

NOW, THEREFORE BE IT RESOLVED:

- A. The Navajo Nation supports the Navajo Agricultural Products Industry Board of Directors request for the Navajo Nation to petition the Secretary of the Interior for reimbursement of all funds spent by the Navajo Agricultural Products Industry to cover the annual shortfall of the operations and maintenance of the Navajo Indian Irrigation Project.
- B. The Navajo Nation supports the Navajo Agricultural Products Industry Board of Directors' request that the current and incoming Navajo Nation leadership direct the Navajo Nation Department of Justice to review and evaluate the viability of a claim against the United States regarding the failure to comply with the 1962 Navajo Indian Irrigation Project Act, Public Law 87-483.

CERTIFICATION

I, hereby, certify that the foregoing resolution was duly considered by the Naabik'íyáti' Committee of the 23rd Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (Arizona), at which a quorum was present and that the same was passed by a vote of 12 in Favor, and 00 Opposed, on this 31st day of December 2018.



LoRenzo C. Bates, Chairman
Naabik'íyáti' Committee

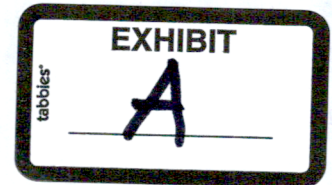
Motioned: Honorable Alton Joe Shepherd
Second : Honorable Nathaniel Brown

Chairman LoRenzo C. Bates not voting



**RESOLUTION OF THE
NAVAJO AGRICULTURAL PRODUCTS INDUSTRY
BOARD OF DIRECTORS**

BDD-33-18



Requesting that the Resources and Development Committee and the Navajo Indian Irrigation Project (NIIP) Negotiation Subcommittee of the Navajo Nation 23rd Council and the Incoming 24th Council, in a unified effort with the 23rd and Incoming 24th Navajo Nation Council and the current and incoming Office of the President and Vice President (OPVP), to Petition the United States Secretary of the Interior to Reimburse the Navajo Agricultural Products Industry (NAPI) for All Monies Spent to Cover the Annual Shortfall of the Operations and Maintenance for the NIIP under its Pub. L. 93-638 Contract, from 2013 to the Present and Direct the Navajo Nation Attorney General and/or Department of Justice In Concert with NAPI's Legal Counsel to Review and Evaluate the Process and Viability of Pursuing a Breach of Trust Lawsuit Against the United States and United States Secretary of Interior for Failure to Complete the NIIP Pursuant to the 1962 NIIP Act, Public Law No. 87-483.

WHEREAS:

1. The Navajo Agricultural Products Industry ("NAPI") is a wholly owned enterprise of the Navajo Nation charged with operating and managing a commercial farm on land held in trust by the United States for the Navajo Nation under an Act of Congress enacted in 1962 authorizing the Navajo Indian Irrigation Project ("NIIP"), Public Law No. 87-483, see 5 N.N.C. § 1601 et seq. (2005); and
2. The NIIP is an irrigated agriculture project in northwest New Mexico located on Navajo tribal lands just south of the city of Farmington; and
3. The NIIP was created in exchange for the operation of the San Juan-Chama Diversion Project ("SJCDP"), which required the Navajo Nation to relinquish a substantial portion of its historic water rights and relinquish its priority rights during shortages in the San Juan River Basin; and
4. The Navajo Nation negotiated with the United States and the State of New Mexico for more than ten years before reaching an agreement to develop 110,630 acres (11 blocks) of irrigated farmland at the NIIP, in exchange for the Navajo Nation's agreement that 110,000 acre-feet per year of water from the San Juan Basin (water that the Navajo Nation might otherwise assert a valid claim to) could be diverted to the Rio Grande Basin by way of the SJCDP; and
5. The United States also agreed to provide for the Operations and Maintenance ("O&M") of the NIIP during the construction period until the Navajo Nation assumed full ownership and control over the NIIP upon the project's completion; and
6. The 1962 NIIP Act contemplated that the SJCDP and the NIIP would be constructed and completed by 1976, but only the SJCDP was completed on schedule (in 1971) and the NIIP remains incomplete today; and
7. The NIIP has been subject to numerous delays and currently serves NAPI operations at just 66% of its originally planned size with Blocks 1-8 completed, Block 9 remains largely incomplete (the Gallegos pumping station is complete, but irrigation infrastructure has no laterals for the on-farm development), and Blocks 10-11 not yet under construction; and

8. On October 1, 1985, the Bureau of Reclamation ("BOR") transferred responsibility for the O&M for the NIIP to NAPI under Pub. L. 93-638 ("638") and the Bureau of Indian Affairs ("BIA") through Congressional appropriations has provided significantly less than the necessary funding for NAPI to fulfill the 638 obligations; and

9. The O&M expenses for the NIIP have increased since 1985 and will continue to increase as additional acreage is added to the NIIP and as the existing infrastructure deteriorates; and

10. Although NAPI has repeatedly submitted annual budget increase requests to BIA to meet the rising costs for managing the O&M for the NIIP, the BIA has not changed the budget amount since 1994 and O&M funding has fallen short of the amount necessary to manage the O&M, which continues to jeopardize the overall structural integrity of the NIIP project and caused substantial loss to NAPI and its contractors as demonstrated by the May 13, 2016, Kutz Siphon breach failure, in which NAPI sustained a total net revenue loss in crops of \$6,769,303; and

11. If BIA does not provide the necessary funding to cover the O&M shortfall for the NIIP immediately, another siphon breach failure is inevitable; and

12. In an effort to cover the most pressing needs of the NIIP, beginning in 2013, NAPI started using NAPI's funds to cover the O&M shortfall to keep the NIIP running once annual 638 contract funds ran out and repaid itself the following funding year as outlined in the 638 Shortfall Timeline, attached hereto as "Exhibit A"; and

13. BIA was fully aware of this action by NAPI and did not dispute the process that NAPI implemented until May 30, 2017, when the BIA issued a letter to NAPI stating that "NAPI should not use the CY 2017 funds to cover its shortfall", see Letter from Awarding Official, BIA – Navajo Regional Office, to Wilton Charley, CEO of NAPI (May 30, 2017), attached hereto as "Exhibit B"; and

14. On November 2, 2017, NAPI issued a response to the BIA's letter dated May 30, 2017, reaffirming its position that it was entitled to reimbursement of approximately \$3,390,409, which included all costs incurred by NAPI to cover the O&M's shortfall, see Letter from Darryl Multine, CFO of NAPI to Jeanette Quintero, Indian Self-Determination Specialist, BIA – Navajo Regional Office (Nov. 2, 2017), attached hereto as "Exhibit C"; and

15. On December 13, 2017, Jeanette Quintero, Indian Self-Determination Specialist, BIA – Navajo Regional Office sent a letter to NAPI stating that NAPI could not reimburse itself for paying the O&M shortfall from 2013 to 2017 as such reimbursement are not permitted under the 638 Contract, see Letter from Jeanette Quintero, Indian Self-Determination Specialist, BIA – Navajo Regional Office to Wilton Charley, CEO of NAPI (Dec. 13, 2017), attached hereto as "Exhibit D"; and

16. On February 6, 2018, the Navajo Nation President Russell Begay sent a letter to Sharon Pinto, Regional Director of the BIA – Navajo Regional Office urging the BIA to allow NAPI to reimburse itself for paying the O&M shortfall, see Letter from Navajo Nation President Russell Begay, to Sharon Pinto, Regional Director, BIA – Navajo Regional Office (Feb. 6, 2017), attached hereto as "Exhibit E"; and

17. On September 28, 2018, Navajo Nation Council Speaker Lorenzo Bates, James Davis with the Office of the President and Vice President, the NAPI Board of Directors Chairperson Peter Deswood, III and NAPI Interim CEO Darryl Multine, met with Bartholomew Stevens, the newly appointed Regional Director of the BIA – Navajo Regional Office and inquired about the status of the BIA's response to President Begay's letter dated February 6, 2018. During that meeting, Regional

Director Stevens confirmed that BIA acknowledges the NIIP O&M shortfall and the problems associated with it and that if he could find funds that they could possibly make payments to NAPI to cover some of the O&M shortfall. Speaker Lorenzo Bates directed the BIA to work with NAPI to resolve the reimbursement request; and

18. On October 11, 2018, Regional Director Bartholomew Stevens met with Interim CEO Darryl Multine and NAPI management and informed them that the BIA did not have the funds available to reimburse NAPI for the O&M shortfall and recommended that NAPI revise its budget for the NIIP to remain within the limits of the amounts allocated each year under the 638 Contract; and

19. In November 2018, the NAPI Board of Directors was advised of the BIA's position and directed its legal counsel, the law firm of Fredericks Peebles & Morgan, LLP to determine what other claims NAPI and/or the Navajo Nation may assert to obtain reimbursement of the O&M shortfall amounts spent and the process and viability for the Navajo Nation to pursue a lawsuit against the United States for failure to complete the NIIP pursuant to the 1962 NIIP Act in preparation for the NIIP Negotiation Subcommittee regular meeting scheduled for November 30, 2018; and

20. The Naabiiik'íyáti' Committee of the Navajo Nation Council formally established the NIIP Negotiation Subcommittee on April 13, 2017, by Resolution No. NABIAP-38-17 to negotiate with the United States to develop a Memorandum of Agreement regarding the funding and completion of the NIIP, advocate for funding for the operation and management of the NIIP, advocate for funding for NIIP under the Water Infrastructure Improvements for the Nation Act and lobby in the interest of the NIIP; and

21. On November 30, 2018, NAPI management and NAPI's legal counsel provided an update to the NIIP Subcommittee during a regular meeting of the NIIP Negotiation Subcommittee of the options for NAPI and the Navajo Nation to seek reimbursement for the NIIP O&M shortfall and the potential for the Navajo Nation to pursue a breach of trust lawsuit against the United States for failure to complete the NIIP pursuant to the 1962 NIIP Act; and

22. On December 7, 2018, NAPI management and NAPI's legal counsel provided an update to the Resources and Development Committee during a Leadership meeting of the options for NAPI and the Navajo Nation to seek reimbursement for the NIIP O&M shortfall and the potential for the Navajo Nation to pursue a breach of trust lawsuit against the United States for failure to complete the NIIP pursuant to the 1962 NIIP Act; and

23. NAPI management reports that it has incurred a total loss of \$4.4 Million for paying the O&M shortfall from 2013 to the present and reports that there will be an estimated \$1.8 Million shortfall in O&M funding by the end of this calendar year, causing more deferred maintenance, risk of further deterioration to the NIIP infrastructure, and uncertainty for NAPI's operations and profitability in the future; and

24. The United States' failure to complete the NIIP by 1976, as anticipated in the 1962 NIIP Act, has imposed significant costs and created substantial losses for the Navajo Nation and NAPI; and

25. Based on the Navajo Nation's standing, the Navajo Nation is the only party that can petition the United States Secretary of the Interior to reimburse NAPI for the O&M shortfall from 2013 to the present and pursue a breach of trust claim against the United States and United States Secretary of Interior for failure to complete the NIIP pursuant to the 1962 NIIP Act; therefore, NAPI management recommends that the NAPI Board request that the actions of the current and incoming Navajo Nation leadership to pursue these actions be paid at the sole expense of the Navajo Nation, including any

and all legal fees of the Navajo Nation associated therewith; and

26. Due to the United States Secretary of the Interior's failure to reimburse NAPI for the O&M shortfall, NAPI management recommends that the NAPI Board of Directors request that the current and incoming Navajo Nation leadership petition the Secretary of the Interior to reimburse NAPI for the O&M shortfall from 2013 to the present by utilizing funds from the Bureau of Reclamation Fund established to pay O&M for irrigation projects, including NIIP pursuant to Section 6 of the Reclamation Act, 57-161, § 6, ch. 1093, 32 Stat. 389 (1902), codified in 43 U.S.C. § 491, funds from the Upper Colorado River Basin Fund established to carry out the provisions of the Colorado River Storage Project Act (Storage Act), Pub. L. No. 84-485, § 5, ch. 203, 70 Stat. 105, 107 (1956), codified in 43 U.S.C. § 620d for participating projects, including NIIP, and from such other funds that may be available to reimburse NAPI for the NIIP O&M shortfall; and

27. Due to the United States failure to complete the NIIP pursuant to the 1962 NIIP Act, NAPI management recommends that the NAPI Board of Directors request that the current and incoming Navajo Nation leadership direct the Navajo Nation Attorney General and/or Department of Justice to review and evaluate the process and viability of pursuing a breach of trust claim against the United States and the United States Secretary of the Interior for failure to complete the NIIP pursuant to the 1962 NIIP Act; and

28. The NAPI Board of Directors has received the recommendations of NAPI management and NAPI legal counsel and has determined that it is in the best interest of NAPI and the Navajo Nation to request that the Resources and Development Committee and the NIIP Negotiation Subcommittee of the Navajo Nation 23rd Council and the incoming 24th Council, in a unified effort with the 23rd and incoming 24th Navajo Nation Council and the current and incoming Office of the President and Vice President, to petition the United States Secretary of the Interior to reimburse NAPI for all monies spent to cover the annual shortfall of the operations and maintenance for the NIIP under its Pub. L. 93-638 Contract, from 2013 to the present and direct the Navajo Nation Attorney General and/or Department of Justice in concert with NAPI's legal counsel to review and evaluate the process and viability of pursuing a breach of trust lawsuit against the United States and United States Secretary of Interior for failure to complete the NIIP pursuant to the 1962 NIIP Act, Public Law No. 87-483; and

29. The NAPI Board of Directors has also determined that it is in the best interest of NAPI to request that the actions of the current and incoming Navajo Nation leadership be paid at the sole expense of the Navajo Nation, including any and all legal fees of the Navajo Nation associated with petitioning the United States Secretary of the Interior to reimburse NAPI for all monies spent to cover the annual shortfall of the operations and maintenance for the NIIP under its Pub. L. 93-638 Contract and any and all legal fees of the Navajo Nation associated with reviewing and evaluating the process and viability of pursuing a breach of trust lawsuit against the United States and the United States Secretary of the Interior for failure to complete the NIIP pursuant to the 1962 NIIP Act, Public Law No. 87-483 .

NOW THEREFORE BE IT RESOLVED THAT:

1. The NAPI Board of Directors respectfully requests that the Resources and Development Committee and the NIIP Negotiation Subcommittee of the Navajo Nation 23rd and incoming 24th Council, in a unified effort with the 23rd and incoming 24th Navajo Nation Council and the current and incoming Office of the President and Vice President, to petition the United States Secretary of the Interior to reimburse NAPI for all monies spent to cover the annual shortfall of the operations and maintenance for the NIIP under its Pub. L. 93-638 Contract, from 2013 to the present, by utilizing funds from the Bureau of Reclamation Fund established to pay O&M for irrigation projects,

including NIIP pursuant to Section 6 of the Reclamation Act, Pub. L. No. 57-161, § 6, ch. 1093, 32 Stat. 389 (1902), codified in 43 U.S.C. § 491, funds from the Upper Colorado River Basin Fund established to carry out the provisions of the Colorado River Storage Project Act (Storage Act), Pub. L. No. 84-485, § 5, ch. 203, 70 Stat. 105, 107 (1956), codified in 43 U.S.C. § 620d for participating projects, including NIIP, and from such other funds that may be available to reimburse NAPI for the NIIP O&M shortfall.

2. The NAPI Board of Directors respectfully requests that the Resources and Development Committee and the NIIP Negotiation Subcommittee of the Navajo Nation 23rd and incoming 24th Council, in a unified effort with the 23rd and incoming 24th Navajo Nation Council and the current and incoming Office of the President and Vice President, to direct the Navajo Nation Attorney General and/or Department of Justice in concert with NAPI's legal counsel to review and evaluate the process and viability of pursuing a breach of trust lawsuit against the United States and United States Secretary of Interior for failure to complete the NIIP pursuant to the 1962 NIIP Act, Public Law No. 87-483.

3. The NAPI Board of Directors respectfully requests that the actions of the current and incoming Navajo Nation leadership be paid at the sole expense of the Navajo Nation, including any and all legal fees of the Navajo Nation associated with petitioning the United States Secretary of the Interior to reimburse NAPI for all monies spent to cover the annual shortfall of the operations and maintenance for the NIIP under its Pub. L. 93-638 Contract and any and all legal fees of the Navajo Nation associated with reviewing and evaluating the process and viability of pursuing a breach of trust lawsuit against the United States and the United States Secretary of the Interior for failure to complete the NIIP pursuant to the 1962 NIIP Act, Public Law No. 87-483.

4. The Chief Executive Officer is authorized and directed to communicate this resolution to the appropriate officials of the Navajo Nation and to take any and all actions necessary to carry out the purpose and intent of this resolution.

CERTIFICATION

I hereby certify that the foregoing resolution was considered by the Navajo Agricultural Products Industry Board of Directors at a special meeting at which a quorum was present at NAPI Headquarters near Farmington, New Mexico, and that the same was passed by vote of 4 in favor, 0 opposed, and 0 abstained, this 10th day of December, 2018.

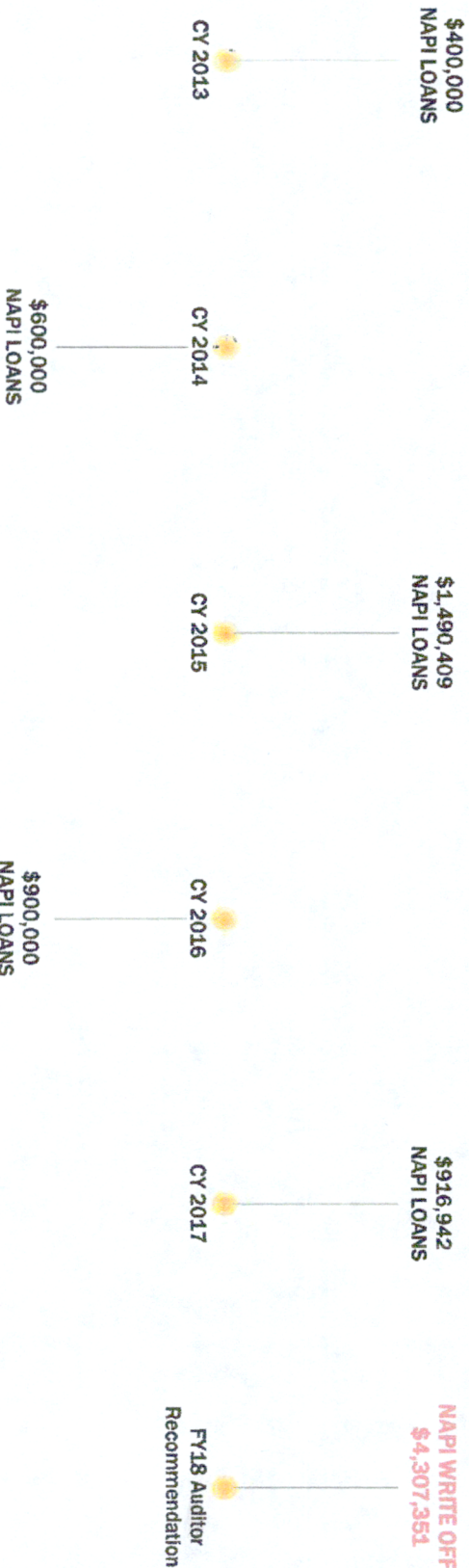
Motion: Delane Atcitty

Second: Lawrence R. Platero



Peter Deswood, III, Chairperson
Board of Directors

638 Shortfall Timeline



	Award Amount	Short fall / NAPI Loan	Total
CY 2013	3,732,000	400,000	4,132,000
CY 2014	3,925,899	600,000	4,525,899
CY 2015	3,852,000	1,490,409	5,342,409
CY 2016	4,000,000	900,000	4,900,000
CY 2017	4,000,000	916,942	4,916,942
	\$19,509,900	\$4,307,351	\$23,817,251



United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Navajo Regional Office
P.O. Box 1060
Gallup, New Mexico 87305

IN REPLY REFER TO:
N303 – Branch of Indian Self-Determination Services

MAY 30 2017

Wilton Charley, Chief Executive Officer
Navajo Agricultural Products Industry
P. O. Box 1318
Farmington, New Mexico 87499-1318

Dear Mr. Charley:

Reference is made to the Navajo Agricultural Products Industry's (NAPI) May 19, 2017 letter for Public Law (Pub. L.) 93-638 Contract No. A16AV00382 for Irrigation Operation, Maintenance and Replacement (O/M); On-Farm Development (OFD); and Agricultural Testing, Research, and Laboratory (ATRL) Programs.

NAPI's May 19, 2017 letter is requesting to use Calendar Year 2017 funds to reimburse CY 2016's shortfall of \$558,245. The Awarding Official and Awarding Official's Technical Representative (AOTR) have noted in previous review of contracts and meeting, that NAPI would take out loans to cover its O/M cost depending on future funding from BIA.

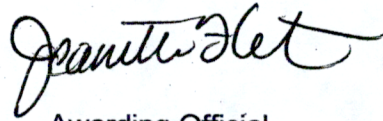
During the AOTR's discussion with NAPI, it was explained that NAPI and BIA negotiate an Annual Funding Agreement every year for this five year contract and is based on funding availability. In CY 2016, NAPI spent more than the funding made available for the year and then took out a loan to cover the balance and now is requesting reimbursement. The AOTR explained she cannot commit the government beyond the funding available and NAPI should have contacted BIA it was going to fall short prior to taking out the loan and modified the contract to do only the work that would be covered by the funds available. Please refer to your 108 Contract Agreement under (b) Terms, Provisions, and Conditions (5) Limitation of Costs (section enclosed).

The option to take out a loan was an internal NAPI decision. No BIA funds are available for the contract negotiated for CY 2016 work and NAPI should not use the CY 2017 funds to cover its shortfall.

The BIA requests to meet with NAPI on June 21, 2017 at 10:00 am at NAPI Headquarters to determine the work for CY 2017 and review the contract again to determine if there are any chances of spending beyond the allocated amount and we can revise the scope of the work for work that would be covered by the funds available for CY 2017.

If you have any questions please contact Ms. Pearl Chamberlin, Awarding Official's Technical Representative (AOTR), at (505) 863-8393 or me at (505) 863-8401.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeanette Helt". The signature is fluid and cursive, with the first name "Jeanette" written in a larger, more prominent script than the last name "Helt".

Awarding Official
BIA-2017-L1-000098

cc: N480/NIIP, Pearl Chamberlin, AOTR
NAPI/O&M, Lionel Haskie, O&M Manager
NAPI/638, Jeremy Yazzie, Program Analyst

CONTRACT NO. A16AV00382
Renewal/Recontract Contract

**AGREEMENT BETWEEN THE SECRETARY AND THE NAVAJO AGRICULTURAL
PRODUCTS INDUSTRY**

(a) AUTHORITY AND PURPOSE -

- (1) **AUTHORITY** - This agreement, denoted a Self-Determination Contract (referred to in this agreement as the "Contract"), is entered into by the Secretary of the Interior (referred to in this agreement as the "Secretary"), for and on behalf of the United States pursuant to Title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and by the authority of the *Navajo Agricultural Product Industry (NAPI)* (referred to in this agreement as the "Contractor"). The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) are incorporated in this agreement.
- (2) **PURPOSE** - Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractible under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor:

PROGRAM: Operation Maintenance and Replacement; On-farm Development;
and Agricultural Testing and Research Laboratory Programs

(b) TERMS, PROVISIONS, AND CONDITIONS-

- (1) **TERM** -Pursuant to section 105(c)(1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(c)(1)), the term of this contract shall be a **Mature Definite Term of Five-Years beginning January 1, 2016, through December 31, 2020 on the basis of Calendar Year**. Pursuant to section 105(d)(1) of such Act (25 U.S.C. 450j(d)), upon the election by the Contractor, the period of this Contract shall be determined on the basis of a **Fiscal Year**, unless the Secretary and the Contractor agree on a different period in the annual funding fiscal year agreement incorporated by reference in subsection (f)(2).
- (2) **EFFECTIVE DATE** - This Contract shall become effective upon the date of the approval and executive by the Contractor and the Secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

- (3) **PROGRAM STANDARD** - The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (a)(2) of the Contract in conformity with the following standards:

Irrigation Operations and Maintenance on Indian Lands: [25 USC 13, 25 USC 450; 31 USC 63; Indian Dams Safety Act of 1994, Pub. L. 103-1560, 108 Stat. 1560; American Indian Agriculture Resource Management, Publ. L. 103-177, 107 Stat 2011, 25 USC 3701; Act of November 4, 1983, Pub. L. 98-140; Pub. L. 103-301, 60 STAT 895, 25 USC 162a; and 76 Stat. 96] The Programs to conserve water and operate and maintain the irrigation water delivery systems on Indian irrigation projects and maintain the dams in a safe economical, beneficial, and equitable manner, including the follows:

1. American Society of Agricultural Engineers (ASAE) Standard S-376;
2. ASAE Standard 5376;
3. North American Proficiency Testing;
4. National forage Testing Association;

- (4) **FUNDING AMOUNT** - Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

- (5) **LIMITATION OF COSTS** - The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

- (6) **PAYMENT** -

- (A) **IN GENERAL** - Payments to the Contractor under this Contract.

- (i) be made as expeditiously as practicable; and
- (ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

- (B) **QUARTERLY, SEMIANNUAL, LUMP-SUM, AND OTHER METHODS OF PAYMENT**



EXHIBIT C

P (505) 566-2600 • F (505) 960-9458 • P.O. Drawer 1318 • Farmington, NM 87499 • www.navajopride.com

November 2, 2017

17-CFO-050

Jeanette Quintero
Indian Self-Determination Specialist
U.S. Department of Interior
Bureau of Indian Affairs
Navajo Regional Office
P.O. Box 1060
Gallup, NM 87305-1060

RE: Funding Shortfall for the Navajo Indian Irrigation Project

Dear Ms. Quintero,

The Navajo Agricultural Products Industry ("NAPI") is in receipt of the Bureau of Indian Affairs ("BIA") letter dated May 30, 2017, stating NAPI should not use the CY 2017 funds to cover its shortfall for operation and maintenance costs incurred in CY 2016. As you are aware, NAPI's 638 contracts do not provide adequate funding to cover all of NIIP's operation and maintenance costs.

Since 2013, in order to keep the project running, NAPI has always funded shortfalls of NIIP's O&M Cost and that the BIA is aware of this practice including NAPI reimbursing itself from the following year's contract award.

As detailed above, NAPI has the right and obligation to seek reimbursement for the costs NAPI has fronted to pay the unfunded operation and maintenance cost for fiscal year 2016. Therefore, NAPI is seeking reimbursement from the BIA in the amount of \$3,390,409.00 which includes all costs incurred to cover O&M's shortfall. Enclosed you will find an invoice for reimbursement from the BIA.

If you should have any questions on this matter, please contact me at (505) 566-2600 or email dmultine@navajopride.com.

Sincerely,

Darryl Multine, Chief Financial Officer
NAVAJO AGRICULTURAL PRODUCTS INDUSTRY
Enclosure: Invoice to U.S. Dept. of Interior – BIA Navajo Regional Office

c. Wilton Charley, NAPI CEO
Lionel Haskie, O&M Manager
file

NAPI - 638 Company
P.O. Drawer 1318
Farmington, NM 87499

EXHIBIT C

INVOICE

Invoice #: 100486
Invoice: 05/31/2017
Ship: 05/31/2017
Pay Terms: NET 30

Sold To: Jeanette Quintero
Indian Self Determination Specialist
US Dept. of Interior-BIA Navajo Regional Office
PO Box 1060
Gallup, NM 87305-1060

Ship To: BIA TREASURY
BIA TREASURY DEPT.

Page 1 of 1

Sale Terms: CASH
Order: 05/31/2017
Cust PO: FY17 Audit Leads

Salesperson: Jeremy Yazzie
Via:
Currency: USD

Carrier:
Trailer lic: St:
Broker:

Description	Quantity	UOM	Price	Amount
Due from BIA				3,390,409.00
INVOICE TOTAL:				3,390,409.00

Please return a copy of this invoice with your remittance - Thank You

The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Navajo Regional Office

P.O. Box 1060

Gallup, New Mexico 87305

IN REPLY REFER TO:
N303 - Branch of Indian Self-Determination Services

DEC 13 2017

Wilton Charley, Chief Executive Officer
Navajo Agricultural Products Industry
P. O. Box 1318
Farmington, New Mexico 87499-1318

Dear Mr. Charley:

This is in response to Navajo Agricultural Products Industries' (NAPI) November 2, 2017 letter responding to the Bureau of Indian Affairs' (BIA) May 30, 2017 letter regarding the use of Calendar Year (CY) 2017 funds to cover CY 2016 over expenditures for Public Law 93-638 Contract No. A16AV00382 Navajo Indian Irrigation Project's Operation and Maintenance (O&M) costs.

In the BIA's May 30, 2017 letter we requested a meeting with NAPI on June 21, 2017 to determine the work for CY 2017 and review the contract. During the meeting, the BIA explained the Annual Funding Agreement is negotiated every year for the five-year Contract No. A16AV00382 and is based on approved appropriation. In CY 2016, NAPI expended more than the awarded amount and then took out a loan to cover the difference and requested reimbursement. The Awarding Official's Technical Representative explained no one is authorized to commit the government beyond the appropriated funds and NAPI should have not expended more than the awarded amount and took out the loan. NAPI should have requested to modify the contract to do only the work that would be covered by the awarded amount. The Awarding Official's Technical Representative requested NAPI to revised the scope of work and identify which work would be suspended if there was a shortage of funds. NAPI has not provided a response.

In addition, the practice of using current funds to cover prior years over-expenditures were not noted in NAPI's 2013, 2014 and 2015 quarterly Federal Financial Status (SF-425) reports for Contract No. A10AV00796. However, when NAPI entered into the new Contract No. A16AV00382, over expending "practices" became evident.

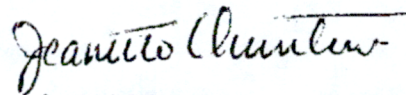
Again, the funds received under Public Law 93-638 Contract No. A10AV00796 and A16AV00382 for the operation and maintenance activities are subject to funding availability. The BIA Central Office provided the Fiscal Year 2017 funds of \$4 million for O&M, excluding the Gallegos Pumping Plant. The Navajo Region sought for additional funds for the shortfall, there were no additional funds available.

The contract states "The contractor shall not be obligated to performance that requires an expenditure of funds in excess of the amount." Instead NAPI made a decision to cover the \$3,390,409 over expenditure for O&M internally without notifying BIA which is almost as much as the year-long contract amount. The BIA recommends reviewing the O&M scope of work and aligned with the cost. The O&M cost should be similar to what was contracted in previous

years. The BIA also recommends reviewing of how the contract support costs (direct and indirect) is used.

If you have any questions please contact Ms. Pearl Chamberlin, Awarding Official's Technical Representative (AOTR) 505-863-8393 or contact me at (505) 863-8401.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeanette Chuntow". The signature is fluid and cursive, with a horizontal line extending from the end.

Awarding Official
BIA-2017-L2-000039

cc: N480 Pearl Chamberlin, AOTR
NAPI, Darryl Multine, Chief Financial Officer
NAPI, Lionel Haskie, O&M Manager



THE NAVAJO NATION

EXHIBIT E

RUSSELL BEGAYE PRESIDENT
JONATHAN NEZ VICE PRESIDENT

February 6, 2018

Ms. Sharon Pinto, Regional Director
Navajo Region
Bureau of Indian Affairs
P.O. Box 1060
Gallup, New Mexico 87305

Re: Funding Shortfall for the Navajo Indian Irrigation Project

Dear Regional Director Pinto,

This letter is in response to the Bureau of Indian Affairs- Navajo Region's letters dated May 30, 2017, and December 13, 2017, enclosed, stating that the Navajo Agricultural Products Industry ("NAPI") cannot use Calendar Year ("CY") 2017 funds to cover operation and maintenance costs for the Navajo Indian Irrigation Project ("NIIP") incurred for CY 2016. As explained below, the United States is still obligated to pay for all operation and maintenance costs for the NIIP, and the Bureau of Indian Affairs ("BIA") must reimburse NAPI for all funds it expended in order to cover CY 2016's funding shortfall for NIIP operation and maintenance expenses.

The NIIP was authorized in 1962 through Pub. L. No. 87-483 ("Initiating Act"). Pub. L. No. 87-483, 76 Stat. 96 (June 13, 1962). The Initiating Act "authorize[d] the Secretary of the Interior to construct, operate, and maintain" the NIIP to irrigate 110,630 acres of land. *Id.* at § 1-2. In exchange for the NIIP, the Navajo Nation relinquished a significant portion of its historic water rights in the San Juan River Basin. *Id.* at § 2. Specifically, the Navajo Nation agreed to limit its annual water diversion of water from the NIIP to 508,000 acre-feet of water per year, and allowed 110,000 acre-feet per year of water to be diverted to the Rio Grande Basin to largely non-Indian users. *Id.* Although the NIIP was supposed to be completed in the 1970s, as of 2013, the NIIP was only 66 percent completed.

The BIA and Bureau of Reclamation initially operated and maintained the NIIP, but since 1985, NAPI has performed the federal operation and maintenance duties for the NIIP through an Indian Self-Determination and Education Assistance Act of 1975 contract ("638 Contract"). Between 2013 and 2017, the BIA provided roughly \$3 to \$4 million to NAPI each fiscal year through 638 Contract No. A16AV00382 at Exhibit C, Chart C-2, Exhibit D, chart D-1.

Since CY 2013, NAPI has used its own funds to keep the project running once annual 638 Contract funding was depleted because the 638 Contracts invariably do not provide enough funds for NAPI to cover the NIIP's operation and maintenance costs. In the most-recent 638 Contract, the BIA acknowledges that "[t]he actual funding amounts have been *substantially less* than the amounts requested for a *proper OM&R program* and the appropriated amounts have not kept pace with continuing development of the project." Contract No. A16AV00382 at 83 (emphasis added). Since CY 2014, NAPI has used funds from the following year's 638 Contract to reimburse itself for the funds it expended to cover the previous year's shortfall. Though NAPI has reimbursed itself this way since 2014, the BIA has never denied NAPI any 638 Contract funds for the subsequent year for this reason. The BIA's May 30, 2017 letter, however, states that "NAPI should not use the CY 2017 funds to cover its shortfall." *Letter from Awarding Official, Bureau of Indian Affairs – Navajo Regional Office, to Wilton Charley, Chief Executive Officer of NAPI* (May 30, 2017).

The United States has a duty to the Navajo Nation to pay for all operation and maintenance costs related to the NIIP for ten years following the NIIP's completion. An October 1957 Report, expressly referred to in the Initiating Act, states that the Navajo Nation would not be required to make payments for reimbursable federal charges until "completion of the project development period." H.R. Doc. No. 424, at 357 (1960) ("Reimbursable Federal charges assessable against project lands would be paid to the Treasury, in accordance with existing laws, following completion of the project development period"). The legislative history of the Initiating Act shows that the development period of the NIIP would take place for ten years after completion of the 110,630-acre project. *Hearing Before the Subcomm. on Irrigation and Reclamation of the Comm. on Interior and Insular Affairs, 86th Cong.* 190 (1960) ("The total subsidy on the part of the taxpayers and Colorado River storage project power users for the benefit of the 1,100 Indian families, calculated as of the end of the construction and development period or the beginning of project operation, may be conservatively estimated at \$266 million, which is the total construction cost plus interest during a 12-year construction period and 10-year development period at 3 percent."); *Id.* at 205 ("The Federal Investment thus proposed, including interest on funds advanced during the construction and development periods, would amount to more than a quarter of a billion dollars by the time the project would be in full operation.").

Because the NIIP is not completed, the United States continues to have an obligation to pay for the operation and maintenance costs of the NIIP. As the BIA has acknowledged, the 638 Contracts have provided *substantially less* than the amounts requested for a *proper OM&R program*." Contract No. A16AV00382 at 83 (emphasis added). The United States cannot avoid its obligations under the Initiating Act by continually underfunding the NIIP and leaving NAPI with the bill. We, therefore, urge the BIA to allow NAPI to use its current 638 Contract funds to cover last year's shortfall for operation and maintenance costs, as NAPI has done since 2014.

Finally, as noted above, the construction phase of the NIIP is still ongoing, and title of the NIIP remains with the United States. From 2003 through 2006, the United States was "negotiating with the Navajo Nation to establish a memorandum of understanding (MOU) identifying activities and addressing responsibilities to initiate the turnover of completed Blocks to the Navajo Nation." DOI BIA, Budget Justifications, Fiscal Year 2007, BIA-CON-RM-3. Negotiations failed in part because NAPI refused to accept transfer of Blocks of the NIIP unless and until the entire NIIP was completed. THE NAVAJO NATION NIIP COMPLETION PLAN, 19 (2005). The BIA was so focused on entering into a MOU with the Navajo Nation to transfer ownership of certain NIIP blocks, that in its 2006 Budget Justification, the BIA stated that "[c]onstruction of additional [NIIP] facilities are being deferred until the MOU is finalized and signed." *Id.* As NAPI stated in a 2003 Resolution, however, "[t]here is nothing in the law that [] allows the Department of the Interior to condition completion of the NIIP on any memorandum of understanding." The United States has delayed completion of the NIIP for over forty years. The United States has a duty to complete the NIIP so that the Navajo Nation can fully profit from the completed project.

If you have any questions please feel free to contact Karis N. Begaye, Legal Counsel, Office of the President and Vice President at (928) 871-7812 or knbegaye@navajo-nsn.gov.

Sincerely,

THE NAVAJO NATION



Russell Begaye, *President*

Cc Speaker 23rd Navajo Nation Council
Resources and Development Committee
NAPI Board of Directors



P (505) 566-2600 • F (505) 960-9458 • P.O. Drawer 1318 • Farmington, NM 87499 • www.navajopride.com

December 08, 2018

To: Resources and Development Committee Members

From: Darryl Multine, Chief financial Officer

Subject: Audit Shortfall Memo

In 2018 Navajo Agricultural Products Industry (NAPI) audit report there was a prior period adjustment of \$3,390,409 made to NAPI's Financial Statements regarding Operation and Maintenance Shortfall. The adjustment was recorded to NAPI's net position and footnoted in Note 19 of the audit report. NAPI also incurred a shortfall of \$916,942 for fiscal year 2018 and recorded in the Statements of Revenues, Expenses, and Changes in Net Position that resulted a net loss of (\$211,087).

If you have any questions regarding NAPI's Audited Financial Statements please call me. Thank you

CC: File

**NAVAJO AGRICULTURAL PRODUCTS INDUSTRY.
STATEMENT OF REVENUES, EXPENSES, AND CHANGE IN NET POSITION
YEAR ENDED MAY 31, 2018**

OPERATING REVENUES

Crops	\$ 27,178,987
Agricultural - Related Leases	6,301,996
Hedging Activities	4,214,014
Sale of Electric Power Rights	695,158
Indirect Cost Recovery	1,105,561
Total Operating Revenues	<u>39,495,716</u>

OPERATING EXPENSES

Cost of Crops and Goods Sold:	
Crops	32,879,127
Agricultural - Related Leases	2,871,808
Feed Yard	125,037
Total Cost of Crops and Goods Sold	<u>35,875,972</u>

SELLING AND ADMINISTRATIVE

7,049,477

Total Operating Expenses

42,925,449

OPERATING LOSS

(3,429,733)

NONOPERATING REVENUES (EXPENSES)

Intergovernmental Revenues	8,146,177
Costs Associated With the Navajo Indian Irrigation Project and Other Related Grants	(8,219,233)
Insurance Proceeds	2,354,367
Settlement Expenses	(70,000)
Other	1,706,867
Investment Income	431,950
Gain on Sale of Capital Assets	11,496
Interest and Finance Charges	(226,036)
O&M Shortfall/Subsidized Cost	(916,942)
Total Nonoperating Revenues (Expenses)	<u>3,218,646</u>

CHANGE IN NET POSITION

(211,087)

Net Position - Beginning Of Year, As Previously Stated

124,186,178

Prior Period Adjustments

(730,869)

Net Position - Beginning Of Year, Restated

123,455,309

NET POSITION - END OF YEAR

\$ 123,244,222

See accompanying Notes to Financial Statements.

**NAVAJO AGRICULTURAL PRODUCTS INDUSTRY
STATEMENT OF NET POSITION
MAY 31, 2018**

ASSETS AND DEFERRED OUTFLOWS

CURRENT ASSETS

Cash and Cash Equivalents	\$ 6,585,268
Cash and Cash Equivalents – Restricted	3,202,330
Equity Margin Account – Held by Commodity Broker	2,229,445
Investments	21,927,874
Accounts Receivable, Net	1,743,630
Inventories	21,130,295
Prepaid Items	208,091
Deferred Charge on Alfalfa Stands	4,019,436
Current Portion of Note Receivable – Pumpkin Patch	120,000
Other Assets	59,834
Total Current Assets	<u>61,226,203</u>

LONG-TERM NOTE RECEIVABLE - PUMPKIN PATCH	366,987
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CAPITAL ASSETS, NET OF ACCUMULATED DEPRECIATION	<u>76,927,314</u>
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Total Noncurrent Assets	77,294,301
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**DEFERRED OUTFLOWS - DERIVATIVE INSTRUMENTS -
COMMODITIES FUTURES**

601,088

Total Assets and Deferred Outflows	<u><u>\$ 139,121,592</u></u>
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LIABILITIES AND NET POSITION

CURRENT LIABILITIES

Accounts Payable	\$ 3,787,394
Other Accrued Expenses	817,137
Unearned Revenue:	
Unearned Revenue – Prepaids, Leases, and Crop Payments	1,803,309
Advances from Grantors	2,602,307
Line of Credit Payable	2,281,509
Current Portion of Long-Term Debt	2,271,429
Total Current Liabilities	<u>13,563,085</u>

NONCURRENT PORTION OF LONG-TERM DEBT	<u>2,314,285</u>
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Total Liabilities	15,877,370
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NET POSITION

Net Investment in Capital Assets	72,341,600
Restricted	3,202,330
Unrestricted	47,700,292
Total Net Position	<u>123,244,222</u>

Total Liabilities and Net Position	<u><u>\$ 139,121,592</u></u>
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See accompanying Notes to Financial Statements.

NAVAJO AGRICULTURAL PRODUCTS INDUSTRY
NOTES TO FINANCIAL STATEMENTS
MAY 31, 2018

NOTE 18 RELATED PARTY TRANSACTIONS (CONTINUED)

At May 31, 2018, the Navajo Pride LLC's related party long-term debt consisted of the following:

	Beginning Balance	Additions	Reductions	Ending Balance	Amounts Due Within One Year
Note Payable	\$ 448,359	\$ -	\$ (75,000)	\$ 373,359	\$ 373,359
Total Long-Term Liabilities	<u>\$ 448,359</u>	<u>\$ -</u>	<u>\$ (75,000)</u>	<u>\$ 373,359</u>	<u>\$ 373,359</u>

As of May 31, 2018, annual debt service requirements to maturity for the note payable are as follows:

<u>Year Ending May 31.</u>	<u>Principal</u>	<u>Interest</u>	<u>Total</u>
2019	\$ 373,359	\$ -	\$ 373,359
Total	<u>\$ 373,359</u>	<u>\$ -</u>	<u>\$ 373,359</u>

On May 26, 2017, the NAPI board of directors approved a forbearance agreement with Flour Mill, LLC. The forbearance agreement allows for one year of no principal and interest payments. Payments on the note payable will be commence on June 30, 2018, based on the original terms of the agreement. This balance is not shown as current as the Company expects to make full payment based on the terms of the forbearance agreement.

NOTE 19 PRIOR PERIOD ADJUSTMENTS

NAPI reported two prior period adjustments, one related to the correction of a prior period impairment of the Flour Mill totaling \$2,659,540 and one related to the removal of the BIA grant receivable for shortfalls in program funding totaling \$3,390,409. The change in the fund balance was decreased by \$730,869.

Net Position - Beginning of Year, As Previously Stated	\$ 124,186,178
Prior Period Adjustments:	
Correct Impairment of Flour Mill	2,659,540
Remove BIA Receivable	(3,390,409)
Total Prior Period Adjustments	<u>(730,869)</u>
Net Position - Beginning of Year, As Restated	<u>\$ 123,455,309</u>

NAVAJO NATION

RCS# 1196

Naa'bik'iyati Committee

12/31/2018

03:54:58 PM

Amd# to Amd#

Legislation 0405-18: Supporting
the NAPI's Request to Petition
the Secretary of Interior for
Reimbursement to the NAPI for...

PASSED

MOT Shepherd

SEC Brown

Yea : 12

Nay : 0

Excused : 0

Not Voting : 12

Yea : 12

Begay, K
BeGaye, N
Bennett

Brown
Daniels
Filfred

Jack
Kieyoomia
Pete

Shepherd
Tsosie
Yellowhair

Nay : 0

Excused : 0

Not Voting : 12

Bates
Begay, NM
Chee

Crotty
Damon
Hale

Perry
Phelps
Slim

Smith
Tso
Yazzie