Albuquerque Bernalillo County
Water Utility Authority

Agenda Item No. 8b

Meeting Date: August 23, 2023
Staff Contact: Diane Agnew, Water Rights Program Manager

TITLE: **R-23-23 – Authorizing the Executive Director to Enter into an Agreement with the Rio Grande Silvery Minnow Plaintiffs to Suballot Storage Space in Abiquiu Reservoir**

ACTION: **Recommend Approval**

SUMMARY:
The Albuquerque Bernalillo County Water Utility Authority (Water Authority) has an existing ten-year Agreement with the Rio Grande Silvery Minnow Plaintiffs (the plaintiffs) to store up to 30,000 acre-feet in Abiquiu Reservoir to be used as an "Environmental Pool for water acquired by the plaintiffs." Water stored in the Environmental Pool will be used to the benefit of species protected under the Endangered Species Act, consistent with the goals of the Middle Rio Grande Collaborative Program (MRGESCP).

The storage agreement between the Water Authority and the plaintiffs is due to be renewed, extending the 30,000 acre-foot Environmental Pool for an additional ten years. This resolution allows the Executive Director to negotiate a storage agreement with the plaintiffs.

FISCAL IMPACT:
None

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY

BILL NO. R-23-23

RESOLUTION

AUTHORIZING THE EXECUTIVE DIRECTOR TO ENTER INTO AN AGREEMENT WITH THE RIO GRANDE SILVERY MINNOW PLAINTIFFS TO SUBALLOT STORAGE SPACE IN ABIQUIU RESERVOIR

WHEREAS, Congress authorized the Secretary of the Army to enter into agreements with entities for storage of 200,000 acre-feet of San Juan-Chama water in Abiquiu Reservoir in Public Law 97-140; and

WHEREAS, the Secretary of Interior was authorized to release San Juan-Chama water to contracting entities for such storage; and

WHEREAS, P.L. 97-140 specified that the storage of San Juan-Chama water in Abiquiu Reservoir shall not interfere with the authorized purposes of the project and shall include a requirement that each user of storage space shall pay any increase in operation and maintenance costs attributable to the storage of that user's water; and

WHEREAS, in Public Law 100-522 Congress further authorized the Secretary of the Army to store 200,000 acre-feet of Rio Grande system water in lieu of San Juan-Chama water to the extent that contracting entities no longer require the storage; and

WHEREAS, in P.L. 116-260 Congress amended P.L. 97-140 and P.L. 100-522 to eliminate the 200,000 acre-feet volume cap from combined sources in favor of allowing for the concurrent storage of San Juan-Chama and native Rio Grande system water in Abiquiu Reservoir up to elevation 6230.00 NGVD29; and

WHEREAS, pursuant to NMSA 1978 § 72-1-10, the Albuquerque Bernalillo County Water Utility Authority ("Water Authority") is the legal successor to the City of Albuquerque under Contract No. DACW47-86-C-0009 dated March 20, 1986 with the U.S. Army Corps of Engineers for water storage space in Abiquiu Reservoir (the "Contract"); and

WHEREAS, pursuant to the Contract, the Water Authority has the right to store up to 170,900 acre-feet of San Juan-Chama Project Water, presently has storage space

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within this volume cap available for suballotment, and has the ability to suballot storage space subject to the terms of the Contract; and

WHEREAS, the Water Authority has acquired the necessary real property ownership to facilitate storage in Abiquiu Reservoir including easements and fee simple property up to elevation 6220.00 NGVD29, and is in the process of completing acquisition of property rights up to elevation 6230.00 NGVD29; and

WHEREAS, the U.S. Army Corps of Engineers ("Corps") is not a party to this Agreement and incurs no obligation under it and has no discretionary authority other than that specified in the Contract; and

WHEREAS, the Water Authority and Plaintiffs negotiated a settlement on claims related to the Rio Grande Silvery Minnow litigation (99 CV 1320/JP/RHS (DNM)); and

WHEREAS, the Settlement Agreement provides for the Water Authority to suballot at no charge up to 30,000 acre-feet of storage space in Abiquiu Reservoir for use as an Environmental Pool for the storage of native Rio Grande and/or San Juan-Chama water acquired by Plaintiffs ("Conservation Water") through lease, purchase, or donation; and

WHEREAS, the Water Authority has and continues to provide storage space in Abiquiu Reservoir for Environmental Purposes under an existing suballotment with the Bureau of Reclamation as part of the Supplemental Water Program; and

WHEREAS, the Water Authority began full diversions in June 2012 and the Parties have agreed that storage space is available at Abiquiu Reservoir; and

WHEREAS, the purpose of the Environmental Pool shall be to benefit the Rio Grande, Bosque habitat, and species protected under the Endangered Species Act in a manner consistent with the goals of the Middle Rio Grande Endangered Species Collaborative Program; and

WHEREAS, the Water Authority and the Plaintiffs entered into that Agreement Between the Rio Grande Silvery Minnow Plaintiffs and the Albuquerque Bernalillo County Water Utility Authority to Suballot Storage Space in Abiquiu Reservoir, dated August 16, 2013 ("Original Agreement"); and

WHEREAS, the Original Agreement provided for the term of the original suballotment to be for ten years, subject to renewal at Plaintiffs' discretion and Corps' approval; and

WHEREAS; Plaintiffs wish to replace the Original Agreement with this Agreement in order to extend the availability of the Environmental Pool for an additional ten years; and

WHEREAS, Plaintiffs are separately working with the Bureau of Reclamation on a water storage agreement that is anticipated to replace this storage agreement at some point in the future, and the Parties anticipate termination of this agreement upon its completion potentially in advance of the termination date of this agreement; and

WHEREAS, the Water Authority and the Plaintiffs wish to enter into this Agreement to allow Plaintiffs a suballotment of a portion of the Water Authority's storage space, subject to Corps approval; now

BE IT RESOLVED BY THE WATER AUTHORITY:

The Executive Director requests the ability to confer with the Rio Grande Silvery Minnow Plaintiffs to enter into an agreement as necessary to facilitate continued use of the environmental pool; and

HEREBY AUTHORIZES:

The Executive Director to act on behalf of the Water Authority to sign an agreement with the Rio Grande Silvery Minnow Plaintiffs whereby the Water Authority will suballot up to 30,000 acre-feet of storage space in Abiquiu reservoir for environmental use.

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8/9/2023 DRAFT

RENEWAL AGREEMENT BETWEEN THE RIO GRANDE SILVERY MINNOW PLAINTIFFS AND THE ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY TO SUBALLOT STORAGE SPACE IN ABIQUIU RESERVOIR

This Agreement (the "Agreement") to suballot Abiquiu Reservoir Storage Space between the Albuquerque Bernalillo County Water Utility Authority ("Water Authority") and the plaintiffs (WildEarth Guardians, Wildlife for All, New Mexico Audubon Council, National Audubon Society, Sierra Club, and Defenders of Wildlife) in *Rio Grande Silvery Minnow v. Keys*, 99CV 1320JP/RHS (DNM) ("Plaintiffs") (the Water Authority and Plaintiffs together are the "Parties"), is made effective as of the date signed below by the Executive Director of the Water Authority (the "Effective Date").

RECITALS

A. **WHEREAS**, Congress authorized the Secretary of the Army to enter into agreements with entities for storage of 200,000 acre-feet of San Juan-Chama water in Abiquiu Reservoir in Public Law 97-140; and

B. **WHEREAS**, the Secretary of Interior was authorized to release San Juan-Chama water to contracting entities for such storage; and

C. **WHEREAS**, P.L. 97-140 specified that the storage of San Juan-Chama water in Abiquiu Reservoir shall not interfere with the authorized purposes of the project and shall include a requirement that each user of storage space shall pay any increase in operation and maintenance costs attributable to the storage of that user's water; and

D. **WHEREAS**, in Public Law 100-522 Congress further authorized the Secretary of the Army to store 200,000 acre-feet of Rio Grande system water in lieu of San Juan-Chama water to the extent that contracting entities no longer require the storage; and

E. **WHEREAS**, in P.L. 116-260 Congress amended P.L. 97-140 and P.L. 100-522 to eliminate the 200,000 acre-feet volume cap from combined sources in favor of allowing for the concurrent storage of San Juan-Chama and native Rio Grande system water in Abiquiu Reservoir up to elevation 6230.00 NGVD29; and

F. **WHEREAS**, pursuant to NMSA 1978 § 72-1-10, the Albuquerque Bernalillo County Water Utility Authority ("Water Authority") is the legal successor to the City of Albuquerque under Contract No. DACW47-86-C-0009 dated March 20, 1986 with the U.S. Army Corps of Engineers for water storage space in Abiquiu Reservoir (the "Contract"); and

G. **WHEREAS**, WildEarth Guardians is the successor in interest and rights of plaintiff Forest Guardians pursuant to the Certificate of Amendment of WildEarth Guardians No. 3343423 dated February 12, 2008; and

H. **WHEREAS**, Wildlife for All is the successor in interest and rights of plaintiff Southwest Environmental Center; and

I. **WHEREAS**, pursuant to the Contract, the Water Authority has the right to store up to 170,900 acre-feet of San Juan-Chama Project Water, presently has storage space within this volume cap available for suballotment, and has the ability to suballot storage space subject to the terms of the Contract; and

J. **WHEREAS**, the Water Authority has acquired the necessary real property ownership to facilitate storage in Abiquiu Reservoir including easements and fee simple property up to elevation 6220.00 NGVD29, and is in the process of completing acquisition of property rights up to elevation 6230.00 NGVD29; and

K. **WHEREAS**, the U.S. Army Corps of Engineers ("Corps") is not a party to this Agreement and incurs no obligation under it and has no discretionary authority other than that specified in the Contract; and

L. **WHEREAS**, the Water Authority has implemented the San Juan-Chama Drinking Water Project to divert and fully utilize the Water Authority's contracted share of San Juan-Chama water in Abiquiu Reservoir; and

M. **WHEREAS**, the Water Authority and Plaintiffs negotiated a settlement on claims related to the Rio Grande Silvery Minnow litigation (99 CV 1320/JP/RHS (DNM)); and

N. **WHEREAS**, the Settlement Agreement provides for the Water Authority to suballot at no charge up to 30,000 acre-feet of storage space in Abiquiu Reservoir for use as an Environmental Pool for the storage of native Rio Grande and/or San Juan-Chama water acquired by Plaintiffs ("Conservation Water") through lease, purchase, or donation; and

O. **WHEREAS**, the Settlement Agreement states that the storage space would become available within twelve (12) months, or as otherwise agreed to by the Parties to this Agreement, after commencement of full diversions by the Water Authority for the Drinking Water Project; and

P. **WHEREAS**, the Water Authority has and continues to provide storage space in Abiquiu Reservoir for Environmental Purposes under an existing suballotment with the Bureau of Reclamation as part of the Supplemental Water Program; and

Q. **WHEREAS**, the Water Authority began full diversions in June 2012 and the Parties have agreed that storage space is available at Abiquiu Reservoir; and

R. **WHEREAS**, the purpose of the Environmental Pool shall be to benefit the Rio Grande, Bosque habitat, and species protected under the Endangered Species Act in a manner consistent with the goals of the Middle Rio Grande Endangered Species Collaborative Program; and

S. **WHEREAS**, the Water Authority and the Plaintiffs entered into that Agreement Between the Rio Grande Silvery Minnow Plaintiffs and the Albuquerque Bernalillo County Water Utility Authority to Suballot Storage Space in Abiquiu Reservoir, dated August 16, 2013 ("Original Agreement"); and

T. **WHEREAS**, the Original Agreement provided for the term of the original suballotment to be for 10 years, subject to renewal at Plaintiffs' discretion and Corps' approval; and

U. **WHEREAS**; Plaintiffs wish to replace the Original Agreement with this Agreement in order to extend the availability of the Environmental Pool for an additional 10 years; and

V. **WHEREAS**, Plaintiffs are separately working with the Bureau of Reclamation on a water storage agreement that is anticipated to replace this storage agreement at some point in the future, and the Parties anticipate termination of this agreement upon its completion potentially in advance of the termination date of this agreement; and

W. WHEREAS, the Water Authority and the Plaintiffs wish to enter into this Agreement to allow Plaintiffs a suballotment of a portion of the Water Authority's storage space, subject to Corps approval; now

X. **THEREFORE,** upon the mutual consideration described in the Original Agreement, the Settlement Agreement, and this Agreement, including all covenants and promises contained herein, the adequacy of which are acknowledged by the Parties, the Water Authority and the Plaintiffs agree as follows:

AGREEMENT

1. The Recitals are incorporated herein by reference.

2. The Water Authority Agrees to provide up to 30,000 acre-feet of storage space in Abiquiu Reservoir at no charge to the Plaintiffs to benefit species protected under the Endangered Species

Act consistent with the goals of the Middle Rio Grande Endangered Species Collaborative Program.

3. The term of this Agreement is ten years from the Effective Date, after which time the Parties may renew this Agreement or enter a new Agreement by Separate Instrument subject to the terms of the Contract.

4. The Plaintiffs agree to provide written notification to the Water Authority when Conservation Water is to be delivered to Abiquiu Reservoir for storage under the terms of this Agreement. When the Water Authority receives notification from the Plaintiffs, the Water Authority will in turn notify the Corps of when Conservation Water is to be delivered.

5. The Parties agree that the 30,000 acre-feet of suballoted storage space referred to in this Agreement is governed by the following provisions:

a. The provision of storage space for the Environmental Pool is subject to any requisite regulatory approvals, and the Plaintiffs agree to work with the Water Authority to obtain the necessary regulatory permits for storage of Conservation Water.

b. The Water Authority retains title authority regarding its property and flowage easement interests, and jurisdiction over its Contract and such storage space and no rights are given to Plaintiffs as to such storage space or the Water Authority's property rights or operations other than as specifically set forth in this Agreement.

c. In accordance with the Parties' Settlement Agreement, the Water Authority is not obligated to provide space for the Environmental Pool during any time where space is unavailable for all or part of the Environmental Pool due to factors or conditions outside the control of the Water Authority, and nothing in this Agreement allows operation of Abiquiu Reservoir in a manner which would otherwise impair or impede the Water Authority's ability to store and release water for Water Authority purposes.

d. Conservation Water acquired by Plaintiffs through lease, purchase, or donation shall be released from the Environmental Pool to benefit species listed under the Endangered Species Act consistent with the goals of the Middle Rio Grande Endangered Species Collaborative Program. The Water Authority will notify the Corps of Conservation Water releases to be made from the Environmental Pool. Conservation Water releases from the Environmental Pool will be made in accordance with Plaintiffs' instructions to the Water Authority.

e. The Water Authority reserves the right to utilize for any purpose whatever space is available from the Environmental Pool that cannot be used by the Plaintiffs in a given year. That space shall be computed as the difference between 30,000 acre-feet and that amount of Conservation Water from any source that is available to be stored in a given year ("Available Space"). The Water Authority agrees that such temporary storage shall not be utilized so as to

impair the ability to store 30,000 acre-feet of Conservation Water in subsequent years in the Environmental Pool.

f. The Water Authority has the right to use any Available Space in the Environmental Pool for storage of Conservation Water or Supplemental Water it may hold or acquire or to make such space available to third parties other than Plaintiffs through suballotments for purposes of storing Conservation Water to be used in accordance with this Agreement.

g. The water stored under this agreement for the Plaintiffs in the Environmental Pool shall suffer evaporative losses in proportion to the total amount stored.

6. **Termination if Advance of Expiration.** Should the Parties agree that this Agreement is no longer needed because storage space for an Environmental Pool has been made available in other reservoirs or for other reasons, the parties agree that this Agreement can be terminated by providing one year's advanced notice of termination in writing.

7. **Amendment.** This Agreement will not be amended, altered or changed except by a written instrument executed by the Parties.

8. **Severability**. If any part, term or provision of this Agreement is held to be illegal, in conflict with any law or otherwise invalid, the remaining portion or portions shall be considered severable and not be affected by such determination, and the rights and obligations of the parties shall be construed and enforced as if the Agreement did not contain the particular part, term or provisions held to be illegal or invalid.

9. **Scope of Agreement.** This Agreement incorporates all the agreements, covenants, and understandings between the Parties concerning the subject matter hereof. No prior agreement or understanding between the Parties is valid or enforceable.

10. **Dispute Resolution.** The parties hereby irrevocably and unconditionally submit to the jurisdiction of the state courts of New Mexico and to the jurisdiction of the United States District Court for the District of New Mexico for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement.

IN WITNESS WHEREOF, this Agreement is agreed to by the Plaintiffs and the Water Authority, which have caused this Agreement to be executed and delivered by its duly authorized representatives to become effective as of the date signed by the Executive Director of the Water Authority.

ALBUQUERQUE BERNALLILLO COUNTY

WATER UTILITY AUTHORITY

_____ Date:_____
Mark S. Sanchez, Executive Director
Albuquerque Bernalillo County Water Utility Authority
PLAINTIFFS

_____
John C. Horning, Executive Director
WildEarth Guardians (f/k/a Forest Guardians)

_____
Kevin Bixby, Executive Director
Wildlife for All (f/k/a Southwest Environmental Center)

_____
Tom Jervis, Board Memberca
New Mexico Audubon Council

_____
Jonathan Hayes, Executive Director Audubon Southwest
National Audubon Society

_____
Camilla Feibelman, New Mexico Chapter Chair
Sierra Club

_____
McCrystie Adams, Vice President, Conservation Law
Defenders of Wildlife

Acknowledged by:

UNITED STATES OF AMERICA

_____

Jennifer Faler
Area Manager, Albuquerque Area Office
Bureau of Reclamation

Approved by:

U.S. ARMY CORPS OF ENGINEERS

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Jerre Hansbrough
Lieutenant Colonel, U.S. Army
District Commander