



Meeting Date: August 23, 2023

Staff Contact: Diane Agnew, Water Rights Program Manager

TITLE: R-23-24 – Authorizing the Executive Director to Enter into an Agreement with the City of Santa Fe to Suballot Storage Space in Abiquiu Reservoir

ACTION: Recommend Approval

SUMMARY:

The Albuquerque Bernalillo County Water Utility Authority (Water Authority) has had agreements with the City of Santa Fe and others for the last 20 years for the storage of water with the Water Authority's allotted space in Abiquiu Reservoir, and for the storage of water on Water Authority easements and fee simple property.

Under the first new agreement, the Water Authority will provide up to 15,000 acre-feet of storage within the Water Authority's allotted space in Abiquiu Reservoir. In exchange, the City of Santa Fe will provide 10% of the delivered water into the Water Authority's Space. Additionally, the second agreement will allow the City of Santa Fe to store water within their allotted space on Water Authority easements and fee simple property. In exchange, the City of Santa Fe will pay \$1 per acre-foot of water stored. Approval of these agreements will be consistent with over two decades of partnership with the City of Santa Fe at Abiquiu Reservoir.

FISCAL IMPACT:

None

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY

BILL NO. R-23-24

1

RESOLUTION

2

AUTHORIZING THE EXECUTIVE DIRECTOR TO ENTER INTO AN AGREEMENT WITH

3

THE CITY OF SANTA FE TO SUBALLOT STORAGE SPACE IN ABIQUIU RESERVOIR

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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

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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

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WHEREAS, in P.L. 116-260 Congress amended P.L. 97-140 and P.L. 100-522 to allow concurrent storage of San Juan-Chama and native Rio Grande system water in Abiquiu Reservoir up to elevation 6230.00 NGVD29; and

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WHEREAS, P.L. 116-260 required that each user of storage space, regardless of source of water, pay for any increase in costs attributable to storage of that user's water; and

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WHEREAS, pursuant to NMSA 1978 § 72-1-10, the Water Authority is the legal successor to the interest and rights of the City of Albuquerque for storage space in Abiquiu Reservoir under Contract No. DACW47-86-C-0009 dated March 20, 1986 with the U.S. Army Corps of Engineers (Corps) and has the ability to allow other parties to use its storage space subject to approval from the Corps; and; and

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WHEREAS, the Water Authority has acquired easements and fee simple property up to elevation 6230.00 NGVD29 in Abiquiu Reservoir.

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WHEREAS, Santa Fe will preferentially use the USACE/Contractors' pool for storage of water but may desire additional storage space from the Water Authority.

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BE IT RESOLVED BY THE WATER AUTHORITY:

1 The Executive Director to act on behalf of the Water Authority to sign an
2 agreement whereby the Water Authority will suballot up to 15,000 acre-feet of storage
3 space in Abiquiu reservoir to the City of Santa Fe. The Executive Director is also
4 authorized to act on behalf of the Water Authority to sign an agreement whereby the
5 City of Santa Fe will compensate for utilizing the Water Authority's easements in
6 Abiquiu reservoir.

Agreement between the City of Santa Fe and the
Albuquerque Bernalillo County Water Utility Authority to Suballot
Contracted Storage Space in Abiquiu Reservoir

This Agreement to authorize the use of portion of the Water Authority's contracted storage space in Abiquiu Reservoir (Agreement) is between the Albuquerque Bernalillo County Water Utility Authority (Water Authority), a political subdivision of the State of New Mexico and the City of Santa Fe, New Mexico (Santa Fe), a municipal corporation of the State of New Mexico, and is made on the date of the last signature below. This Agreement supersedes the agreements between the Water Authority and Santa Fe dated July 11, 2007 and January 1, 2016.

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**, 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

C. **WHEREAS**, in P.L. 116-260 Congress amended P.L. 97-140 and P.L. 100-522 to allow concurrent storage of San Juan-Chama and native Rio Grande system water in Abiquiu Reservoir up to elevation 6230.00 NGVD29; and

D. **WHEREAS**, P.L. 116-260 required that each user of storage space, regardless of source of water, pay for any increase in costs attributable to storage of that user's water; and

E. **WHEREAS**, pursuant to NMSA 1978 § 72-1-10, the Water Authority is the legal successor to the City of Albuquerque in its agreement with the U.S. Army Corps of Engineers (the "Corp") for 170,900 acre-feet of storage space in Abiquiu Reservoir (the Water Authority's "Allotment") under Contract No. DACW47-86-C-0009 dated March 20, 1986, as may be amended ; and

F. **WHEREAS**, Section 10 of the Contract No. DACW47-86-C-0009 contemplates that the Water Authority may partition its Allotment into subsidiary allotments for use by other users with water storage needs at Abiquiu Reservoir (a "Suballotment"), and the purpose of this Agreement is to grant such a Suballotment to the City of Santa Fe for its water storage needs subject to the terms and conditions included herein; and

G. **WHEREAS**, the Water Authority has acquired easements and fee simple property up to elevation 6220.00 NGVD29 in Abiquiu Reservoir, and is in the process of acquiring property interests up to elevation 6230.00 NGVD29, as necessary to store water its total Allotment; and

H. **WHEREAS**, Santa Fe will preferentially use the USACE/Contractors' pool for storage of water, but may desire additional storage space from the Water Authority as Suballoted by this Agreement; now

I. **THEREFORE**, upon the mutual consideration described by the Agreement, including the covenants and promises contained herein, the adequacy of which is acknowledged by the parties, the Water Authority and Santa Fe agree as follows:

Agreement

1. The Recitals are incorporated herein by reference.

2. The Water Authority agrees:

a. To provide to the City of Santa Fe a total of up to 15,000 acre-feet of water storage space within the Water Authority's contracted storage space in Abiquiu Reservoir. The actual amount of storage space available shall be determined solely by the Water Authority which shall be based on the amount of space needed by the Water Authority (see paragraph 7 below).

b. To provide Santa Fe with as much advance notice as practicable whenever exercising the Water Authority's right to require that Santa Fe vacate its stored water because the Water Authority becomes aware that the contracted space to Santa Fe is necessary for storage of Water Authority water.

3. The City of Santa Fe agrees:

a. That the Water Authority maintains the exclusive right to store their San Juan-Chama or native Rio Grande system water within the unused storage space allocated under this Agreement.

b. To provide payment of 10% of the water stored within the Water Authority's allotted storage space, based on the maximum day of stored volume during the calendar year. Stored volume is considered to be only that volume of water in excess of Santa Fe's USACE/contractors' pool. Accounting of previous calendar year water stored in the Water Authority's contracted storage space will be submitted to the Water Authority by the end of February for the previous year's storage. The payment of 10% water shall be San Juan-Chama water and be due by the end of February.

c. To prepare and submit an annual report to the Water Authority by January 10th for the previous calendar year. The annual report shall provide the amount of water deposited, stored and evaporated during that calendar year, broken down into both the USACE/Contractors' pool (easement agreement) and ABCWUA's storage space (this agreement), and the amount to be carried over to the following year, and anticipated storage space to be used in the following year.

d. That storage of Santa Fe's San Juan-Chama or native Rio Grande system water within the Water Authority's contracted storage space, easements or fee simple property does not convey any right of possession, control or exclusion nor does it affect or modify Water Authority contract rights under Contract No. DACW47-86-C-009 dated March 20, 1986, or its subsequent amendments.

e. Not to store San Juan-Chama or native Rio Grande system water that is subleased, purchased or otherwise acquired or obtained from any third party without the written approval from the Water Authority.

f. To take the necessary steps to as soon as practical release or move Santa Fe San Juan-Chama or native Rio Grande system water from Abiquiu Reservoir to Elephant Butte Reservoir if the Water Authority determines that sub-allotted water storage space is not available in Abiquiu Reservoir.

g. To cooperate with the Water Authority and federal agencies on timing of release and delivery of water from El Vado or Heron to meet various objectives, such as recreational and ecological benefits on the Rio Chama.

h. That Santa Fe is responsible for its proportional share of the monthly evaporative losses that occur on Santa Fe water stored in Abiquiu including the current and any water added to the reservoir over time. Santa Fe will work with the U.S. Bureau of Reclamation to provide the records of the evaporative computation calculated on a monthly basis and ensure that these losses are deducted from Santa Fe's account.

4. Both parties agree:

a. That the amount stored, and the storage deadline will continue until written mutual consent by the Water Authority's Executive Director and the City of Santa Fe is executed to terminate this Agreement.

b. That this agreement shall be for a term of five years and shall renew each year unless Santa Fe or the Authority provides a 180-day, written notice of termination of this agreement. The storage agreement can be renewed for a subsequent period of five years with written consent of the Water Authority and Santa Fe.

c. To coordinate closely to ensure that any state, federal or other permitting necessary to store native Rio Grande system water in the Water Authority's easements and fee simple property is properly obtained.

d. That Santa Fe will support the Water Authority's efforts to obtain the necessary state, federal and other permitting to store native Rio Grande system water in Abiquiu Reservoir.

e. That this Agreement can be terminated at the sole discretion of the Water Authority or the City of Santa Fe by providing a 90-day written notice of termination. All of

Santa Fe's San Juan-Chama or native Rio Grande system water remaining in the Water Authority's space upon written termination may remain for a period of up to one year at which time Santa Fe shall have released or otherwise caused their remaining water to be removed from the Water Authority storage space in Abiquiu Reservoir.

5. **Liability.** Any claim of tort liability against either the City of Santa Fe or the Water Authority is subject to the privileges and immunities of the New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 through 41-4-30, as amended. Except as expressly provided by the New Mexico Tort Claims Act, the parties hereto do not waive sovereign immunity, or any defense or limitation of liability provided by applicable law. No provision of this Agreement shall be construed to modify, abrogate, or waive any provision of the New Mexico Tort Claims Act. None of the provisions contained within this Agreement are intended to create in the public or any member thereof a third-party beneficiary or to authorize anyone not a party to the Agreement to maintain a suit or any claim whatsoever, pursuant to the provisions of this Agreement.

6. **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.

7. **Merger Clause.** This Agreement constitutes the entire Agreement between the Water Authority and Santa Fe. No waiver, consent, modification or change of terms of this Agreement shall bind either party unless in writing and signed by both parties. The waiver, consent, modification or change, if made shall be effective only in the specific instance and for the specific purpose given. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. Santa Fe by signature of its authorized representative hereby acknowledges that they have read this Agreement, understands it, and agrees to be bound by its terms and conditions.

8. **Dispute Resolution.** The parties (a) hereby irrevocably and unconditionally submit to the jurisdiction of the state courts of New Mexico for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement.

9. **Appropriations.** The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the City Council for the performance of this Agreement. If sufficient appropriations and authorization are not made by the City Council, this Agreement shall terminate immediately upon written notice being given by the City to the Authority.

10. The Water Authority designates Mark S. Sanchez, Executive Director, or his designee as the Water Authority's Representative and person to receive notifications from Santa Fe under this Agreement. Santa Fe designates the Water Division Director, or their designee, as Santa Fe's Representative and person to receive notifications from the Water Authority under this Agreement.

11. This agreement may be signed in counterparts, and each signed copy shall be deemed an original.

IN WITNESS WHEREOF, the City of Santa Fe and the Albuquerque Bernalillo County Water Utility Authority have caused this Agreement to be executed and delivered by its duly authorized representatives as of the date specified below.

ALBUQUERQUE BERNALILLO COUNTY
WATER UTILITY AUTHORITY

Mark S. Sanchez, Executive Director
Albuquerque Bernalillo County Water Utility Authority

Date

THE CITY OF SANTA FE

Alan M. Webber, Mayor
City of Santa Fe

Date

Attest:

Kristine Bustos Mihelcic, City Clerk

Date

City Attorney's Office:

Senior Assistant City Attorney

Date

Approved for Finances:

Emily Oster, Finance Director

Date

Acknowledged by:

UNITED STATES OF AMERICA

Jennifer Faler, Area Manager
Albuquerque Area Office
Bureau of Reclamation

Date

Approved by:

U.S. ARMY CORPS OF ENGINEERS

Lt. Col. Jerre Hansbrough
LTC District Commander
U.S. Army Corps of Engineers

Date

Agreement between the City of Santa Fe and
the Albuquerque Bernalillo County Water Utility Authority to Allow Storage of
Water within Easements and Fee Simple Property Surrounding Abiquiu Reservoir

This Agreement to allow for storage of water within the easements and fee simple property owned by the Albuquerque Bernalillo County Water Utility Authority (Water Authority), a political subdivision of the State of New Mexico, and the City of Santa Fe, New Mexico (Santa Fe), a municipal corporation of the State of New Mexico, is made on the date of the last signature below and supersedes the agreements between the Water Authority and Santa Fe dated July 11, 2007 and January 1, 2016.

Recitals

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 (P.L. 97-140); and

WHEREAS, P.L. 97-104 required 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, P.L. 116-260 amended P.L. 97-140 and P.L. 100-522 to allow 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, P.L. 116-260 further required each user of storage space, regardless of source of water, shall pay for any increase in costs attributable to storage of that user's water; and

WHEREAS, P.L. 116-260 Sec. 337(d) allocates 29,100 acre-feet of storage for San Juan-Chama contractors other than the Water Authority, herein called the "USACE/Contractors' Pool," that will not diminish in volume due to sedimentation through time; and

WHEREAS, Santa Fe has a contract with U.S. Army Corps of Engineers to store water in the USACE/Contractors' Pool and is in the process of updating the contract to account for changes in PL 116-260; and

WHEREAS, the City's portion of the USACE/Contractors' Pool space, with the new contract, will be 59.2 percent of that total, or 17,240 acre-feet; that volume may decrease if additional SJCP contractors choose to store water in Abiquiu or increase if current storage contracts choose to nullify their storage contracts; and

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

WHEREAS, the Water Authority has acquired the necessary water ownership real estate including easements and fee simple property up to elevation 6230.00 NGVD29 in Abiquiu Reservoir; and

NOW, therefore, upon the mutual consideration described by the Agreement, including the covenants and promises contained herein, the adequacy of which is acknowledged by the parties, the Water Authority and Santa Fe agree as follows:

Agreement

The Water Authority agrees:

1. To provide a total of the City's portion of the 29,100 acre-feet of USACE/Contractors' pool storage space set aside by the Water Authority within easements and fee simple property owned by the Water Authority. This storage space automatically renews each year unless Santa Fe provides a 30-day, written notice of termination of this agreement.
2. To set aside a total of the City's portion of the 29,100 acre-feet of USACE/Contractors' pool storage space for storage of San Juan-Chama or native Rio Grande water for storage and use exclusively by Santa Fe. San Juan-Chama or native Rio Grande water stored can be carried over, but in no case shall the total quantity of San Juan-Chama or native Rio Grande system water exceed the City's portion of the 29,100 acre-feet under this easement agreement.
3. If requested, to cooperate with Santa Fe to suballot a portion of the Water Authority's contracted space under a separate agreement.

The City of Santa Fe agrees:

1. That the Water Authority maintains the exclusive right to store their San Juan-Chama or native Rio Grande system water within the unused storage space allocated under this Agreement.
2. To prepare and submit an annual report to the Water Authority by January 10th for the previous calendar year. The annual report shall provide the amount of water deposited, stored and evaporated during that calendar year, broken down into both the USACE/Contractor's Pool (this agreement) and ABCWUA's storage space

(suballotment agreement), the amount to be carried over to the following year, and anticipated storage space to be used in the following year.

3. To provide a lease payment of \$1 for each acre-foot of San Juan-Chama or native Rio Grande system water stored in the Water Authority's easements and fee simple property during the previous calendar year, based on the maximum day of stored volume during the previous calendar year as shown in URGWOM, up to the City's portion of the 29,100 acre-foot USACE/Contractors' Pool. Payment is due by the end of February for the previous year's storage. The lease payment is a fee in consideration of the use and administration of the Water Authority's easements and fee simple property.
4. Not to store San Juan-Chama or native Rio Grande system water that is suballotted, purchased, leased or otherwise acquired or obtained from any third party without the written approval from the Water Authority.
5. That storage of Santa Fe's San Juan-Chama or native Rio Grande system water within the easements or fee simple property does not convey any right of possession, control or exclusion nor does it affect or modify the Water Authority contract rights under Contract No. DACW47-86-C-009 dated March 20, 1986 or its subsequent amendments.
6. That Santa Fe is responsible for their proportional share of the monthly evaporative losses that occur on Santa Fe water stored in Abiquiu including the current and any water added to the reservoir over time. Santa Fe will work with the U.S. Bureau of Reclamation to provide the records of the evaporative computation calculated on a monthly basis and ensure that these losses are deducted from Santa Fe account.
7. To contract separately with the U.S. Army Corps of Engineers (Corps) for the storage of San Juan-Chama or native Rio Grande system water including the proportional share of the annual increased cost for operation and maintenance as determined by the Corps.

Both parties agree:

1. That the amounts stored, and the storage deadline outlined herein will continue until either the Water Authority or the City of Santa Fe elect to terminate this agreement, provided that the terminating party shall provide 180 days' notice of its intent to terminate the agreement.
2. To coordinate closely to ensure that any state, federal or other permitting necessary to store native Rio Grande system water in the Water Authority's easements and fee simple property is properly obtained.

3. That Santa Fe will support the Water Authority's efforts to obtain the necessary state, federal and other permitting to store native Rio Grande system water in Abiquiu Reservoir.
4. **Liability.** Any claim of tort liability against either Santa Fe or the Water Authority is subject to the privileges and immunities of the New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 through 41-4-30, as amended. Except as expressly provided by the New Mexico Tort Claims Act, the parties hereto do not waive sovereign immunity, or any defense or limitation of liability provided by applicable law. No provision of this Agreement shall be construed to modify, abrogate, or waive any provision of the New Mexico Tort Claims Act. None of the provisions contained within this Agreement are intended to create in the public or any member thereof a third-party beneficiary or to authorize anyone not a party to the Agreement to maintain a suit or any claim whatsoever, pursuant to the provisions of this Agreement.
5. **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.
6. **Merger Clause.** This Agreement constitutes the entire Agreement between the Water Authority and Santa Fe. No waiver, consent, modification or change of terms of this Agreement shall bind either party unless in writing and signed by both parties. The waiver, consent, modification or change, if made shall be effective only in the specific instance and for the specific purpose given. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. Santa Fe by signature of its authorized representative hereby acknowledges that they have read this Agreement, understands it, and agrees to be bound by its terms and conditions.
7. **Dispute Resolution.** The parties (a) 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.
8. **Appropriations.** The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Santa Fe City Council for the performance of this Agreement. If sufficient appropriations and authorization are not made by the City Council, this Agreement shall terminate immediately upon written notice being given by the City to the Authority.
9. The Water Authority designates Mark S. Sanchez, Executive Director, or his designee as the Water Authority's Representative and person to receive

notifications from Santa Fe under this Agreement. Santa Fe designates Water Division Director, or their designee, as Santa Fe's Representative and person to receive notifications from the Water Authority under this Agreement.

10. This agreement may be signed in counterparts, and each signed copy shall be deemed an original.

IN WITNESS WHEREOF, the City of Santa Fe and the Albuquerque Bernalillo County Water Utility Authority have caused this Agreement to be executed and delivered by its duly authorized representatives as of the date specified below.

ALBUQUERQUE BERNALILLO COUNTY
WATER UTILITY AUTHORITY

Mark S. Sanchez, Executive Director
Albuquerque Bernalillo County Water Utility Authority

Date

THE CITY OF SANTA FE

Alan M. Webber, Mayor
City of Santa Fe

Date

Attest:

Kristine Bustos Mihelcic, City Clerk

Date

City Attorney's Office:

Senior Assistant City Attorney

Date

Approved for Finances:

Emily Oster, Finance Director

Date

The City of Santa Fe

Santa Fe Easement Agreement
2023