
Meeting Date: June 20, 2018

Staff Contact: John M. Stomp, P.E., Chief Operating Officer

TITLE: C-18-21- Approval of First Amendment to Settlement Agreement the Albuquerque Bernalillo County Water Utility Authority, Rio Grande Silvery Minnow and with City of Albuquerque

ACTION: Recommend Approval

SUMMARY:

In 2005, the City and Water Authority jointly settled with the Plaintiffs in the Rio Grande Silvery Minnow v. Keys litigation. The purposes of the settlement agreement were to take steps to protect and restore the ecological integrity of the Rio Grande and to provide greater certainty for the Water Authority to develop and utilize San Juan-Chama as part of the Drinking Water Project. Under the terms of the settlement agreement, the Water Authority has successfully implemented the following items:

1. Set aside 30,000 acre-feet of space in Abiquiu Reservoir as an environmental pool for the storage of native or San Juan-Chama water acquired by others for use in the Middle Rio Grande to benefit endangered species. The environmental pool does not affect the ability for the Water Authority to utilize the space in the event that space is needed, but does provide important benefits for endangered species, the Bosque and other ecosystem restoration efforts.
2. The Living River Fund was established that allows for rate payers of the Water Authority to donate to a fund to acquire water rights for storage in the environmental pool.

We are seeking authorization for the Executive Director to enter into an agreement with the Plaintiffs to utilize existing funds with the goal of working to secure the legal and operational flexibilities to Rio Grande Basin Reservoirs. The settlement agreement amendment allows for funds that were set aside for pilot environmental leasing program to be utilized to hire staff whose job will be to promote reservoir flexibility in the Middle Rio Grande.

FISCAL IMPACT: None

FIRST AMENDMENT TO SETTLEMENT AGREEMENT
BETWEEN
RIO GRANDE SILVERY MINNOW V. KEYS PLAINTIFFS, THE CITY OF
ALBUQUERQUE AND THE ALBUQUERQUE-BERNALILLO COUNTY WATER
UTILITY AUTHORITY

THIS FIRST AMENDMENT TO Settlement Agreement (“First Amendment”) amends that certain Settlement Agreement Between *Rio Grande Silvery Minnow v. Keys* Plaintiffs, 99 CV 1320 JP/RHS (DNM) (“Plaintiffs”), the City of Albuquerque (“Albuquerque” or “the City”), and the Albuquerque-Bernalillo County Water Utility Authority (“Water Authority”) (collectively “the Parties”) executed in 2005 between the parties.

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;

Whereas, the purposes of the 2005 Settlement Agreement were to take steps towards protecting and restoring the ecological integrity of the Rio Grande and to provide greater certainty for the Authority to develop and utilize a reliable water supply;

Whereas, the Parties have worked together over the past decade and continue to work collaboratively to implement the provisions of the 2005 Settlement Agreement;

Whereas, the Parties agreed to “support the establishment and implementation of a pilot water leasing program for the Middle Rio Grande area via agricultural forbearance to increase flows in the Rio Grande and protect federally-listed species dependent on the river;”

Whereas, the water leasing program was a means for acquiring and transferring water from existing uses to provide flows in the Rio Grande;

Whereas, the Water Authority contributed \$225,000 in funding for such a water leasing program;

Whereas, *Rio Grande Silvery Minnow v. Keys* Plaintiff, WildEarth Guardians, likewise contributed \$25,000 in funding for such a water leasing program;

Whereas, the Parties agreed to “work in good faith and in cooperation with the Collaborative Program to use the above-referenced funding to secure additional state and federal funding on a 75/25 matching basis in order to secure \$1 million for the water leasing program;”

Whereas, the Parties jointly worked collaboratively to encourage Senator Udall to support and request an increase in federal funding for the U.S. Bureau of Reclamation to develop

and implement a pilot water acquisition and leasing program in the Rio Grande Basin in New Mexico;

Whereas, in 2014 with the leadership of Senator Udall, Congress passed an appropriations bill including funding and direction for the U.S. Bureau of Reclamation to develop and implement a long-term pilot water acquisition program in the Rio Grande Basin in New Mexico;

Whereas, in 2015 again with the leadership of Senator Udall, Congress appropriated \$1 million directed to the establishment of a voluntary water leasing program in the Middle Rio Grande in New Mexico;

Whereas, due to the efforts of the Parties, Congress, and other stakeholders in the Basin, the establishment of a water acquisitions and leasing program is coming to fruition;

Whereas, based on the collective federal, state, and local support of such an environmental water leasing program and the dedicated federal funding, we believe that the 2005 Settlement Agreement needs to be amended to reflect these accomplishments and evolving landscapes;

Whereas, all of the original funds contributed to support the environmental water leasing program remain unspent in a joint Escrow Account;

Whereas, the Parties believe these funds should be leveraged in way that will accomplish the purposes of this agreement; and

Whereas, the Parties wish to amend the 2005 Settlement Agreement regarding how the contributed funds can be leveraged in order to guide the Parties cooperative efforts to meet the original purposes for which the agreement was entered.

NOW THEREFORE, the Parties agree as follows:

1. The Parties agree that due to the evolution of the landscape in the Rio Grande Basin there are important water management flexibilities—beyond a pilot environmental water leasing program—that are necessary to meet the purposes of the 2005 Settlement Agreement. In order to provide more options for how to leverage the funds contributed by the Water Authority and Guardians, the Parties agree to amend the 2005 Settlement Agreement as follows:

a. Section III(1)(f) shall be amended to read: “To complement the Authority's appropriation of \$225,000 pursuant to paragraph III(3)(c), provide \$25,000 in funding through voluntary contributions from the Plaintiffs, exclusive of the Sierra Club, for the purposes described in that paragraph III(5)(a).

b. Section III(3)(c) shall be amended to read: “Support the efforts in the Rio Grande Basin to increase flows in the Rio Grande and protect federally-listed species

dependent on the river. Subject to appropriations, the Authority shall provide \$225,000 in funding for such purposes described in paragraph III(5)(a).

c. Section III(5)(a) shall be amended to read: "Work in good faith to use the funding described in Paragraphs III(1)(f) and III(3)(c) to support the hiring of a full-time staff person within WildEarth Guardians' Wild Rivers Program with the goal of working to secure legal and operational flexibilities to Rio Grande Basin Reservoirs. The details of implementing this effort to increase the operational flexibilities to Rio Grande Basin Reservoirs will be determined in a future agreement, to which the Authority and the relevant Plaintiff, WildEarth Guardians, will be signatories.

d. Section III(5)(b) shall be deleted.

2. The Parties agree to continue to cooperate to fulfill its duties under the 2005 Settlement Agreement as amended by this Agreement.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement on the dates indicated below:

**ALBUQUERQUE-BERNALILLO
COUNTY WATER UTILITY
AUTHORITY**

By: _____
Mark S. Sanchez

Date: _____

WILDEARTH GUARDIANS

By: _____
John Horning

Date: _____

DEFENDERS OF WILDLIFE

By: _____
Michael Senatore

Date: _____

SIERRA CLUB

By: _____
Richard Barish

Date: _____

NATIONAL AUDUBON SOCIETY

By: _____
David Henderson

Date: _____

**SOUTHWEST ENVIRONMENT
CENTER**

By: _____
Kevin Bixby

Date: _____

NEW MEXICO AUDUBON

By: _____
Jonathan Hayes

Date: _____

**SETTLEMENT AGREEMENT BETWEEN
RIO GRANDE SILVERY MINNOW v. KEYS PLAINTIFFS,
THE CITY OF ALBUQUERQUE AND THE
ALBUQUERQUE-BERNALILLO COUNTY WATER UTILITY AUTHORITY**

Section I. Parties

The Parties to this Settlement Agreement ("Agreement") are the Plaintiffs in *Rio Grande Silvery Minnow v. Keys*, 99 CV 1320 JP/RHS (DNM) ("Plaintiffs"), the City of Albuquerque ("Albuquerque" or "the City"), and the Albuquerque-Bernalillo County Water Utility Authority ("Authority") (collectively "the Parties").

Section II. Purposes of the Agreement

The purposes of this Agreement are to take steps towards protecting and restoring the ecological integrity of the Rio Grande and to provide greater certainty for the Authority to develop and utilize a reliable water supply. The City and Authority recognize that the health and vitality of the Rio Grande and the Bosque and fish and wildlife that depend on them, including the endangered Rio Grande silvery minnow and Southwestern willow flycatcher, contribute to the cultural, economic and environmental well-being of the City and the State of New Mexico. The Plaintiffs recognize that the Authority requires a reliable water supply to ensure the future vitality and economic viability of the City and the region.

In order to provide certainty to the Parties and to further these purposes, the Parties agree to work together to implement the provisions of this Agreement.

Section III. Terms and Conditions

1. Plaintiffs shall:
 - a. Not challenge in any way, through judicial or other means, Section 205(a), Title n, Division C of the Consolidated Appropriations Act, 2005, Pub. L. No. 108-447(2004).
 - b. Enter into a stipulation with the City pursuant to the terms of this Agreement and Rule 41 (a) in *Rio Grande Silvery Minnow v. Keys*, for dismissal of claims against the City and claims regarding consultation or discretion over San Juan-Chama water for federally-listed species, or any claim relating in any manner to San Juan Chama water and federally listed species, whether such claims are asserted as to the City or federal defendants, and seek the agreement of all other parties to *Rio Grande Silvery Minnow v. Keys* to such stipulation. If all parties do not agree to the stipulation, Plaintiffs, the City and any party joining the stipulation shall move under Rule 41(a)(2) for court approval of the stipulation dismissing such claims.

- c. Request that any final orders or judgment entered by the District Court in *Rio Grande Silvery Minnow v. Keys* reflect the dismissal of any and all claims regarding San Juan-Chama water.
 - d. Forego and refrain from bringing in any judicial or administrative forum, any future claims relating to or brought pursuant to the Endangered Species Act seeking use of San Juan-Chama Water without the consent of San Juan-Chama contractors for protection of federally-listed species in the Rio Grande Basin, and/or seeking federal consultation regarding use of San Juan-Chama water for protection of federally listed species in the Rio Grande Basin. Plaintiffs shall not bring any claims or lawsuits challenging the lawfulness or validity of the February 13, 2004 Biological Opinion for the Albuquerque Drinking Water Project (BiOp) or the June 1, 2004 Record of Decision for the Drinking Water Project. However, nothing in this Agreement shall be construed as prohibiting Plaintiffs from bringing any claims or lawsuits if there are violations of the BiOp and/or reinitiation of consultation over the Drinking Water Project or additional compliance with the National Environmental Policy Act is required due to changed circumstances or new information as allowed and provided by applicable law.
 - e. Acknowledge that the availability of storage space in Abiquiu Reservoir as contemplated by this Agreement is contingent upon completion and operation of the Authority's Drinking Water Project and subject to the conditions of Paragraph III (3)(a) of this Agreement.
 - f. To complement the Authority's appropriation of \$225,000 pursuant to paragraph III(3)(b), provide \$25,000 in funding through voluntary contributions from the Plaintiffs, exclusive of the Sierra Club, for the pilot environmental water leasing program described in that paragraph.
 - g. Recognize the City's water conservation program is a progressive and successful program with appropriate conservation goals.
2. Plaintiff Sierra Club shall:
- a. Move for an order of dismissal with prejudice in *Carangelo, et al. v. New Mexico State Engineer, Appellee and City of Albuquerque Public Works Department, Appellee-Applicant*, No. CV-2004-05036 dismissing Sierra Club as a Plaintiff from that action.
3. Albuquerque and the Authority shall:
- a. Within twelve (12) months or as otherwise agreed to by the Parties, after commencement of full diversions by the Authority for the Drinking Water Project, lease, at no charge, 30,000 acre-feet of storage space in Abiquiu Reservoir for use as a permanent Environmental Pool for the storage of native and/or San Juan-Chama water acquired by Plaintiffs or others through lease, purchase or donation. Such leases, purchases or donations shall be from willing participants ("Conservation Water"), including leases, purchases or

donations by or through the Middle Rio Grande Endangered Species Collaborative Program ("Collaborative Program"). The purpose of the lease of storage space between the Authority and the Plaintiffs shall be to benefit the Rio Grande or Bosque habitat and to benefit species listed on the federal threatened and endangered species list consistent with the goals of the Collaborative Program.

- b. Provide such storage space as governed by the following provisions:
 - i. The provision of storage space for the Environmental Pool shall be subject to any requisite regulatory approvals. The Parties shall enter into a sublease for the Environmental Pool.
 - ii. The Authority shall retain title to and jurisdiction over such storage space, and no rights are given to Plaintiffs as to such storage space or the Authority's operations other than as specifically set forth in this Agreement.
 - iii. The Authority shall not be 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 Authority, and nothing in this Agreement shall allow operation of Abiquiu Reservoir in a manner which would otherwise impair or impede the Authority's ability to store and release water for Authority purposes.
 - iv. Conservation Water shall be released from the Environmental Pool for the purpose of benefiting the Rio Grande or Bosque habitat and benefiting federally-listed species consistent with the goals of the Collaborative Program.
 - v. The Authority reserves the right to utilize for any purpose whatever space is available from the Environmental Pool that cannot be used 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. The 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.
 - vi. The Authority has the right to use any available space in the Environmental Pool for storage of Conservation Water it may hold or acquire or to make such space available to third parties other than Plaintiffs through leases for purposes of storing Conservation Water to be used in accordance with this Agreement.
 - vii. In the event additional storage space in other reservoirs is made available in the future for an Environmental Pool and the Parties agree that the Authority's space is no longer needed, the Parties agree that any sub-lease

regarding the conservation pool will terminate and the provisions of this Agreement obligating the Authority to provide space shall be null and void and of no force or effect.

- c. Support the establishment and implementation of a pilot water leasing program for the Middle Rio Grande area via agricultural forbearance to increase flows in the Rio Grande and protect federally-listed species dependent on the river. Subject to appropriations, the Authority shall provide \$225,000 in funding for such a water leasing program.
 - d. Institute a residential check-off program whereby residents may choose to pay an additional \$1.00/month on their monthly water bill provided that such additional sums are allocated exclusively to acquire water to increase flows in the Rio Grande. Such program shall commence only after the Drinking Water Project is fully operational. Specific provisions of the residential check-off program shall be developed and implemented by the Authority. The administrative costs for the program shall be paid for by the program funds derived from the \$1.00/per month check-off. Subject to any necessary regulatory approvals, the water made available by this program shall be placed in the Environmental Pool in Abiquiu Reservoir created by this Agreement to be used to increase flows in the Rio Grande and protect federally-listed species dependent on the river.
 - e. Incorporate restoration as a component of any fuel reduction program undertaken by the City in the Rio Grande Bosque, including leaving or restoring dense stands of native vegetation to the extent feasible and environmentally appropriate.
 - f. Fulfill any obligations the City or Authority may have with regard to the Biological Opinion for the Drinking Water Project.
4. The City and the Plaintiffs shall:
- a. Jointly request in the *Rio Grande Silvery Minnow v. Keys* litigation that the Court's final order or judgment include a statement that those portions of the Court's April 19, 2002, and September 23, 2002, Memorandum Opinions and/or Orders that relate to the use of San Juan Chama water for endangered species or the Bureau of Reclamation's discretion regarding the same are no longer in effect, in light of this Settlement Agreement, but that all other portions of the Opinions and Orders remain unaffected by this Agreement.
5. The Parties shall:
- a. Work in good faith and in cooperation with the Collaborative Program to use the funding described in Paragraphs 111(1)(f) and III(3)(c) to secure additional state and federal funding on a 75/25 matching basis in order to secure \$1 million for the water leasing program. The details of implementation of the water leasing program resulting from this Agreement will be determined in a

future agreement, to which the City, the Authority and Plaintiffs will be signatories.

- b. Attempt to execute environmental water lease agreements with one or more Pueblos or other Middle Rio Grande water users to use the funding described in Paragraph III(3)(c) to forbear the use of a designated quantity of agricultural water rights for a future irrigation season in order to provide increased river flows to protect federally-listed species such as the Rio Grande silvery minnow.
- c. Work in good faith to complete a future agreement among the Plaintiffs, the Authority, and relevant governmental agencies and in cooperation with the Collaborative Program regarding the details of control and use of the water in the Environmental Pool. The agreement shall provide that the water shall be released for the purpose of benefiting the Rio Grande or Bosque habitat and for federally-listed species, consistent with the goals of the Collaborative Program.

Section IV: Duration and Enforcement

- a. The Parties intend for this agreement to be perpetual, as a permanent resolution of the issues in dispute between them as outlined in this Agreement. Any party may seek judicial enforcement for specific performances of the duties required hereunder, provided that prior to seeking judicial enforcement, the enforcing party shall provide the other party written notice of the alleged breach to allow the non-enforcing party thirty (30) days to correct the alleged breach. Notice shall be provided to:

For the City:

For the Plaintiffs:

Letty Belin
Belin & Sugarman
618 Paseo de Peralta
Santa Fe, New Mexico 87501

And

Sierra Club Managing Attorney
85 Second Street, 2nd Floor
San Francisco, CA 94105-3441

In no event shall any party be entitled to monetary damages for breach.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement on the dates indicated below:

**ALBUQUERQUE-BERNALILLO
COUNTY WATER UTILITY
AUTHORITY**

By: _____
Mark Sanchez
Executive Director

Date: _____
CITY OF ALBUQUERQUE

By: _____
James Lewis
Chief Administrative Officer

Date: _____

FOREST GUARDIANS

By: _____
Jofen Morning
Date: 2.23.05

NATIONAL AUDUBON SOCIETY

By: _____
David Henderson

Date: 2/23/05

DEFENDERS OF WILDLIFE

By: _____
Kara Gillon
Date: 2/23/05

SIERRA CLUB

By: _____
Richard Barish
Date: 2/23/05

NEW MEXICO AUDUBON COUNCIL

By: _____
Tom Jervis
Date: 2/23/05

**SOUTHWEST ENVIRONMENT
CENTER**

By: _____
Kevin Bixby
Date: 2/25/05