

INCORPORATED COUNTY OF LOS ALAMOS ORDINANCE NO. 687

AN ORDINANCE AUTHORIZING THE INCORPORATED COUNTY OF LOS ALAMOS TO ENTER INTO A LOAN AGREEMENT AND PROMISSORY NOTE WITH THE NEW MEXICO ENVIRONMENT DEPARTMENT FOR THE PURPOSE OF OBTAINING LOAN FUNDS FOR THE CONSTRUCTION OF A NEW WASTEWATER TREATMENT FACILITY, DECLARING THE NECESSITY FOR THE LOAN, RESTRICTING THE USE OF THE LOAN FUNDS SOLELY FOR THE PROJECT, AND PLEDGING LOAN WILL BE PAYABLE FROM THE REVENUES OF THE WASTEWATER SYSTEM

WHEREAS, the Incorporated County of Los Alamos ("County" or "Borrower") is an incorporated home-rule county created pursuant the New Mexico Constitution and statutes of the State of New Mexico ("State"); and

WHEREAS, the County, through its Department of Public Utilities ("DPU") owns, operates, and maintains a public utility system including a Wastewater Collection and Treatment System ("System"), which includes a system for disposing of wastes by surface and underground methods; and

WHEREAS, the County's White Rock ("WR") Wastewater Treatment Plant ("WWTP") has been determined to be insufficient and inadequate to meet the current and future regulatory, environmental, and permitted discharge requirements; and

WHEREAS, the County has determined using current engineering review standards, that the WR WWTP must be replaced (hereafter "Project") to meet current state and federal discharge requirements; and

WHEREAS, the County and DPU has reviewed its available financial resources and funds and has determined that it is necessary to seek financial assistance to help plan, develop, and construct the Project; and

WHEREAS, the County has entered into discussions with the State of New Mexico Environment Department ("NMED"), Construction Programs Bureau ("CPB") for possible financial assistance for construction of the Project; and

WHEREAS, the NMED, CPB has reviewed the application, documentation, and financial capabilities of the County and DPU to construct the required WR WWTP and determined that the County and DPU is an eligible candidate for a receiving federally authorized and funded Clean Water State Revolving Fund ("CWSRF") loan monies ("CWSRF Loan"); and

WHEREAS, in exchange for the CWSRF Loan, the County, DPU, and Project will be subject to specific loan requirements of the CWSRF Loan; and

WHEREAS, one essential term of the CWSRF Loan agreement ("Agreement") and promissory note ("Note") will be that the Loan shall be payable solely from the Pledged Revenues of the County's and DPU's Sewer Fund; and

WHEREAS, pursuant to an Agreement with Respect to Subordination dated August 13, 2014 (the "Subordination Agreement"), NMED and the County agreed that existing NMED Loans (CWSRF 1438143 and ARRA CWSRF 09 Loan) were "Subordinate Obligations" under the debt issued under both the First Lien Indenture and the Second Lien Indenture; and

WHEREAS, NMED and the County agree that the CWSRF Loan refunding CWSRF Loan 1438143 and financing the Project shall also constitute "Subordinate Obligations" as defined in both the First Lien Indenture and the Second Lien Indenture (as such terms are defined in the Subordination Agreement; and

WHEREAS, the Governing Body of the Borrower has determined that it is in the best interest of the Borrower to accept and enter into the Loan Agreement and to execute and to deliver the Note to the NMED.

BE IT ORDAINED BY THE GOVERNING BODY OF THE INCORPORATED COUNTY OF LOS ALAMOS as follows:

Section 1. Definitions. As used in the Ordinance, the following terms shall have the meanings specified below, unless the context clearly requires otherwise (*such meanings to be equally applicable to both the singular and the plural forms of the terms defined unless the plural form is separately defined*):

Act. The general laws of the State, including the Wastewater Facility Construction Loan Act at sections 74-6A-1 to 74-6A-15 NMSA 1978, as amended; enactments of the governing Body of the Borrower relating to the Note and the Loan Agreement made by resolution or ordinance, including this Ordinance; and the powers of the Borrower as a public body under authority given by the Constitution and Statutes of the State.

Annual Audit or Single Audit. Financial statements of the Borrower as of the end of each Fiscal Year, audited by an Auditor, consistent with the federal Single Audit Act and the State Auditor's rules.

Authorized Officer. The Chair of the County Council, the County Manager, the Utilities Manager, the Deputy Utilities Manager of Finance and Administration, or other officer or employee of the County when designated by a certificate authorized by the County Council and signed by the Chairman of the County Council of the County from time to time. The certificate may designate one or more alternates. The Borrower agrees to provide a signatory Resolution and signature page designating all signatory duties required.

Borrower. The entity requesting funds pursuant to the Act, here the Incorporated County of Los Alamos, through its Department of Public Utilities.

Fiscal Year. The twelve-month period commencing on the first day of July of each year and ending on the last day of June of the succeeding year, or any other twelve-month period which the Borrower hereafter may establish as the fiscal year or the System.

Governing Body of the Borrower. The Incorporated County of Los Alamos County Council.

Loan. The loan of public funds from NMED pursuant to the Loan Agreement.

Loan Agreement. The loan agreement including attachments and or exhibits, and any amendments thereto, between the Borrower and the NMED, pursuant to which funds will be

loaned to the Borrower to construct the Project and pay eligible costs relating thereto; and the final loan agreement which shall state the final amount the NMED loaned to the Borrower, which shall be executed upon completion of the Project and dated on the date of execution.

NMED. The State of New Mexico Environment Department.

NMSA. New Mexico Statutes Annotated, 1978 Compilation, as amended and supplemented.

Note. The interim and final promissory notes issued by the Borrower to the NMED evidencing the obligation of the Borrower to the NMED incurred pursuant to the Ordinance and Loan Agreement.

Operation and Maintenance. All reasonable and necessary expenses of the System, paid or accrued, relating to operating, maintaining and repairing the System.

Ordinance. This Ordinance including any amendments, attachments, or exhibits.

Parity Bonds or Parity Obligations. Revenue Bonds and other bonds or other obligations payable from the Pledged Revenues issued with a lien on the Pledged Revenues on parity with the bonds or obligations as listed in this Ordinance.

Pledged Revenues. Wastewater System Revenues.

Project. The most current NMED approved Project Description described on the Project Description Form on file with NMED and attached hereto.

Project Completion Date. The date that operations of the completed works are initiated or capable of being initiated, whichever is earlier. This also applies to individual phases or segments.

Regulations. Regulations promulgated by the New Mexico Water Quality Control Commission at 20.7.5 NMAC and New Mexico Environment Department at 20.7.6 – 20.7.7 NMAC.

Subordinate Obligations. Other obligations payable from the Pledged Revenues issued with a lien on the Pledged Revenues subordinate to the lien of the Loan Agreement and Note as may be listed in this Ordinance.

Section 2. Ratification. All action before now (not inconsistent with the provisions of the Ordinance) by the Council, the officers and employees of the Borrower, directed toward the Loan Agreement and the Note, is ratified, approved and confirmed as a result of this document.

Section 3. Findings. The Governing Body of the Borrower declares that it has considered all relevant information and data and makes the following findings:

a. The execution and delivery of the Loan Agreement and the Note pursuant to the Act to provide funds to finance the Project, is necessary and in the interest of the public health, safety, and welfare of the residents of the Borrower.

b. The money available for the Project from all sources other than the Loan Agreement is not sufficient to pay when due the cost of the Project.

c. The Pledged Revenues may lawfully be pledged to secure the payment of amounts due under the Loan Agreement and Note.

Section 4. System. The System and Project shall constitute a wastewater treatment system and shall be operated and maintained as such.

Section 5. Authorization of Project. The construction of the Project and payment of eligible items as set forth in the Regulations from proceeds of the Loan Agreement and Note is hereby authorized at a cost not to exceed the principal Loan amount of \$17,000,000.00 excluding any cost of the Project to be paid from any source other than the proceeds of the Loan Agreement and Note.

Section 6. Authorization of Loan Agreement.

a. The Council hereby authorizes the County Utilities Manager to execute and deliver the Interim and Final Loan Agreement and Note to NMED. Such Loan and Note are to be payable and collectible solely from the Pledged Revenues of the System. NMED will disburse the proceeds according to the terms of the Loan Agreement to the Borrower over the construction period of the Project. The principal Loan amount of the Note shall not exceed \$17,000,000.00 plus accrued interest and the annual interest rate on that principal amount shall not exceed 2.375% percent per annum. Such amounts and interest shall not change without the approval and adoption of another Ordinance amending this Ordinance as required by County Code and Charter. The term of the Loan and Note and final maturity date on the Note shall not extend beyond the agreed upon useful life of the project. The Loan shall be repaid in substantially equal annual installments in the amount and on the dates provided in the Loan Agreement with the first annual installment due no later than one year after completion of the project. The County will maintain a debt service coverage ratio of no less than 1.2 and must obtain the written consent of the NMED before issuing additional obligations secured by the Pledged Revenues.

b. If the Borrower fails to satisfy any federal grant requirements or conditions as required by the Loan and Note, the Borrower may be required to refund any federal grant funds disbursed to the Borrower from NMED.

c. The form of the Loan Agreement and the Note are approved. The Authorized Officer (Utilities Manager) is hereby directed to execute and deliver the Loan Agreement and the Note and any amendments to the Loan Agreement or Note to be executed after completion of the Project with such changes consistent with the Ordinance. The approval by an Authorized Officer of these documents in their final forms shall constitute conclusive evidence of the County's approval and compliance with this section.

d. From the date of the initial execution and delivery of the Loan Agreement and the Note, Authorized Officers, agents and employees of the Borrower are authorized, empowered and directed to carry out such acts and to execute all such documents as may be necessary to comply with the provisions of this Ordinance, the Loan Agreement and the Note.

Section 7. Special Limited Obligations. All Funds disbursed pursuant to the Loan Agreement and the Note shall be special limited obligations of the Borrower and shall be payable and collectible solely from the Pledged Revenues which are irrevocably pledged as set forth in this Ordinance. The NMED may not look to any general or other fund for the payment on the Loan Agreement and the Note except the designated special funds pledged. The Loan Agreement and the Note shall not constitute indebtedness or debts within the meaning of any

constitutional, charter or statutory provision or limitation, nor shall they be considered or be held to be general obligations of the Borrower and shall recite that they are payable and collectible solely from the Pledged Revenues.

Section 8. Operation of Project. The Borrower shall operate and maintain the Project so that it will function properly over its structural and material design life.

Section 9. Use of Proceeds. The NMED shall disburse Funds pursuant to the Loan Agreement for NMED approved costs incurred by the Borrower for the Project or to pay contractors or suppliers of materials for work performed on the Project as set forth in the Loan Agreement.

Section 10. Application of Revenues.

a. OPERATION AND MAINTENANCE. Defined as all costs and expenses to safely and reliably operate, repair, and maintain systems and equipment according to design specifications and within manufactured operating parameters and to maintain qualified staff to do so.

b. PARITY OBLIGATIONS AND OTHER APPROVED DEBT(S). The Borrower shall pay the principal, interest and administrative fees (if applicable) of parity obligations and other approved debts which are secured from the Pledged Revenues as scheduled.

c. EQUITABLE AND RATABLE DISTRIBUTION. Obligations of the Borrower secured by the Pledged Revenues on parity with the Loan Agreement and the Note, from time to time outstanding, shall not be entitled to any priority one over the other in the application of the Pledged Revenues, regardless of the time or times of their issuance or creation.

d. SUBORDINATE OBLIGATIONS. The Pledged Revenues used for the payment of Subordinate Obligations shall be applied first to the payment of the amounts due the Loan Agreement and the Note, including payments to be made to other obligations payable from the Pledged Revenues which have a lien on the Pledged Revenues on parity with the Loan Agreement and the Note.

Section 11. Lien of Loan Agreement and Note. The Loan Agreement and the Note shall constitute irrevocable liens upon the Pledged Revenues with priorities on the Pledged Revenues as set forth in this Ordinance. The Borrower hereby pledges and grants a security interest in the Pledged Revenues for the payment of the Note and any other amounts owed by the Borrower to the NMED pursuant to the Loan Agreement.

Section 12. Other Obligations. Nothing in the Ordinance shall be construed to prevent the Borrower from issuing bonds or other obligations payable from the Pledged Revenues and having a lien thereon subordinate to the liens of the Loan Agreement and the Note. The Borrower must obtain the written consent of the NMED before issuing additional obligations secured by the Pledged Revenues.

Section 13. Default. The following shall constitute an event of default under the Loan Agreement:

a. The failure by the Borrower to pay the annual payment due on the repayment of the Loan set forth in the Loan Agreement and Note when due and payable either at maturity or otherwise; or

b. Default by the Borrower in any of its covenants or conditions set forth under the Loan Agreement (*other than a default described in the previous clause of this section*) for 60 days after the NMED has given written notice to the Borrower specifying such default and requiring the same to be remedied.

Section 14. Upon Occurrence of Default:

a. The entire unpaid principal amount of the Interim and Final Promissory Note plus accrued interest and any fees thereon may be declared by the NMED to be immediately due and payable and the Borrower shall pay the amounts due under Note from the Pledged Revenues, either immediately or in the manner required by the NMED in its declaration, but only to the extent funds are available for payment of the Note. However, if insufficient funds are available for payment of the Note(s), the NMED may require the Borrower to adjust the rates charged by the System to ensure repayment of the Note.

b. If default by the Borrower is of covenants or conditions required under the federal grant, the Borrower may be required to refund the amount of the Loan disbursed to the Borrower from NMED.

c. The NMED shall have no further obligation to make payments to the Borrower under the Loan Agreement.

Section 14. Enforcement; Venue. The NMED retains the right to seek enforcement of the terms of the Loan Agreement. If the NMED and the Borrower cannot reach agreement regarding disputes as to the terms and conditions of this Loan Agreement, such disputes are to be resolved promptly and expeditiously in the First Judicial District Court for Santa Fe County. The Borrower agrees that the District Court for Santa Fe County shall have exclusive jurisdiction over the Borrower and the subject matter of this Loan Agreement and the Borrower waives the right to challenge such jurisdiction and venue.

Section 15. Remedies Upon Default. Upon the occurrence of any of the events of default as provided in the Loan Agreement or in this Ordinance, the NMED may proceed against the Borrower to protect and enforce its rights under the Ordinance by mandamus or other suit, action or special proceedings in equity or at law, in any court of competent jurisdiction, either for the appointment of a receiver or for the specific performance of any covenant or agreement contained in the Ordinance for the enforcement of any proper legal or equitable remedy as the NMED may deem most effective to protect and enforce the rights provided above, or to enjoin any act or thing which may be unlawful or in violation of any right of the NMED, or to require the Borrower to act as if it were the trustee of an express trust, or any combination of such remedies. Each right or privilege of the NMED is in addition and cumulative to any other right or privilege under the Ordinance or the Loan Agreement and Note and the exercise of any right or privilege by the NMED shall not be deemed a waiver of any other right or privilege.

Section 16. Duties Upon Default. Upon the occurrence of any of the events of default as provided in this Ordinance, the Borrower, in addition, will do and perform all proper acts on behalf of and for the NMED to protect and preserve the security created for the payment of the Note to ensure the payment on the Note promptly as the same become due. All proceeds derived from the System, so long as the Note is outstanding, shall be treated as revenues. If the Borrower fails or refuses to proceed as required by this Section, the NMED, after demand in writing, may proceed to protect and enforce the rights of the State and NMED as provided in this Ordinance and the Loan Agreement.

Section 17. Termination. When all obligations under the Loan Agreement and Note have been paid, the Loan Agreement and Note shall terminate and the pledge, lien, and all other obligations of the Borrower under the Ordinance shall be discharged. The principal amount of the Note, or any part thereof, may be prepaid at any time without penalty at the discretion of the Borrower and the prepayments of principal shall be applied as set forth in the Loan Agreement.

Section 18. Amendment of Ordinance. This Ordinance may be amended with the prior written consent of the NMED.

Section 19. Ordinance Irrepealable. After the Loan Agreement and Note have been executed and delivered, the Ordinance shall be and remain irrepealable until the Note has been fully paid, terminated and discharged, as provided in the Ordinance.

Section 20. Severability. If any section, paragraph, clause or provision of the Ordinance shall for any reason be held to be invalid or unenforceable, the invalidity or unenforceability of such section, paragraph, clause or provision shall not affect any of the remaining provisions of the Ordinance.

Section 21. Repealer. All bylaws, orders, Ordinances and Ordinances, or parts thereof, inconsistent herewith are hereby repealed to the extent only of such inconsistency. This repealer shall not be construed to revive any bylaw, order, Ordinance, or part thereof, heretofore repealed.

ADOPTED this _____ day of _____ 2018.

**COUNCIL OF THE INCORPORATED
COUNTY OF LOS ALAMOS**

David Izraelevitz, Council Chair

ATTEST: (Seal)

**Naomi D. Maestas,
Los Alamos County Clerk**

Exhibits:

Exhibit 1. Draft NMED CWSRF Loan Agreement

Exhibit 2. Draft NMED CWSRF Promissory Note

Exhibit 3. Project Description