

## **MEMORANDUM OF AGREEMENT BETWEEN THE IDAHO DEPARTMENT OF WATER RESOURCES (IDWR) AND THE FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA)**

1. **PARTIES:** The parties to this Agreement are the Idaho Department of Water Resources (IDWR) and the Federal Emergency Management Agency (FEMA), a component of the U.S. Department of Homeland Security.
2. **AUTHORITY:** This Agreement is authorized under the provisions of The National Flood Insurance Act, as amended, 42 U.S.C. § 4102 *et seq.* and both Idaho Code § 42-1805(1) both Idaho Executive Order 2015-06.
3. **PURPOSE AND SCOPE:** The purpose of this Agreement is to formalize the consensus between the Parties regarding current inconsistencies between certain provisions of the Idaho Code and FEMA regulations, and to identify the Parties' respective commitments and responsibilities regarding compliance with the National Flood Insurance Program. The scope of this agreement is between FEMA and the State of Idaho as an NFIP participating community and the State of Idaho as the State Coordinating Agency.
4. **BACKGROUND:** FEMA is the federal agency charged with administration of the National Flood Insurance Program (NFIP) under the National Flood Insurance Act, as amended, 42 U.S.C. § 4001 *et seq.* The IDWR is the agency designated by the State of Idaho under Executive Order No. 2015-06 as responsible for implementing and administering the NFIP within the State. NFIP implementing regulations require all communities participating in the NFIP to require permits for all proposed construction or other development within the community and to appropriately review such permits<sup>1</sup>. To support the NFIP in Idaho, Idaho Code §§ 46-1020 through 46-1023 encourages and authorizes local governments to regulate floodplains within their jurisdiction.

In 2010, the definition of development in Idaho Code § 46-1021(1) was amended to exclude "operation, cleaning, maintenance, or repair of any ditch, canal, lateral, drain, diversion structure or other irrigation or drainage works" and Idaho Code §46-1022 was amended to prohibit regulation of "operation, cleaning, maintenance or repair of any ditch, canal, lateral, drain, diversion structure or other irrigation or drainage works." In November 2016, FEMA alerted IDWR that Idaho Code §§ 46-1021(1) and 46-1022 were non-compliant with NFIP implementing regulations 44 CFR §§ 59.1 and 60.3 due to the exclusions of operation, cleaning, maintenance, or repair of irrigation and drainage works. FEMA warned IDWR that it may suspend the State of Idaho from the NFIP unless the State of Idaho either 1) amended Idaho Code §§ 46-1021(1) and 46-1022 to remove the exclusions, or 2) developed a guidance document that defines the exclusions and the criteria in which the exclusions apply.

In May 2018, IDWR and FEMA finalized a Guidance Document that defines operation, cleaning, maintenance and repair of irrigation and drainage works, and distinguishes the types of

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<sup>1</sup> 44 C.F.R. 60.3

irrigation and drainage activities that meet the definition and those that require a floodplain development permit. The Guidance Document also describes a General Irrigation Floodplain Development (GIFD) permit which covers qualified irrigation and drainage development over a specified period of time. To formalize the Guidance Document IDWR has incorporated it into an Administrative Memorandum that guides IDWR floodplain management staff when advising local communities working with irrigation entities.

The Parties entered into a Memorandum of Agreement ("MOA") on April 9, 2019, to identify the Parties' respective commitments and responsibilities regarding the implementation of the Administrative Memorandum. This MOA supersedes and replaces the original April 9, 2019 MOA.

## 5. RESPONSIBILITIES OF THE PARTIES:

5.1. IDWR will maintain a copy of this Agreement and the Administrative Memorandum on the Floodplain Management page of the IDWR website.

5.2. IDWR will send a notice letter announcing this new MOA and the requirements for continued participation in the NFIP to all Idaho communities currently participating in the NFIP by August 31, 2022. The notice letter will include a link to the related guidance and support documents on IDWR's Floodplain Management webpage.

5.3. IDWR will send a notice letter announcing the new MOA to all irrigation districts, canal companies, and other irrigation entities in Idaho by August 31, 2022. IDWR will also send the notice letter to the Idaho Board of Professional Engineers and Professional Land Surveyors (IBPEPLS) and the Idaho Water Users Association (IWUA) to request an announcement of the MOA in IBPEPLS' and IWUA's next available newsletters.

5.4. IDWR will continue to incorporate the requirements and expectations outlined in the Administrative Memorandum at all regular floodplain management training workshops and classes, or other training events sponsored by IDWR or FEMA in Idaho for as long as this Agreement is in effect. IDWR must demonstrate that the corrective and preventative control measures identified in the herein referenced Administrative Memorandum include effective enforcement provisions.<sup>2</sup>

5.5. In 2025 (3 years from date both parties sign this agreement), if there is no solution resulting in a submission of adequate resolution to the State Law inconsistency with the NFIP minimum requirements or if there is no citation to State statutes and ordinances authorizing actions regulating land use which meet the NFIP minimum requirements, the State will be given notice before FEMA takes appropriate suspension or probation actions.<sup>3</sup> FEMA will not offer extensions to the MOA.

5.6. FEMA agrees to support IDWR, the State of Idaho, Idaho NFIP communities, and Idaho irrigation entities with ongoing training and educational opportunities in Idaho, and in addressing questions from NFIP communities, IDWR floodplain management staff, and Idaho irrigation entities.

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<sup>2</sup> 44 C.F.R. 59.2(b)

<sup>3</sup> 44 C.F.R. 59.24(b), 44 C.F.R. 59.24(d)

## 6. GENERAL PROVISIONS:

### 6.1 Points of Contact

6.1.1 For IDWR: Maureen O'Shea

6.1.2 For FEMA: John Graves

6.2 SEVERABILITY: Nothing in this Agreement is intended to conflict with current federal law or regulations or the directives of DHS/FEMA. If a term of this Agreement is inconsistent with any such authority, then that term shall be invalidated, but the remaining terms and conditions of this Agreement shall remain in full force and effect.

6.3 NON-LIMITATION OF AUTHORITY CLAUSE: Nothing in this Agreement is intended to restrict the authority of either party to act as provided by statute or regulation.

6.4 PRIVACY ACT: Any information shared under this Agreement shall be in compliance with the Privacy Act, and to the extent required and allowable, the Freedom of Information Act (FOIA), and any other applicable statute, regulation, or Executive Order.

6.5 NO AUTHORITY TO BIND: This Agreement creates neither a partnership nor a joint venture, and neither party has the authority to bind the other. This Agreement is not intended to be enforceable in any court of law or dispute resolution forum.

6.6 EMBLEMS, SEALS, AND TRADEMARKS: The parties will use or display each other's name, emblem, or trademarks only in the case of particular projects and only with the prior written consent of the other party/ The DHS seal is protected by 18 U.S.C. §§ 506, 701, and 1017, among other laws, and use of the seal is controlled by the DHS Office of Public Affairs through DHS Management Directive No. 123-06. If parties to this Agreement are not Federal entities, they may only use an official DHS seal or logo upon written permission from DHS.

6.7 LIABILITY: The parties to this Agreement agree to be responsible for the negligent or wrongful acts or omissions of their respective employees arising under this Agreement. The parties agree—subject to any limitations imposed by law, rule, or regulation—to cooperate in good faith to resolve any claims promptly and whenever appropriate, without litigation. For all claims or suits arising under this Agreement, each party's designated legal representatives will, within seven (7) calendar days of receipt, provide the other's designated legal representatives copies of any documents memorializing such claims. Nothing in this Agreement shall be construed as a waiver of any sovereign immunity of the United States. The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346 (b), 2671-2680 provides the exclusive monetary damages remedy for allegedly wrongful or negligent acts or omissions by Federal employees with the scope of their employment.

6.8 ENTIRE AGREEMENT: This Agreement, upon execution, contains the entire agreement of the parties and supersedes all prior agreements and understandings, both written and oral, between the parties with respect to the subject matter.

6.9 NON-OBLIGATION OF APPROPRIATED FUNDS: This Agreement is not a fiscal or funds obligation document. Any funds, services, or equipment provided to accomplish the goals stated within this Agreement are done so without expectation of reimbursement or the payment of fees related to the provision of such services, equipment, or personnel unless otherwise agreed. Any specific work or activity that involves the transfer of funds, services, or property among the parties will require execution of a separate agreement and will be contingent upon the availability of appropriated funds. Such activities must be independently authorized by the appropriate statutory or other legal authority. This Agreement does not provide such authority.

7. EFFECTIVE DATE: The terms of this Agreement shall become effective on the date the Agreement is signed by both Parties. This Agreement shall remain in effect for a period of 36 months after the execution of this Agreement.

8. MODIFICATION: This Agreement, upon execution, contains the entire agreement of the Parties and no amendment, change, or modification of any term of this Agreement is valid unless it is in writing and signed by both Parties.

9. TERMINATION: IDWR or FEMA may terminate this Agreement by providing thirty (30) days written notice to the other party. This Agreement will terminate 36 months after the signing of this Agreement by both Parties.

10. IN WITNESS WHEREOF, the Parties have executed this Agreement on the date following their respective signatures.

State of Idaho  
Idaho Department of Water Resources  
322 East Front Street  
PO Bo 83720  
Boise, ID 83720-0098



Gary Spackman  
Director  
Idaho Department of Water Resources

Federal Emergency Management Agency  
Federal Insurance and Mitigation  
Administration (FIMA), Resilience  
400 C Street SW  
Washington, DC 20472

PAUL P  
HUANG

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Date: 2022.06.30  
09:57:43 -04'00'

Paul Huang  
Deputy Associate Administrator (Acting)  
FIMA, Resilience  
Federal Emergency Management Agency

Date

7/6/2022

Date