

The following is a draft Memorandum of Agreement (MOA) between the State of Idaho/IWRB and owners of Conversion Projects to be developed to support the ESPA CAMP process. This draft was prepared for the ESPA CAMP Conversion Projects Working Group.

Information and figures presented in this draft are for discussion purposes only and do not reflect decisions made by the Idaho Water Resource Board, the ESPA CAMP Implementation Committee, or the Idaho Department of Water Resources.

This draft MOA was generated to accommodate applications filed for the 2009 AWEP and will need to be adapted for each project. Note: This draft does not address potential financial incentives through the IWRB or the ESPA CAMP because funding is not currently available. The MOA is likely to be revised for larger conversion projects.

MEMORANDUM OF AGREEMENT
between the
IDAHO WATER RESOURCE BOARD
and the
[NAME OF SPONSOR]
Conversion Project No. ESPA-CAMP-AWEP-01
Contract No. CON00XXX

THIS AGREEMENT is made and entered into this ____ day of __, 20__, by and between the STATE OF IDAHO (the State), by and through the IDAHO WATER RESOURCE BOARD (IWRB), and _____ (Sponsor).

RECITALS

- A. The IWRB is attempting to use funding made available through the ESPA CAMP process or from programs identified to support the ESPA CAMP process to develop projects that result in the reduction of ground water pumping within the ESPA. One strategy is to develop long-term conversion projects equally above and below American Falls to accomplish an annual average water budget change of approximately 100,000 acre-feet (af). To accomplish this goal, proposed conversion projects must result in the reduction of ground water pumping within the ESPA.
- B. Owners of conversion projects funded through the ESPA CAMP or with other programs supporting the implementation of the ESPA CAMP goals are expected to commit to the use of surface water when available.
- C. The IWRB, on behalf of the State, submitted a proposal to the U.S. Department of Agriculture's (USDA) Agricultural Water Enhancement Program (AWEP) to receive funding over a five year period (2009-2013) for projects that contribute to the implementation of the ESPA CAMP. The IWRB's proposal was approved in its entirety allowing the IWRB and USDA's Natural Resource Conservation Service (NRCS) to partner in providing financial and technical assistance to owners and operators of agricultural and nonindustrial private forest lands through the AWEP. Several programs were identified in the IWRB AWEP proposal, one of which is construction of projects that will reduce ground water pumping from the aquifer by converting ground water use to surface water when available.
- D. The Sponsor is seeking funding through the Agricultural Water Enhancement Program (AWEP) for construction of a project that converts irrigation from ground water to surface water when available (conversion project) in order to contribute to the goals of the Eastern Snake Plain Aquifer Comprehensive Aquifer Management Plan (ESPA CAMP) approved by the 2009 Idaho Legislature. The Sponsor executed an agreement

with the NRCS on September __, 2009 in order to meet the deadline for commitment of the 2009 AWEP funds awarded to the IWRB proposal.

- E. Through this MOA, the IWRB acknowledges that the proposed project is consistent with the goals of the ESPA CAMP and the objectives of the IWRB's AWEP proposal. The Sponsor agrees to fully utilize available surface water supplies for irrigation before diverting ground water, in order to reduce ground water pumping from the ESPA. This agreement does not commit the IWRB to provide surface water or potential incentives beyond the terms of this agreement. The Sponsor and the IWRB may amend the terms of this agreement to accommodate incentives offered by the IWRB or through the ESPA CAMP in the future.

In consideration of the promises stated, the parties agree as follows:

1. DEFINITIONS.

- A. The term "IWRB" means the Idaho Water Resource Board, located at 322 E. Front Street, Boise, Idaho or for mail at P.O. Box 83720, Boise, Idaho 83720-0098, by and through its authorized representative.
- B. The term "Sponsor" means _____, located at _____, _____, Idaho, Zip Code, phone number: _____-_____, e-mail: _____@_____._____
- C. The term "Conversion Project" means a project developed to convert lands currently irrigated with ground water to irrigation with surface water when available in order to reduce ground water pumping in the ESPA. The project shall include the required infrastructure and agreements necessary to deliver surface water to the specified lands.
- D. The term "Conversion Project Area" means the lands specified for conversion from ground water irrigation to irrigation with surface water (See Exhibit A for map of the proposed conversion project area).
- E. The term "Conveyance Company" refers to the _____, the entities expected to deliver surface water from the Snake River to a point at which the Sponsor can further deliver the surface water to the conversion project area.
- F. The term "ESPA CAMP Implementation Committee" means the advisory committee designated to develop, review and recommend strategies intended to implement the ESPA CAMP.

2. DESIGNATION OF THE CONTRACT MANAGER.

- A. The IWRB's contract manager shall be Cynthia Bridge Clark, P.E., who shall be the IWRB's representative for the administration of this Contract.
- B. The Sponsor contract manager shall be _____, who shall be the Sponsor representative for the administration of this Contract.

3. STATEMENT OF PURPOSE.

This purpose of this Agreement is to describe the elements of the proposed conversion project including the proposed project area, amount of surface water required for the project, and detail conveyance requirements. The Agreement will also identify the responsibilities of each party and clarify monitoring and reporting requirements.

4. TASKS

A. Sponsor Responsibilities

- (1) Once the Project is constructed in accordance with the engineering design approved by the NRCS, the Sponsor shall fully use all available surface water prior to making diversions of ground water for irrigation within the Conversion Project Area identified in Exhibit A. The Sponsor shall reduce ground water pumping by the equivalent amount of surface water delivered to the headgate of the Project Area.
- (2) In the event the Sponsor is unable to utilize available surface water due to conditions beyond the his control, including water delivery restrictions imposed by the conveyance company, the Sponsor may divert ground water and apply ground water to the identified project lands in accordance with valid ground water rights.
- (3) The Sponsor shall coordinate agreements with the designated Conveyance Company(s) to deliver surface water, and shall pay all water conveyance costs associated with the delivery of surface water to the Conversion Project. A copy of the agreement between the Sponsor and the Conveyance Company to deliver water shall be provided to the IWRB.
- (4) The Sponsor shall pay the total costs for operation and maintenance and other associated costs during the term of this Agreement.
- (5) The Sponsor shall coordinate with the Watermaster of Water District (WD) ____, IWRB and the Conveyance Company to develop, install and maintain a measuring system appropriate for monitoring annual ground water pumping

and surface water delivered to the conversion project. The Sponsor shall comply with the following in developing an acceptable measurement plan :

- a) All surface water delivered to the project must be measured using devices which comply with minimum acceptable standards for open channel measurement, as defined by the Idaho Department of Water Resources (Department) as of the date of this Agreement. If surface water is to be measured in a pipeline, then closed conduit standards, including the use of magnetic flow meters, shall apply.
 - b) All ground water diversions associated with the conversion project shall be measured with magnetic flow meters meeting Department specifications, unless a variance is provided by the Watermaster and the IWRB. Upon specific notification, data loggers may also be required.
 - c) The measurement plan shall be approved by the Watermaster, the IWRB, and the Conveyance Company(s).
 - d) Prior to diversion and use of water through this conversion project, the Sponsor shall install and maintain all measuring devices pursuant to the approved measurement plan, unless an extension or alternate method of measurement has been approved by the Watermaster and the IWRB.
 - e) All measuring devices including flow meter displays or recorders must be accessible to the watermaster, hydrographer, or other water measurement staff for the purpose of collecting or verifying water use data. If the flow meter display is located in a locked or secured area, the watermaster or hydrographer shall be provided with a key or other reasonable access.
- (6) The Sponsor shall submit an annual water usage report (Exhibit B) to the IWRB's Project Manager, or designee, by December 1 of each year over the term of the Agreement. The report shall document the amount of ground water pumped during the irrigation season and the amount surface water delivered to the project as certified by the Conveyance Company. Ground water diversion data submitted to IDWR by the Conveyance Company (or the applicable district) hydrographer or the water district watermaster will be acceptable documentation of ground water pumped in any year, provided the data are submitted by December 1.
- (7) The Sponsor agrees to take necessary actions through the Department to resolve the status of Transfer no. XXXXX including filing an application for a

five (5) year extension of time to develop the transfer, an application to lease water right no. XX-XXX to the State Water Supply Bank (bank) and an application to rent the same right from the bank for a period of five (5) years.

B. IWRB Responsibilities

- (1) The IWRB, in coordination with Watermaster of WD ___ and the Department, will monitor the annual diversion of ground water and application of surface water to the Conversion Project Area. Monitoring may include field inspections, utilization of satellite imagery/aerial photography and measurement data to ensure dedicated surface water is applied to the Conversion Project Area and ground water pumping is reduced accordingly. The monitoring program shall include review of an annual report provided by the Sponsor, and an annual assessment of ground water savings developed by the State for the purposes of the ESPA CAMP.
- (2) The IWRB shall cooperate with the Sponsor and the NRCS to ensure the project is operated in compliance the authorized water rights and the conditions of the agreement with the NRCS.

5. TERM

This Agreement shall take effect upon signature by the parties and shall continue in effect until December 31, 2015 or completion of the duties described herein, unless terminated earlier under section 6 of this Agreement. This Agreement may be renewed upon execution of an extension amendment by both parties.

6. EARLY TERMINATION AND REIMBURSEMENT

- A. Either IWRB or the Sponsor may terminate its obligations and duties under this Agreement pursuant to paragraphs 6B and 6C below. All duties and obligations of both parties under this Agreement shall cease at that time except as provided below.
- B. If, prior to construction and prior to receipt of funding through the AWEP, this agreement may be terminated by either party after thirty (30) days written notice to the other party.
- C. The Sponsor acknowledges that it is subject to all terms and conditions of the agreement between the Sponsor and the NRCS to receive AWEP funding. In the event the Sponsor elects to terminate this Agreement or is unable to execute the terms of this agreement after receipt of funding through the AWEP, the IWRB will coordinate with the NRCS to determine whether reimbursement of AWEP funds or other damages are appropriate under the NRCS contract.

7. RIGHTS TO CONVERSION PROJECT DATA AND INFORMATION.

The sponsor agrees to provide the IWRB and the Department with the following information pertaining to the Conversion Project:

- (1) Project location and identification of acres included in the project.
- (2) Project design information generated by the NRCS, or others, including construction drawings and design specifications.
- (3) Construction inspection, site visit, or other reports generated by the NRCS in review of the Conversion Project construction and operation.

8. SUCCESSORS AND ASSIGNS OBLIGATED.

This Agreement and all of its provisions shall apply to and bind the respective heirs, personal representatives, successors, and assigns of the parties hereto.

9. GENERAL TERMS AND CONDITIONS.

The Sponsor shall abide by all applicable terms and conditions contained in the Standard Contract Provisions, Idaho Water Resource Board, attached hereto as “Attachment A” and incorporated herein by this reference.

10. DUPLICATE ORIGINAL

This Agreement is executed in Duplicate. Each of the documents with an original signature of each party shall be an original.

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

IDAHO WATER RESOURCE BOARD
322 East Front Street

XXX
XXX

Boise, ID 83720-9098

XXX

Terry T. Uhling, Chairman
Idaho Water Resource Board

(Sponsor Name, title)
Sponsor

Date

Date

DRAFT

ATTACHMENT A

STANDARD CONTRACT PROVISIONS IDAHO WATER RESOURCE BOARD

1. DEFINITIONS

- A. "Project Coordinator" shall mean that person appointed by the IWRB to administer this Contract on behalf of the IWRB and the term includes, except as otherwise provided in this Contract, an authorized representative of the Project Coordinator acting within the limits of his authority.
- B. "Subcontractor" shall mean one, not in the employment of any party to this Contract, who is performing all or part of those services under this Contract under contract. The terms "subcontractor" and "subcontractors" mean subcontractor(s) in any tier.

2. PROJECT COORDINATION

- A. All communications given to a party's Project Coordinator shall be as binding as if given to the party.
- B. The IWRB's director or anyone authorized to act on its behalf, may change the IWRB's Project Coordinator at any time by written notice served on the Contractor. This entity may change its Project Coordinator by prior written notice served on the IWRB.
- C. The Contractor's Project Coordinator shall be the entity's representative for administration of this Contract and shall have full authority to act on behalf of the Contractor, unless specified otherwise in the main body of the Contract.

3. LIMITATION OF PROGRAM FUNDS

- A. The Contractor acknowledges that the IWRB cannot obligate funds prior to obtaining funding approval.
- B. The IWRB certifies that state or federal funds are presently available and authorized for expenditure to pay the portion of costs which will accrue during the current state or federal fiscal year or applicable grant period.
- C. The Contractor agrees that all obligations of the IWRB, including the continuance of payments under this Contract, are contingent upon the availability and continued appropriation of funds. In the event state or federal funds become

unavailable as determined by the IWRB, the IWRB may immediately terminate this Contract or amend it accordingly. In no event shall the IWRB be liable for any payments in excess of approved or appropriated funds available for this project.

4. INDEMNIFICATION

The Contractor agrees to indemnify and hold harmless the IWRB and the State of Idaho, its officers, agents or employees from all liability and expense, including attorney fees, on account of claims, suits and costs growing out of or connected with negligent acts, errors, or omissions by the Contractor or its employees if any, provided, however, that the IWRB shall not be relieved hereby from liability for its own negligence and that of its employees.

5. NO PERSONAL LIABILITY

Contractor specifically understands and agrees that in no event shall any official, officer, employee or agent of the IWRB be personally liable for any representation, statement, covenant, warranty or obligation contained in, or made in connection with, this Contract, express or implied.

6. TAXES

The Contractor, with respect to its employees and those of its subcontractors, if any, shall pay, indemnify and hold the IWRB harmless from the payment of all taxes and contributions imposed by federal and state laws, including social security taxes, with respect to said employees and their remunerations, including all interest and penalties payable under said laws as the result of noncompliance therewith.

7. WORKER'S COMPENSATION INSURANCE

Unless the Contractor is exempt under the provisions of I.C. § 72-212, the Contractor warrants that it has purchased worker's compensation insurance for Contractor and all employees engaged in the performance of this Contract and shall provide the IWRB with a Certificate of Insurance to verify the same within 15 days of the execution of this Contract. The Contractor shall notify the IWRB's Project Coordinator within five (5) days of any change in the status of its worker's compensation insurance.

8. INSURANCE

The Contractor shall maintain insurance of the types and in the amounts typically maintained by others in the same occupation or profession as the Contractor, including, but not limited to, comprehensive general liability insurance in the minimum amount of \$1,000,000 per occurrence, and professional malpractice insurance, if applicable, all with insurance companies properly licensed to do business in Idaho.

9. RELATIONSHIP OF THE PARTIES

- A. The parties intend to create by the terms of this Contract an independent contractor relationship between the IWRB and the Contractor.
- B. The parties do not intend to create by the terms of this Contract the relationship of employer and employee. The Contractor shall be responsible to withhold all monies required by law for FICA and income tax purposes.

10. ASSIGNMENT OF BENEFITS AND DELEGATION OF DUTIES

- A. The Contractor shall not delegate any duties under this Contract or assign any benefits, including any moneys due or to become due hereunder, without the prior written consent of the IWRB.
- B. In the event a delegation of duties or an assignment of benefits is approved by the IWRB, the Contractor agrees to bind every such delegate or assignee to comply with the terms and conditions of this Contract.

11. WAIVER, MODIFICATION OR AMENDMENT

No waiver, modification, or amendment of this Contract or of any covenants, conditions or limitations herein contained shall be valid unless in writing duly executed by both parties and the parties further agree that the provisions of this section may not be waived, modified, or amended except as herein set forth.

12. COVENANT AGAINST CONTINGENT FEES

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty, the IWRB shall have the right to annul this Contract without liability or in its discretion to deduct from the price of

consideration, or other wise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

13. PUBLIC RECORDS

Pursuant to Idaho Code section 9-335 *et seq.*, information or documents received from Contractor may be open to public inspection and copying unless exempt from disclosure as a trade secret or proprietary. Contractor shall clearly designate individual documents as “trade secret” or “confidential” and Contractor agrees to indemnify and defend the State for honoring such a designation. The failure to designate any document that is released by the IWRB shall constitute a complete waiver of any and all claims for damages caused by any such release.

14. RIGHTS IN DATA

- A. The Contractor agrees that all data, plans, drawings, specifications, reports, operating manuals, notes and other written documents produced in the performance of this Contract or in contemplation thereof, are subject to the rights of the IWRB set forth in this paragraph.
- B. The IWRB shall have the right to reproduce, publish and use all such documents or any part thereof, in any manner and for any purposes whatsoever and to authorize others to do so.
- C. The IWRB agrees to identify the Contractor or designate appropriate authorship, on all materials reproduced and published that are a direct product of the work performed under this Contract.

15. RETENTION OF RECORDS AND ACCESS TO FACILITIES, PREMISES AND RECORDS

- A. The Contractor shall establish and maintain project budget accounts and records for work and services required by this Contract in accordance with generally accepted accounting principles and practices. Records shall be retained by the Contractor throughout the term of this Contract and for a period of three (3) years following final settlement.
- B. At all reasonable times during the term of this Contract and for a period of three (3) years following final settlement, the IWRB, State of Idaho, and their authorized representatives shall have access at the Contractor's offices to its records related to the services performed under this Contract for the purposes of inspection, audit and copying by the IWRB, State of Idaho, and their authorized

representatives. In addition, the Contractor is required to comply with the requirements of the federal "Single Audit Act of 1984." The IWRB may make available to the Contractor the Single Audit requirements upon completion of the Contractor's fiscal year.

16. ATTORNEYS' FEES

In the event of a legal proceeding of any kind instituted under this Contract or to obtain performance of any kind under this Contract, the prevailing party shall be awarded such additional sums as the court may adjudge for reasonable attorneys' fees and to pay all costs and disbursements incurred in such proceeding.

17. FORCE MAJEURE

Neither party shall be liable for or deemed to be in default for any delay or failure to perform under this Contract if such delay or failure to perform results from an act of God, civil or military authority, act of war, riot, insurrection or other occurrence beyond that party's control. In such case, the intervening cause must not be caused by the party asserting it and the excused party is obligated to promptly perform in accordance with the terms of this Contract after the intervening cause ceases.

18. RESTRICTIONS ON AND ARRANTIES – ILLEGAL ALIENS

Contractor warrants that contract resulting from this Solicitation is subject to Executive Order 2006-40 [http://gov.idaho.gov/mediacenter/execorders/eo06/eo_2006-40.html]; it does not knowingly hire or engage any illegal aliens or persons not authorized to work in the United States; it takes steps to verify that it does not hire or engage any illegal aliens or persons not authorized to work in the United States; and that any misrepresentation in this regard or any employment of persons not authorized to work in the United States constitutes a material breach and shall be cause for termination of its contract. If its contract is for the provision of services or for the sale or lease/licensing of computer software, Contractor further warrants that its contract is subject to Executive Order 2007-09 [http://gov.idaho.gov/mediacenter/execorders/eo06/eo_2007-09.html] and that it must notify the IWRB in advance if, during the term of its contract, it seeks to shift services or work that it represented would be done inside the United States to outside the United States. Failure to obtain the consent of the IWRB for such shift constitutes a material breach.

19. ENTIRE AGREEMENT

This Contract sets forth all the covenants, provisions, agreements, conditions and understandings between the parties, and there are no covenants, provisions, agreements, conditions or understandings, oral or written, between them other than are herein set forth.

20. SEVERABILITY

If any part of this Contract is declared invalid or becomes inoperative for any reason, such invalidity or failure shall not affect the validity and enforceability of any other provision.

21. NO WAIVER

The waiver of any breach or default of this Contract shall not be construed as or deemed to be a waiver of any subsequent breach or default.

22. EFFECT OF SECTION HEADINGS

The section headings appearing in this Contract are not to be construed as interpretations of the text but are inserted for convenience and reference only.

23. GOVERNING LAW

This Contract shall be governed as to validity, construction and performance by the laws of the State of Idaho. The venue of any action brought by any parties to this Contract shall be in a State of Idaho District Court or the United States District Court for the District of Idaho.

24. NOTICES

All notices shall be sent certified mail, postage prepaid, return receipt requested to:

Idaho Department of Water Resources
Attn: Janet Garrett
P O Box 83720
Boise, ID 83720-0098

EXHIBIT A

CONVERSION PROJECT AREA

DRAFT

EXHIBIT B

EXAMPLE
ANNUAL CONVERSION PROJECT WATER USE REPORTING FORM

Ground Water Diversion Data

(Please fill out this section for each well)

Well name: _____
IDWR site tag: _____
Legal description: _____
Owner/Operator: _____
Water District: _____

Meter Data

Beginning Reading: _____ Date of Reading: _____
End Reading: _____ Date of Reading: _____

Signature of Watermaster: _____

I, _____, Watermaster of Water District _____
acknowledge that the information provided is true and correct.

Signature of Watermaster

Date

Surface Water Delivery Data

Diversion Name: _____
Legal description: _____
Owner/Operator: _____
Water District: _____
Conveyance Company: _____

Meter Data

Beginning Reading: _____ Date of Reading: _____
End Reading: _____ Date of Reading: _____

Signature of Conveyance or Canal Company Representative:

I, _____, representing _____

_____ acknowledge that the information provided is true and correct.

Signature of Conveyance Company
Representative

Date