MEMORANDUM FOR: Regional Directors
Regions I-X

ATTENTION: Mitigation Division Directors

FROM: James L. Witt
Director

SUBJECT: Policy Guidance for Closed Basin Lakes

The Federal Emergency Management Agency (FEMA) has been working with Tribal, State and local officials around Devils Lake, North Dakota to develop a comprehensive long term solution to the continuous flooding caused by this closed basin lake. The purpose of this memorandum is to establish a national policy for closed basin lakes, drawing from our experience in North Dakota. This document is intended to create a policy and procedural framework for the combining of resources (insurance, mitigation grant programs and other Federal, State and local programs) to contribute to a comprehensive unified solution to any closed basin lake flooding problem.

For the purpose of this guidance, a "closed basin lake" is a natural lake from which water leaves primarily through evaporation and whose surface area now exceeds or has exceeded one square mile at any time in the recorded past. Most of the nation's closed basin lakes are in the western half of the United States, where annual evaporation exceeds annual precipitation and where lake levels and surface areas are subject to considerable fluctuation due to wide variations in the climate. These lakes may overtop basin divides on occasion. Because of the unique type of flooding, special policy and procedural considerations are warranted.

The NFIP has amended the Standard Flood Insurance Policy to address the closed basin lake continuous flooding circumstance. An endorsement has been added to all policies allowing policyholders to file a total loss claim for an insured building that is actually damaged or under imminent threat of flooding, without the requirement for the building to be continuously inundated for 90 days. The claim payment, less salvage value, must be used by the policyholder to relocate their structure to a site outside the area subject to flooding. This special flood prone area around closed basin lakes will be referred to in this policy guidance and on Flood Insurance Rate Maps (FIRMs) as an Area of Special Consideration (ASC). The insurance claim provision, which may be used in conjunction with FEMA's Hazard Mitigation Grant Program (HMGP) and/or Flood Mitigation Assistance (FMA) Program, provides the means for homeowners and commercial business interests to relocate outside the ASC--thereby affording the community and its residents a permanent means of eliminating future flood losses. The success of this strategy relies on the cooperation and commitment of State, Tribal and local government as well as business interests in the area. As explained in sections to follow, the relocation assistance provided by FEMA under the insurance policy endorsement and acquisition assistance provided
by FEMA through the HMGP or FMA programs must be joined by specific land use measures adopted and enforced by the State, Tribal, and local governments. These measures are intended to reinforce and ensure a permanent solution to the lake flooding.

FEMA's Regional Directors shall determine that the following requirements are satisfied before policyholders can qualify for insurance claim benefits under the closed basin lake flood insurance policy endorsement:

**General Conditions:**

1. In order for a community or area to begin the process of being designated a "closed basin lake," and in order for homeowners and commercial interests to be eligible for a total loss claim under the closed basin lake flood insurance policy endorsement, the community, county, or other local jurisdiction must request this designation in writing to the FEMA Regional Director, through the State NFIP Coordinating Agency.

2. If the Regional Director concurs that a "closed basin lake" flooding condition exists, then he or she will forward their written recommendation to FEMA's Mitigation Directorate, Technical Services Division, that the FIRM be revised to include an ASC.

3. FEMA's Mitigation Directorate will establish elevation levels at which flooding may occur and notify the community in writing with this information. The purpose of this written notification is to expedite the community's ability to establish a temporary building moratorium. FEMA will also publish the ASC elevation in local newspapers to assist in the efforts to inform the public. Subsequently, FEMA will revise and publish a FIRM, which depicts areas subject to continuous flooding (the ASC). This published area will take into consideration United States Army Corps of Engineers (USACE) certified flood control projects and otherwise certified flood control projects designed to prevent future flooding. FEMA will, upon request from the appropriate land use jurisdiction, amend the ASC to remove areas protected by the construction of additional certified flood control projects.

4. State, Tribal, and local governments will conduct a risk assessment that: (a) identifies the number of structures at risk around the lake within the published ASC; (b) provides the current elevation of these structures and an assessment of insurance coverage; (c) identifies properties that have received previous flood insurance claim payments; and (d) identifies any new or ongoing construction within the published ASC. FEMA will provide technical assistance for the conduct of the risk assessment. Further, funding through the FMA Program’s Technical Assistance and Planning Grants, as well as through the five percent set-aside for State initiatives under the HMGP, may be used to support this assessment. The results of the assessment will provide the technical foundation for a plan defining the actions that will implement a long-term solution to the closed basin lake flooding.

5. The FEMA Regional Director must determine and notify the State, Tribal, and local governments that they are in compliance with all of the requirements necessary for property owners to claim insurance benefits under the closed basin lake flood insurance policy endorsement. Within this notification will be the flood insurance purchase date for property
owners. The FEMA Regional Director, in consultation with the Administrator of the Federal Insurance Administration, will establish this date, from which property owners must have purchased and maintained flood insurance coverage, in order to be eligible for payments under the endorsement.

State Government:

The State and FEMA will work together to develop and enter into an agreement, prior to the provision of insurance claim payments, that articulates the actions the State will take to contribute to a permanent solution to the closed basin lake flooding problem. Commitments in this agreement must be reflected in future FEMA/State agreements for Presidential disaster declarations. A critical component of this agreement will be the State's acknowledgement that relocation and acquisition of structures and property in the ASC may become a priority use of HMGP funds. FMA grants for this area may also be used to advance a permanent solution to the flooding. Use of these programs will enable the State, in conjunction with local communities, to move forward to effect the acquisition of property that becomes available as residents relocate their homes to higher ground.

Tribes and Local Governments:

FEMA's new insurance endorsement can only be implemented if the tribe or local government:

1. Participates in the NFIP; and

2. Develops, adopts, and enforces a permanent land use ordinance, or a temporary moratorium for a period not to exceed six months to be followed by a permanent land use ordinance, prohibiting the construction of any residential or commercial buildings within the ASC. The only buildings the ordinance or temporary moratorium will allow on any portion of property within the ASC are certain, simple agricultural and recreational structures (see section 1(b) of Attachment 1 – Sample Closed Basin Lake Deed Restriction or section 2(b) of Attachment 2 – Sample Closed Basin Lake Conservation Easement). If any of these allowable structures are insurable buildings under the NFIP and are insured under the NFIP, they will not be eligible for the benefits of this endorsement. If a USACE certified flood control project or otherwise certified flood control project later protects the property, FEMA will, upon request from the appropriate land use jurisdiction, amend the ASC to remove areas protected by those projects. The restrictions of the permanent land use ordinance or temporary moratorium will then no longer apply in areas removed from the ASC. The community must agree to declare to FEMA any violations of this ordinance so that provisions of Section 1316 of the National Flood Insurance Act of 1968 can be used to deny insurance to any structure constructed within the ASC in violation of this ordinance.

3. In addition, the local government or tribe must agree to notify, in writing by “certified mail/return receipt requested,” all owners of structures within the ASC. The notification must inform property owners of the requirement that flood insurance must be purchased by the date specified by the FEMA Regional Director and maintained continuously thereafter,
in order to be eligible for the opportunity to receive a claim payment in accordance with the new endorsement process.

4. The local government or tribe must also agree to maintain any property acquired with FEMA grant funds as open space (as defined in Sections 1(a) and (b) of Attachment 1 - Sample Closed Basin Lake Deed Restriction, and as defined in Sections 2(a) and (b) of Attachment 2 - Sample Closed Basin Lake Conservation Easement). The local or tribal government must further agree to hold, manage and enforce all property protected by easements, unless the property with the easement is donated by the owner to a non-profit land trust organization.

Property Owners:

Property owners who become eligible for the new insurance endorsement must agree to relocate their structure outside the ASC. Property owners have several options concerning the disposition of their vacated land located in the ASC. They can either:

1. Donate vacated property to the local government or a land use management organization that will deed-restrict it, for as long as it is within the ASC, for open space uses only [see Attachment 1 - Sample Closed Basin Lake Deed Restriction, especially sections 1(a) and 1(b) for definition of open space uses]; or

2. Establish an easement on the property that permits only certain agricultural or recreational uses, and continue to use it for one of these exclusive purposes for as long as the property is within the ASC [see Attachment 2 - Sample Closed Basin Lake Conservation Easement, especially sections 2(a) and 2(b) for definition of these uses]; or

3. Apply to the local government and the State to have the land acquired through the HMGP or FMA programs. This option would require an easement or deed restriction in perpetuity regardless of future certified flood control projects.

In any case, an easement or deed restriction must be in place prior to the approval of any insurance claim under the endorsement. Once approved, an advance payment of 60 percent will be provided, with the remainder payable upon the completion of the relocation.

SUMMARY:

FEMA's Regional Directors are responsible for implementing this “closed basin lake” policy and for ensuring that States, Tribal and local governments within the region are aware of the policy. FEMA's Office of Public Affairs, in conjunction with Regional Public Affairs Officers, will assist the regions in this regard. If the Regional Director determines that the local government or tribe has established new building restrictions as detailed above, and determines that the State is providing the support needed to eliminate future flood losses, then FEMA can agree to exercise the endorsement provision for eligible flood insurance policy holders and begin paying total loss claims when insured property owners' structures are actually damaged or under imminent threat of flooding.
Attachments:

1. Sample Closed Basin Lake Deed Restriction
2. Sample Closed Basin Lake Conservation Easement
SAMPLE

CLOSED BASIN LAKE DEED RESTRICTION
FOR USE WITH NATIONAL FLOOD INSURANCE PROGRAM
ENDORSEMENT

WHEREAS, under the National Flood Insurance Act of 1968, as amended, the Director of the Federal Emergency Management Agency (FEMA) is authorized to establish and carry out a National Flood Insurance Program which enables interested persons to purchase insurance against loss resulting from physical damage to or loss of real property or personal property related thereto arising from any flood occurring in the United States;

WHEREAS, under the authority of this Act, the Director has promulgated regulations at 44 C.F.R. § 61, App. A(1), A(2), and A(3), which define the scope of coverage provided to policyholders by the standard flood insurance policy;

WHEREAS, FEMA has promulgated an endorsement to the scope of coverage which allows for expedited claim payments for those individuals who are subject to continuous lake flooding in closed basin lakes;

WHEREAS, the [local community, tribe, or conservation organization] (Transferee) has agreed that it is necessary in order to promote the public interest for the purposes provided in the Act to acquire title in order to restrict the use of the land;

WHEREAS, the terms of the endorsement, promulgated under 44 C.F.R. § 61.13(d), require that the Transferee agree to conditions which are intended to restrict the use of the land to open space [in perpetuity (where State law permits)] or in accordance with the conditions specified in Section 2, Terms, below, in order to prevent property loss, and protect and preserve natural floodplain values; and

WHEREAS, the [State] authorizes restrictions on the use of property [in perpetuity (where State law permits)] under the provisions of [appropriate State statute];

NOW, THEREFORE, this agreement is made subject to the following terms and conditions:

1. Terms and Conditions. These restrictions shall apply to all portions of the property that are at risk of flooding within the Area of Special Consideration (ASC) and, pursuant to the terms of the endorsement as set forth at 44 C.F.R. § 61, App. A, as it reads now and may be amended in the future, the following conditions and restrictions shall apply to each property described in the attached deed and acquired by the Transferee:

   (a) Compatible uses. The land shall be used only for purposes compatible with open space, or recreational uses; in general, such uses include parks for outdoor recreational activities, nature reserves, unimproved pervious parking lots, cultivation, and grazing.
(b) **Structures.** Only the following structures or improvements shall be erected on the property. All structures must meet NFIP requirements for wet-floodproofing (or dry-floodproofing or elevation, where practicable), pursuant to 44 C.F.R. § 60.3:

(i.) simple agricultural structures used exclusively for agricultural purposes in connection with the production, harvesting, storage, drying, or raising of agricultural commodities, including livestock, and limited to the following:

(a) General purpose barns for the temporary feeding of livestock which are open on at least one side;

(b) Pole frame buildings with open or closed sides used exclusively for storage of farm machinery and equipment, and related agricultural items; and

(c) Steel grain bins and steel frame corn cribs.

(ii.) Simple recreational structures such as open bleachers and docks.

(c) **Duration.** The restrictions on the use of the property shall last [in perpetuity (where State law permits)], or until a United States Army Corps of Engineers (USACE) certified flood control project or other certified flood control project is in place and certified by the USACE as protecting the land from flooding. If a USACE project terminates the deed restrictions, then all of its terms and conditions, including building restrictions, will no longer apply.

(d) **Transfer.** The Transferee agrees that it shall convey any interest in the property only with prior approval of the Regional Director of FEMA and only to another public entity or to an organization qualified under Section 170(h) of the Internal Revenue Code of 1954, as amended, and applicable regulations promulgated thereunder. However, the Transferee may convey a lease to a private individual or entity for purposes compatible with the uses described in Paragraph 1(a), above, including agriculture, with the prior approval of the Regional Director.

The Transferee may convey title, an easement, license, lease, or other interest in the land. Such conveyance, whether implied or express, shall be subject to all conditions and restrictions described herein, which shall run with the land [in perpetuity (where State law permits)], or in accordance with the terms specified in section (c) above.

If title to the property is transferred to a public entity other than a qualified state or federal agency with a conservation mission, it must be conveyed subject to a Conservation Easement that shall be recorded with the deed and shall incorporate all terms and conditions set forth herein, including the easement holder’s responsibility to enforce the easement. This shall be accomplished by one of the following means:

(i) the Transferee shall convey, in accordance with section (d), above, a conservation easement to someone other than the new title holder, or
(ii) at the time of title transfer, the Transferee shall retain such conservation easement, and record it with the deed.

2. Inspection. FEMA, its representatives, and assigns, including [State agency], shall have the right to enter upon the property, at reasonable times and with reasonable notice, for the purpose of inspecting the property to ensure compliance with the terms of the agreement.

3. Monitoring and Reporting. Every two (2) years on October 1st, the Transferee shall submit to FEMA a report certifying that the property continues to be maintained consistent with the provisions of this agreement.

4. Enforcement. If the subject property is not maintained according to the terms of this agreement, the transferee is responsible for taking measures to bring the property back into compliance.

   (a) If the Transferee fails to demonstrate a good faith effort to come into compliance with the terms of the agreement, FEMA shall take action to correct the violation.

   (b) FEMA, its representatives and assigns may enforce the terms of the agreement by taking any measures it deems appropriate, including, but not limited to, the following:

      (i) requiring a transfer of title in accordance with Paragraph 1(e). The Transferee shall bear the costs of bringing the property back into compliance with the terms of the agreement; or

      (ii) bringing an action at law or in equity in a court of competent jurisdiction.

5. Severability. Should any provision of this agreement or the application thereof to any person or circumstance be found to be invalid or unenforceable, the rest and remainder of the provisions of this agreement and their application shall not be affected and shall remain valid and enforceable.

[Signed by Transferor(s) and Transferee, witnesses and notarization in accordance with local law.]
Signature Transferee (community or tribe)  Date

Printed or Typed Name of Transferee
SAMPLE

CLOSED BASIN LAKE CONSERVATION EASEMENT
FOR USE WITH NATIONAL FLOOD INSURANCE PROGRAM
ENDORSEMENT

WHEREAS, under the National Flood Insurance Act of 1968, as amended, the Director of the Federal Emergency Management Agency (FEMA) is authorized to establish and carry out a National Flood Insurance Program which enables interested persons to purchase insurance against loss resulting from physical damage to or loss of real property or personal property related thereto arising from any flood occurring in the United States;

WHEREAS, under the authority of this Act, the Director has promulgated regulations at 44 C.F.R. § 61, App. A(1), A(2), and A(3), which define the scope of coverage provided to policyholders by the standard flood insurance policy;

WHEREAS, FEMA has promulgated an endorsement to the scope of coverage which allows for expedited claim payments for those individuals who are subject to continuous lake flooding in closed basin lakes;

WHEREAS, the [local community, tribe, or conservation organization] (Transferee) has agreed that it is necessary in order to promote the public interest for the purposes provided in the Act to acquire a conservation easement to this certain real property owned by the individual property owner (Transferor) in order to restrict the use of the land;

WHEREAS, the terms of the endorsement, promulgated under 44 C.F.R. § 61.13(d), require that the Transferor and (Transferee) agree to conditions which are intended to restrict the use of the land to open space [in perpetuity (where State law permits)], or in accordance with the conditions specified in Section 2, Terms, below, in order to prevent property loss, and protect and preserve natural floodplain values; and

WHEREAS, the [State] has also recognized the need to preserve the natural and open condition of the land and so authorizes conveyance of an easement under the provisions of [appropriate State statute];

NOW, THEREFORE, the Transferor, for and in consideration of the opportunity to receive the benefit of an endorsement to their standard flood insurance policy, does transfer and convey to the Transferee a conservation easement [in perpetuity (where State law permits)], or in accordance with the conditions specified in Section Two, Terms, below. The property is situated in the [Village/City/County], County of [county], State of [state] and the legal description is included in Attachment-A.
1. **Purpose.** This transfer of a conservation easement is made for conservation purposes in order to restrict the use of the land to open space.

2. **Terms and conditions.** In order to accomplish the purposes of this easement (which shall apply to all portions of the property that are at risk of flooding within the Area of Special Consideration (ASC) and shall run with the land) and, pursuant to the terms of the endorsement as set forth in 44 C.F.R. 61, App. A, as it reads now and may be amended in the future, the following conditions and restrictions shall apply:

   (a) **Compatible uses.** The land shall be used only for purposes compatible with open space, or recreational uses; in general, such uses include parks for outdoor recreational activities, nature reserves, unimproved pervious parking lots, cultivation, and grazing.

   (b) **Structures.** Only the following structures or improvements shall be erected on the property. All structures must meet NFIP requirements for wet-floodproofing (or dry-floodproofing or elevation, where practicable), pursuant to 44 C.F.R. § 60.3:

      (i.) simple agricultural structures used exclusively for agricultural purposes in connection with the production, harvesting, storage, drying, or raising of agricultural commodities, including livestock, and limited to the following:

        (a) General purpose barns for the temporary feeding of livestock which are open on at least one side;

        (b) Pole frame buildings with open or closed sides used exclusively for storage of farm machinery and equipment, and related agricultural items; and

        (c) Steel grain bins and steel frame corn cribs.

      (ii.) Simple recreational structures such as open bleachers and docks.

   (c) **Duration.** The easement shall remain in place [in perpetuity (where State law permits)], or until a United States Army Corps of Engineers (USACE) certified flood control project or other certified flood control project is in place and certified by the USACE as protecting the land from flooding. If a USACE project terminates this easement, then all of its terms and conditions, including building restrictions, will no longer apply.

   (d) **Transfer.** The Transferee agrees that it shall convey the easement only with prior approval by the FEMA Regional Director. The easement may be transferred only to someone other than the title holder and only to another public entity or to an organization...
qualified under Section 170(h) of the Internal Revenue Code of 1954, as amended, and applicable regulations promulgated thereunder, and authorized to acquire and hold conservation easements.

The Transferor may convey title, an easement, license, lease, or other interest in the land. Such conveyance, whether implied or express, shall be subject to all conditions and restrictions described herein, which shall run with the land [in perpetuity (where State law permits)], or in accordance with the terms specified in section (c) above.

3. Inspection. The Transferee and FEMA, its representatives, and assigns shall have the right to enter upon the property, at reasonable times and with reasonable notice, for the purpose of inspecting the property to ensure compliance with the terms of the easement.

4. Monitoring and Reporting. Every two (2) years on October 1st, the Transferee shall submit to the FEMA Regional Director a report certifying that the Transferee has inspected the subject property within the month preceding the report, and that the property continues to be maintained consistent with the provisions of the easement.

5. Enforcement. If the subject property is not maintained according to the terms of the easement, FEMA, its representatives, and assigns and the Transferee are responsible for taking measures to bring the property back into compliance. However, they may require financial reimbursement from the entity responsible for the violation for any associated costs.

(a) The Transferee will notify the title holder (Transferor) of the violation in writing and advise the title holder that it has 60 days to correct the violation. At the same time, the transferee shall notify FEMA of the violation.

(b) If the title holder fails to demonstrate a good faith effort to come into compliance with the terms of the easement within the 60-day period, the Transferee shall take action to correct the violation.

(c) FEMA may enforce the terms of the easement by taking any measures it deems appropriate, including but not limited to the following:

(i) requiring transfer of the conservation easement in accordance with Paragraph 2(d), or;

(ii) bringing an action at law or in equity in a court of competent jurisdiction.

6. Severability. Should any provision of this easement, or the application thereof to any person or circumstance, be found to be invalid or unenforceable, the rest and remainder of the provisions of this easement and their application shall not be affected and shall remain valid and enforceable.

The Transferee accepts the easement and this document, and agrees to monitor the use of the land and enforce the provisions of the easement. Upon execution of this easement by the parties, the
Transferee will officially record the easement.

_________________________  __________________________
Signature Transferor (Property owner)  Date

_________________________
Printed or Typed Name of Transferor

_________________________
Signature Transferee (community or tribe)  Date

_________________________
Printed or Typed Name of Transferee
CLOSED BASIN LAKES
SETTLEMENT AGREEMENT
RELEASE OF CLAIM

It is understood and agreed that _____________________________ as owner (s) and _____________________________ as mortgagee (s) and no one else except _____________________________ had an insurable interest in the real property located at _____________________________

That the property is insured by _____________________________

Under policy number _____________________________ effective from ___ to ___

That the amount of coverage is _____________________________, and that the insured building sustained covered flood damages beginning on _____________________________ and continuously since, or otherwise became eligible for a flood insurance payment under the Endorsement for Closed Basin Lakes.

Since (1) all the covered flood damage to the insured building, sustained on or after the date specified immediately above, is deemed to be reimbursable under the Standard Flood Insurance Policy (SFIP) as one loss, and since it has now been reasonably established, that the total covered loss sustained, will in time equal or exceed the smaller of (a) the amount of coverage specified above, or (b) the value of the building, even though the actual direct physical damages determined to date is less than this amount, the total amount reimbursable under the policy limits for the building is _____________________________. A total of $ _____________________________ will be advanced or paid for the building loss upon the receipt by the insurance company of this executed release. A final payment of $ _____________________________ less salvage value of $ _____________________________ will be paid upon the completion of the move in accordance with 5 below.

In consideration of the payment(s) being issued pursuant to this release, the insured(s), named above, agree(s) to the following terms and covenant(s):

1. To make no further claim under this policy;
2. Not to seek renewal of the referenced policy;
3. Not to apply, and will not be eligible for any new flood insurance policy under the National Flood Insurance Act of 1968, as amended, for property at the property location of the insured building, or for other construction elsewhere in the area of special consideration (ASC), except for approved certain simple agriculture or recreational structures as defined in the easement;
4. To acquire an Elevation Certificate and a Floodplain Development Permit from the local Floodplain Administrator for the new location of the structure;
5. To move the structure outside of the ASC, within 90 days unless an extension of up to 30 days is granted. This includes clearing the lot of structures and foundations and returning the land to its natural condition, in accordance with established Health and Environmental Policies and Regulations as enforced by the Regional Environmental Health Officer. If these requirements are not met, the insured(s) agree to repay the advance payment with interest immediately at the end of the allotted time;
6. To have placed on the property a deed conservation easement as defined in the Federal Emergency Management Agency Policy Guidance for Closed Basin Lakes; and
7. Insured property owner understands that if they do not adhere to the above stipulations and agreement, the Insured may be subject to; the cost of reimbursement for cleanup and removal to local or State government authorities. Penalties and /or prosecution for non-compliance or fraud will be applied and/or enforced.

Negotiation of payment issued pursuant to this release will signify the agreement of all parties at interest to the above conditions.

In witness thereof, we have executed this release on this day of _____________________________

Insured: _____________________________ Insured: _____________________________

Notary: _____________________________ Commission Expires: _____________________________ Adjuster _____________________________