

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF EXPANSION OF
GROUND WATER RIGHTS IN THE
COTTONWOOD CRITICAL GROUND
WATER AREA

**FINAL ORDER REGARDING
MANAGEMENT PROGRAM**

FINDINGS OF FACT

Background

1. On January 16, 1962, the Director (“Director”) of the Idaho Department of Water Resources (“Department”)¹ issued an order designating the Goose Creek-Rock Creek (“GCRC”) critical ground water area (“CGWA”) pursuant to Idaho Code § 42-233a. *Order Designating the Goose Creek-Rock Creek Critical Ground Water Area* (Jan. 16, 1962).
2. The boundary of the GCRC CGWA was modified on September 6, 1967, creating three separate CGWAs including Artesian City, Cottonwood, and Oakley Kenyon CGWA’s. *Order Modifying Boundaries of Goose Creek-Rock Creek Critical Ground Water Area* (Sept. 6, 1967). The Cottonwood CGWA is the subject of this order.
3. Idaho Code § 42-1416B, enacted March 2, 1989, allows uses of ground water in a CGWA expanded in violation of mandatory permit requirements to be “decreed in a general water rights adjudication if the expansion occurred after the designation of the critical ground water area, before the commencement of the adjudication, and before the date of enactment of” the statute.
4. The Cottonwood CGWA is located within the Snake River Basin. A general adjudication of the Snake River Basin was completed on August 26, 2014, through issuance of the *Final Unified Decree* by the Snake River Basin Adjudication (“SRBA”) District Court. *See Final Unified Decree, In re SRBA, Case No. 39576* (Fifth Jud. Dist. Ct. Aug 26, 2014).
5. The SRBA District Court issued partial decrees in the Cottonwood CGWA based on claims filed pursuant to Idaho Code § 42-1416B.
6. Idaho Code § 42-1416B(2) states that, even if expansion rights are decreed in a general water rights adjudication, water will not be deemed available to “fill the rights for

¹ At the time, the Department was known as the Idaho Department of Reclamation.

expanded use” unless the Director “finds that a management program exists which will, within a time period acceptable to the [D]irector, limit the average annual water withdrawals from the aquifer designated in the critical ground water area to no more than the average annual recharge to the aquifer.”

7. The Director must “make a finding as to whether an adequate management program exists to bring withdrawals into balance with recharge.” I.C. § 42-1416B(3). The finding must occur “[w]ithin two (2) years after a decree determining the water rights within a critical ground water area becomes final, but not sooner than four (4) years from the date of enactment” of Idaho Code § 42-1416B. *Id.*

8. “If the [D]irector finds that an adequate management program to bring withdrawals into balance with recharge does not exist, the [D]irector shall order all holders of rights to expanded use of ground water within the area to cease or reduce withdrawal of water . . .” I.C. § 42-1416B(4). “The [D]irector’s order shall be issued before September 1 and shall be effective beginning with the following irrigation season.” *Id.*

9. In accordance with Idaho Code 42-1416B, the Director must find whether an adequate management program exists to bring withdrawals into balance with recharge in the Cottonwood CGWA by August 26, 2016. If the Director finds an adequate management program does not exist, the Director must order all holders of expansion rights in the Cottonwood CGWA to cease or reduce withdrawal of water.

History of the Cottonwood CGWA

10. In 1969, the United States Geological Survey (“USGS”) published a report that estimated about 15,000 acre-feet of ground water was annually withdrawn in the Cottonwood CGWA for irrigation. When the report was prepared, the annual rate of ground water withdrawal was three times the amount of annual natural recharge to the aquifer. Ground water levels in two separate observation wells within the Cottonwood CGWA declined at an average rate of about 20.5 feet per year, or a total average decline of 175 feet, between 1961 and 1970.

11. On October 1, 1971, the Idaho Fifth Judicial District Court, Cassia County, adjudicated the water rights within the Cottonwood CGWA (*Baker v. Ore-Ida*, Civil Case No. 7876) ordering that water right holders in the area are:

prohibited from at any time removing more water than the average annual rate of natural recharge of the aquifer herein described, which is fixed by this decree as 5,500 acre feet per year, and which may be subsequently fixed by the [Department] at a greater or lesser amount. After January 1, 1972, no water may be removed from the aquifer herein described except through a well equipped with a meter approved by the [Department].

12. On May 3, 1973, the Department created Water District No. 45-O, Golden Valley, pursuant to Idaho Code § 42-604. The water district boundaries were identical to the boundaries of the Cottonwood CGWA. The water district was created to establish a water use administrative framework and hire a watermaster to regulate withdrawal and distribution of water from the aquifer within the Cottonwood CGWA.

13. On July 26, 1973, the Idaho Supreme Court issued its decision in *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 586, 513 P.2d 627, 638 (1973), affirming the District Court's decision in Civil Case No. 7876.

14. On June 25, 1980, the Idaho Fifth Judicial District Court, Cassia County, issued a judgment in Civil Case No. 9818 (*Briggs v. Higginson*), ordering that the average annual withdrawal from all irrigation wells in the Cottonwood CGWA shall not exceed 5,500 AFA during any consecutive five year period, and allowing each user to carryover the unused portion of any water right entitlement from the preceding year. The judgment further provided that:

The Department may limit or expand the amount of water which may be pumped from the aquifer without exceeding its average annual rate of recharge in accordance with ... the Amended Decree made and entered on October 1, 1971, in said Civil Case No. 7876.

15. In 1984, the USGS published a report that revised the estimated ground water recharge in the Cottonwood CGWA to 4,000 acre feet per annum. The recharge area is not within the Cottonwood CGWA.

16. On January 4, 1985, the Director issued an order limiting the average annual withdrawal of ground water from the Cottonwood CGWA to 4,000 acre feet. The Director stayed the order on February 15, 1985, contingent upon the success of a managed ground water recharge project being implemented at that time.

17. On January 16, 1987, the Director sent notice to holders of water rights in the Cottonwood CGWA advising them of a continued stay of the order of January 4, 1985, based on the apparent success of managed ground water recharge within the area. This latter notice further advised the right holders that the "January 4, 1985 order was stayed and not permanently set aside."

18. Department records subsequently demonstrated continuous average annual declining ground water levels in the Cottonwood CGWA.

19. On August 4, 2004, the Department sent correspondence to water right holders in the Cottonwood CGWA and Water District No. 45-O advising them that the Director was considering lifting the stay of the order of January 4, 1985, which would limit average annual ground water withdrawals to 4,000 acre-feet to bring average annual ground water withdrawals back in balance with average annual ground water recharge. Holders of ground water rights were requested to submit any data or information about recent or past managed recharge efforts and an update regarding any future plans for managed ground water recharge. The Department also asked for comments or input regarding the proposed restriction of annual ground water withdrawals to 4,000 acre-feet. The Department received no response to this inquiry.

20. On August 30, 2004, the Director issued an *Order* limiting ground water withdrawal in the Cottonwood CGWA ("2004 Order"). The Director noted that Civil Case No. 7876 dated October 1, 1971, and Civil Case No. 9818 dated June 25, 1980, both ordered that the Director may, by order, limit or expand the amount of water that may be withdrawn from the

aquifer underlying the Cottonwood CGWA without exceeding its average annual rate of natural recharge. 2004 Order at 4. The Director stated:

The Department has determined, based on the USGS 1984 report, that the average annual rate of natural recharge in the Cottonwood CGWA is 4,000 acre-feet. Authorization of ground water withdrawals in excess of 4,000 AFA is not warranted given that ground water levels have further declined in the aquifer since 1980. The Director should limit annual ground water pumping in the Cottonwood CGWA to 4,000 acre-feet.

Id. Therefore, the Director lifted the stay of the January 4, 1985, order, and ordered that the “annual withdrawal of ground water for those water rights located within the Cottonwood CGWA and identified in the Water Right Delivery Schedule, Attachment A to this order, shall not exceed 4,000 acre-feet per year.” *Id.* The Director ordered that “[a]ll diversions of ground water under those water rights” identified in Attachment A “shall be measured using flow meters or measuring devices of a type acceptable to the Department.” *Id.* The Director also ordered that the watermaster “continue to monitor diversions of ground water during the irrigation season” and “regulate the diversions in accordance with the Water Rights Delivery Schedule in Attachment A.” *Id.*

Finding Pursuant to Idaho Code § 42-1416B

21. Again, Idaho Code § 42-1416B requires the Director find whether an adequate management program exists to bring withdrawals into balance with recharge in the Cottonwood CGWA by August 26, 2016. If the Director finds an adequate management program does not exist, the Director must order all holders of expansion rights in the Cottonwood CGWA to cease or reduce withdrawal of water.

22. Department staff analyzed hydrographs from wells in the Cottonwood CGWA. The hydrographs demonstrate that, both the 1971 decision in Civil Case No. 7876, which initially limited diversions to 5,500 acre feet per year and authorized the Department to further limit diversions if necessary, and the 1980 decision in Civil Case No. 9818, which reiterated the Director’s ability to further limit diversions, supply an effective mechanism for the Department to regulate water withdrawals into balance with recharge. Specifically, prior to 1972, the average rate of decline in the Cottonwood CGWA wells was about 21 feet per year. From 1972 to 2004, the rate of decline decreased to an average of 3.35 feet per year. After the Director issued the 2004 Order limiting diversions to 4,000 acre feet per year, from 2005 until 2016, the rate of decline decreased to an average of 2.98 feet per year. While further reductions may be necessary to bring withdrawals into balance with recharge in the Cottonwood CGWA, an adequate management program exists to achieve that goal (i.e. the 1971 and 1980 orders authorizing the Director to further limit water use in the Cottonwood CGWA).

23. Consistent with the 1971 and 1980 decisions, the Department may modify its determination of the average annual rate of natural recharge of the aquifer and thereafter prohibit water rights holders in the Cottonwood CGWA from withdrawing more than the average annual rate of natural recharge. Therefore, in accordance with Idaho Code 42-1416B, the Director finds that the 1971 and 1980 court orders constitute an adequate management program to bring withdrawals into balance with recharge in the Cottonwood CGWA.

CONCLUSIONS OF LAW

1. The Director is responsible for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director as set forth in chapter 6, title 42, Idaho Code.

2. Idaho Code § 42-604 authorizes the Director to form water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation.

3. The Director established Water District 45-O, which includes all of the area within the boundary of the Cottonwood CGWA, to properly administer ground water rights pursuant to administrative authorities set forth in chapter 6, title 42, Idaho Code.

4. Again, Idaho Code § 42-1416B(3) requires that, because a general adjudication of the Snake River Basin was completed on August 26, 2014, through issuance of the *Final Unified Decree*, the Director must find whether an adequate management program exists to bring withdrawals into balance with recharge in the Cottonwood CGWA by August 26, 2016. If the Director finds an adequate management program does not exist, the Director must order all holders of expansion rights in the Cottonwood CGWA to cease or reduce withdrawal of water. I.C. § 42-1416B(4).

5. As explained in Findings of Fact 21 through 23, the Director finds that the 1971 and 1980 court orders constitute an adequate management program to bring withdrawals into balance with recharge in the Cottonwood CGWA. Consistent with Idaho Code 42-1416B, the Director will not order that holders of rights to expanded use of ground water within the area cease or reduce withdrawal of water.

ORDER

IT IS HEREBY ORDERED that, because the Director determines that the 1971 and 1980 court orders constitute an adequate management program to bring withdrawals into balance with recharge in the Cottonwood CGWA, holders of rights to expanded use of ground water within the area may continue use of water consistent with the partial decrees issued by the SRBA District Court.

DATED this 26th day of August 2016.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of August 2016, I served a true and correct copy of the foregoing document by U.S. mail, postage prepaid to the following:

PATTCO LLLP
1800 Z STREET
HEYBURN ID 83336

Courtesy Copies to:

SOUTHWEST IRRIGATION DIST
GOOSE CREEK IRRIGATION DIST
C/O WILLIAM PARSONS
PARSONS SMITH LOVELAND
STONE & SHIRLEY LLP
PO BOX 910
BURLEY ID 83318

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WATERMASTER
WATER DISTRICT 130
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Deborah J. Gibson
Administrative Assistant to the Director
Idaho Department of Water Resources

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.