BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF GROUND WATER) WITHDRAWAL IN THE COTTONWOOD) CRITICAL GROUND WATER AREA))	**ORDER**

The Director of the Department of Water Resources ("Director" or "Department") has the duties of protecting vested water rights, enforcing specific statutes of the State of Idaho, and enforcing rules promulgated by the Department. As part of these duties, the Director is authorized to order the cessation or reduction of ground water withdrawals within a critical ground water area.

Based upon the Department's investigation of ground water withdrawals and the sufficiency of the water supply to meet the demands for ground water under water rights within the Cottonwood Critical Ground Water Area ("Cottonwood CGWA") and his understanding of the law, the Director enters the Following Findings of Facts, Conclusions of Law, and Order.

FINDINGS OF FACT

1. On January 16, 1962, the Director established the Goose Creek – Rock Creek CGWA pursuant to Idaho Code § 42-233a. The Goose Creek – Rock Creek CGWA included the area that is currently known as the Cottonwood CGWA. On September 6, 1967, the Director modified the boundaries of the Goose Creek – Rock Creek CGWA by designating three separate CGWAs including the Cottonwood, Artesian City, and West Oakley Fan CGWAs. The Director designated the original Goose Creek – Rock Creek CGWA and the subsequent Cottonwood CGWA upon a determination that there was not a sufficient amount of ground water available to fill the water rights within the area at the then current rates of withdrawal.

2. In 1969, the United States Geological Survey ("USGS") published a report that estimated the total surface water yield for the hydrologic basin overlying the Cottonwood CGWA at approximately 10,000 acre-feet per annum (AFA). Of the 10,000 AFA, approximately 5,000 AFA is ground water recharge and about 5,000 AFA is surface water runoff. The USGS also estimated that about 15,000 acre-feet of ground water was withdrawn in the Cottonwood CGWA each year for irrigation.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.

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

4. 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 provide for a watermaster to control withdrawal and distribution of water from the aquifer within the Cottonwood CGWA.

5. 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.

6. In 1984, the USGS published a report that revised the estimated ground water recharge in the Cottonwood CGWA to 4,000 AFA.

7. 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. On January 15, 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."

8. Between 1970 and 2003, ground water levels in the Cottonwood CGWA have declined about 80 feet, or an average rate of about 2.5 feet per year. One observation well maintained by the Department in the area shows a decline of about 50 feet between 1989 and 2003. According to records of the watermaster for Water District No. 45-O, ground water withdrawals in the Cottonwood CGWA have varied between 2,550 and 5,520 AFA between 1985 and 2003. Average annual ground water withdrawals from 2000 to 2003 were 4,763 AFA.

Ground water levels in several monitoring wells in the Cottonwood CGWA have declined about 20 feet between 2000 and 2003.

9. The watermaster for Water District No. 45-O has confirmed that there is currently no active managed ground water recharge being implemented in the Cottonwood CGWA. The Department has no record of any active managed recharge occurring in the Cottonwood CGWA since 1996.

10. 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 provide any data or information about recent or past managed recharge efforts and to provide 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 as of August 30, 2004.

CONCLUSIONS OF LAW

1. The Director has a statutory responsibility to administer the use of ground water in the State of Idaho in a manner that protects prior surface and ground water rights while allowing for full economic development of the state's underground water resources in the public interest. See Idaho Code §§ 42-226, 42-237a.g, and 42-602.

2. The Director has general responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts through watermasters supervised by the Director, as provided in chapter 6, title 42, Idaho Code and Department regulations.

3. The establishment of Water District No. 45-O, which includes all of the area included within the boundaries of the Cottonwood CGWA, provides the Director with the water administration authorities available under chapter 6, title 42, Idaho Code.

4. Idaho Code § 42-233a provides in pertinent part:

> The Director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or a portion of a critical ground water area, shall order those water right holders on a time priority basis, within the area determined by the Director, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water. Such order shall be given only before September 1 and shall be effective for the growing season during the year following the date the order is given.

5. The Fifth Judicial District Court of Idaho issued two judgments regarding the amount of annual ground water use in the Cottonwood CGWA. 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.

6. 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.

ORDER

IT IS HEREBY ORDERED AS FOLLOWS:

1. The stay of the Director's order dated January 4, 1985, is hereby lifted.

2. 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. This limitation applies only to those water rights listed in Attachment A and does not apply to existing water rights or uses of water for domestic and stockwater purposes as defined in Idaho Code § 42-111.

3. All diversions of ground water under those water rights identified on the Water Right Delivery Schedule in Attachment A shall be measured using flow meters or measuring devices of a type acceptable to the Department. The watermaster for Water District No. 45-O shall shut off and refuse to distribute water to any diversion in the water district that does not have an adequate measuring device.

4. The watermaster for Water District No. 45-O shall continue to monitor diversions of ground water during the irrigation season and shall regulate the diversions in accordance with the Water Rights Delivery Schedule in Attachment A.

DATED this 30th day of August, 2004.

KARL J. DREHER
Director

ATTACHMENT A

WATER RIGHT DELIVERY SCHEDULE
FOR THE COTTONWOOD CRITICAL GROUND WATER AREA

Priority	Water Right Number	Flow Rate (CFS)	Decreed Volume (AF)	Maximum Deliverable Volume (AF)	Owner
12-13-1948	45-2283	1.64			Joe Tugaw
01-16-1950	45-2322	3.33			Joe Tugaw
04-03-1959	45-2575	0.55	1,663*	1,663*	Joe Tugaw
04-29-1959	45-2578	3.56	978	978	Don McFarland
06-16-1959	45-2582A	1.99	474	474	Russell Patterson
06-16-1959	45-2582B	2.01	478	478	Russell Patterson
07-20-1959	45-2585A	3.19	714	206	Russell Patterson
07-20-1959	45-2585B	3.12	699	201	Russell Patterson
01-13-1960	45-2597		1,271	0	Don McFarland
Total			6,277	4,000	

*Rights 45-2283, 45-2322, and 45-2575 have a combined annual diversion volume limit of 1,663 acre-feet.

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) 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.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 30th day of August 2004, the above and foregoing document was served upon the following individuals by placing a copy of the same in the United States Mail, postage prepaid, certified as requested and properly addressed as follows using the attached list of names

USGS
230 COLLINS ROAD
BOISE ID 83702

S W IRRIGATION DIST
PO 668
BURLEY ID 83316

TUGAW RANCH
C/O JOE TUGAW
3277 WOODRIDGE DR
TWIN FALLS ID 83301

RUSSELL PATTERSON
1800 Z STREET
HEYBURN ID 83336

DON MCFARLAND
PO BOX 268
EDEN ID 83325-0268

Crystal N. Calais
Administrative Assistant
Water Distribution Section
Idaho Department of Water Resources