BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 87-10022 IN THE NAME OF RALPH NAYLOR FARMS, LLC	)	**PRELIMINARY ORDER**

This matter having come before the Idaho Department of Water Resources ("Department") in the form of a protested application for permit and the Department having held a conference and a hearing in the matter, the hearing officer enters the following Findings of Fact, Conclusions of Law and Preliminary Order:

FINDINGS OF FACT

1. On June 26, 2002, Ralph Naylor Farms, LLC ("applicant" or "Naylor Farms") submitted Application for Permit No. 87-10022 ("application") to the Department proposing a total diversion rate of 14.35 cubic feet per second ("cfs") of ground water of which 12 cfs would be used from April 15 to November 1 for the irrigation of 636 acres and 2.35 cfs would be used year-round for industrial purposes. The location of the points of diversion were proposed within the NW1/4SW1/4 Section 20, T40N, R5W, B.M. and NE1/4SE1/4 Section 29, T40N, R 5W, B.M. and the proposed place of use was within parts of Sections 19, 20, 29 and 32, T40N, R5W, B.M. The applicant subsequently amended the application twice ending in a request for a total diversion rate of 4.97 cfs of water of which 3.98 cfs would be used from March 15 to November 15 for irrigation of 199 acres in E1/2SW1/4 and N1/2SE1/4 Section 29 in T40N, R5W, B.M. and 0.99 cfs would be used year-round for industrial use. The proposed point of diversion is located within NE1/4SE1/4 Section 29, T40N, R5W, B.M. (See Applicant's Exhibit 2).

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).

2. The Department published notice of the application that was subsequently protested by the city of Pullman and the city of Moscow ("protestants"). The Department granted intervention into the matter to the Latah County Commissioners, the Whitman County Commissioners, Dr. Lois Blackburn, and Kelly Moore ("intervenors"). The city of Moscow and the city of Pullman subsequently withdrew their protests based on the terms of a protocol agreement that among other items includes providing notice of planned drilling and well pumping tests, general information exchange, water quality sampling and short and longer term monitoring plans. (See

Applicant's Exhibit 37). The Whitman County Commissioners also withdrew their protest.

3. On September 29, 2004, the Department conducted a hearing in the matter in Moscow, Idaho. The applicant was present and was represented by Tod Geidl. Intervenor Latah County was represented by William Thompson. Intervenor Dr. Lois Blackburn was present representing herself and testifying on behalf of the Moscow Civic Association. Kelly Moore was present and represented himself.

4. Issues the Department can consider in this matter are as follows:

a. Whether the appropriation will reduce the quantity of water under existing water rights;

b. Whether the water supply itself is insufficient for the purpose for which it is sought to be appropriated;

c. Whether the application is made in good faith, or is made for delay or speculative purposes;

d. Whether the applicant has sufficient financial resources with which to complete the work involved therein;

e. Whether the proposed appropriation will conflict with the local public interest;

f. Whether the proposed use is contrary to conservation of water resources within the state of Idaho; and

g. Whether the proposed use will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates.

5. Exhibits premarked, offered or accepted as a part of the record are as follows:

<u>Applicant's Exhibits</u>:

1. Application for Permit No. 87-10022

2. Letter dated March 17, 2003, to Allen Beardsley from W. Robert Lemke

3. Letter dated August 11, 2003, to Robert G. Haynes from Mitchell D. Chandler

3a. Letter dated September 10, 2003, to Allen Beardsley from Robb Lemke

3b. Proposed Protocol Demonstrating the Presence, or Absence, of Adverse Aquifer Impact to Senior Water Right Holders Resulting from Ralph Naylor Farms, LLC Groundwater Withdrawal dated May 20, 2003

4. Letter dated November 18, 2003, to Robb Lemke, Marshall Comstock and Mitchell D. Chandler from Robert G. Haynes

5. Letter dated December 15, 2003, to Robert G. Haynes, Marshall Comstock and Mitchell Chandler from Robb Lemke

6. Letter dated December 17, 2003, to Marshall Comstock from Robb Lemke

7. Decree of Distribution dated March 3, 1977 - Case No. 7555

8. Ralph Naylor Farms, LLC - Operating Agreement

8a. Articles of Organization for Ralph Naylor Farms, LLC

8b. Letter dated December 6, 2002, to W. Robert Lemke from Allen Beardsley

9. Map showing location of proposed well and 40-acre parcels proposed for irrigation

9a. Map showing well locations

10. Well Driller Report information

11. Video of well log core samples for the Naylor test well

11a. Stratigraphy and Geology of the Palouse Aquifer and Their Basis and Their Effects on Understanding Groundwater Resources by Philip C. Nisbit

11b. Power point slides for Stratigraphy and Geology of the Palouse Aquifer Sub-Basins and Their Effects on Understanding Groundwater Resources by Philip C. Nisbit - January 12, 2004

12. Well log for Naylor Farms test hole

12a. Daily Time Report - Target Drilling Inc.

12b. Pictures of core samples from the Ralph Naylor Farms test hole

13. Slides from a January 14, 2002 presentation by John Bush and Dean L. Garwood

13a. Map and photos

14. Latah County Property Tax Documents

15. Maps - Naylor Farms

16. Business Plan Summary - Naylor Farms

16a. Idaho Crop Input Price Summary for 2001, University of Idaho College of Agricultural and Life Sciences dated December 2001

17. Soil Map of Naylor Farms

18. Moscow City Council - Groundwater Workshop - November 24, 2003

19. Letter dated January 23, 2003, to Ralph Naylor Farms, LLC from Robert G. Haynes

20. Letter dated January 13, 2003, to Director of IDWR from the Whitman County Board of County Commissioners

21. Letter dated October 18, 2002, to Director, IDWR from Mitchell D. Chandler for the city of Pullman, Washington

22. Petition to Intervene dated January 7, 2003, from Latah County

23. Letter dated October 18, 2002, to Director, IDWR from Marshall Comstock on behalf of the city of Moscow

24. Letter received on December 9, 2002, from Kelly M. Moore

25. Letter dated December 11, 2002, to Bob Haynes from Dr. Lois Blackburn

26. Letter dated December 4, 2002, to Robert G. Haynes from W. Robert Lemke

27. Letter dated September 10, 2003, to Allen Beardsley from Rob Lemke

28. Letter dated September 10, 2003, to Mark D. Workman from Robb Lemke

29. Letter dated September 10, 2003, to Whitman County Commissioners from Robb Lemke

30. Letter dated September 10, 2003, to Latah County Commissioners from Robb Lemke

30a. Letter dated September 10, 2003, to Marshall Comstock from Robb Lemke

31. Excerpt from Idaho Water Law Handbook - Givens Pursley 2003

32. Letter dated July 31, 2003, to Idaho Department of Water Resources from Marshall Comstock

33. Letter dated January 9, 2004, to Rob Lemke, Marshall Comstock and Glenn A. Johnson from Paul K. Kimmell, Tom S. Stroschein and John A. Nelson

34. Press Release

35. Quitclaim Deed

36. Operating Agreement - Naylor Farms, LLC

37. Proposed Protocol dated September 15, 2004

38. Cash Flow Projection - Naylor Farms (Revised 9/27/04)

Intervenors' Exhibits:

A. Memorandum and Statement of Position of Intervenor, Latah County Commissioners

B. Latah County - Comprehensive Plan

C. Large map titled Naylor Farms - Residences and Registered Wells - 2 Mile Radius

6. The applicant operates a 634-acre dry farm about 3 miles north of Moscow, Idaho. Typical crops grown on the applicant's property include wheat, peas, barley, oats, hay and blue grass seed. There are no loan obligations or encumbrances against the applicant's property, which has been valued at approximately $1,000 to $1,200 per acre.

7. The applicant seeks a means to make the farm more profitable including plans to test kaoline clay to determine the feasibility of producing an organic kaoline based pesticide. The pesticide will be tested on irrigated plots of the applicant's land. The industrial use proposed in the application is a washing process to separate kaoline clay from other particles in the clay. Crops being considered for irrigation include grapes, potatoes, hops and herbs.

8. The applicant has drilled 3 geological exploration holes as part of a geological model to understand the geology underlying Naylor Farms and its relationship to regional geological formations. One well was drilled to a depth of 470 feet. The core drilling encountered artesian water below the (shallow) Wanapum aquifer that underlies much of the region including the Naylor Farms property. The

geologist for the applicant encountered 4 water bearing strata at a depth of about 300 feet below land surface and estimates an available flow of water from the aquifer at about 800 gallons per minute.

9. Water sources for the wells of Moscow and Pullman are the Wanapum aquifer and the deeper Grande Ronde aquifer. Withdrawal of ground water by Moscow and Pullman are upgradient from the applicant's property. None of the existing rural Latah County wells around the Naylor Farms property penetrate the Wanapum basalt. Naylor Farms intends to case out water bearing strata above the Wanapum basalt and to withdraw water below the Wanapum basalt. The ground water in this area flows northwesterly away from the cities of Moscow and Pullman.

10. Latah County's primary concern is to insure that the interests of rural Latah County water users (both existing and reasonably anticipated) are adequately protected. The county wants "to insure that full and appropriate consideration is given to prospective beneficial uses of the water supplies in Latah County lying outside of the Moscow city limits, and that this consideration include a reasoned comparison between such prospective uses and the uses proposed by Naylor Farms." The county further stated that "the proposed irrigation uses are inconsistent with long-standing historical water uses and agricultural practices in our area, and may be detrimental to [ ] other reasonable, appropriate and beneficial uses by our constituents." (See applicant's Exhibit 33).

11. Dr. Blackburn was primarily concerned about the proposed clay operation as related to potential contamination of surface water. Kelly Moore was concerned about the amount of water applied for and that the proposed use could limit future uses of ground water in the general area of Moscow.

12. Intervenors Latah County, Dr. Lois Blackburn, and Kelly Moore do not own water wells or water rights.

13. The proposed place of use is not outside of the watershed or local area where the source of water sought for appropriation originates.

ANALYSIS

Idaho water law does not provide for the evaluation or balancing of an applicant's proposed uses against "prospective" beneficial uses of water that may arise in the future. Water is needed for the irrigation of grapes, potatoes, hops and herbs that the applicant is proposing to raise on Naylor Farms. Water is not needed to irrigate traditional crops that have been grown in the general area including wheat, peas, barley, oats, hay and blue grass seed.

The intervenors were concerned that the applicant had applied for more water than could be beneficially used. This concern is not well based, since the future field examination conducted by the Department will determine the extent of beneficial use made of water by an applicant. The Department will not issue a license in excess of the

amount of water that is needed and has been beneficially used regardless of the amount applied for or approved on a permit.

The protocol entered into between the applicant and the protestants provides a significant degree of protection to the holders of existing water rights. The applicant is entitled to a permit from the Department.

CONCLUSIONS OF LAW

1. Section 42-203A, Idaho Code, provides in pertinent part as follows:

> In all applications whether protested or not protested where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions. ...

2. The use of water for irrigation may not be as common in Latah County as in other parts of Idaho, but irrigation is a commonly accepted beneficial use of water in Idaho and is a reasonable use of water in Latah County.

3. The aquifer model prepared by the applicant shows that there are several aquifers in the Naylor Farms-Moscow-Pullman region rather than one single aquifer system serving the whole region. The available information indicates that there is little interconnection between the aquifer underlying Naylor Farms and the aquifers used by the city of Moscow and Pullman due to geologic formations that restrict flow. [See Applicant's Exhibit 11(a)]. A January 14, 2004, presentation by Dr. John Bush and Dean L. Garwood at the University of Idaho independently corroborates the geologic structure shown by the Naylor Farms geologic test hole. (See Applicant's Exhibit 13).

4. If Naylor Farms installs unperforated well casing through the Bovill sediments located above the Wanapum basalt and seals the casing into the Wanapum basalt, Naylor Farm's pumping will essentially be from a separate source of water and will not reduce the quantity of water available to existing wells in the area.

5. Based on available information, the water supply is sufficient for the purposes intended.

6. The applicant has spent substantial sums of money in core drilling to understand the geology of the region and the potential of obtaining a suitable water supply. The application was made in good faith and not for delay or speculative purposes.

7. The applicant has sufficient financial resources with which to complete the project.

8. The applicant has gone to extensive lengths to accommodate the concerns of protestants and intervenors. The application does not conflict with the local public interest.

9. The application is not contrary to the conservation of water resources within Idaho.

10. The Department should approve the application with certain conditions.

ORDER

IT IS THEREFORE hereby ORDERED that Application for Permit No. 87-10022 in the name of Ralph Naylor Farms, LLC. is APPROVED subject to the following conditions:

1. Proof of application of water to beneficial use shall be submitted on or before November 1, 2009.

2. The permit is subject to all prior water rights.

3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which permit holder had no control.

4. The permit holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code, and applicable Well Construction Rules of the Department.

5. The authorized irrigation season is from April 15 to November 1 each year.

6. The applicant shall comply with applicable planning and zoning ordinances of local and state government jurisdictions.

7. The industrial use is for the processing of clay.

8. The portion of this right for irrigation purposes when combined with all other water rights for irrigation shall provide no more than 0.02 cfs per acre nor more than 3.0 afa per acre at the field headgate for irrigation of the authorized lands.

9. The right holder shall not assign or sell the permit without first securing the written approval of the Department of Water Resources.

10. Use of water under this right may be affected by an agreement (termed a protocol in this matter) between protestants and the right holder.

Signed this 1st day of December, 2004.

L. Glen Saxton

L. GLEN SAXTON, P.E.
Hearing Officer

CERTIFICATE OF MAILING

I HEREBY CERTIFY that service of the within and foregoing document was made this 1st day of December, 2004, by mailing a copy thereof, postage prepaid, to each of the parties listed below.

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Victoria Wigle
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