

**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,)	AMENDED
LLC)	PRELIMINARY ORDER
_____)	

This matter having come before the Idaho Department of Water Resources ("Department" or "IDWR") in the form of a protested application for permit and the Department having held a conference and two hearings and received briefing by the parties in the matter, the hearing officer enters the following Findings of Fact, Conclusions of Law and Amended 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, and on April 6, 2005, the Department conducted hearings in the matter in Moscow, Idaho. The applicant was present and was represented by Tod Geidl. William Thompson and John Simpson represented intervenor Latah County. 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:

Applicant's Exhibits:

- 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)
39. Curriculum Vitae for Edward Squires, R.P.G.

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
- D. Curriculum Vitae for Charles E. Brockway
- E. Curriculum Vitae for Dale R. Ralston
- F. Power Point Presentation - Hydrologic Condition in the Palouse Aquifer by Dale Ralston, May 28, 2004
- G. Characterization of Grande Ronde Aquifers in the Palouse Basin Using Large Scale Aquifer Tests by Dennis Owsley, May 2003
- H. Map of Palouse-Moscow-Pullman area – from a presentation by L. Kirkland
- I. Presentation at the University of Idaho January 14, 2004 by John Bush and Dean L. Garwood
- J. Letter dated December 22, 2004, to L. Glen Saxton from John H. Bush, Reed S. Lewis and John D. Kauffman
- K. Page 10 of Exhibit G - Figure 4 - Schematic east west cross section of study area.
- L. Naylor Basin Area – Conceptual Cross Section from the report of Phillip Nisbet (Redrawn by Brockway Engineering)
- M. Naylor Basin Area - Conceptual Cross Section
- N. Geologic Cross-Section Moscow - Pullman, Idaho-Washington
- O. Graph of Annual Water Pumped from the Grande Ronde Aquifer
- P. Presentation by Larry Kirkland, Palouse Basin Aquifer Committee, May 28, 2004

- Q. Cross Section of geological formations in the Naylor Farms area
- R. Stratigraphic panel diagrams (10 pages)
- S. Bedrock Geologic Maps (5 sheets)
- T. LETTER NOT ASSIGNED TO AN EXHIBIT
- U. Letter dated March 22, 2005 to L. Glen Saxton from Kevin M. Brackney and Affidavit of Kevin M. Brackney
- V. Slides of Power Point presentation titled Hydrogeologic Opinion in Opposition to Naylor Farms Preliminary Order 87-10022 by Kevin M. Brackney
- W. Testimony of William J. Elliot – Naylor Farms Geology Hearing
- X. Naylor Farms Geology Hearing – Slides of Power Point presentation – Testimony by William J. Elliot
- Y. Public Witness Exhibit of Jim Mital

6. At the hearing held on April 6 and 7, 2005, the hearing officer officially noticed the Order of the Director dated December 1, 2004, in the matter of Petition Seeking Designation of a Critical Ground Water Area and Designation of a Ground Water Management Area, Moratoriums on Approval of New Water Right Appropriations, and Other Actions and officially noticed the January 4, 2005, Order of the Director Denying Petition for Reconsideration in the matter.

7. 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.

8. 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.

9. The general area including the Naylor Farms property, the city of Moscow and the University of Idaho is underlain by two major aquifers. The aquifers are in basalts and sedimentary interbeds in formations within the Columbia River Basalt Group. The upper aquifer is found at a depth of about 250 to 500 feet in layered sand zones in the Wanapum Formation. Static water levels are about 60 feet below land surface. The lower aquifer occurs at a depth of about 650 to 1,300 feet in the Grande Ronde Formation. Static water levels are about 300 feet below land surface.

10. Distinct characteristics define each aquifer. The upper aquifer in the Wanapum Formation responds to both precipitation and pumping, indicating recharge from surface precipitation. Age dating indicates water in the upper aquifer is relatively recent, which is consistent with recharge from precipitation and other surface water sources. The lower aquifer in the Grande Ronde Formation does not reflect fluctuations in climate or precipitation

and appears to receive limited recharge. Age dating of water in the lower aquifer has shown ages of 10,000 years old or older. Recharge that does occur is believed to be from leakage from the upper aquifer in the Wanapum Formation, although there appears to be poor connectivity between the upper and lower aquifers.

11. Ground water from the upper aquifer in the Wanapum Formation has been used since the late 1890s and provides water to rural residents of Latah County. The upper aquifer also supplied all the water used by the city of Moscow and the University of Idaho until the mid 1960s. Flowing wells once existed in the area, probably arising from sand beds in the surface sediments of the Latah Formation and shallow fractured basalt comprising the upper aquifer. Water levels declined rapidly and by the 1920s, water levels were 44 feet below land surface. By about 1965, both the city of Moscow and the University of Idaho ceased using ground water diverted from the upper aquifer and began using only ground water from the lower aquifer in the Grande Ronde Formation. Ground water levels in the upper aquifer subsequently recovered to about 50 feet below land surface by the 1980s. With water levels in the upper aquifer having recovered from previous declines, the city of Moscow resumed diverting ground water from the upper aquifer for approximately 30 percent of its municipal needs. The remaining 70 percent of Moscow's water supply is withdrawn from the lower aquifer.

12. Ground water levels in the lower aquifer have been declining at rates of 1 to 2 feet per year for more than 50 years. Recent data over the last six years suggests that the slope of decline is decreasing and water levels in the Grande Ronde Formation are beginning to stabilize.

13. The applicant reportedly drilled 3 geological exploration holes to understand the geology underlying Naylor Farms and its relationship to regional geological formations. One bore hole was reportedly drilled to a depth of 470 feet and reportedly encountered artesian water in the bore hole that is not cased or screened.

14. 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.

15. 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.

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

17. The applicant's hydrogeologist stated that hydraulic testing and monitoring, both short term and long term, are necessary to determine the effect of pumping upon adjacent wells. When asked his opinion about the degree of interconnectivity between the applicant's proposed well and other wells in the vicinity, the applicant's expert stated, "We don't know, right now, about the degree and level of that interconnection." Long term monitoring which could take months or years may be the only way to know the effects of pumping a well on the Naylor Farms property upon the aquifer or upon other wells in the area.

18. Naylor Farms has conducted no pumping tests for the proposed use, has not estimated the recharge to its proposed well site, has not estimated the number of wells that might be needed to produce 2,250 gpm, does not know whether there would be well interference and has not attempted to determine impacts upon the aquifer or upon existing wells in the area.

19. The Naylor Farms property is located on the eastern edge of the Columbia River Basalts. Beginning at the surface and moving downward, a well drilled in the vicinity of the Naylor Farms property typically would encounter upper sediments, Wanapum basalt, sediments referred to as "Vantage" and then crystalline bedrock. Grande Ronde basalt does not exist under the Naylor Farms property. Existing wells near Naylor Farms have encountered the same sequence of formations. The Wanapum basalt underlying Naylor Farms is surrounded in all directions by sediments. Ground water connection among wells in the vicinity of the Naylor Farms property most likely is through the sediments. *See* Protestant's Exhibit R and Protestant's Exhibit Q.

20. There are a number of domestic wells in the vicinity of Naylor Farms. The wells are constructed in the Wanapum Formation and are of low yield generally producing five (5) gallons per minute ("gpm") or less and in one case produce less than one (1) gpm. Some of these wells are finished in granite bedrock and cannot be deepened to obtain more water. There are no wells in the vicinity that produce a diversion rate as much as 4.97 cfs (2,250 gpm) applied for by the applicant.

21. There is little evidence to show that there are subbasins in the Moscow area that would separate diversions of water at the Naylor Farms property from other ground water diversions from the Palouse Basin aquifer system or that an alleged geologic structure referred to by the applicant as the "D Street Ridge" separates ground water at the Naylor Farms property from ground water used by the city of Moscow and the University of Idaho.

22. A well identified as "Well No. 6" located in the SENW Section 8, T39N, R5W, B.M. was drilled in 1955 for the city of Moscow to a depth of 280 feet and was finished in the Wanapum Formation. The well log shows that the capacity of the well was 1,200 gpm and that the "well went dry" in December 1957 resulting in deepening of the well to 1,305 feet

into the Grande Ronde Formation in the 1958 to 1960 period. *See* Protestant's Exhibit W - page 41.

23. Six individuals appeared as public witnesses at the hearing. Several of the witnesses owned and used low output domestic wells near the Naylor Farms property. The general concern expressed by the public witnesses was that the rate of diversion (2,250 gpm) sought by Naylor Farms most likely would decrease or terminate their ability to obtain water from their wells. The witnesses were also concerned that since their wells are located on the eastern edge of mixed sediments and Wanapum basalts with granite bedrock below, there likely would be no option for them to deepen or to otherwise obtain domestic well water. The witnesses expressed concern about depressed property values if they could not maintain their source of domestic water.

ANALYSIS

The Preliminary Order issued on December 1, 2004, was based on information provided by the parties at the September 29, 2004 hearing in Moscow. After reviewing petitions for reconsideration and responses filed in the matter, the hearing officer determined that additional information relative to geologic structure and potential hydrologic connectivity of ground water at the proposed Naylor Farms well site with ground water at other wells in the general area would be useful in further consideration of the application. For that reason, the hearing officer scheduled and conducted a supplemental hearing on April 6, 2005, to augment the prior hearing record.

Testimony shows that the applicant has conducted no pumping tests for its proposed use, has not estimated the recharge to the proposed well site, has not estimated the number of wells that might be needed to provide 2,250 gpm, does not know whether there would be well interference and has not attempted to determine impacts on existing wells in the area. The hydrogeologist for the applicant stated that hydraulic testing and monitoring are necessary to determine the effect upon existing wells in the Naylor Farms area.

Testimony from expert witnesses called by the intervenors was persuasive and showed that wells drilled by Naylor Farms would not obtain ground water from a sub-basin that is separated from other ground water diversions in the area. Diversion of water by Naylor Farms, at the rate requested, almost certainly would adversely affect the ability of existing water users in the vicinity of the Naylor Farms property to obtain water.

Intervenors claim that the protocol entered into between the applicant and the protestants does not provide adequate protection to rural wells near Naylor Farms. While the protocol may not be as clear as the intervenors would like, the testimony of Rob Lemke on behalf of the applicant about interference of water diverted from the Naylor Farms well with other water rights was very clear. When asked under cross-examination by William Thompson on behalf of Latah County "... if the testing indicates it is directly affecting a neighbor, then Naylor Farms will stop pumping?" Lemke responded, "Test results must be verified as accurate - but yeah." Although the protocol provides a basis for addressing well interference

problems, resolution of problems likely would not be quickly reached, would occur after interference and/or injury, and would not be without cost to the parties and others that might be adversely affected.

Well owners near Naylor Farms found little comfort in the testimony of the applicant's hydrogeologist that a diversion rate of 2,250 gpm is a relatively small amount of water and that the domestic wells potentially affected by the applicant's proposal probably were not constructed using adequate drilling techniques.

The opinion of the applicant that there is sufficient water available for appropriation at the Naylor Farms property is not supported by evidence. In addition, the applicant did not provide reasonable probability that the applicant's proposed appropriation will not injure existing water rights. Until the applicant makes an adequate showing of this nature, the risk to the local public interest by approving the application is not justified.

It is important to point out that the hearing officer does not find that there is no water available for appropriation in the Palouse Basin aquifer system for future uses. Instead, the hearing officer finds that the applicant simply did not meet its burden of proof for issuance of a water right permit.

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. It would be short sighted to conclude that irrigation in the county is not a beneficial use of water even though it may not be a common

use.

3. Recovery of the water levels in the Wanapum Formation after the lows in the 1960s cannot be equated to whether or not there is water available for additional appropriation. The evidence shows that the increased water levels are due to action of the city of Moscow and the University of Idaho in the 1960s to cease diverting so much of their water from the upper aquifer and to rely more heavily on the diversion of water from the lower aquifer in the Grand Ronde Formation. There likely is water available for appropriation from the upper aquifer but the location and extent of available water has not been determined.

4. The general area including the Naylor Farms property, the city of Moscow and the University of Idaho is generally underlain by two major aquifers, the upper aquifer in the Wanapum Formation and the lower aquifer in the Grande Ronde Formation. Both aquifers are in basalts and sedimentary interbeds. The Grande Ronde Formation, however, does not underlie the Naylor Farms property or the other rural properties containing domestic wells *located on the eastern fringe of the Palouse Basin aquifer system generally located near Moscow Mountain.*

5. Ground water for Naylor Farms, rural wells near the Naylor Farms property, wells of the city of Moscow and the University of Idaho that either is or would be diverted from the Wanapum Formation is interconnected. There is not a separate sub-basin under the Naylor Farms property from which Naylor Farms could obtain ground water.

6. Naylor Farms has not shown that diversion of water as proposed in its application will not reduce the quantity of water available to existing water rights. Withdrawal of ground water by Naylor Farms at the diversion rate proposed (2,250 gpm) will adversely affect other wells completed in the basalts or sediments associated with the lower aquifer in the Wanapum Formation. The amount of the impact is unknown but it would be a function of the pumping rate, the duration of pumping and the distance between wells. Over an extended period, the effect of pumping likely would affect a broad area for which the size could be determined by aquifer test data.

7. Although the applicant has conducted core drilling on its property in order to understand the geology of the region and the potential of obtaining a suitable water supply, the bore hole and recovered core do not show the extent of water that might be available for diversion and use. Based on lack of information, the applicant has not shown that the water supply itself is sufficient for the purposes for which it is sought to be appropriated. The low yield wells near the Naylor Farms property strongly suggest that the water supply is not sufficient for the purposes proposed by the applicant.

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

9. Conservation of water resources is generally related to the efficiency of water use rather than the concept of "higher or better" use. Although efficiency of water use was not

extensively addressed by the evidence presented at the hearings, the evidence does not indicate that the applicant intends to waste or will waste water. The application is not contrary to the conservation of water resources within Idaho.

10. The Department should not approve the application, since the applicant has not shown that the water supply is sufficient for the purposes intended or that existing water rights will not be reduced or injured.

ORDER

IT IS THEREFORE hereby ORDERED that Application for Permit No. 87-10022 in the name of Ralph Naylor Farms, LLC. is **DENIED** without prejudice.

Signed this 27th day of May 2005.


L. GLEN SAXTON, P.E.
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the within and foregoing document was made this 27th day of May, 2005, by mailing a copy thereof, postage prepaid, to each of the parties listed below.

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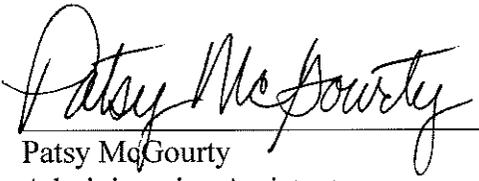
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