

Movant's Name:
UNITED STATES OF AMERICA

Attorneys' Names and Addresses:

LOIS J. SCHIFFER
Acting Assistant Attorney General
Environment and Natural Resources Division

MICHAEL A. GHELETA
DARIA J. ZANE
R. LEE LEININGER
Attorneys, U.S. Department of Justice
General Litigation Section
Environment and Natural Resources Division
999 18th Street, Suite 945
Denver, Colorado 80202
(303) 294-1900

PETER C. MONSON
LEIF JOHNSON
Attorneys, U.S. Department of Justice
Indian Resources Section
Environment and Natural Resources Division
P.O. Box 44378
Washington, D.C. 20026-4378

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re the General Adjudication of)
Rights to the Use of Water from)
the Snake River Basin Water System)

Case No. 39576

Subcase Nos.:

The State of Idaho, ex rel.)
R. Keith Higginson in his official)
capacity as director of the Idaho)
Department of Water Resources,)

36-15450
36-00030
36-00104A
36-00104B
36-00043A
36-00084
36-00012

Petitioner,)

vs.)

the United States; the State of)
Idaho; and all claimants to the)
use of water from the Snake River)
Basin Water System,)

Defendants.)

MOTION FOR TEMPORARY
RESTRAINING ORDER OR
TEMPORARY INJUNCTION

The United States of America,
Petitioner,

vs.

The Idaho Department of Water
Resources; Flying Triangle, Inc.;
William Brailsford; Fred L.
Mavencamp; V. John Mavencamp;
Ronnie D. Smith; Sharlene Smith;
Nevada Omohundro; Joan Wise; and
Shelby Wise,
Defendants.

DESCRIPTIVE SUMMARY

This document contains the United States' motion for temporary restraining order or temporary injunction to prevent interference with water use at Hagerman National Fish Hatchery.

MOTION

The United States moves under Idaho Rule of Civil Procedure 65(b) for a temporary restraining order or temporary injunction against the Idaho Department of Water Resources, an agency of the State of Idaho (IDWR), its Watermaster George Lemmon, and certain holders of decreed water rights -- Flying Triangle, Inc., William Brailsford, Fred L. Mavencamp, Ronnie D. Smith, Sharlene Smith, Nevada Omohundro, Joan Wise, and Shelby Wise -- known as the Brailsford Ditch users, and states its motion as follows:

A. GROUND FOR MOTION

1. A temporary restraining order may be granted upon a showing that immediate and irreparable injury, loss or damage will result to the applicant prior to notice and a hearing. Idaho Rules of Civil Procedure 65(b). It is intended to serve as a

restraint until the propriety of granting preliminary or permanent injunctive relief can be determined. Scholtz v. American Sur. Co., 35 Idaho 207, 206 P. 187, 188 (1922). Thus, the function of a temporary restraining order is to preserve the status quo during the interim until a hearing can be held after notice on an application for a permanent injunction. Wood v. Wood, 96 Idaho 100, 524 P.2d 1072, 1073 (1974).

2. The United States owns lands in Section 6, Township 8 South, Range 14 East B.M. upon which the U.S. Fish and Wildlife Service operates the Hagerman National Fish Hatchery (Hatchery). The United States purchased these lands in 1930 and has operated the Hatchery since that time. The Hatchery produces more than 1.5 million steelhead each year.

3. The operation of the Hatchery is dependent upon an adequate and constant supply of water during the critical rearing period for steelhead. A steelhead's life in the Hatchery is completed each spring in April, when it is transported to Idaho's Salmon River drainage.

4. Fish distribution from the Hatchery to the release sites for the 1994 season will begin on March 28 and conclude on April 28. See Affidavit of Bryan Kenworthy at ¶ 3.c.

5. The Hatchery utilizes a number of springs that arise on or flow into Hatchery property. The United States claims the right to use water from these springs pursuant to State law. Among the springs utilized by the Hatchery is Len Lewis Spring (Spring), which arises on Hatchery property. The Spring's

capacity is estimated at approximately 24 to 26 cubic feet per second (cfs). The Hatchery diverts directly from the Spring.

6. The United States claims the right to use 21.2 cfs of water from the Spring from October 16 through April 14, i.e., during the non-irrigation season and 8.0 cfs from April 15 through October 14, i.e., during the irrigation season, with a priority date of 1950. The basis of this claim is the constitutional or beneficial use doctrine pursuant to Art. XV, Sec. 3 of the Idaho Constitution.

7. IDWR has recommended in its Response to Objection that the United States be adjudicated a water right from the Spring for fish propagation at the Hatchery of 21.2 cfs between October 16 and April 14 each year, and a water right of 8.0 cfs between April 15 and October 15 each year, with a priority date of 1950 (Water Right 36-15450).

8. In addition to the Hatchery, six irrigators also use water from the Spring. These irrigators, who comprise the Brailsford Ditch Company, and their respective water right claim numbers, are Flying Triangle, Inc. (owned and operated by William Brailsford) (36-00030), Fred L. and V. John Mavencamp (36-00104A), Ronnie D. and Sharlene Smith (36-00140B), Nevada Omohundro (36-00043A), Shelby and Joan Wise (36-00084), and the State of Idaho Department of Fish and Game (36-00012) (collectively referred to

herein as the Brailsford Ditch users).¹ The Brailsford Ditch users receive Spring water via the Brailsford Ditch, which diverts water on Hatchery property and carries it to a pipe which delivers it to these users.

9. The Brailsford Ditch users hold rights to water from Len Lewis Spring subject to determination in the Snake River Basin Adjudication (SRBA) which were previously adjudicated in the New International Mortgage Bank v. Idaho Power Co. decree in 1932. The decree included a total of 18 cfs of water for the Brailsford Ditch users or their predecessors, with a priority date of 1889, for irrigation, stockwater, power, domestic, and other purposes. The decree does not specify a period of use.

10. In the Director's Report for Basin 36 of the SRBA, IDWR has reported that the Brailsford Ditch users beneficially use 11.15 cfs per year for irrigation and stock use during the irrigation season. They are reported to have no stockwater use at other times. The Brailsford Ditch users have filed claims in the SRBA for 18 cfs of water for irrigation purposes only, except for a de minimus stockwater claim by Flying Triangle, Inc. The Director's Report recommends the irrigation season of March 15 to November 15 claimed by the Brailsford Ditch users (except for Fred L. and V. John Mavencamp, who jointly filed a claim for March 1 to

¹The United States does not by this motion seek to restrain or obtain injunctive relief against the State of Idaho Department of Fish and Game (IDFG), which has agreed, by letter dated March 10, 1994, not to call for IDFG's claimed 3.0 cfs of irrigation water from the Brailsford Ditch prior to April 15, 1994. (See Attachment 1 to Affidavit of Bryan Kenworthy).

November 1 which IDWR disallowed). Since IDWR also recommended the non-irrigation season of October 16 to April 14 claimed by the Hatchery, IDWR has recognized two overlapping periods of use for the Brailsford Ditch users and the Hatchery: from March 15 to April 14 and from October 16 to November 15.²

11. The Hatchery has historically made consistent beneficial use of Spring waters during the periods of March 15 to April 14 and October 16 to November 15. Of particular significance for purposes of this motion is Hatchery use of Spring waters during the March 15 to April 14 period, which is a critical point in the rearing process for steelhead prior to their transportation for release in the Salmon River drainage.

12. The Hatchery is currently putting Spring water to beneficial use for fish propagation purposes under its State constitutional water rights. The Hatchery intends to continue this beneficial use until steelhead in the Hatchery have progressed through the final stages of rearing, at which point they can be transported for release into the wild.

13. Upon information and belief, the United States alleges that IDWR, its Watermaster George Lemmon, and the Brailsford Ditch users are about to take or have taken actions leading to curtailment of flows to the Hatchery through the diversion of water into the Brailsford Ditch prior to April 15, 1994, and

²The United States request that the Court take judicial notice of the Director's Report for Basin 36, as well as the Director's Response to Objection with respect to the United States' water right claim no. 36-15450.

possibly as early as March 15, 1994. Such actions would deprive the Hatchery of water which is essential to the steelhead currently in the Hatchery nearing the final stages of rearing.

14. Diversion of water from the Spring by the Brailsford Ditch users under their claimed water rights between March 15 and April 14 will deprive the United States of water to which it is entitled under its state constitutional water rights for fish propagation purposes at the Hatchery, and will cause the United States immediate and irreparable injury for which the United States has no plain, speedy or adequate remedy at law.

15. Water flows from Len Lewis Spring either to the Hatchery or to Brailsford Ditch. Therefore, a decrease in flow rate from Len Lewis Spring to the Hatchery would correspond to an increase in the flow rate to Brailsford Ditch. Hatchery records can be examined to assess the historic timing and magnitude of diversions to the Brailsford Ditch. See Declaration of Randall Schmeller at ¶¶ 4, 6.

16. Hatchery records show that, at least since 1963, the Brailsford Ditch users have not made any significant beneficial use of water from Len Lewis Spring during the March 15 to April 14 period, and that this water has been utilized by the Hatchery. The Hatchery, in the winter months, has received most of the water produced by the Spring. The flow rate to Brailsford Ditch in the spring has generally increased incrementally over a period of time, rather than increasing abruptly. In the period between 1963 and 1992, the earliest time period in the spring that the water

flow rate to Brailsford Ditch has increased incrementally has been in the first week of April. The earliest date in the spring that the flow rate to Brailsford Ditch has increased to the Ditch's full capacity has been in the third week in April. See Affidavit of Randall Schmeller at ¶ 7.

17. Between March 15 and April 14, the Brailsford Ditch users have no right to divert Spring water appropriated by the United States for use at the Hatchery. Since the Brailsford Ditch users have not put Spring waters to beneficial use during this time period, they have never obtained rights to so use these waters. Alternatively, they have forfeited any rights they may have once had through lack of beneficial use during this period.

18. A reduction in water flow to the Hatchery such as that proposed by IDWR and the Brailsford Ditch users would cause the Hatchery to exceed its carrying capacity, as measured by the Flow Index method. A preferred Flow Index for the Hagerman National Fish Hatchery is 1.2, and a Flow Index of 1.5 is the upper limit of the Hatchery's carrying capacity. If any amount of water now being used by the Hatchery becomes unavailable, the Flow Index will be above 1.5. The Flow Index at the Hatchery would increase from an anticipated level at distribution of just over 1.5 to a higher level of 1.9 if 9.5 cfs of water from Len Lewis Spring becomes unavailable to the Hatchery. See Affidavit of Bryan Kenworthy at ¶ 3.c.

19. Exceeding the Hatchery Flow Index would reduce available oxygen and increase the accumulation of fish waste products, and

would have a high likelihood of causing gill disease, bacterial infection, and stress to the fish. Exceeding the Hatchery carrying capacity in this manner can result in increased morbidity, increased mortality, poor growth, and a lower rate of fish survival upon release into the natural environment. See Affidavit of Bryan Kenworthy at ¶ 3.a.; Affidavit of Robert G. Piper at ¶¶ 2-6; Affidavit of Joseph C. Lientz at ¶¶ 3-4.

20. Based on the 1994 distribution schedule, the Hatchery could provide up to 18 cfs of water by April 15, when significant removal and transportation of fish will have already occurred. See Affidavit of Bryan Kenworthy at ¶ 3.e.

21. The diversion of water from the Spring by the Brailsford Ditch users during mid-March is not encompassed within their water rights and is inconsistent with the absence of past beneficial use of such water, which has been put to beneficial use by the Hatchery during this time period. The Brailsford Ditch users have not made beneficial use of water available in the Ditch during this past winter but have instead wasted it, diverting most of this water into the spillway located at the IDF&G Wildlife Management area. See Affidavit of Bryan Kenworthy at ¶ 4.

22. The Brailsford Ditch users would suffer little, if any, actual harm if the Court grants the instant motion and preserves the status quo by allowing the Hatchery to continue to utilize water from Len Lewis Spring at this time as it has in the past. Any actual harm to the users would not be irreparable, but could be compensable. By contrast, the Hatchery would suffer immediate

and irreparable damage to its steelhead fishery by having its water supply curtailed at this point in the rearing process.

B. REQUEST FOR RELIEF

The United States moves the Court for a temporary restraining order or temporary injunction against IDWR, Watermaster George Lemmon, and the Brailsford Ditch users enjoining these parties from taking or continuing any action which allows the diversion of water from Len Lewis Spring into the Brailsford Ditch until a hearing can be held on a preliminary injunction. In bringing this motion, the United States merely seeks to maintain the existing regime with respect to use of water from the Spring, and to avert irreparable harm to a significant fishery resource from the unprecedented diversions proposed by the Brailsford Ditch users.

The United States intends to seek a preliminary injunction as necessary at the earliest opportunity to enjoin the Brailsford Ditch users from diverting Spring waters during the period in question until the periods of use of the respective parties are established in the final decree in this general adjudication.

DATED this 17th day of March, 1994.

Respectfully submitted,



MICHAEL A. GHELETA,
Attorney, U.S. Department
of Justice
Environment and Natural
Resources Division
General Litigation Section

Of Counsel:

Barbara Scott-Brier
Office of the Solicitor
U.S. Department of the Interior