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

IN RE: SRBA	)	Sub-case Nos.:	36-15450
	)		36-00030
CASE NO. 39576	)		36-00104A
	)		36-00104B
	)		36-00043A
	)		36-00084
	)		36-00012
	)		
	)	UNITED STATES' MOTION FOR EXPEDITED	
	)	HEARING	

DESCRIPTIVE SUMMARY

This motion of the United States of America requests the District Court to expedite the hearing for consideration of the CONSOLIDATED ALTERNATIVE MOTIONS FOR PRELIMINARY INJUNCTION AND INTERIM ADMINISTRATION. The United States requests a hearing date of Thursday, March 24, 1994 at 9:00 a.m.

MOTION FOR EXPEDITED HEARING

The United States of America moves the District Court to expedite the hearing on the CONSOLIDATED ALTERNATIVE MOTIONS

FOR PRELIMINARY INJUNCTION AND INTERIM ADMINISTRATION. The United States requests a hearing be scheduled for Thursday, March 24, 1994 at 9:00 a.m. The grounds for this motion are as follows:

1. The United States has moved under Rule 65(a) of the Idaho Rules of Civil Procedure for a preliminary injunction against Idaho Department of Water Resources, an agency of the State of Idaho (IDWR), its Watermaster George Lemmon, and certain holders of decreed water rights (known as the Brailsford Ditch users).

2. The United States seeks to protect beneficial uses of water at Hagerman National Fish Hatchery by seeking to enjoin the defendants from diverting or allowing the diversion of water from Len Lewis Spring which the Hagerman National Fish Hatchery has put to beneficial use under its State constitutional water rights.

3. The present flow of water in Len Lewis Spring is not sufficient to maintain the United States' present level of operations at the Hagerman National Fish Hatchery and, at the same time, allow full diversions by the Brailsford Ditch Users. Reductions of water flowing to the Hatchery have caused and will continue to cause irreparable harm. Consequently, the United States seeks an expedited hearing on this matter.

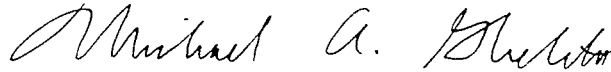
DATED this 21st day of March, 1994.

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	)	UNITED STATES' CONSOLIDATED MOTIONS	
	)	FOR PRELIMINARY INJUNCTION AND	
	)	INTERIM ADMINISTRATION	

DESCRIPTIVE SUMMARY

This document contains the United States' consolidated alternative motions for preliminary injunction and interim administration of water rights from Len Lewis Spring.

I. MOTION FOR PRELIMINARY INJUNCTION

The United States moves under Rule 65(a) of the Idaho Rules of Civil Procedure for a preliminary injunction against the Idaho Department of Water Resources, an agency of the State of Idaho (IDWR), 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, to protect beneficial uses of water at Hagerman National Fish Hatchery.

This motion seeks to enjoin the defendants from diverting or allowing the diversion of water from Len Lewis Spring which the Hagerman National Fish Hatchery has put to beneficial use under its State constitutional water rights, and which the Brailsford Ditch users have failed to put to beneficial use historically, prior to April 15 each year.

A. GROUND FOR THIS MOTION

1. 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 typically produces more than 1.5 million steelhead each year.

2. 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.

3. Many aspects of the production program at the Hatchery such as species reared, number of fish produced, location of release, time of release, and size at release are established

through coordinated efforts and legal constraints relating to the overall fishery situation in the Snake and Columbia River Basins, including the Lower Snake River Compensation Plan, the Columbia River Fish Management Plan, and the Endangered Species Act. The Hatchery is not authorized to deviate from the program established through these efforts, and cannot unilaterally release fish earlier than scheduled or reduce numbers of fish produced.

4. Fish distribution to the release sites for the 1994 season will begin on March 28 and conclude on April 28.

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) ¹ (collectively referred to herein as the Brailsford Ditch users). 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 awarded a total of 18 cfs of water to the

¹ The United States does not by this motion seek an injunction against the State of Idaho Department of Fish and Game (IDF&G), which has agreed, by letter dated March 10, 1994, not to call for IDF&G's claimed 3.0 cfs of irrigation water from the Brailsford Ditch prior to April 15, 1994. The United States does, however, seek interim administration of Len Lewis Springs with respect to all users of this water source, including IDF&G.

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 only 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 November 1 which IDWR disallowed). Since IDWR also recommended the non-irrigation season of October 16 to April 14 claimed by the Hatchery for its most significant use of water, 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

² The United States requests that the Court take judicial notice of those portions of the Director's Report for Basin 36 pertaining to the water rights of the parties to this motion, as well as the Director's Response to Objection with respect to the United States' water right claim no. 36-15450.

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. During the past year, as it has historically, the Hatchery has been putting Spring water to beneficial use for fish propagation purposes under its State constitutional water rights. The Hatchery needs to continue this beneficial use until April 14, 1994, when a sufficient number of steelhead in the Hatchery have progressed through the final stages of rearing and have been transported for release into the wild.

13. Within the past week, IDWR and its Watermaster George Lemmon have been undertaking ongoing actions resulting in the reduction of flows to the Hatchery through the diversion of water into the Brailsford Ditch. On March 17, 1994, diversions into the Brailsford Ditch, which had been transporting approximately 5.5 cfs prior to that time, were increased some 5.0 cfs for a total diversion of approximately 10.5 cfs pursuant to a call by the holders of water right nos. 36-00104A (Mavencamp), 36-00030 (Brailsford), and 36-00140B (Smith). On March 19, an additional 4.5 cfs was diverted into the Brailsford Ditch pursuant to a call by holders of water right nos. 36-00043A (Omohundro) and 36-00084 (Wise), for a total flow of approximately 15.0 cfs. IDWR is conducting ongoing investigations to determine whether the increased flows down the Brailsford Ditch are in fact being put to beneficial use.

14. Water flows from Len Lewis Spring either to the Hatchery or to the Brailsford Ditch. Therefore, the recent increases in flows down Brailsford Ditch have resulted in corresponding decreases in flows to the Hatchery from Len Lewis Springs. These actions have deprived the Hatchery of water which is essential to the steelhead currently in the Hatchery nearing the final stages of rearing.

15. In cases involving ownership or right of possession of specific property, a preliminary injunction to preserve the property in status quo pending final judgment is proper, although other remedies may be available to the moving party. Farm Service, Inc. v. United States Steel Corp., 90 Idaho 570, 414 P.2d 898, 907 (1966). In other cases, a preliminary injunction is properly granted where a plaintiff makes a showing that it will suffer great or irreparable injury during the pendency of the action, that any such injury may not be adequately compensated in damages and the defendant may not be able to respond in damages, and that plaintiff will likely prevail on the merits at trial. Farm Service, 414 P.2d at 907. These considerations should be weighed against the injury which may result to the defendant during the pendency of the action by the imposition of the preliminary injunction, in case it is finally determined that plaintiff was not entitled thereto. Id.

16. The increased diversions of water from the Spring pursuant to calls by the Brailsford Ditch users for their full decreed amounts which commenced March 17 have deprived the United STATES' CONSOLIDATED ALTERNATIVE MOTIONS FOR PRELIMINARY INJUNCTION AND INTERIM ADMINISTRATION --7

States of water to which it has established an entitlement under its state constitutional water rights by putting the water to beneficial use historically for fish propagation purposes at the Hatchery. The Brailsford Ditch users have not put this water to beneficial use prior to April 15 historically. They have thus never developed any right to the water, or have forfeited any rights that they once may have had. As a result of this non-use, the water has been available for appropriation by others under State law, pursuant to which the United States has made a valid claim to and appropriation of this water.

17. The United States is likely to prevail on the merits. Because the decree describing the Brailsford Ditch users' water rights does not specify a period of use, the permissible period of use is defined by actual beneficial use. Beneficial use is the measure and limit of a water right. Idaho Code 42-204. Non-use of a water right for a five-year consecutive period results in a forfeiture of that right. Idaho Code 42-222(2). Decreed water rights are subject to forfeiture. Albrethson v. Wood River Land Co., 231 P. 418 (Idaho 1924). A water right can be partially forfeited. See Dovel v. Dobson, 122 Idaho 59, 831 P.2d 527 (1992). If a water right has been forfeited, the right to use that water reverts to the state and it becomes subject to further appropriation. Jenkins v. State Department of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982). Forfeiture cannot be defeated by a resumption of use after third parties have made a claim to the water. Id. Finally, continued and

UNITED STATES' CONSOLIDATED ALTERNATIVE MOTIONS FOR PRELIMINARY
INJUNCTION AND INTERIM ADMINISTRATION --8

uninterrupted use of water for a period of more than five years constitutes a valid appropriation under the Idaho constitutional rights doctrine. Short v. Praise Water, 208 P. 844 (Idaho 1922). See also Nettleton v. Higginson, 98 Idaho 87, 558 P.2d 1048 (1977).

18. The Brailsford Ditch users have no right to divert Spring water prior to April 14 which has been appropriated by the United States for use at the Hatchery. To the extent that these users claim any entitlement to water which they have not put to beneficial use before now, they are junior to the United States, which has appropriated the water through actual beneficial use at the Hatchery. The results of IDWR's ongoing investigation of whether actual beneficial use is occurring is inconsequential to the question of relative priorities, since any new beneficial uses being made by the Brailsford Ditch users are junior to historic beneficial uses made by the United States at the Hatchery.

19. Hatchery records can be examined to assess the historic timing and magnitude of diversions to the Brailsford Ditch. 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 Len Lewis 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.

20. The continued diversion of water from the Spring by the Brailsford Ditch users under their claimed water rights prior to April 14 is causing and will continue to cause the United States irreparable injury for which the United States has no plain, speedy or adequate remedy at law. The resulting reduction in water flow to the Hatchery has already resulted and will continue to result in the Hatchery exceeding its carrying capacity, as measured by the Flow Index method, detrimentally affecting the health of the fish.

21. Exceeding the Hatchery Flow Index or carrying capacity reduces available oxygen and increases the accumulation of fish waste products, and has a high likelihood of causing gill disease, bacterial infection, and stress to the fish. Exceeding the Hatchery carrying capacity also results in increased morbidity, increased mortality, poor growth, and a lower rate of fish survival upon release into the natural environment.

22. The irreparable damage suffered by the Hatchery to its steelhead fishery resource as a result of having its water supply curtailed at this point in the rearing process outweighs any damage that might be incurred by the Brailsford Ditch users.

Because they have not made any appreciable beneficial use of water prior to April 14 historically, 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 would not be irreparable, but could be compensable.

23. The Brailsford Ditch users have not made actual 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 Idaho Department of Fish and Game Wildlife Management area.

B. REQUEST FOR RELIEF UNDER THIS MOTION

The United States moves the Court for a preliminary injunction against IDWR, Watermaster George Lemmon, and the Brailsford Ditch users enjoining these parties from taking any action which would allow the continuation of diversions of water from Len Lewis Spring into the Brailsford Ditch prior to April 14 until a determination is made on the merits of the parties' respective water rights. In bringing this motion, the United States seeks to maintain the historic regime with respect to use of water from Len Lewis Spring, and to avert irreparable harm to a significant fishery resource which the unprecedented diversions proposed by the Brailsford Ditch users would bring about.

II. MOTION FOR INTERIM ADMINISTRATION

A. GROUND'S FOR THIS MOTION

24. The United States repeats and realleges the allegations of paragraphs 1 through 23 of their Motion for Preliminary Injunction, and incorporates such allegations herein in full.

25. The Director's Report for Reporting District 3 (Basin 36), and the Director's Responses to Objections to this Report, include the following recommended water rights for diversions from Len Lewis Spring:

<u>Owner</u>	<u>Water Right No.</u>	<u>Priority Date</u>	<u>Water Use</u>	<u>Use Period</u>	<u>Diversion Rate</u>
U.S.A.	36-15450	1/1/1950	Fish Propagation	4/15-10/15	8.0 cfs
U.S.A.	36-15450	1/1/1950	Fish Propagation	10/16-4/14	21.2 cfs
Mavencamp	36-00104A	9/1/1889	Irrig.	3/15-11/15	2.15 cfs
Smith	36-00104B	9/1/1889	Irrig.	3/15-11/15	1.0 cfs
Flying Triangle, Inc.	36-00030	9/1/1889	Irrig.	3/15-11/15	3.85 cfs
Wise	36-00084	9/1/1889	Irrig.	3/15-11/15	0.6 cfs
IDF&G	36-00012	9/1/1889	Irrig.	3/15-11/15	2.2 cfs

26. Under the provisions of Idaho Code Sec. 42-1417, this Court may, at any time after the filing of the Director's Report in the SRBA, by order, permit the formation of a water district and require delivery of water in part of the water system pursuant to Chapter 6, Title 42, Idaho Code, in accordance with

part I of the Director's Report or as modified by the Court's order.

27. Interim administration of water rights pursuant to the Director's Report as modified below is reasonably necessary to protect senior water rights. The United States has senior rights to water which it has appropriated under State law and which the Brailsford Ditch users have not put to beneficial use historically. The Director's Report recognizes that only 11.15 cfs, and not 18.0 cfs as claimed by the Brailsford Ditch users, has been put to beneficial use. The United States has historically put to beneficial use and continues to require for Hatchery operations that 6.85 cfs portion of the 18.0 cfs claimed by the Brailsford Ditch users which the users have not put to beneficial use.

B. REQUEST FOR RELIEF UNDER THIS MOTION

As an alternative to the relief requested in the Motion for Preliminary Injunction, the United States moves the Court for an order:

1. Permitting, as necessary, the immediate formation of a water district encompassing users of Len Lewis Spring within Reporting District 3 (Basin 36), and permitting the delivery of the water of Len Lewis Spring pursuant to Chapter 6, Title 42, Idaho Code;

2. Modifying the Director's Report for Water Right No. 36-15450 in accordance with IDWR's recommended water right for 8.0 cfs during the use period April 15 to October

1, and for 21.2 cfs during the use period October 16 to April 14.

3. Ordering IDWR and its Watermaster to administer water use from Len Lewis Spring in accordance with the Director's Report as modified.

In filing this motion for interim administration as an alternative to its request for preliminary injunctive relief, the United States seeks to mitigate damage to the Hatchery brought about by the recent actions of IDWR and the Brailsford Ditch users' by maintaining the status quo with respect to the amount of water found to be beneficially used by the respective parties in the Director's Report. The filing or granting of this motion should not be construed to waive any right of the United States to obtain a ruling that the Brailsford Ditch users have no entitlement to utilize water from the Spring during periods in which they have not made beneficial use of water historically.

DATED this 21st day of March, 1994.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that on this 22nd day of March, 1994, I served a true and correct copy of the foregoing United States' Consolidated Motions for Preliminary Injunction and Interim Administration, United States' Motion for Expedited Hearing and Order Setting Expedited Hearing by overnight delivery via Federal Express upon:

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Court Certificate of Mailing
For Expedited Hearings

February 9, 1994

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