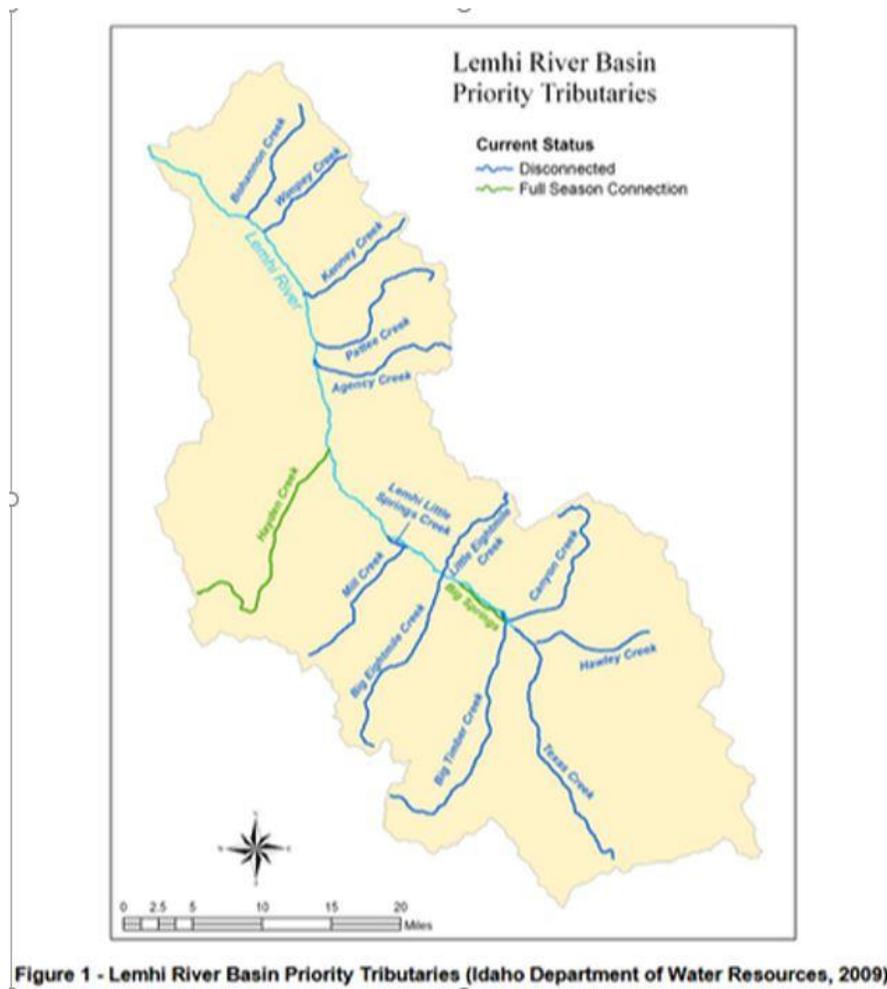


Control Over Idaho Water – Part 2

By Karen Schumacher | January 24, 2020

The Lemhi [river](#) is 60 miles long, as a tributary flows northwest to the Salmon river, feeding into the Snake river, and ultimately flows into the Columbia river.

Below is a map of Lemhi River Basin tributaries that are priority areas for conservation. Multiple ranches are dependent on this water for livestock grazing and agriculture. Those who are [involved](#) in gaining control over water for fish claim grazing "degrades the riparian vegetation and streambank stability" and "dewatering of the lower river can delay anadromous smolt and adult migrations" occurs from irrigation practices.



As noted in part 1, multiple organizations are involved in this pursuit of protecting fish, it is all about saving the fish, at the expense of not only the taxpayer, but to livelihoods.

Merrill Beyeler, a former Idaho [legislator](#), Lemhi Regional Land Trust (LRLT) [Chairman](#), Idaho Business for the Outdoors board [member](#), Salmon Work Group [member](#), Central Idaho Rangelands Network [member](#) which partners with The Nature Conservancy (TNC) and LRLT,

and High Divide Collaborative Coordinating Committee [member](#) whose [mission](#) is conserving land as part of the Heart of the Rockies [Initiative](#) is one benefactor of this plot.

As part of the Upper Lemhi River Acquisition [project](#), in 2010, Mr. Beyeler was paid \$3,426,523 for his conservation easement according to this Columbia Basin Fish & Wildlife program [document](#). The description of the easement agreement follows:

"TNC purchased Cottom Ranch in fee in 2008. In the acquisition (involving BPA), TNC will deed the Cottom Ranch property to Beyeler Ranches, LLC but reserve a CE on the property (held by TNC). In addition, as part of the transaction, Beyeler Ranches, LLC will also grant to TNC, a CE upon the Beyeler Ranches, LLC existing ranch. In the end, Beyeler Ranches, LLC will own a bigger ranch, but it will have a conservation restrictions applied. TNC will hold the easements and BPA will have 4rd party rights of enforcement of these easements. Cottom - 1354 acres, Beyeler Ranch 1000 acres."

In other words, Mr. [Beyeler](#) "entered into a conservation easement with The Nature Conservancy...which...allowed him to purchase another ranch with an existing easement, almost doubling the size of his property." Not bad, over \$3 million dollars in his pocket and an expansion of his ranch, including an [award](#). In this CE agreement, Mr. Beyeler agreed to a 20 year restoration [project](#) that "consolidates diversions...from the main stem of the Lemhi rather than from several of its local tributaries." Mr. Beyeler has a knack for using other funding [sources](#) to his benefit, including the taxpayer footing the bill. The Columbia Basin Fish & Wildlife [program](#) targets land acquisition from 2010-2032. The consolidation of diversions achieves the objective laid out by the Northwest Power & Conservation Council ([NWPCC](#)) to reconnect "tributary streams to the Lemhi River."

LRLT bought a [CE](#) near Leadore to "permanently protect nearly 10 miles of in-stream and riparian habitat" through a habitat management [plan](#). As more land is taken for fish habitat restoration through CE, expectations for fish protection weighs heavily on other land owners. The [unelected](#) Idaho Water Resources Board (IWRB) is pouring thousands of dollars into [changing](#) irrigation practices, allocating it to private land owners for fish habitat restoration projects. Once again, the federal outfit BPA, is funding this activity. What happens if a private land owner chooses to not participate? Now, water [rights](#) are involved. Water law is extremely complex, however, even though this article focuses on the Lemhi River, this issue is applicable to every Idahoan that hold water rights.

IDWR [defines](#) a water right as "authorization to use water in a prescribed manner, not to own the water itself. Without *diversion* and *beneficial use*, there is no water right." In the Idaho [Constitution](#), Article XV, Section 3 states, "The right to divert and appropriate the unappropriated waters of any natural stream to [beneficial](#) uses, **shall never be denied...**". Beneficial uses include domestic, agricultural (stock and irrigation), mining, manufacturing, and power. It is the [duty](#) of IDWR to supervise the appropriation and allotment of water rights. In Idaho, a water right is considered a [real property right](#) much like property rights in land. Once [established](#), a

water right cannot be denied as long as that water right continues to be used for beneficial use.

The Snake River Basin Adjudication ([SRBA](#)) was a [litigious](#) case that began in 1987 and finally settled in 2014. It determined that priority of water rights "must be quantified" making water rights more clearly defined for administration. One of the affected areas in SRBA was the Lemhi basin, Water District 170, and its associated water districts. Up to this point water rights were established by diverting the water and putting it to beneficial use such as the Big timber Creek, first decreed in 1912, and being measured every year since. This [document](#) gives an in-depth explanation of SRBA.

Water District 170 was implemented for the express purpose of identifying any and all illegal uses of water, taking our high flow rights, and requiring the measuring of ground water. As a result of the SRBA, Lemhi Basin 74 was required to participate, and in 2017, [IDWR](#) proposed an expansion of Water District [170](#) by combining 12 active water districts within Administrative Basin [74](#), and placing the administration of those water rights under IDWR, out of the hands of the water districts themselves. The SRBA Basin 74 General Provisions included a [provision](#) that [27](#) tributary streams be administered separately from all other water rights and that diversion and high flow use, such as spring runoff, could be diverted for beneficial use, with existing water rights satisfied. Historically, Lemhi water districts have been properly managing and administering tributary streams to the Lemhi River, but with this proposal, these water districts are being reduced to subdistricts, with IDWR taking over the administration of those districts, including control over the measuring and accounting for ground water diversions, traditionally conducted by the water districts.

Under the administration of IDWR, there could be a demand for additional restrictions for future high flow diversions. These high flow periods are needed by ranchers for agricultural purposes, a beneficial use. If IDWR diverts that water it would cause economic devastation to those ranchers. Or perhaps IDWR is looking at it from a perspective of fish. As previously noted, blame is laid upon ranchers for "dewatering" tributary streams, claiming it affects fish habitat. However, in the 2004 BOR Instream Flow Assessment [study](#), it states, "[fish populations continue to exist within available physical habitat throughout the year](#)" which does not substantiate the need to deny water rights for fish. High flow water is especially needed because there is no storage system, such as a dam, that will provide the necessary water for irrigation as needed. The issue of high flow water use was adjudicated in SRBA, reaffirming the Lemhi high flow practice through inclusion of the Basin 74 General [Provisions](#).

Since water rights are considered real property in Idaho, an analogy would be the state deciding to combine your property with your neighbor, then dictating how that property could be used. There could be nothing more sinister towards property rights. When discussing approval of water right applications in the Upper Salmon Basin Watershed June 6, 2019 meeting [notes](#), IWRB expressed concern "...that transacted water for reconnects such as Big Timber Creek could once again be dewatered if these new water rights are used, particularly on the shoulder seasons." At the same meeting Mr. Beyeler was soaking up more funds for fish restoration

projects. Amy Cassel, IDWR, noted spring water runoff is acceptable. However, it has always been unappropriated water, meaning not approved as a water right. If unappropriated, is IDWR planning to take that water only for fish habitat use, devastating the livelihoods of those who are dependent on that water?

At the Idaho Water Resource Board (IWRB) July 25, 2019 [meeting](#), a resolution was proposed that "would authorize staff and counsel to retain technical consultants and experts to support the Board's protests to applications for permits to divert from tributaries to the Upper Lemhi River." Clearly the intent here was using more of your tax dollar to fight Idahoans with legal water rights who objected to the IDWR proposal to take the use of their water rights away from them.

As a result of this IDWR [proposal](#), major adverse changes to water rights are being proposed that do not align with the SRBA Basin 74 General Provisions.

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BEFORE THE DEPARTMENT OF WATER RESOURCES	
OF THE STATE OF IDAHO	
IN THE MATTER OF THE PROPOSED)	
EXPANSION OF WATER DISTRICT 170,)	
THE PROPOSED MODIFICATION OF)	
ALL WATER DISTRICTS WITHIN)	
ADMINISTRATIVE BASIN 74 TO)	
INCLUDE GROUND WATER)	PRELIMINARY ORDER EXPANDING,
DIVERSIONS AND THE PROPOSED)	MODIFYING AND COMBINING
COMBINATION OF WATER)	WATER DISTRICTS
<u>DISTRICTS 74, 74K, 74U AND 74Y</u>)	
PROCEDURAL HISTORY	
<p>On November 9, 2017, the Idaho Department of Water Resources ("Department" or "IDWR") sent a letter to all owners of record for water rights within Water District 170 and Administrative Basin 74 ("Basin 74"), except for domestic and stockwater uses, as defined in Idaho Code §§ 42-111 and 42-1401(11), and instream stockwater uses, as defined in Idaho Code § 42-113. The letter notified the recipients of a public meeting to discuss certain changes proposed for Water District 170 and water districts within Basin 74. The Department conducted the public meeting on November 28, 2017, in Salmon, Idaho, and presented information about the proposed water district changes.</p>	
<p>On January 17, 2018, the Department issued a Notice of Public Hearing describing specific changes proposed for Water District 170 and all water districts within Basin 74. The notice was sent to all current owners of record for water rights administered by Water District 170 and water rights within Basin 74, except for domestic and stockwater uses, as defined in Idaho Code §§ 42-111 and 42-1401(11), and instream stockwater uses, as defined in Idaho Code § 42-113.</p>	

Idaho Code § [42-604](#) referenced in the order states, "The director may...combine two (2) or more water districts by entry of an order if such action is required in order to properly administer uses of the water resource. Water right users in Basin 74 were properly administering water resources. Again, this is akin to the state combining and assuming control over private property use.

Idaho Statute [42-1736B](#) states, "All water plans and development projects proposed by the water resource board shall be subject to review and approval of the legislature" and "To take all necessary actions to assure that Idaho citizens **shall not be denied the right to divert and appropriate to beneficial uses.**" This IDWR proposal was never presented to the legislature for approval, they just moved forward with it. On January 20, 2020, IDWR attempted to do an end run around the SRBA Basin 74 General Provisions for separate tributaries legislatively, essentially tying them all to the Lemhi River, and comingling them. Legal action by ranchers was successful in stopping this, at least for now. Clearly, the IDWR objective is taking control over water rights for their, and others, pursuit of fish habitat restoration, even if it means violating Idaho statutes.

Objections to this action by private land owners with water rights were ignored.

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STATEMENT OF PUBLIC WITNESSES
IDAPA 37.01.01.355

In the Matter of the Proposed Expansion of Water District 170, the Proposed Modification of All Water Districts Within Basin 74 To Include Ground Water Diversions and the Proposed Combination of Water Districts 74, 74K, 74U and 74Y

We, the undersigned, submit the following statement concerning the Proposed Expansion of Water District 170, the Proposed Modification of All Water Districts Within Basin 74 To Include Ground Water Diversions and the Proposed Combination of Water Districts 74, 74K, 74U and 74Y.

1. We are water users who possess water rights that are authorized to divert surface water and/or ground water within the boundaries of Basin 74.
2. The Basin 74 General Provisions issued in the Snake River Basin Adjudication provide that certain tributary streams to the Lemhi River "shall be administered separately from all other water rights in Basin 74." These same general provisions also allow for diversion and use of so-called "high flows" provided that the water is diverted to a beneficial use and existing decreed rights are satisfied.
3. As a result of the historic separate stream administration of water in the Lemhi River basin, individual water districts for individual tributary streams have been organized and functioned appropriately on nearly all tributary streams to the Lemhi River. The proposed administrative action that is the subject of this proceeding will relegate these well-functioning districts to "subdistricts."

It appears that if private land owners do not engage in the quest to restore fish habitats through a CE or other restoration projects, the next step is to devise a way in which the state takes control over the use of water rights. With the amount of money and partnerships behind fish and habitat restoration, perhaps IDWR will ultimately do the same by combining tributaries for fish and diversion into the Lemhi River. This action will ultimately destroy a land owners right to use water for beneficial use, and destroy their livelihoods. Lemhi tributaries don't have a big enough flows to support spawning, which flood irrigation does not affect.

The goal has been to alter tributary water to a consistent flow state by diverting the streams into one, such as what Mr. Beyeler did on his land for fish habitat and [spawning](#). The BOR [studied](#) the Big Timber Creek 2006 to identify stream flow needs for steelhead, salmon, and bull trout, blaming irrigation "dewatering" for problems. What is so crazy about this is that the Bull Trout is a predatory fish towards others, and have a recovery [plan](#) of their own, in which the Upper Snake [area](#) is included. Spawning times are typically during July-August, well after the high spring runoff. By combining tributary streams into a one flow stream, perhaps the plan is to reintroduce fish with this newly created fish habitat. "[Observations](#)" of large bull trout in Big Timber Creek have been reported even though the life histories are unclear. How scientific is that?

Idaho Statute [42-1503](#) states any change on minimum stream flow "will not interfere with any vested water right, permit, or water right application with priority of right date", and "is *necessary* for the preservation of fish and wildlife habitat". If IDWR chooses to divert tributary streams into one for a minimum stream flow for fish habitat it would interfere with vested water rights.

Idaho Statute [42-1501](#) also states that Idaho streams "be *protected against loss of water supply* to preserve the minimum stream flows required for the protection of fish and wildlife habitat". Does this mean water supply cannot be used for purposes other than for fish habitat protection?

In our form of government, a Republic, a court decision is not law. Laws can only be created through the legislature. There is no law for this IDWR proposal. IDWR admitted in committee that they often use policies instead of rules or laws. In response, Governor Little signed Executive Order [2020-02](#) which requires Idaho agencies to limit and consolidate "agency guidance", including a statement indicating that it is not law. IDWR created this proposal, presented it to those with water rights, ignored their objections, and have made a decision to move forward with it as if it were the law.

Idaho Administrative [Rule](#) 025-01 states "Applications to appropriate unappropriated water...will be evaluated using the criteria of Section 42-203A, Idaho Code, which requires an **assessment to be made of the impact of the proposed use on water availability for existing water rights**...and the effect of the proposed use on the local public interest". The impact of taking unappropriated high flow water will destroy ranchers in the Lemhi area.

It is clear that there is a nefarious agenda to use certain species of fish, their habitat or lack thereof, and interfere with water rights which are a real property to those Idahoans who hold those rights. Millions of dollars, most of which are your tax dollars, are being spent to acquire land, change the landscape into something it isn't, and create habitats which never existed. If a [Beaver](#) understands that a spot in the water isn't suitable for a dam, why do humans think they can do better? To those who are involved, quit messing with Mother Nature, follow the law, and quit violating property rights.