

427 KAF RETROSPECTIVE

GOVERNOR'S SALMON WORKGROUP MEETING
OCTOBER 29, 2019
TWIN FALLS, IDAHO

MICHAEL BOGERT
GENERAL COUNSEL
MIDAS GOLD IDAHO, INC.

I. INTRODUCTION

“[L]et me reaffirm today our efforts to protect Idaho water from being controlled by the federal government.

...

Today, we put the federal government on notice that Idaho will not relinquish its sovereignty over its water resources.”

I. INTRODUCTION (CONT.)

“In our vigilance to protect Idaho's water, I will recommend that the Legislature not act on the federal government's request to extend authority to contract for 427,000 acre feet of Idaho water.”

Dirk Kempthorne, Governor of Idaho,
State of the State Address (Jan. 11,
1999)

➤ "Knowledge is Good" -
Emil Faber



I. INTRODUCTION (CONT.)



■ Settle or Die?

II. DISCUSSION

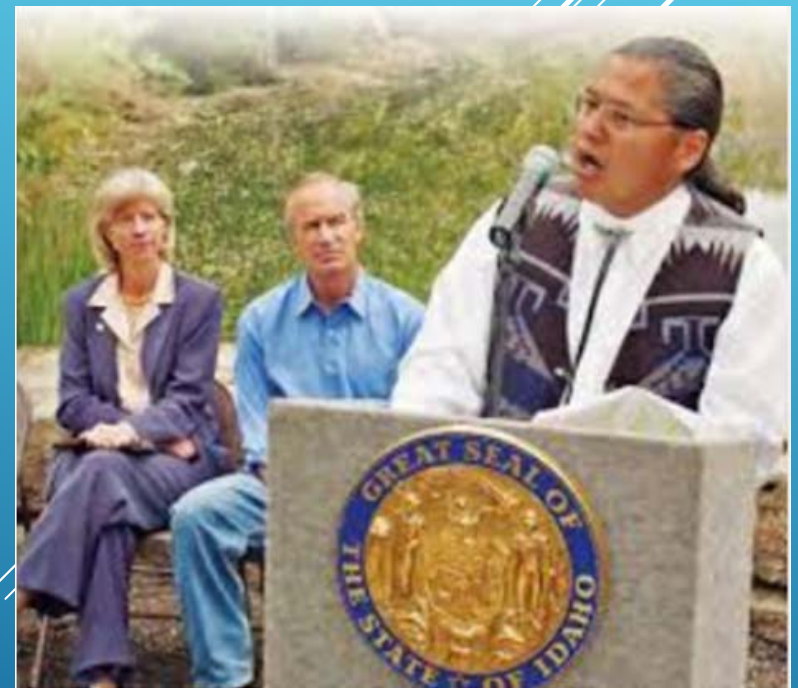
Why are these deals different?

- Life blood of irrigated agriculture (yes, really).
- Economic future for Tribes.
- State sovereignty maintained through McCarran Act proceedings and the ability to get United States interests aligned through the lens of state law.

II. DISCUSSION (CONT.)

Relationships, relationships, relationships:

- With water negotiations, the relationships forged now will continue into the future.
- Often tricky relationship between Tribes and the United States.



II. DISCUSSION (CONT.)

Snake River Water Rights Act of 2004 (Title X of Division J in the Consolidated Appropriations Act of 2005, H.R. 4818, 108th Cong. (2004) (enacted))

➤ **Three elements:**

1. **State-based instream flow program;**
2. **Forest Practices Program; and**
3. **Habitat restoration program.**

II. DISCUSSION (CONT.)

Flow Augmentation Pieces:

- 30-year ESA Biological Opinions issued by NOAA Fisheries and the U.S. Fish and Wildlife Service under the Endangered Species Act;

2. The flow augmentation program above the Hells Canyon Complex is designed to assist fish survival downstream of Hells Canyon Dam. The parties understand that the flow augmentation program provides maximum amounts of flow augmentation delivered from the upper Snake and that no guarantee can be provided, beyond the terms of this agreement, that any particular amount of water will be provided in any particular water year.

II. DISCUSSION (CONT.)

4. **Idaho Code § 42-1763B will be reenacted to authorize the rental of up to 427,000 acre-feet (AF) of water annually for flow augmentation for the term of the agreement. Reauthorization shall also provide for the rental of water from storage or natural flow sources from the Snake River and its tributaries at or above Lewiston.**

II. DISCUSSION (CONT.)

Federal Interests

- **Unique opportunity of McCarran Amendment proceedings, 43 U.S.C. § 666 (1952):**
 - **Waives US sovereign immunity in cases concerning ownership or management of water rights;**
 - **Rare occasion non-Federal parties can grab US and sovereign Tribal governments by the lapels and have direct relationships.**

II. DISCUSSION (CONT.)

Non-Federal Interests:

- Again, through McCarran Amendment proceedings, ability to develop relationships not otherwise attainable.
- Q: What is the analog to the SRBA in the time left for the Snake River Act BiOps?

II. DISCUSSION (CONT.)

Non-Federal Interests (cont.)

➤ Snake River Act lesson:

Negotiations may provide be some opportunity for creativity or the tools to develop a new analog for problem solving (ESA Section 6 agreement in Snake River Act).

II. CONCLUDING THOUGHTS

Litigate or Negotiate?

- Litigate when there is no down side;
- Litigate to win, or die on a particular Hill;
and
- Litigate when the risk is minimal and costs of loss can be absorbed.

II. CONCLUDING THOUGHTS

Litigate or Negotiate?

- Negotiate when there is not everything to lose, something can be given up, and risk can be reasonably managed.
- Negotiate when there is a chance that enough risk can be spread across the spectrum of the deal among the participants (the only way a deal will hold).

II. CONCLUDING THOUGHTS

Litigate or Negotiate?

- Simply being at the table may be useful to hear the conversations, **HOWEVER**
- If a party is unwilling to reexamine its fundamental value system and perhaps test its outer boundaries and margins, don't waste everyone's time, and worse, obstruct the progress to a potential successful conclusion.