



Van Ness Feldman is home to the premier hydropower law practice in the United States and to one of the largest and most experienced teams of hydropower attorneys available.

Our current and recent matters involve over 50 percent of all installed hydroelectric capacity in the country.

Additionally, the firm advises developers of new hydropower projects, including conventional large and small hydro, pumped storage, and emerging technologies using wave and tidal energy.

Upcoming Speaking Engagements

- [Sharon White](#), Environmental Law Institute and American Bar Association Seminar, "ESA and CITES: Two Statutes, Both Alike in Dignity," Washington, DC, November 1, 2018.
- [Mike Swiger](#), NHA California Regional Meeting, "Regulatory and Legal Developments," Los Angeles, CA, December 4, 2018.

Hydro Newsletter

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FERC Issues Jurisdictional Determination on Hydro Generation Related to Water Supply Project

On September 20, 2018, the Federal Energy Regulatory Commission (FERC) issued an [order](#) denying a petition filed by the Utah Board of Water Resources and Washington County Water Conservancy District (together, UBWR) for a declaratory order holding that FERC's licensing jurisdiction extends both to the electric generating equipment at in-line generating facilities within a major water supply pipeline and to those portions of the pipeline that supply the head for the in-line generation facilities.

The 140-mile Lake Powell Pipeline Project (LPPP) will go uphill for approximately 50 miles from its intake at Lake Powell in Arizona to a high point in Utah from which it will slope downhill for the remaining 89 miles before discharging into the Sand Hollow Reservoir in southwest Utah. Four hydroelectric turbines will be located within the pipeline and take their head from the downhill slope, as will a generating facility at the project discharge into the reservoir. UBWR's petition contended that those portions of the pipeline which provide the head for the in-line turbines and turbine at the point of discharge are part of a complete unit of hydroelectric development including conduits necessary or appropriate to operate and maintain the unit. The petition identified many instances in which FERC has found water supply conduits associated with hydroelectric generators to be included in the jurisdictional unit of development.

FERC acknowledged its prior orders, but found that its views regarding the scope of its jurisdiction in connection with water supply projects have evolved and that the facts of those orders are distinguishable from the facts presented by the petition. Although it declined to explicitly adopt a "primary purpose" test to distinguish non-jurisdictional water supply pipelines from jurisdictional penstocks, FERC found that the power supply purpose of the turbines and the water supply purpose of the pipeline in this instance were incidental to one another. FERC also suggested that the length of the water supply pipeline plays a role in its jurisdictional determination but established no clear standard in that regard.

FERC Declines to Designate Pumped Storage Plant as Transmission Facility for Purposes of Cost Recovery

On September 20, 2018, FERC issued an [order](#) dismissing as premature Nevada Hydro Company's (Nevada Hydro) petition for declaratory order which sought approval to operate the Lake Elsinore Advanced Pumped Storage (LEAPS) facility as a transmission facility for purposes of cost recovery. The proposed \$2 billion LEAPS project, to be located in Riverside, California, would consist of a 500 MW

pumped storage project and a 30-mile transmission line. Nevada Hydro argued that the project satisfies FERC's criteria for storage to operate as a transmission facility, which would make it eligible for transmission rate incentives. The California Independent System Operator Corporation (CAISO) opposed the petition, arguing that Nevada Hydro cannot "short-circuit" CAISO's transmission planning process by asking FERC to presume, based on Nevada Hydro's own analysis, that LEAPS is the more efficient or cost-effective solution to transmission constraints.

FERC dismissed the petition as premature, finding that CAISO's regional transmission planning process is the proper forum to determine whether LEAPS is a transmission facility and is needed to address a transmission constraint in the area. That process, as described in CAISO's tariff, is an open and transparent process to identify transmission constraints that may be resolved through specific proposals and to analyze potential solutions. FERC concluded that it cannot determine that the LEAPS project is a transmission facility eligible to recover its costs through transmission rates without a specific transmission planning process that has analyzed transmission needs in the area and how the project would meet those particular transmission needs. It determined that CAISO must first identify the LEAPS project as a more efficient or cost-effective solution to identified transmission needs before it can seek cost recovery. FERC noted that the CAISO has committed to studying LEAPS as a transmission proposal and that it expects CAISO to adhere to that commitment.

Legislative Update

On September 13, 2018, the U.S. House of Representatives passed [S. 3021](#), the America's Water Infrastructure Act of 2018 (AWIA), a comprehensive water resources bill that includes, among other things, provisions specifically targeted to promote new hydropower development. The AWIA includes a package of hydropower bills that were previously approved by the U.S. House or Senate but were never enacted into law. First, the bill directs FERC to convene an interagency task force to establish an expedited licensing process for certain projects at existing, non-powered dams and closed-loop pumped storage projects. The bill envisions that FERC would issue a licensing decision within two years of receipt of a completed license application. Second, the bill directs FERC, when determining the term of a new license, to give equal consideration to project-related investments by the licensee under the new license and over the term of the existing license, including rehabilitation or replacement of major equipment. This is a modification to FERC's license term policy issued in 2017, which exempts all "maintenance measures" from consideration toward a new license term. The bill allows a licensee to seek a determination from FERC, within 60 days, on whether any planned, ongoing, or completed investment will meet the criteria to be considered by FERC in determining a new license term. Third, the bill amends the Federal Power Act to authorize FERC to issue preliminary permits for up to four years, instead of the current three-year limit. The bill also authorizes FERC to extend a preliminary permit once for no more than four years and would allow FERC to issue a new permit after the end of an extension in extraordinary circumstances. It also authorizes FERC to extend the time a licensee has to commence construction under a license for up to eight years. Under current law, FERC may extend the license once for no more than two years. Lastly, the bill amends FERC's qualifying conduit process by reducing the time by which a facility is deemed a qualifying conduit facility from 45 to 30 days after filing a notice of intent to construct such a facility, and expands the maximum capacity of such facilities from 5 to 40 MWs. The bill must pass the Senate before it is ready for the President's signature.

Van Ness Feldman Enhances Litigation and Environmental Capability with Five Lateral Partners, Adds California Office

In August 2018, [Van Ness Feldman LLP](#) announced the addition of five lateral partners, expanding the firm's environmental litigation and transactional practices and adding new capabilities in the insurance recovery area. The five partners joining the firm are Michael Goodstein, Anne Lynch, Andrew Cooper, Brian Zagon, and Allison McAdam, all formerly with Hunsucker Goodstein PC. Mr. Goodstein, Ms. Lynch, and Mr. Cooper will be based in Van Ness Feldman's Washington, DC office, with Mr. Zagon and Ms. McAdam leading the firm's new San Francisco Bay Area office (located in Lafayette,

California). Other Hunsucker Goodstein personnel joining the firm include attorneys Dana Stotsky, Kathryn (Kaki) Schmidt, and Justin Panitchpakdi.

The group brings a notable record of success in resolving matters through effective litigation and alternative dispute resolution. They have considerable trial experience related to environmental statutes and common law, insurance coverage, property damage, cost recovery, and contract disputes. Van Ness Feldman's capabilities in the areas of regulatory counseling, compliance assurance, and claims on matters involving groundwater, surface water, contaminated soil and air have expanded considerably with the new team, as well as expertise handling the environmental aspects of transactions.

[John Clements](#), [Sharon White](#), and [Robert Conrad](#) contributed to this issue.

For more information

The professionals at Van Ness Feldman possess decades of experience covering every aspect of hydroelectric development, ranging from licensing, environmental permitting, regulatory compliance, litigation, transmission and rates, public policy, transactions and land use planning. If you would like additional information on the issues touched upon in this newsletter, please contact any member of the firm's [hydroelectric](#) practice.

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