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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 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

- John Clements, Midwest Hydro Users Group Fall Meeting, October 28, 2015, Wausau, WI.

Hydro Newsletter

VOLUME 2, ISSUE 10: OCTOBER 2015

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http://www.vnf.com/KnowledgeCenter.aspx?SignUp=True

Legislative Update

On September 30, 2015, the House Energy & Commerce Committee reported out its comprehensive energy bill entitled the North American Energy Security and Infrastructure Act of 2015 on a bipartisan vote of 32 to 20. Key provisions of the bill focus on modernizing and protecting energy infrastructure, developing the energy and manufacturing workforce, improving energy security and diplomacy, and enhancing energy efficiency and accountability.

Like the Senate's energy bill reported out of the Energy and Natural Resources Committee on July 30, 2015, the House bill contains a number of provisions designed to improve federal licensing of non-federal hydropower. Among them are provisions designating the Federal Energy Regulatory Commission (FERC) as lead agency for coordinating federal authorizations from all agencies needed to develop a project, and directing agencies and tribes to comply with FERC's schedule for such authorizations. The House bill also contains provisions to promote new hydropower development at existing infrastructure, including: expedited licensing of new closed-loop pumped storage projects; exemptions from licensing for new hydropower projects at existing non-powered dams that meet certain criteria designed to minimize impacts, including no changes to dam operations; and streamlined approval of generation, environmental and recreation upgrades with minimal or positive environmental effects at existing projects. The bill establishes a voluntary pilot program in which FERC and resource agencies would conduct basin-wide studies to inform future relicensing of projects in the basin, and includes provisions to protect private property interests at hydropower projects.

Like the Senate bill, the House bill also proposes to extend the eligibility window for the hydropower production incentives under the Energy Policy Act of 2005. Under this program, the Department of Energy is authorized to make incentive payments to owners or operators of qualified hydroelectric facilities based on the number of kilowatt hours of hydroelectric energy generated by the facility during the incentive period. Currently, the incentives only apply to projects that added a turbine or other generating device at an existing dam or conduit between 2005 and 2015. The House bill proposes to extend the eligibility window to projects that add a turbine or other generating device between 2016 and 2025.

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Spotlight on Jordan Smith

Jordan has been a member of the firm's public policy practice since 2000. He offers advocacy, strategic planning, and political communication expertise on issues related to the ESA, land and water resource matters, healthcare policy, and the federal budget and appropriations process.

Where did you grow up?

Oceanside, Long Island, New York

Did you have a favorite subject in high school?

I took a U.S. History and Government class in high school that piqued my interest in domestic politics. It was all downhill from there.

Did you always aspire to work in public policy? How long have you been in practice?

From that early high school experience, I knew that there was a role for me in government policy. I moved to Washington for college where I studied Political Communication, and subsequently landed here at Van Ness Feldman. My fifteen year anniversary with the firm was this past May.

What drew you to hydropower?

I have always prided myself on being a problem solver, and challenges in this unique policy area are multifaceted and complicated. Identifying and implementing creative solutions allows me to think outside of the box and to work with incredibly intelligent and thoughtful experts in the field.

Confederated Salish and Kootenai Tribes Become First Native Indian Tribe to Own and Operate a Hydroelectric Project

On September 5, 2015, the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT or Tribes) located in Polson, Montana, became the first Native Indian Tribe to own and operate a hydroelectric project in the Nation – a milestone that has been more than 80 years in the making. The Salish and Kootenai Dam, formerly known as the Kerr Dam, was constructed on the Tribes' reservation in the 1930's. Now, the Tribes have realized the vision they created in 1985 when FERC relicensed the project to the Montana Power Company and the CSKT.

As part of the relicensing proceeding, the Tribes were given the option to become the sole licensee 30 years from the relicensing date, upon the payment of a "conveyance price." In early 2013 the "conveyance price" was set by an arbitration panel at $18.3 million. In early 2015, CSKT filed notice with FERC that they would assume ownership of the project. And so on September 5, 2015, the Tribes held a community-wide event to celebrate the historic and culture significance of assuming ownership of the approximately 200 megawatt hydroelectric project. FERC's Chairman Norman Bay attended and spoke at the event, where he applauded the Tribes' perseverance and visioning. The dam is currently being operated by the Tribes' wholly-owned energy corporation, Energy Keepers, Inc. Van Ness Feldman assisted CSKT in the arbitration and conveyance proceedings.

FWS Finds Greater Sage-Grouse ESA Listing Not-Warranted

On September 22, 2015, the U.S. Fish and Wildlife Service (FWS) announced that the greater sage-grouse does not warrant listing under the Endangered Species Act (ESA), a significant decision that affects species habitat and lands in 11 states across the West. According to Department of the Interior Secretary Sally Jewell, the decision results from progress made from unprecedented, landscape-scale conservation efforts that have significantly reduced threats to the greater sage-grouse across 90 percent of the species' breeding habitat.

The listing decision was motivated by a 2011 settlement agreement that required FWS to review and make a determination on the status of the greater sage-grouse by September 30, 2015. Since the settlement, numerous federal agencies, affected states, and public and private partners worked to proactively protect, restore and enhance important sage-grouse habitat to preclude the need for listing.

In part, the decision not to list the sage-grouse relies upon Bureau of Land Management and U.S. Forest Service land use plans that will help conserve greater sage-grouse habitat by minimizing new or additional surface disturbances, improve habitat conditions, and reduce the threat of rangeland fire. Notably, the plans curtail oil and gas development, transmission lines, wind farms, mining and other uses on portions of public lands in 10 states across the West. However, the plans will honor all valid, existing rights, such as those for energy development, rights-of-way, and other permitted projects.

While these conservations measures provide the basis for FWS's determination not to list the greater sage-grouse species under the ESA, some stakeholders have expressed concern that they are too burdensome and economically restrictive. If litigation or legislative measures overturn the conservation measures, FWS may be required to revisit its listing decision.

FWS Releases Strategic Plan for Fish and Aquatic Conservation Program

On September 15, 2015, the FWS announced a new strategic plan for its Fish and Aquatic Conservation (FAC) Program. The FAC Program operates, in part, to recover and restore imperiled species, fulfill tribal trust and mitigation responsibilities, conserve fish and aquatic resources, and restore habitat. The plan identifies the following seven interdependent goals that are critical to accomplishing the mission of the FAC Program:

- Conserve aquatic species;
- Conserve, restore, and enhance aquatic habitats;

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Spotlight Continued

What aspect of your job do you find most challenging?

Developing and advancing solutions for clients through the legislative process is a long road. A successful outcome is rewarding, but requires patience in an era of divided - and divisive - government.

What would you be doing if you weren't a policy professional?

I likely would be working in the public relations field. I have always been intrigued by "crisis communications" and the idea of developing strategies for protecting an individual, company, or organization facing a public challenge to its reputation.

What is your favorite snack?

Swedish fish…but only the red ones!

- Manage aquatic invasive species;
- Fulfill tribal trust and subsistence responsibilities;
- Enhance recreational fishing and other public uses of aquatic resources;
- Increase staffing levels, technical capabilities, and natural and physical assets to fully meet FWS's mission; and
- Educate and engage the public and partners to advance FWS's conservation mission.

Notably, the plan expresses concern about the increasing degradation and fragmentation of aquatic habitat from human activities such as agricultural, urban, and transportation development; discharge of pollutants; construction of dams; and the diversion of water resources. The purpose of the plan is to provide a strategic vision that is intended to serve as the foundation for the development and implementation of annual operating plans for fiscal years 2016-2020, and to inform the development of annual and out-year budget initiatives and other proposals.

Oral Argument Date Set for Water Transfers Rule Challenge

The United States Court of Appeals for the Second Circuit has set an oral argument date of December 1, 2015 in the appeal of a district court order striking down the Environmental Protection Agency's (EPA) Water Transfers Rule. The Water Transfers Rule, adopted in 2008, codified EPA's longstanding policy that water transfers between waters of the United States that do not subject the water to an intervening industrial, municipal, or commercial use do not constitute "addition of pollutants" to navigable waters and are not subject to National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the Clean Water Act (CWA). The United States District Court for the Southern District of New York's March 2014 ruling, which EPA appealed, found that EPA used a "flawed methodology" in interpreting the CWA under the rule and did not reasonably explain its determination to exclude water transfers from the NPDES program. As reported in the March 2014 Hydro Newsletter, the district court vacated the Water Transfers Rule and remanded it to EPA for additional explanation and justification.

Under long-standing judicial precedent, hydropower dams generally are not subject to the NPDES program, unless they physically "add" pollutants from the outside world, such as the discharge of grease or oil from a pipe. The Second Circuit's decision on appeal could have a significant impact on hydroelectric and water supply projects that involve cross-basin transfers, if the court ultimately decides that water transfers are subject to NPDES requirements.

DOE Releases 2015 Quadrennial Technology Review

The U.S. Department of Energy released its 2015 Quadrennial Technology Review (QTR) on September 10, 2015. The 2015 QTR is the second QTR—the first was released in 2011—and examines the current status of clean energy technologies and identifies clean energy research opportunities that could support the effort to modernize the power sector. The 2015 QTR finds that emerging advanced energy technologies provide a rich set of options to address the nation's economic, security, and environmental challenges, but continued improvements in cost and performance are crucial to the large-scale deployment of these technologies.

Among other things, the 2015 QTR highlights the major challenges and opportunities for hydropower and marine and hydrokinetic (MHK) development. With respect to conventional hydropower, the 2015 QTR recognizes a number of market and technology challenges, including environmental mitigation issues and the potential for small-scale hydropower developments. The report also emphasizes opportunities to assist conventional hydropower generation by enhancing materials and turbine designs and by supporting research needed in hydrologic, ecological, environmental, hydrodynamic, hydro-mechanical, operations, and power system data collection, monitoring, modeling, and analysis.

The 2015 QTR also recognizes the major challenges to domestic MHK development, to date. The report emphasizes that capital cost reduction and performance improvements are challenges for MHK to be

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competitive on a regional basis. The report notes that high initial costs of current prototypes hamper competitiveness of MHK devices and MHK devices will have to double the amount of energy for the same device size in order to be cost competitive. In addition, it further reports that the lack of available testing facilities hampers development, while the dearth of scientific information (*e.g.*, baseline environmental data) and high monitoring costs can drive environmental and regulatory expenses to 30%–50% of total early-stage MHK project cost. While there is currently no commercial-scale MHK technologies deployed in the U.S., the 2015 QTR reports that as of the end of 2014, four companies held pilot licenses from FERC for MHK projects, with eleven other projects either holding a preliminary permit or in pre-filing license consultation. The report finds that MHK research, development, demonstration, and deployment opportunities exist including: (1) technology advancement and demonstration projects; (2) testing infrastructure and instrumentation (providing access to testing facilities); (3) resource characterization (classifying the U.S. MHK resource base); and (4) market acceleration and deployment assistance (supporting baseline environmental research on the impacts of MHK deployment).

Tyson Kade, Jordan Smith, Michael Pincus, Sharon White, and Erin Bartlett contributed to this issue.

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