



Van Ness Feldman is home to one of the premier hydropower law practices in the United States. 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.

Hydro Newsletter

VOLUME 8, ISSUE 3: MARCH 2021

To receive the Hydropower Newsletter on a regular basis, follow this link:

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

- *Idaho Congressman Releases Energy and Salmon Concept*
- *President Biden Issues a Memorandum on Tribal Consultation*
- *Chairman Glick Announces a Plan to Create a Senior FERC Role for Environmental Justice*
- *FERC Issues Notice of Workshop Regarding the Office of Public Participation*
- *Former Chair of the FirstLight Power Board Joins the Biden Administration*
- *American Rivers Picks a New President*
- *FERC Issues Trio of Preliminary Permit Decisions*
- *FERC Approves the Transfer of the Chili Bar License*
- *FERC Issued a Rulemaking Removing Profile Drawing Requirement for Qualifying Conduit Facilities*
- *Final Rule Codifying Exemption of Incidental Take Under the Migratory Bird Treaty Act Faces Substantial Hurdles*

Idaho Congressman Releases Energy and Salmon Concept

Republican U.S. Rep. Mike Simpson of Idaho released a \$33.5 billion [proposal](#) to save Idaho salmon from extinction on the lower Snake River. The plan calls for breaching four dams managed by the Department of Energy's ("DOE") Bonneville Power Administration in Washington State by 2031: the 802-MW Lower Granite dam, the 675-MW Little Goose dam, the 752-MW Lower Monumental dam, and the 447-MW Ice Harbor dam. Rep. Simpson's plan proposes to invest \$10 billion to replace the power produced by the dams. While acknowledging the many benefits of the lower Snake River dams, Rep. Simpson's proposal attempts to break the litigation cycle involving the dams and salmon in the Pacific Northwest. The proposal stands in stark contrast to the [U.S. Army Corps of Engineers' analysis](#), which concluded that the dams should not be breached or removed, and that taking the dams offline would increase the risk of blackouts.

President Biden Issues a Memorandum on Tribal Consultation

On January 26, 2021, President Biden [issued](#) a Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, signaling this Administration's intent to prioritize federal Indian policy and its commitment to engaging in regular and robust consultation with Tribal governments. The memorandum affirms Executive Order 13175 of November 6, 2000, which requires federal agencies to seek and ensure "meaningful and timely input by tribal officials" prior to the implementation of any federal policies with Tribal implications, including regulations and legislation. According to the memorandum, the head of each agency must submit to the Office of Management and Budget within 90 days how the agency is implementing and complying with Executive Order 13175. Within 270 days and annually thereafter, agencies will be required to submit progress reports on their proposed actions.

Chairman Glick Announces a Plan to Create a Senior FERC Role for Environmental Justice

Federal Energy Regulatory Commission (“FERC” or “Commission”) Chairman Richard Glick announced plans to create a new senior position at the Commission to incorporate environmental justice and equity concerns into FERC’s decision-making process. Among other mandates, FERC regulates and approves energy infrastructure projects, and studies show that low income and communities of color are disproportionately impacted by the pollution and associated adverse health effects caused from these projects. According to FERC’s [press release](#) on the matter, Chairman Glick stated that FERC “should more aggressively fulfill its responsibilities to ensure our decisions don’t unfairly impact historically marginalized communities,” and that he intends “to empower this new position to ensure that environmental justice and equity concerns finally get the attention they deserve.” While full details of the position are not yet available, the role will cut across all FERC program offices to integrate environment justice and equity matters into Commission decisions. This announcement is consistent with President Biden’s efforts to bring environmental justice to the forefront of his Administration. For more information about the Biden Administration’s environmental justice policy measures, please see our alert [here](#).

FERC Issues Notice of Workshop Regarding the Office of Public Participation

On February 22, 2021, FERC issued a [notice](#) of a workshop regarding the Office of Public Participation (“Office”), whose purpose is to facilitate public engagement with the Commission. During the workshop, FERC will hear input on topics that include: the Office’s function and scope; the Office’s organizational structure and approach; participation by Tribes, environmental justice communities, and other affected individuals and communities, including those who have not historically participated before the Commission; and intervenor compensation.

Additionally, the Commission is seeking nominations for stakeholder panelists by March 10, 2021. Nominations should be submitted to FERC at OPPWorkshopNominations@ferc.gov. The workshop will be held via webcast on April 16, 2021.

Former Chair of the FirstLight Power Board Joins the Biden Administration

Phil Giudice, former Chair of FirstLight Power’s (“FirstLight”) Board of Directors has joined the Biden-Harris Administration as Special Assistant to the President for Climate Policy. FirstLight is a major owner of hydroelectric assets, including pumped storage hydro, in Massachusetts and Connecticut. Mr. Giudice has 40 years of experience in the energy sector, starting as an energy geologist and expanding to energy consulting and entrepreneurship. Mr. Giudice has experience at the government level as well, having served as Massachusetts Undersecretary of Energy and Commissioner of Energy Resources, and was a member of DOE’s State Energy Advisory Board, Energy Efficiency and Renewables Advisory Committee, and the Environmental Protection Agency/DOE’s State Energy Efficiency Action Network. Mr. Giudice was also a founding Board Member, Treasurer, and Vice Chair for the Regional Greenhouse Gas Initiative. His experience in the climate and clean energy sectors will complement the Biden Administration’s goals for those sectors.

Stephan Rupert has been elected FirstLight’s new Board Chair. Mr. Rupert, who has over 20 years of experience in international mergers and acquisitions and asset management, first joined FirstLight’s Board in 2016.

American Rivers Picks a New President

On February 22, 2021, Tom Kiernan will begin his new role as president and CEO of American Rivers. American Rivers is a nonprofit which represents over 300,000 members calling for dam removal to increase free-flowing rivers across the U.S. Mr. Kiernan will bring to the position his years of experience as a leader in clean energy and climate issues.

FERC Issues Trio of Preliminary Permit Decisions

At its meeting on February 18, 2021, the Commission issued several orders on contested preliminary permit applications.

In *Pumped Hydro Storage, LLC*, the Commission authorized a preliminary permit to study the feasibility of the proposed San Francisco River Pumped Storage Project, to be located in Greenlee County, Arizona, and Catron County, New Mexico, on land that is part of the Apache-Sitgreaves National Forest in Arizona and the Gila National Forest in New Mexico. The Center for Biological Diversity (“Center”) opposed the permit on a number of grounds, including that the U.S. Forest Service considers the Lower San Francisco River eligible for inclusion in the National Wild and Scenic River System. In rejecting the Center’s arguments, the Commission reaffirmed its policy of issuing permits unless it is clear that the proposed project could not be configured in any way to avoid conflicting with the Wild and Scenic Rivers Act, and that potential for inclusion in the Wild and Scenic River System is not a reason to deny a permit. The Commission also held that proximity to a wilderness study area does not prevent issuance of a permit.

In *Navajo Energy Storage Station LLC*, the Commission granted a preliminary permit for the proposed Energy Storage Station Pumped Storage Project, to be located at the U.S. Bureau of Reclamation’s (“Bureau”) Lake Powell Reservoir on the Colorado River and on Navajo Nation land in San Juan County, Utah. The proposed project would use the Bureau’s Lake Powell Reservoir, created by Glen Canyon Dam, for its lower reservoir, and would include the construction of a new upper reservoir. Over the objections of the Center and other groups, the Commission issued the permit on the basis that the permit is only a study permit and concerns regarding the impacts of construction and operation are premature at the permit stage. The Commission pointed out that its jurisdiction would be limited because hydropower at Lake Powell has been reserved for federal development. Thus, the Bureau would have jurisdiction over the part of the project within the federal footprint, and the Commission would retain jurisdiction over the non-federal facilities located outside of Lake Powell, including the new upper reservoir, the new access tunnels, the new powerhouses, and the transmission line. Because of the concurrent jurisdiction, the developer would have to obtain a lease of power privilege from the Bureau as well as a license from FERC.

Finally, in *ECOsponsible, LLC*, perhaps reflecting heightened concern with the ability of some licensees to implement the requirements of their licenses, the Commission upheld FERC staff’s denial of an application for a preliminary permit for the proposed Springville Dam Hydro Project in Erie County, New York, finding that the applicant had not demonstrated compliance with dam safety and environmental requirements of its existing license for another project, and owed back annual charges. Under these circumstances, the Commission agreed with its staff that granting the license a permit to study yet another project would be inappropriate.

FERC Approves the Transfer of the Chili Bar License

On February 17, 2021, FERC approved the latest transfer from Pacific Gas and Electric Company (“PG&E”) of a small project license, this time to the Sacramento Municipal Utility District (“SMUD”) for PG&E’s Chili Bar Project. SMUD is the licensee of the 637 MW Upper American River Project (“UARP”) which is located immediately upstream of the 7 MW Chili Bar Project. The Chili Bar Project stores releases from the UARP on a daily basis, and FERC cited coordinated operations as a factor weighing in favor of the transfer. Consistent with long-standing precedent defining the scope of a license transfer proceeding, FERC rejected the request of whitewater boating organizations to use the transfer proceeding to resolve issues pending in the UARP docket regarding whitewater boater access, reiterating that “imposing new environmental conditions in a transfer proceeding is inappropriate.” The transfer order also reflected a relatively recent trend of increasing times to approve license transfers, taking almost 11 months after PG&E and SMUD filed their application. Van Ness Feldman advised SMUD in the transfer proceeding.

FERC Issued a Rulemaking Removing Profile Drawing Requirement for Qualifying Conduit Facilities

FERC has issued a [Notice of Proposed Rulemaking](#) (“NOPR”) to streamline its requirements for certain small hydroelectric projects based on the Hydropower Regulatory Efficiency Act of 2013 (“HREA”). First, the February 18, 2021 NOPR would revise FERC’s regulations to remove the requirement that a notice of intent to construct a qualifying conduit hydroelectric power project exempt from FERC permitting under the HREA include a profile drawing showing the source of the hydroelectric potential in instances where a dam would be constructed in association with the facility. FERC explains this change by noting that the Commission in its 2015 *Soldier Canyon Filter Plant* decision held that a proposed conduit facility will not be disqualified under the HREA even if some proportion of the head for generating electric power can be attributed to an upstream dam; thus, the profile drawings are no longer relevant. Second the NOPR would extend the reduced requirements for filing a license application that currently apply to major projects up to 5 MW to major projects up to 10 MW, consistent with the amended definition of a small hydroelectric power project in the HREA. This will reduce the time and cost of preparing a license application for all power projects under 10 MW commensurately.

Final Rule Codifying Exemption of Incidental Take Under the Migratory Bird Treaty Act Faces Substantial Hurdles

On January 7, 2021, the U.S. Fish and Wildlife Service (“FWS”) issued a final rule codifying the Trump Administration’s interpretation that the prohibitions of the Migratory Bird Treaty Act (“MBTA”) only apply to actions “directed at” migratory birds, their nests, or their eggs (“Final Rule”). Consistent with the proposed rule, FWS adopted the interpretation “that the scope of the MBTA does not include incidental take.” The Final Rule is currently scheduled to become effective on February 8, 2021. However, implementation of this Final Rule faces significant hurdles—it may be struck down in federal court, disapproved pursuant to the Congressional Review Act, or withdrawn by the Biden Administration.

An overview and review of potential challenges to the rule can be found in our latest [alert here](#).

[Ani Esenyan](#), [Rachael Lipinski](#), [Mike Swiger](#), and [Mealear Tauch](#) 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.

Practice Group Leader:

Mike Swiger 202.298.1891 mas@vnf.com

Other Group Members:

Ani Esenyan 202.298.1939 aesenyan@vnf.com

Shelley Fidler 202.298.1905 snf@vnf.com

Rachael Lipinski 202.802.3843 rlipinski@vnf.com

Jenna Mandell-Rice 206.829.1817 jrm@vnf.com

Michel Pincus 202.298.1833 mrp@vnf.com

Mealear Tauch 202.298.1946 mzt@vnf.com