

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

FINAVERA RENEWABLES
OCEAN ENERGY, LTD

Project No. 12751-000

**REQUEST FOR REHEARING OF
STATE OF WASHINGTON
DEPARTMENT OF NATURAL RESOURCES**

I. INTRODUCTION

This request for Rehearing is made by the Washington State Department of Natural Resources (DNR). As fully set forth below, DNR requests that the Federal Energy Regulatory Commission (Commission) clarify the December 21, 2007, *Order Issuing Conditioned Original License* (Order) to provide that, with the exception of the tidelands owned by the Makah Tribe, all the submerged lands to be occupied under the license issued by the Order are owned by the State of Washington and managed by DNR. DNR also requests that the Commission reconsider its finding that the Sanctuary is a federal reservation for purposes of Section 4(e) of the Federal Power Act (FPA), 16 U.S.C. § 797(e).

This Request for Rehearing is filed pursuant to Section 312(a) of the FPA, 16 USC § 8251(a), and FERC's Rule of Practice 713, 18 C.F.R. § 385.713.

Alleged Error. Although the Order issues a license for a project that will occupy state submerged lands within the Washington State boundary as established by the Washington State Constitution and the federal Submerged Lands Act, the

Order fails to identify the lands as state-owned and to recognize DNR's management authority over the lands. Because the designation of the Olympic Coast National Marine Sanctuary (Sanctuary) did not affect the State's title to the lands to be occupied by the project or displace its land-management authority over the project area, the Commission should clarify the Order to indicate the lands are owned by the State of Washington and managed by DNR, and that Finavera must obtain the right to use the land prior to beginning construction of the project. Additionally, the Commission's determination in the Order that the project will be located within a federal "reservation" for purposes of 4(e) of the FPA¹ is in error because the United States does not have a proprietary interest in the lands of the Sanctuary on which the project will be located.

II. STATEMENT OF ISSUES

A. The Submerged Lands to be Occupied by the Project Within the Sanctuary Are State Owned and Managed by DNR.

1. Background.

On December 21, 2007, the Commission issued a conditioned original license to Finavera to construct, operate, and maintain a 1.0 megawatt project known as the Makah Bay Offshore Wave Pilot Project (Project).² The Project will consist of four 250-Kilowatt wave energy conversion buoys anchored to the seabed approximately 1.9 nautical miles from Waatch Point on Washington's mainland, and a submarine transmission cable crossing the approximately 3.7 statutory miles

¹ *Finavera Renewables Ocean Energy, Ltd.*, 121 FERC ¶ 61,288, at nn.6 & 26 (2007).

² *Finavera*, 121 FERC ¶ 61,288 at p.1.

from the buoys to a shore station located on the Makah Indian Reservation.³ As set forth in the Order, “about 28.3 acres of lands” within the Sanctuary will be occupied, collectively, by the wave energy buoys and transmission line associated with the Project.⁴ Although the Commission notes that there are state-owned aquatic lands administered by DNR within the project area,⁵ the Order fails to specify that the 28.3 acres to be occupied by the Project within the Sanctuary are state owned and managed by DNR. DNR suggests the relevant part of the Order should be rewritten to provide the Project will occupy “about 28.3 acres owned by the State of Washington and managed by the Washington Department of Natural Resources (Washington DNR) within the regulatory jurisdiction of the Olympic Coast National Marine Sanctuary administered by the U.S. Department of Commerce, National Oceanic and Atmospheric Administration (NOAA).”

The Commission’s Order issues Finavera a license to operate the Project provided that Finavera obtains all authorizations needed for construction or operation of the Project within two years.⁶ Given that the Commission has issued the license without all authorizations it deems necessary in place, the Commission should be clear about what authorizations Finavera must obtain before commencing construction. The Commission does not identify the right to use state-owned aquatic lands among the authorizations Finavera must obtain prior to beginning

³ *Id.* at p.4.

⁴ *Id.* at p.2.

⁵ *Id.*

⁶ *Id.* at 24.

construction. The Commission may have intended to require Finavera to obtain the right to use state-owned aquatic lands through Section 204 of the Order, but the section is not clear. Section 204 requires Finavera to obtain “all property rights necessary or appropriate for the construction, maintenance, and operation of the project” within two years of the issuance of the Order. The import of Section 204 with regard to the state-owned lands within the Sanctuary is unknown, however, because the Order fails to indicate what “necessary or appropriate” property rights are. With the exception of the approximately 1 acre of land on the Makah Indian Reservation, the entire Project will occupy state-owned aquatic lands managed by DNR. Accordingly, Finavera’s obligation to obtain the right to use the lands managed by DNR is a significant condition that should be spelled out in the Order.

2. State Ownership.

Because the Project will be only about 1.9 nautical miles from Washington’s mainland, it will occupy submerged lands owned by the State. When it became a state in 1889, Washington claimed title to a swath of the submerged lands of the Pacific Ocean extending from the state’s coast seaward one marine league.⁷ With the passage of the Submerged Lands Act in 1953, Congress re-affirmed the State’s ownership of these submerged lands to three nautical miles from the Washington coast.⁸ The State of Washington claims ownership of its

⁷ Wash. Const. art. XXIV.

⁸ 43 U.S.C. §§ 1311, 1312 (2007).

aquatic lands in fee simple absolute⁹ and has delegated management authority over its state-owned aquatic lands to the Department of Natural Resources.¹⁰ Accordingly, as the Project will be located 1.9 nautical miles from mainland Washington, it will occupy submerged lands owned by the State and managed by DNR.¹¹

3. Effect of the Sanctuary Designation on State Ownership.

Nothing in the National Marine Sanctuaries Act (Act),¹² the Sanctuary rules,¹³ or the management plan¹⁴ for the Sanctuary affect Washington's ownership of the submerged lands along its coast. The Act provides the authority to create marine sanctuaries for the purpose of regulating the use of areas that have special national significance.¹⁵ In the case of the Olympic Coast National Marine Sanctuary (Sanctuary), the sanctuary designation covered both submerged lands owned by the United States on the Outer Continental Shelf and submerged lands owned by the State of Washington.¹⁶ While the Act provides for regulation of the use of resources within a sanctuary, it does not create a proprietary interest in the

⁹ See *Draper Machine Works, Inc. v. Dep't of Natural Resources*, 117 Wn.2d 306, 312, 815 P.2d 770 (1991); see also Wash. Rev. Code 79.105.010.

¹⁰ Wash. Rev. Code 79.105.010.

¹¹ The state boundary in the project area is approximately 5 nautical miles from Washington's mainland because the salient points used to determine Washington's coastal extent include coastal islands.

¹² 16 U.S.C. § 1431 et seq.

¹³ 15 C.F.R. § 922.1-50, 150-54 (2007).

¹⁴ Olympic Coast National Marine Sanctuary, Final Environmental Impact Statement, Part V (November 1993).

¹⁵ 16 U.S.C. § 1431(b)(1).

¹⁶ 15 C.F.R. § 922.150 (2007).

United States to lands within Washington's state boundary.¹⁷ The Act does not convey property; it only provides authority to regulate the use of sanctuary resources.

Just as the Act does not affect state title to its submerged lands, it also does not displace state authority to manage or regulate state-owned lands within the Sanctuary. The Act calls for regulations to be implemented in a way that "complements existing regulatory authorities."¹⁸ The Act provides authority to adopt rules that augment but do not displace state regulation within state jurisdiction in sanctuaries.¹⁹ As such, the Act was intended to preserve state authority to prohibit an activity on state-owned submerged lands under state law even if the federal rules applicable to the sanctuary would permit the use.²⁰

Consistent with the intent of the Act, the rules and management plan governing the Sanctuary limit NOAA's authority to regulate the use of Sanctuary resources to a relatively narrow band of prohibited activities and preserve the State's authority over its submerged lands. The Sanctuary rules govern only those

¹⁷ The United States has released "all right, title, and interest" to the submerged lands within Washington's state boundary except as otherwise provided in 43 U.S.C. §§ 1311-15. The rights relinquished by the United States include the "proprietary rights of ownership" in such submerged lands. 43 U.S.C. § 1314. Accordingly, the power to create National Marine Sanctuaries on state-owned submerged lands comes from Congressional regulatory authority under the Commerce Clause and the Navigational Servitude. See 43 U.S.C. § 1314 (describing authority of United States over state-owned submerged lands).

¹⁸ 16 U.S.C. § 1431(b)(2).

¹⁹ 16 U.S.C. § 1431(b)(6) (the purpose of the Act is, inter alia, "to facilitate to the extent compatible with . . . resource protection, . . . uses of the resources of these marine areas not prohibited pursuant to other authorities . . ."); see also 15 C.F.R. § 922.42 ("All activities . . . may be conducted unless prohibited or otherwise regulated . . . , subject to any emergency regulations . . . , subject to all prohibitions, regulations, restrictions, and conditions validly imposed by any Federal, State, or local authority of competent jurisdiction . . .").

²⁰ *Id.*

uses of Sanctuary resources enumerated in the regulations. If a use of Sanctuary resources is not prohibited by the Sanctuary regulations, the use is permitted but subject to emergency rule-making authority and applicable state laws.²¹ Conversely, if a use of state-owned aquatic lands in the Sanctuary would be prohibited by Sanctuary rules, DNR may, nonetheless, approve an application for such a use, provided that NOAA receives notice of the application and approves it, and the applicant complies with all terms and conditions NOAA deems appropriate for the use.²² Accordingly, the Sanctuary regulations enhance the protection of resources within the state waters of the Sanctuary by supplementing state authority over state-owned lands, not by displacing it. As such, Finavera must obtain the right to use state-owned aquatic lands from the State prior to commencing construction of the project.

Among the documents required for the creation of a national marine sanctuary is a management plan that defines the management responsibilities for the sanctuary and identifies mechanisms to coordinate existing regulatory and management authorities within a sanctuary.²³ Like the Act and the Sanctuary regulations, the Olympic Coast National Marine Sanctuary Management Plan expressly preserves the State's role in managing its submerged lands. The Management Plan for the Sanctuary provides that the State of Washington's role in resource protection is that it "owns and manages aquatic lands, manages living

²¹ 15 C.F.R. § 922.42.

²² 15 C.F.R. § 922.153(g).

²³ 16 U.S.C. § 1434.

resources, and enforces state laws and regulations within state waters of the sanctuary.”²⁴ As plainly stated in the Management Plan, Washington continues to own and manage its submerged lands in the Project area.

Washington’s continuing ownership of its submerged lands within the Sanctuary has been acknowledged by Finavera and the Olympic Coast National Marine Sanctuary²⁵ in this proceeding. In its comments to the preliminary draft environmental assessment for the Project, the Sanctuary noted the PDEA should identify the state water boundary because “portions, if not all, the project are within Washington State waters, the sanctuary, and the Flattery Rocks National Wildlife Refuge” and that the transmission cable portion of the project “would lie on state owned bedlands/seafloor.”²⁶ In accord with the Sanctuary’s comments, Finavera, then AquaEnergy, found the entire Project would be located on state-owned aquatic lands. In its October 2006 Preliminary Draft Environmental Analysis, the company stated, “the entire project . . . will be on state-owned aquatic lands.” As confirmed by the company’s survey map created by a registered surveyor for the Project, “[t]he land portion of the project is owned by the Makah Indian Nation, the seabeds

²⁴ Olympic Coast National Marine Sanctuary, Final Environmental Impact Statement, Part V Sec. V(B)(4) (November 1993).

²⁵ The Olympic Coast National Marine Sanctuary resides within the National Ocean Service, which is a subdivision of NOAA.

²⁶ January 3, 2006, Comments of the Olympic Coast National Marine Sanctuary, provided in Submittal No. 20061108-4008.

owned by the State of Washington. The project does not occur in federal waters, but instead is within the state aquatic land ownership boundary.”²⁷

Nothing in the Act, the Sanctuary regulations, or the Sanctuary Management Plan affects Washington’s title to its submerged lands within the Sanctuary or DNR’s authority to require a lease or other authorization for use of such lands. As acknowledged by Finavera, the submerged lands the Project will occupy in the Sanctuary are owned by Washington. Accordingly, DNR requests that the Commission clarify its Order to provide that the 28.3 acres of submerged lands within the Sanctuary to be occupied by the Project are state-owned aquatic lands and that Finavera must obtain the right to use the lands from DNR before beginning construction or operation of the Project.

B. The Submerged Lands in the Sanctuary to be Occupied by the Project Are Not Part of a Federal Reservation.

Without addressing state ownership of the lands within the Sanctuary on which the Project will be located, the Commission concludes that the Project will be located within a federal “reservation” for purposes of Section 4(e) of the FPA because it is in the Sanctuary.²⁸ As discussed below, the Commission’s conclusion is in error because the portion of the Sanctuary in which the Project will be located is owned by the State of Washington.

²⁷ Cover letter of Finavera Renewables, filed February 20, 2007, Submittal No. 20070222-0297 (describing the contents of Exhibit G, a non-public document).

²⁸ *Finavera*, 121 FERC ¶ 61,288 at nn.6 & 26.; *cf. AquaEnergy Group LTD*, 102 FERC ¶ 61,242 at p.4 (ruling appears to be based on finding that project will be on outer continental shelf which is not in accord with facts presented here).

Among other things, Section 4(e) of the FPA enables a federal department to ensure adequate protection for a reservation under the department's supervision by inserting mandatory conditions in licenses issued by the Commission. Under the FPA, the term "reservation" includes "lands and interests in lands acquired and held by the United States for any public purpose."²⁹ In its Order, the Commission found that the Sanctuary consists of lands acquired and held for a public purpose because it contains "not only the 'coastal and ocean waters' within its boundaries, but also 'the submerged lands thereunder'" and the Secretary of Commerce has jurisdiction over such lands.³⁰ Based on the Commission's finding, the Project license incorporates 10 mandatory conditions provided by the Secretary of Commerce to protect Sanctuary resources.³¹

The Commission's finding that the part of the Sanctuary on state-owned aquatic lands is a federal reservation is incorrect. While a sanctuary designation may encompass the seafloor as well as the waters above, the fact does not render the portion of the Sanctuary within the Washington State boundary a federal reservation. As discussed thoroughly above, the Sanctuary designation enables federal regulation of designated uses of resources within the Sanctuary including the seafloor; sanctuary designation does not create a proprietary interest in the seafloor or displace state authority to manage it. The National Marine Sanctuaries

²⁹ 16 U.S.C. § 796(2).

³⁰ *Finavera*, 121 FERC ¶ 61,288 at n.26 (citing 15 C.F.R. § 922.150(a)(2007)).

³¹ *Id.* at p. 11.

Act and the federal regulations governing the Sanctuary do not do more than create an additional layer of regulatory protection for important natural resources.

Regulatory authority over land owned by another is insufficient to render the lands a “reservation” for purposes of the FPA.³² A reservation cannot exist without federal ownership. For example, lands in which the United States holds a fiduciary interest but which are owned in fee by a tribe are not a federal reservation for purposes of Section 4(e).³³ The Supreme Court has held “the term ‘reservations’ is confined, as Congress evidently intended, to those located on ‘lands owned by the United States’ or in which it owns a proprietary interest.”³⁴ Because the authority of the United States under the National Marine Sanctuary Act and its implementing regulations only purport to regulate the use of state-owned aquatic lands, the designation of the Sanctuary does not provide the proprietary interest needed to create a federal reservation for purposes of Section 4(e) of the FPA.

That federal ownership exists within the Sanctuary seaward of the Washington state boundary does not put the Project in a reservation, because the Project will be entirely on state-owned lands in the Sanctuary.³⁵ The Commission

³² See *Federal Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 113 (1960).

³³ *Id.*

³⁴ *Id.*

³⁵ See *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 784 (1984) (“Congress concluded that reservations were not entitled to the added protection provided by the proviso of § 4(e) unless some of the licensed works were actually within the reservation.”). Note that the lands owned by the Makah on which a portion of the Project will be located are not within the Sanctuary. To the extent that the Makah lands would qualify as a 4(e) reservation, the Secretary of the Department of Interior rather than the Commerce Secretary would have 4(e) authority.

has found that the project will be located approximately 1.9 miles off Waatch point on Washington's mainland. This location is well within the Washington state boundary established by the state constitution and the Submerged Lands Act at three nautical miles from the coast.³⁶ Accordingly, the Sanctuary is not a "reservation" for purposes of the Project.

Although the Commission has incorrectly concluded that the Sanctuary is a reservation for purposes of the Project, DNR has few objections to the ten mandatory conditions inserted into the license by the Secretary of the Department of Commerce.³⁷ Rather, DNR's primary reason for raising its objection is that the Commission's conclusion that the Project occupies a reservation unnecessarily places a cloud over the State's title to and authority over its submerged lands within the Sanctuary.

Alternatives exist for incorporating the Secretary's conditions into the Project that would not require finding the Sanctuary is a reservation for purposes of the Project. Notably, Congress has provided a mechanism for interagency coordination in the National Marine Sanctuaries Act. The Act provides that if the

³⁶ The distance from the coast is stated as one marine league in the state constitution which is the equivalent of the three nautical miles recognized in the Submerged Lands Act. A "marine league" is equal to one-twentieth of a degree of latitude, or three "geographic" or "nautical" miles. *Black's Law Dictionary* 907 (8th ed. 2004). The state boundary in the Project area is approximately 5 nautical miles from the mainland. See note 11, *supra*.

³⁷ Because no Section 4(e) authority exists, DNR objects to condition number 10. With regard to condition number 8, DNR suggests that the bond required for the Project would be an appropriate subject for "coordinated management" as intended by 16 U.S.C. § 1431(b)(2). As DNR requires bonding for all projects on state-owned aquatic lands in its use authorizations, the Sanctuary's bond requirement is duplicative. It is DNR's hope that this issue can be discussed and resolved through the upcoming process to establish an interagency memorandum of understanding for hydrokinetic licenses.

Secretary finds a federal agency action is likely to injure sanctuary resources the Secretary may recommend reasonable alternatives to be taken by the agency implementing the action.³⁸ Presumably, these alternatives could include placing conditions, such as the ten enumerated in the license, on a project within the state waters of the Sanctuary. Additionally, the Secretary could append conditions to authorizations Project proponents obtain from DNR to use the state-owned aquatic lands within the Sanctuary. 15 C.F.R. § 922.153(g) provides that applicants who obtain an authorization to conduct a prohibited activity under state authority must comply with conditions the Sanctuary deems appropriate for protection of Sanctuary resources. Either of these options would ensure protection of Sanctuary resources without the legally incorrect conclusion that the Sanctuary is a reservation for purposes of the Project.

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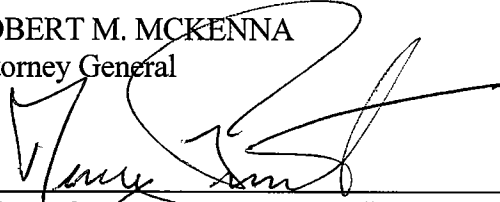
³⁸ 16 U.S.C. § 1434(d)(2). If the recommendations are ignored and resources are damaged, the Secretary can mandate mitigation measures. 16 U.S.C. § 1434(d)(4).

III. CONCLUSION

DNR respectfully requests that the Commission rehear this matter for the reasons set forth above.

RESPECTFULLY SUBMITTED this 18th day of January, 2008.

ROBERT M. MCKENNA
Attorney General



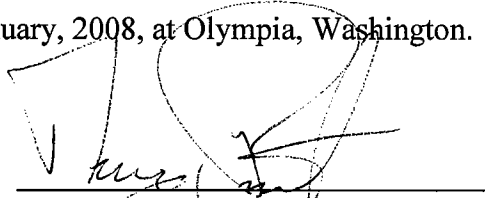
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PROOF OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

DATED this 18th day of January, 2008, at Olympia, Washington.



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