



January 25, 2008

Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

Re: P-12751 Finavera Renewables Ocean Energy, Ltd.
National Marine Sanctuary Program Comments on the National Marine Sanctuaries Act
and the Federal Power Act

Dear Secretary Bose:

The National Marine Sanctuary Program (NMSP), a program within the National Oceanic and Atmospheric Administration (NOAA) under the supervision of the Secretary of Commerce (Secretary), submits these comments to the Commission to clarify the application of the National Marine Sanctuaries Act (NMSA) in the OCNMS and state owned submerged lands and support the Federal Energy Regulatory Commission (Commission)'s finding that the Finavera wave energy project is located "within a reservation" for purposes of the Federal Power Act (FPA), 16 USC §796(2).

The NMSP has received the petitions for rehearing filed by the Makah Indian Tribe (Makah) and the State of Washington's Department of Natural Resources (DNR). Both parties have reiterated their discomfort with the conclusion that the Finavera project is located "within a reservation" as "reservation" is defined by the FPA. The arguments proposed by both Makah and DNR suggest that because the project is to be anchored on the submerged lands owned by the State of Washington, albeit within the Federally-designated Olympic Coast National Marine Sanctuary (OCNMS), the project is not located "within a reservation" for purposes of section 4(e) of the FPA.

The NMSP does not dispute, and never has disputed, that Finavera's project, as currently proposed, will be anchored on submerged lands owned by the State of Washington and managed under state law by the DNR.¹ That said, the DNR's property interest does not in any way undermine the Commission's finding that a national marine sanctuary is a reservation as defined in the FPA. Further, contrary to the DNR's arguments, application of the FPA and NMSA do not create a "cloud" of the State of Washington's title to its submerged lands. Finally, ownership

¹ The NMSP also encourages the Commission to note the actual anchoring of the project on the state's submerged lands does not occupy 28.3 acres of the seabed. Rather, 28.3 acres of the surface waters and the water column of the OCNMS are occupied by the wave energy buoys, floats, cabling and other devices necessary for the generation of electricity and must be closed off to other access for operation of the project. The footprint on the state's seabed of project anchors and the power transmission cable is only approximately 0.32 acres.



and control of submerged lands does not determine whether or not a national marine sanctuary is a “reservation.”

A. Designation of the OCNMS

The NMSA provides that a specific geographic area of the marine environment may be designated as a national marine sanctuary in accordance with the standards set forth in the statute.² National marine sanctuaries are designated to protect nationally-significant marine resources and provide Federal jurisdiction and management authority to achieve the goals and objectives of the NMSA. The NMSA provides that the geographic area designated as a national marine sanctuary may or may not include state submerged lands. 16 U.S.C. §1433.

When the Secretary of Commerce proposes to designate a national marine sanctuary that will include state submerged lands, the state, through its governor, is closely involved throughout the public process. The NMSA expressly provides the governor of the affected state the opportunity to certify that the designation or any of its terms is unacceptable to the state. 16 U.S.C. §1434(b)(1). If the governor of the state certifies that the designation of the sanctuary or any of its specific terms are unacceptable, then the unacceptable terms do not take effect in the area of state lands and waters. *Id.* In this way, state submerged lands can be fully incorporated within the area designated as a national marine sanctuary only with the acceptance of the governor. This results in Federal jurisdiction and management authority over the state submerged lands within the scope of the terms of the designation.

In 1988, Congress directed the Secretary of Commerce to issue a notice of designation for the OCNMS not later than June 30, 1990. Pub. L. 100-627 §205(a). In 1989, NOAA, then working through the Office of Coastal and Resource Management, conducted scoping meetings throughout the Olympic Peninsula and in Seattle. On September 20, 1991, NOAA published a proposed designation document and draft environmental impact statement (EIS) for the OCNMS. 56 Fed. Reg. 47836 (Sept. 20, 1991). NOAA published a final EIS/management plan in November 1993 proposing the designation of the marine and intertidal water adjacent to Olympic Peninsula within the present sanctuary boundary and the submerged lands thereunder as a national marine sanctuary. 59 Fed. Reg. 24586 (May 11, 1994). The Governor of the State of Washington did not object to the designation of any of its terms or application to state waters and submerged lands; therefore, they were included in the sanctuary and subject to the Federal management authority provided by the NMSA. 59 Fed. Reg. 51105 (October 7, 1994).

At no time during the designation process was the issue raised that designation of the national marine sanctuary would “cloud” the state’s title over its submerged lands. And indeed, no such “cloud” exists.

OCNMS regulations provide direct Federal authority and jurisdiction over resources of the sanctuary, including the seabed. Specifically, sanctuary regulations exclude and prohibit, *inter alia*, exploring for, developing or producing oil, gas or minerals from the sanctuary and drilling into, dredging or otherwise altering the seabed of the sanctuary; or constructing, placing or

² More detailed discussion of the provisions of the NMSA can be found in NOAA’s Notice of Intervention, Comments and Preliminary Terms and Conditions filed with the Commission on February 16, 2007, pp. 11-15.

abandoning any structure, material or other matter on the seabed of the sanctuary. 15 CFR §922.152 (a)(1) and (4). NOAA exercises jurisdiction over and regulates both the mineral estate and surface estate of state submerged lands and regulates activities and protects the resources of the water column above state submerged lands for the purposes enumerated in the NMSA and the designation document of the sanctuary. The phrase “on the seabed of the sanctuary” includes the submerged lands of the state of as they are fully incorporated within the geographic boundaries of the OCNMS. 15 CFR §922.150.

B. Ownership of Submerged Lands Does Not Determine “Reservation” Status

The designation of the OCNMS and promulgation of its regulations, like those of all other national marine sanctuaries, make no distinction between submerged lands owned by the State of Washington and the Federal lands of the outer continental shelf – they are all within the national marine sanctuary as designated by the Secretary of Commerce. Further, even if the DNR itself proposed to construct a wave energy project anchored on its submerged lands within the OCNMS, it could not proceed without the permission or authorization of the OCNMS.³

The State of Washington is correct when it says that the OCNMS is a regulatory overlay on the state’s submerged lands and is not a proprietary interest in those state lands.⁴ However, the OCNMS has thoroughly and totally incorporated the affected state-owned submerged lands for management, regulatory and administrative purposes under the NMSA and, as such, the United States has an “interest” in those lands and waters and holds that “interest” for public purposes. *See* 16 U.S.C. §796(2). It is beyond dispute that the state’s submerged lands are part the OCNMS as designated by the Secretary of Commerce. It is the view of the NMSP that the entirety of the OCNMS consists of “lands and interests in lands acquired and held for any public purpose.” 16 U.S.C. §796(2). Contrary to the DNR’s suggestion, the words “proprietary,” “ownership,” and “title” do not appear in this part of the definition.⁵

³ As previously noted, altering or placing any structure upon the seabed is prohibited by OCNMS regulation. 15 CFR §922.152(a)(4). Further, DNR suggests that OCNMS regulation at 15 CFR §922.152(g) is a mechanism for DNR’s approval of activities within the sanctuary. DNR Petition at p. 7. The Federal regulation states to the contrary. The function of the OCNMS “authorization” regulation is to obviate the need for the holder of a permit from a state or other Federal agency to go through a separate sanctuary permitting process for the same activity; for streamlining purposes, the sanctuary may instead “authorize” this activity with any additional terms and conditions deemed necessary to protect sanctuary resources. For instance, it may be appropriate for the OCNMS to “authorize” the Finavera license as issued by FERC, which would obviate the need for a separate sanctuary permitting process.

⁴ For some sanctuaries that include state submerged lands, the NMSP formally acknowledges state ownership in cooperative management agreements. For instance, NOAA executed a *Co-trustees Agreement for Cooperative Management* with the State of Florida for the Florida Keys National Marine Sanctuary wherein NOAA acknowledges that “the Florida trustees hold title to State lands, including sovereignty submerged lands, for the use and benefit of the People of the State of Florida.” Florida likewise acknowledges that “NOAA has been vested with the jurisdiction and authority to protect and manage the resources of this Sanctuary in trust for the People of the United States and is specifically charged with the implementation of the policy of the United States.” <http://floridakeys.noaa.gov/management/welcome.html>

⁵ The case *Federal Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) (*Tuscarora*), (relied upon by both the State and the Tribe) does not state otherwise. *Tuscarora* rests on a different factual situation, where the property at issue was owned by the Tuscarora Nation in fee. When examining whether this property constituted “lands and interests in lands acquired and held for any public purpose,” the Court held that a reservation does not exist when the United States has *no property interest whatsoever*. The Court rejected the contention that “[t]he national ‘paternal interest’ in the welfare and protection of Indians” qualified as an “interest in land” sufficient to

In general, NMSA jurisdiction and control does not depend on ownership of submerged lands within a designated sanctuary. Rather, Congress has delegated to the Secretary of Commerce the authority to identify which geographic areas of the marine environment are of national significance and to withdraw them from the general use by designating them national marine sanctuaries for the purposes of management and protection of natural and cultural resources as enumerated in the NMSA. It is the view of the NMSP that the United States need not hold a fee interest or proprietary interest in the state submerged lands to have the OCNMS constitute a “reservation” for purposes of the FPA. The OCNMS is uniformly subject to Federal administration, management and control by the Secretary of Commerce and is a “reservation” in its entirety for FPA purposes.

If DNR’s argument were to prevail, then the boundary of the “reservation” would not be coterminous with the boundary of the OCNMS, but instead would section off a portion of the sanctuary as not part of the “reservation.” The result of such a scheme would be to protect the Federal purpose and utilization administered by the Secretary of Commerce in some portions of the sanctuary, but not other areas even though they are also administered by the Secretary through the same regulatory scheme. To interpret section 4(e) in this manner would not be in keeping with the purposes of the drafters of the FPA.⁶ The inclusion of state submerged lands within the boundaries of the area designated by the Secretary of Commerce as a national marine sanctuary does not defeat the qualification of a national marine sanctuary as a “reservation” for purposes of the FPA.

For the benefit of the State of Washington, it should be fully understood that the Commission’s finding that the OCNMS is a “reservation” is not a “cloud” on the title of the sovereign submerged lands of the state anymore than the designation of the sanctuary itself is a “cloud.” The DNR continues to issue leases for state submerged lands in the OCNMS pursuant to state law and activities permitted by the NMSP can be carried out on state leases within the OCNMS. The designation of the OCNMS does not affect the operation of state law.

C. Conclusion

Applying the FPA in the face of new technologies and in the marine environment requires a fresh look at the scope and purposes of the FPA. National marine sanctuaries designated pursuant to the NMSA are unique geographic areas of the marine environment, of national significance and containing natural and cultural resources requiring special protection by the United States in the FPA licensing process.⁷

create a reservation. *Id.* at 114-115. This holding is inapposite in the current case, where the interest claimed by the Federal government is not the general trust responsibility toward Tribes, but rather is direct Federal regulatory control and management of public resources in the OCNMS. In sum, *Tuscarora* is silent on the type of Federal interest in land held in the OCNMS and is not controlling here.

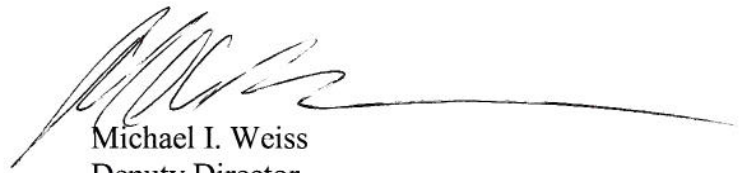
⁶ *Escondido Mutual Water Company v. La Jolla Band of Mission Indians*, 466 U.S. 765, 773-774 (1984) (“The provision [section 4(e)] is for the purpose of preserving the administrative responsibility of each of the three Departments over lands and matters within their exclusive jurisdictions.”).

⁷ The Energy Policy Act of 2005, for instance, recognizes the unique status of national marine sanctuaries and has withdrawn sanctuaries from consideration of OCS leasing for alternative energy development purposes. *43 U.S.C. §133(p)*.

The NMSP is particularly gratified that the science-based concerns and scientific monitoring proposed by NOAA through the National Marine Fisheries Service and the NMSP have resulted in 4(e) conditions appropriate to the new wave energy technology and acceptable to our partners in marine resource management, the Makah Indian Tribe and State of Washington.⁸

NOAA is the Nation's preeminent ocean science agency and fully intends to bring its scientific and technical expertise to supporting our country's goals in developing environmentally sound and sustainable sources of energy. The NMSP looks forward to working cooperatively with all parties in the development of Finavera's Makah Bay pilot project.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Weiss', with a long horizontal flourish extending to the right.

Michael I. Weiss
Deputy Director
National Marine Sanctuary Program

cc: Service List P-12751

⁸ The NMSP is aware of a preliminary permit application for hydrokinetic energy production filed by Sonoma County, California for a potential project that would be located, in part, within the Cordell Bank and Gulf of the Farallones national marine sanctuaries. P-13076. The data and information gathered as a result of the 4(e) conditions in the Finavera license will undoubtedly inform the NMSP of the need and scope for 4(e) conditions in future license proceedings.

