



# Fluid Body *of* Law

*From Maritime Statutes of Old to New Developments in Wave and Tidal Energy, Ocean Law Continues to Evolve*

By Melody Finnemore

Ocean law is a legal term nearly as expansive as the sea itself. It encompasses maritime statutes that have governed shipping routes, fishing rights and coastal boundaries for hundreds of years. It has evolved to include environmental considerations such as the protection of marine life, enforcement of pollution cleanup and guidance on scientific research.

More recently, ocean law plays a key role in the development of alternative energy, the protection of national security and the exploration of new frontiers opening up because of global warming. And yet some elements of ocean law that conjure ancient images of danger on the high seas — such as protection from pirate attacks and claims to shipwreck recoveries — remain as relevant and crucial today as they have been for centuries.

Whether on an international, federal or state level, new issues related to ocean law emerge all the time. Many legal professionals involved in one aspect or another of ocean law say they appreciate the fluidity of the practice area, which is constantly evolving and presents continuous intellectual challenges.

Among them is Jack Sterne, a graduate of Lewis & Clark College's Northwestern School of Law, who cut his teeth doing commercial fisheries and marine mammals policy work in Alaska. While there, Sterne partnered with law school classmate Janis Searles Jones, now vice president for national conservation policy and legal affairs for the Ocean Conservancy in Washington, D.C., on litigation involving the protection of Steller sea lions.

Sterne, principal at Bend's Rising Tide Strategies and a renewable energy consultant, co-taught Lewis & Clark's Ocean and Coastal Law course with Searles Jones last fall.

"One of the challenges in teaching ocean law is that there's a lot of law, but not necessarily a lot of case law," he says, noting many of the most interesting questions relate to issues that are still under discussion.

For example, the \$900-million Cape Wind Project off Cape Cod in Massachusetts is slated to become one of the nation's first offshore wind energy farms. However, it has been delayed by opposition and bureaucratic red tape for nearly a decade. When the project was first proposed in 2001, the regulatory framework wasn't even in place to handle the application, Sterne says.

The lack of such a framework led to a regulatory standoff between the Federal Energy Regulatory Commission (FERC) and the U.S. Department of Interior's Mineral Management Service (MMS). The issue was settled in April 2009 with a memorandum of understanding in which the agencies agreed that FERC will issue licenses and MMS will issue leases, easements and other rights-of-way for hydrokinetic projects in waters beyond the Outer Continental Shelf.

Sterne says the FERC-MMS standoff is an example of a fractured governance system in the U.S., in which there are 20-plus agencies involved in regulating various aspects of domestic ocean waters but no comprehensive policy in place.

"The solution to the energy problem is a microcosm of what makes ocean and coastal law interesting," he says. "There is just a ton of really interesting, cutting-edge issues related to the oceans."

## Ocean Energy Making Big Waves

Of those cutting-edge issues, wave and tidal energy (or "ocean renewables," in industry lingo) tops the list. Thomas Jensen, an Oregon State Bar member who now practices in Washington, D.C., is a natural resources and energy lawyer whose specialties include hydropower projects on both the East and West coasts.

Jensen has seen marked advancements within the ocean energy industry during the past five years. However, there have been plenty of challenges along the way, too.

"The ocean energy business is a subset of the overall renewable energy sector, but with very peculiar and very intense problems created by the fact that building and operating anything in an ocean environment is extremely difficult, controversial and capital-intensive," he says.

While the wind and solar power sectors have made significant market gains, the marine energy sector lags behind because of the complexities of developing facilities in water and of working within the nation's scattershot regulatory framework.

"There's a real tension between those who want to start building ocean energy projects and the state, federal and, in some cas-

es, tribal governments that are still trying to decide how to govern these actions," Jensen says.

"The regulators, the agencies with jurisdiction of activities occurring at sea, really have not gotten their heads around the type of governance they will bring to those types of developments," he adds. "The agencies are just learning how to say, 'Yes,' or 'Yes, but with lots of conditions,' to this portion of the renewable energy market."

While the recession hasn't helped either, Jensen says the ocean energy business is "struggling successfully" and ultimately will become a substantial part of the world's energy mix.

And, he notes, Oregon is poised as a leader in the movement. From its political backing for renewable energy development to the use of state universities as research platforms, Oregon already is a step ahead of most other states when it comes to ocean energy.

"Oregon can legitimately claim a leadership role here, particularly in wave energy, and whatever does come in the structure of government and business and development, Oregon is going to have an awful lot to say about that," Jensen says.

Already underway here is one of the nation's first commercial wave energy projects. Ocean Power Technologies Inc. (OPT) hired Oregon Iron Works of Clackamas to build the PowerBuoy system it will install off the coast near Reedsport.

The PowerBuoy system, developed after 15 years of research, uses the rise and fall of waves to move the buoy up and down and drive an electric generator inside it. The buoy is expected to generate about 1.5 megawatts of electricity, which will be conditioned and transmitted ashore as high-voltage power via an underwater cable. The Reedsport wave power station will be located about 2.5 miles off the coast and connect directly to the Bonneville Power Administration's Gardiner substation.



OPT plans to place up to 10 of the buoys at Reedsport over the next two to three years with funding from the Department of Energy, federal and state tax credits, and investment from the private sector. PNGC Power may purchase some of the electricity generated from the buoys.

Also on the drawing board are offshore wind farms, which have the potential for great success here because some of the country's strongest winds blow off the Oregon and California coasts.

Bill Holmes, a partner in Stoel Rives' Portland office and chair of its renewable energy initiative, works with clients who want to invest in wave and tidal energy projects. Holmes says that despite the recession, he has several clients — including companies that have developed successful ocean energy projects in the United Kingdom and Portugal — interested in developing facilities in the Pacific Northwest.

"I think we're going to hear more about that in the next year or two as the recession ends and more companies look at coming here," he says.

### Mapping the Ocean from a New Perspective

Onno Husing, executive director of the Oregon Coastal Zone Management Association (OCZMA), likens the growing interest in developing ocean energy facilities off the Oregon coast to a modern-day gold rush. One of OCZMA's greatest charges right now is marine spatial planning for the ocean waters reaching three miles off the coast.

This system of mapping overlays is an effort to ensure that all ocean users — from the creatures that live in it to the humans who utilize it for recreation and commercial purposes — get a fair shake, says Husing, a University of Oregon law school grad.

OCZMA's guiding principle is Goal 19 of the state's land-use management plan, adopted during the 1970s. Goal 19 outlines the protection of Oregon's coastal waters, including the preservation of its recreational and commercial fishing grounds.

"Oregon made an enormously large decision way back when to protect not only the ecological value of the environment, but the twin towers of recreational and commercial fishing," Husing says.

Also involved in the marine spatial planning effort is the state's Ocean Policy Advisory Council (OPAC). David Allen, of counsel to Newport's Macpherson, Gintner & Diaz, has been a member of the advisory council since 2005. Last year, he was elected as OPAC's vice chair, and he is co-chair of its Territorial Sea Plan Working Group.

The working group recently completed Part Five of the state's Territorial Sea Plan, which details the decision-making process involved in the development of renewable energy facilities and specifies where those developments can be located.

Approved by the Land Conservation and Development Commission last November, Part Five outlines requirements that are intended to protect marine ecosystems, fishing grounds and coastal communities from the potential negative impacts of renewable energy facility siting, development, operation and decommissioning.

OPAC also crafted House Bill 3013, passed during the 2009 legislative session, which established pilot marine reserves at Ot-



ter Rock and Redfish Rocks, and targeted potential marine reserves at Cape Falcon, Cascade Head, Cape Perpetua and Cape Arago-Seven Devils.

Allen says OPAC's biggest achievement is to generate a collaborative atmosphere among vastly divergent interest groups.

"Over the past couple of years, I think OPAC has really developed into a council that is working well in addressing the concerns of...all the various stakeholders," he says. "OPAC is one of the forums where we need to discuss these ocean issues so we can forward recommendations and they can be signed into law. I look at OPAC as a vital organization that will continue to be important going into the future."

### All Waters Lead to Newport... and Corvallis

As Oregon establishes itself as a national leader in ocean energy, the city of Newport and Oregon State University are forging the way. OCZMA and OPAC's Allen both call Newport home, and the National Oceanic and Atmospheric Administration last summer selected Newport as the headquarters for its Pacific fleet.

Plans for NOAA's new \$19 million operations center include office and warehouse space, berthing for the four NOAA ships home-ported at the center and up to two visiting ships, and environmentally sustainable main buildings. Once completed in June 2011, the facility is expected to generate up to 250 local jobs.

Newport also is home to the Hatfield Marine Science Center, established 40 years ago as a marine laboratory for Oregon State University. OSU, a forerunner in wave energy research, formed



When you stop growing,  
you stop.

Paula Barran, Class of '91, Partner, Barran Liebman LLP

Every day you make a decision about how your life and career will unfold. Choosing to do something or to do nothing — they both affect your future. Earning an Oregon Executive MBA can change a career path. Our innovative program is focused on helping high potential leaders reach farther. Take the next step at [oemba.uoregon.edu](http://oemba.uoregon.edu).

Now Accepting Applications. Call (503) 276-3622 or toll-free (866) 996-3622



A University of Oregon degree in partnership  
with Oregon State University and Portland State University.

CELEBRATING TWENTY-FIVE YEARS

## PAUL R. DUDEN Mediation

- ◆ Mediation for Northwest Lawyers and their Clients
- ◆ Schedule online at [www.DudenMediation.com](http://www.DudenMediation.com)

503-936-9176      Paul@DudenMediation.com

the Northwest National Marine Renewable Energy Center in a partnership with the University of Washington, which focuses on tidal energy. Both universities collaborate with each other and the National Renewable Energy Laboratory on research, education and outreach.

And, in a delightful twist of serendipity, NOAA is headed by former Oregon State University professor Jane Lubchenco. Lubchenco, one of the country's most prominent marine biologists, is the first woman and the first marine ecologist to lead NOAA.

Not to be left out, the U.O. has a place in the state's prominence in ocean-related issues. Richard Hildreth, director of the U.O.'s Ocean & Coastal Law Center, is a member of the U.S. Interior Department's Outer Continental Shelf Scientific Committee, which gathers for an annual peer-review meeting to provide guidance for the government.

And Alexandra Leumer, a recent U.O. law school grad, is working as an ocean policy analyst for the Environmental Defense Fund on a contract basis. Leumer says her law degree — as well as internships with environmental nonprofits and federal agencies — has helped her build experience in a field in which she hopes to specialize.

"Just being familiar with the environmental laws and policies and how they are developed, being able to look through those has helped a lot," she says.

As a new generation of attorneys interested in ocean law emerges, they will have plenty of territory to explore. Unfortunately, one of the most pressing issues also is one of the oldest: how to determine who is responsible for cleaning up the often devastating spills, dumps and debris that pollute the seas and harm marine life.

Just a few weeks ago, in response to a lawsuit filed by the Center for Biological Diversity, the Environmental Protection Agency agreed to regulate ocean acidification under the Clean Water Act.

According to the center, the lawsuit was the first to address ocean acidification, which results from the ocean's absorption of carbon dioxide from the atmosphere, increases its acidity and changes the chemistry of seawater. The primary known consequence of ocean acidification is that it impairs the ability of marine animals to build and maintain the protective shells and skeletons they need to survive.

"Ocean acidification is global warming's evil twin, and CO2 (carbon dioxide) pollution is one of the biggest threats to our marine environment," Miyoko Sakashita, the center's oceans director, says. "We need prompt action to curb CO2 emissions to avoid the worst consequences of acidification."

Sakashita says the center's settlement with the EPA sets the stage to combat ocean acidification with one of the nation's strongest water-quality laws. "We already have the legal tools we need to limit ocean acidification, and the Clean Water Act has a history of success reducing pollution."

According to the center, scientists have confirmed widespread ocean acidification due to carbon dioxide pollution. A survey off the U.S. West Coast showed that waters affected by ocean acidification are upwelling onto the continental shelf and exposing marine life in surface waters to corrosive conditions. Areas of the Arctic are expected to become corrosive by 2016.

## Pressing for Ratification of Law of the Sea Treaty

Michael Becker, a commercial litigator in New York, has been intrigued by international disputes, ocean law and the United Nations Convention on the Law of the Sea (UNCLOS) since he was a law student a decade ago.

“Ocean law encapsulates so many issues related to international law. Some examples are the Somali piracy problem, fisheries development, international borders and development in the Arctic,” he says. “And there are so many issues that tie into the law of the sea that also tie into environmental issues and even state-to-state issues.”

As the United Nations negotiated the current Law of the Sea Treaty during the 1970s, the U.S. was among those at the forefront of the process. The treaty was intended to establish a comprehensive set of rules governing the oceans and to replace two previous, outdated conventions.

The Law of the Sea Treaty calls for technology and wealth transfers from developed to undeveloped nations. It also requires parties to the treaty to adopt regulations and laws to control marine pollution.

In addition, the treaty establishes specific jurisdictional limits on the ocean area that countries may claim, including a 12-mile territorial sea limit and a 200-mile exclusive economic zone limit.

Proponents believe the treaty upholds a system of property rights for mineral extraction in deep seabeds, making the investment in such ventures more attractive. However, the treaty has its share of opposition, including — at least initially — the United States.

President Ronald Reagan rejected the treaty in 1982 because of rules regarding seabed mining, which he believed would

## RICHARD G. SPIER MEDIATOR



Highly experienced—full-time neutral since 1992

Business & commercial; personal injury; employment;  
real estate & construction

Listed for Alternative Dispute Resolution in  
*The Best Lawyers in America*®

**503-284-2511**

Fax 503-284-2519

[rspier@spier-mediate.com](mailto:rspier@spier-mediate.com) [www.spier-mediate.com](http://www.spier-mediate.com)  
2536 N.E. 28th Avenue ■ Portland, Oregon 97212-4916

## Lincoln City

On the Central Oregon Coast

We went to the beach for a business  
retreat & came back...



**A Great Place  
to Try New  
Things!**

Lincoln City, on the Central Oregon Coast, is the perfect  
site for your next office meeting or retreat. And an ideal  
location for incentive travel or just to run away!

541-996-1274 • [www.oregoncoast.org](http://www.oregoncoast.org) • 800-452-2151

## MEDIATION &

## ARBITRATION



**35+ Yrs Experience**  
**Plaintiff & Defense**  
**Impartial**  
**Effective**  
**Resolutions**

### **Reasonable Rates**

**James D. Case**

**No Charge for Travel**  
**to Central Oregon**

**Member: Oregon and Washington State Bars.**  
**Washington Federal Court Certified**  
**Mediator/Arbitrator:**

[www.wawd.uscourts.gov/CourtServices/AlternativeDisputeResolution.htm](http://www.wawd.uscourts.gov/CourtServices/AlternativeDisputeResolution.htm)  
[www.wawd.uscourts.gov/CourtServices/mediators/Case.htm](http://www.wawd.uscourts.gov/CourtServices/mediators/Case.htm)

**Arbitration Service of Portland, Inc.**  
**Multnomah Co. Mandatory Arb. Panel.**  
**Oregon Mediation Association.**  
**Former Pro-Tem Judge, Multnomah Co.**  
**AV Rated and Martindale-Hubbell**  
**Recognized Pre-Eminent Attorney.**

**Personal Injury-Product Liability-UM/UIM-Business**  
**and Commercial Disputes-Corporate Issues-**  
**Contracts-Construction Law-Real Estate-Professional**  
**Malpractice-Domestic Relations-Elder Issues**

**JAMES D. CASE**  
**503.641.7222**

**[jcase@case-dusterhoff.com](mailto:jcase@case-dusterhoff.com)**

# PARKS MEDIATION & ARBITRATION

*Offering Services Statewide*

**Personal injury, commercial disputes,**  
**construction law, professional**  
**liability and insurance coverage.**  
*Over 35 years of litigation experience.*



**J. Philip Parks**  
570 Liberty St. SE, Suite 200  
Salem, Oregon 97301  
phone: 503-371-3502  
fax: 503-371-0429  
email: [pparks@pbswlaw.com](mailto:pparks@pbswlaw.com)

**[www.parksmediation.com](http://www.parksmediation.com)**

inhibit commercial development. The U.N. amended those provisions in 1994, but the U.S. still has yet to ratify it.

Presidents Bill Clinton and George W. Bush both supported U.S. ratification of the treaty, and the Senate Foreign Relations Committee has voted for it twice. It received unanimous support in 2003 and was voted on in 2007, but didn't make it to the House floor for a vote. The treaty's ratification was pushed to the back burner as Congress dealt with health care reform and the economic recession.

The American Bar Association has encouraged Congress to ratify the treaty since 1994. Becker, who joined the ABA's Law of the Sea Committee in 2006, says nearly every stakeholder — from petroleum companies and the military to environmental and marine science groups — supports its ratification.

"It's really an amazing example of widespread bipartisan support," he says.

Despite that, opponents still exist.

"There is an extremely vocal fringe minority that is against U.S. involvement in any kind of international agreement and prefers isolationism and U.S. military dominance," Becker says.

Now, though, with growing interest in exploration and development of the Arctic, the issue has gained a new sense of urgency, he adds.

As global warming changes the Arctic climate, the possibility arises for new access to oil, gas, minerals, fisheries and shipping routes as well as uncharted territory for scientific exploration.

From a national security standpoint, the Law of the Sea Convention is important because it calls for coastal states to recognize the right of "innocent passage" through their waters by both naval vessels and commercial ships. It grants ship and aircraft passage through straits used for international navigation, many of them in strategically sensitive areas.

Under the Law of the Sea Treaty, a U.N. independent commission reviews all claims to the area. The U.S. has the right to make claims, but it must be part of the treaty in order to exercise those rights, Becker says.

"Plus, we can't have a member on the independent commission if we're not part of the convention. So not only are we losing out on claims that we have a right to, but we also don't have a voice on a panel that is overseeing the process," he says. "By joining the convention, the U.S. has a chance to expand its sovereignty to the greatest extent in recent history."

U.S. Secretary of State Hillary Rodham Clinton last October sent a letter to the Foreign Relations Committee strongly advising the U.S. to ratify the treaty, and President Barack Obama has established an Interagency Ocean Policy Task Force that is sure to weigh in on the matter. Still, this is an election year, which could further delay efforts to ratify the Law of the Sea Treaty, Becker says.

"It's really frustrating for those of us who care about these issues." **B**

*Melody Finnemore is a Portland-area freelance writer and a frequent contributor to the Bulletin.*