Number 134, Original

In The
SUPREME COURT of the UNITED STATES

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

Before the Special Master
The Hon. Ralph I. Lancaster, Jr.

MOTION OF THE STATE OF NEW JERSEY TO STRIKE THE EXPERT REPORT OF JOSEPH SAX AND TO STRIKE THE LEGAL CONCLUSIONS IN THE EXPERT REPORT OF CAROL HOFFECKER, OR, IN THE ALTERNATIVE, TO DISREGARD SAME AS EVIDENCE

Plaintiff, State of New Jersey, by its Attorney General, hereby moves for an order striking the expert report of Joseph Sax and striking the legal conclusions in the expert report of Carol Hoffecker, both reports having been offered on Defendant's behalf or, in the alternative, for an order disregarding same as evidence. In support of this motion, plaintiff shall rely upon the letter-brief and exhibits filed herewith.

STUART RABNER
Attorney General

RACHEL J. HOROWITZ*
Deputy Attorney General
BARBARA L. CONKLIN*
Deputy Attorney General
*Counsel of Record

Richard J. Hughes Justice Complex
25 West Market Street
P.O. Box 112
Trenton, New Jersey 08625
(609) 984-6811

Dated: November 27, 2006

No. 134, Original

In the Supreme Court of the United States

State of New Jersey

v.

State of Delaware

Expert Report of Professor Joseph L. Sax

1. My name is Joseph L. Sax. My address is: Boalt Hall, School of Law, University of California, Berkeley, California, 94720. I am the James H. House & Hiram H. Hurd Professor (emeritus) at the University of California, Berkeley. I have been a member of the Berkeley faculty since 1987. From 1966 to 1986, I was on the faculty of the University of Michigan, where I was the Philip Hart Distinguished University Professor. Prior to that time, I practiced law in Washington, D.C. and was on the faculty of the University of Colorado. From 1994 to 1996, I served as Deputy Assistant Secretary of the Interior and as Counselor to the Secretary of the Interior. I am a graduate of Harvard College and the University of Chicago Law School, and hold an honorary Doctor of Laws degree from the Illinois Institute of Technology. I am a fellow of the American Academy of Arts and Sciences.

2. I have no interest in, or connection with, any of the parties to this case other than having been retained by the State of Delaware to review the claim made by the State of New Jersey, to provide my opinion as an expert on the background and historical understanding of riparian law, and to prepare this Expert Report.

Qualifications

3. For more than 40 years as a scholar and teacher, one of my principal interests has been research and teaching in the field of water law. It has been a central issue considered in classes and seminars I have taught. I am the author of a number of books and articles on the subject, including *Water Law: Cases and Commentary* (Pruett Press, 1965); *Water Law, Planning and Policy* (Bobbs-Merrill, 1968); *Federal Reclamation Law, in II Waters and Water Rights,* Chapter 8 (Allen Smith Co., ed. R. E. Clark, 1967); and four editions of *Legal Control of Water Resources*, the most recent being the 4th edition (with Barton H. Thompson, John Leshy & Robert H. Abrams) (St. Paul, Thomson/West, 2006). I have consulted for the Council of Great

Lakes Governors and the International Joint Commission (Great Lakes). During my tenure at the United States Department of the Interior, one of my principal responsibilities was dealing with interstate water issues on the Colorado River. After leaving the Department of the Interior, I served as a consultant for the U.S. Bureau of Reclamation, and I am currently a consultant for the Southern Nevada Water Authority. I served as an expert for the State of Mississippi in a case involving riparian rights and submerged lands owned by the State. I recently prepared a report on the law of groundwater for the California State Water Resources Control Board.

Information Required Pursuant to Rule 26(a)(2)(B)

4. My *curriculum vitae* is attached hereto as Exhibit A, and a list of all my publications within the past 10 years is attached hereto as Exhibit B.

5. All the data and information considered by me in forming the opinions herein, other than knowledge gained over many years of study in the field, are cited in this report.

6. I am being compensated for my work in preparing this report and for my testimony, if called, at the rate of $500 per hour, plus out-of-pocket and travel expenses. My compensation is not contingent on or related in any way to the outcome of this case.

7. I testified as an expert witness for the State of Mississippi in *Bayview Land, Ltd. v. Mississippi*, Cause No. C2402-98-389, in the Chancery Court of Harrison County, Mississippi, in 2002. I have recently prepared an expert report for the United States and expect to be called to testify in the pending case of *Glamis Gold, Ltd. and United States of America (In the Arbitration Under Chapter Eleven of the NAFTA and the UNCITRAL Arbitration Rules).*

Scope of Assignment

8. I have been retained by the State of Delaware to provide an historical analysis of riparian rights and laws as they existed at the time the 1905 Compact was executed by Delaware and New Jersey, as well as an opinion as to the interpretation to be given to the language in Article VII of the 1905 Compact at issue in this case, insofar as I can do so based on my knowledge of the history and understanding of the law of riparian rights in the 19th and early 20th centuries. For the purpose of preparing this opinion, I have read the initial pleadings and appendices filed in this case, the riparian grants, leases, and conveyances issued by New Jersey between 1854 and 1920 (which are discussed in the Affidavit of Richard Castagna and attached to New Jersey's initial filing), New Jersey's responses to Delaware's requests for admissions, certain documents pertaining to New Jersey's 1980 Coastal Management Plan, a permit issued by New Jersey in 1991 to the Keystone project, and a permit issued by New Jersey in 1996 to the Fort Mott project.

9. I have been asked to address the historical context for the drafting of Article VII, and the meaning and scope of the Article VII language "to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." My report therefore describes the history and understanding of riparian

rights and laws in the United States, including New Jersey and Delaware, up to the execution of the 1905 Compact.

Summary of Opinion

10. Riparian jurisdiction embraces jurisdiction only over the incidents of riparian land-ownership, such as authorization to build a wharf to access navigable waters far enough to permit the loading and unloading of ships, and the right to own accretions. Authority to make grants, leases, and conveyances of riparian lands and rights is the concomitant power to make available state-owned lands beneath navigable waters needed to implement incidents of riparian landownership, such as construction of a wharf. Such authority is jurisdiction over the definition and scope of property rights, that is, the rights and privileges that attach to riparian lands. It does not include police power jurisdiction to determine the legality of activities on, or in connection with the use of, riparian property such as a wharf. Nor does it include jurisdiction to determine the scope or content of public rights in navigable waters, which may be invoked to limit the exercise of riparian rights.

Opinion

11. Article VII of the 1905 Compact reads: "Each state may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective states." The phrase "riparian jurisdiction" was not then, and is not now, a legal term of art. It is, to the best of my knowledge, found neither in the treatise or article literature, nor in judicial opinions or statutes. That particular verbal formulation seems to have been devised for use in Article VII of the 1905 Compact as a limitation on the term "jurisdiction."[1]

12. Riparian law is a distinctive sub-category of the law of property. It deals with the incidents specific to ownership of riparian land.[2] A riparian tract of land is one that abuts the water's edge on a river or lake, or the shore of the sea.[3] The term derives from the Latin word "ripa", which means bank, as in the bank of a river. Land that is on the bank of a river is riparian land. As a

---

[1] Elsewhere in the 1905 Compact one finds the more familiar terms "jurisdiction" (in the introductory paragraphs and in Article VIII) or "exclusive jurisdiction" (in Article IV).

[2] In this Report, I shall speak of riparian rights as they existed prior to the time of the 1905 Compact, though the general shape of riparian rights has not changed significantly in the past century.

[3] *See* John M. Gould, *A Treatise on the Law of Waters, Including Riparian Rights and Public and Private Rights in Waters Tidal and Inland* § 148, at 297 (3d ed. 1900) ("Gould"). Legally, there is no distinction between land on the bank of a river and land on the bank of a lake or the sea, though technically the latter categories are termed littoral land, lit(t)us being the Latin word for sea shore or coast.

legal matter, the test of whether land is riparian is whether its boundary is at the water's edge, touching the water, whether or not there is anything like a bank. Such lands – and only such lands – are riparian. Riparian law, or what is usually called the law of riparian rights,[4] describes a set of special benefits in regard to the adjacent water body to which riparian landowners are entitled.

13. Riparian landownership conventionally includes the right to divert a reasonable amount of water for use on the riparian tract, the right to use the entire surface of the water (regardless of bottomland ownership) for recreational swimming or boating, and the right to stop up a river to install a dam in order to produce hydro-power.[5] There are other incidents of riparian ownership, such as a right to cut ice in the winter, though that use is of little importance today, as compared with the 1800s. Other important elements of riparian law are the rules of accretion, avulsion, erosion, and reliction, which determine how and whether the shore boundary moves as land is deposited or eroded at the edge of the tract, or as the sea level rises or falls. Another incident of riparian landownership is wharfing out, which is a right of access to a navigable depth of water.[6]

---

[4] While it is conventional to use the term riparian rights, or entitlements, some riparian incidents are property rights, and some – such as wharfing out onto state-owned bottomlands – are usually privileges that depend on prior governmental permission. *See, e.g.*, 1 Henry Philip Farnham, *The Law of Waters and Water Rights* § 113, at 528 (1904) ("Farnham's Law of Waters"). For convenience, in this Report, I will use "riparian rights" as a general term to describe use incidents of riparian landownership.

[5] *See generally* 1 Farnham's Law of Waters at 278-347; Gould at 296-447. A modern description of the incidents of riparian ownership, which for most purposes are quite similar to what they were a century ago, can be found in 1 Joseph W. Dellapenna, *Waters and Water Rights* §§ 6.01 *et seq.* (1991).

[6] *See* Gould § 149, at 300; 1 Samuel C. Wiel, *Water Rights in the Western States* § 904, at 942 (3d ed. 1911) ("Wiel"). *See, e.g.*, *New Jersey v. Delaware*, 291 U.S. 361, 375 (1934) ("By the law of waters of many of our states, a law which in that respect has departed from the common law of England, riparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers, and this though the title to the foreshore or the bed may have been vested in the state."); *Shively v. Bowlby*, 152 U.S. 1, 40 (1894) ("a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream, for his own use, or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public") (internal quotation marks omitted); *Mayor of Newark v. Sayre*, 60 N.J. Eq. 361, 372-73, 45 A. 985, 990 (Ct. Errors & Appeals 1900) ("Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river, as one of the public. This, however, is not a right coming to him qua owner or occupier of any lands on the bank, nor is it a right which per s[e] he enjoys in a manner different from any other member of the public. But, when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a

Essentially, wharfing out allows the riparian landowner to build a structure in the adjacent bottomlands sufficiently far out into the water to allow a ship to navigate to it, so it could load and unload, and its cargo could be transported on the wharf to the shore. As an access right, it provides the riparian landowner the physical capacity to make use of its water adjacency to benefit from water-borne commerce or recreation.[7]

14. As these examples demonstrate, riparian rights deal with facilitation of the ability by a riparian landowner to make general use of the water to which the riparian land is adjacent, rather than with the ultimate specific uses made of the water. Riparian law is property law.[8] It speaks to the rights of riparian landowners to make use of tidelands beneath navigable waters. And it speaks to the rights of riparian landowners among themselves, but not to the application of the general police power to riparian property. Thus, for example, riparian law determines how much water a riparian landowner may divert for use on his riparian tract, vis-à-vis other riparian landowners, but it does not speak to regulation of the kind of crops that may be grown, or whether

---

very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land[.]") (Depue, J., concurring) (internal quotation marks omitted).

[7] However, as a New Jersey court held long ago, while "[i]t is true[] that a grant of a right to build and maintain a wharf bears with it, by implication, the right to use it," that does not mean that any use that is advantageous to, or desirable for, the owner of the wharf is permissible. *Keyport & Middletown Point Steamboat Co. v. Farmers Transp. Co.*, 18 N.J. Eq. 511, 1866 WL 89, at *5 (Ct. Errors & Appeals 1866). "Extraordinary, unusual modes of use, no matter how convenient they may be, are not annexed as incidents in law to" the property right of wharfing out. *Id.*

[8] *See Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 504 (1871) ("This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired."); *Bell v. Gough*, 23 N.J.L. 624, 1852 WL 3448, at *38 (Ct. Errors & Appeals 1852) ("I am further of opinion that, by the true principles of the English common law, adopted in this state by the constitution of 1776, and adapted to the condition and requirements of our government, the owner of a freehold estate on the margin of tide water navigation has rights appurtenant to his freehold in the adjoining shore . . . as appurtenant to his riparian ownership, the right to exclude the influx of the tide by the erection of embankments, docks, or wharves, provided he does not impair or interfere with the common right of navigation or fishery or any other common right") (Nevius, J.); *see also id.* at *23 (Elmer, J.), *33 (Potts, J.); 1 Farnham's Law of Waters § 65, at 294 ("It appears to me impossible to say that a mode of enjoyment of land on the bank of a navigable river which is thus valuable, and as to which the landowner can thus protect himself against disturbance, is otherwise than a right, or claim to which the owner of land on the bank of the river is by law entitled within the meaning of the act requiring compensation for the destruction of such rights.").

a certain type of industrial facility, for which cooling water may be diverted from the river, is permissible in regard to air pollution. Those are matters left to the general police power. One finds no discussion or consideration of such issues in treatises and case law describing riparian rights and riparian law. By analogy, the law of real property permits ownership and occupancy of real property, but those general rights may be limited under the police power to regulate, restrict, or even prohibit specific activities on that property.

15. Similarly, certain public rights such as the federal navigation servitude, or state public trust law, impose limits on what riparian landowners may do, but they do not arise out of riparian landownership, and they exist independently of riparian law.[9] For example, the federal navigation servitude arises out of the federal commerce power,[10] not out of property law, and imposes independent restrictions on riparian rights.[11] Similarly, there are public rights in the preservation of fisheries that arise out of an independent body of environmental law – international, national, or state – that may restrict the riparian rights to dam a stream for hydro-power, but the exercise of that power would not logically be deemed an exercise of "riparian" jurisdiction.[12]

16. Because the jurisdiction of only one state is at issue in ordinary cases affecting riparian rights, courts have not needed to distinguish between the realm of riparian jurisdiction and jurisdiction exercised pursuant to the police power. For example, if a riparian landowner loses the use of some of the industrial cooling water it was diverting under its riparian rights because the factory using it had to cut back production under applicable state air pollution laws, no question arises as to the scope of riparian jurisdiction, as all jurisdiction is ordinarily embodied within a single sovereign state or is dealt with under the Supremacy Clause of the Constitution[13] if there is conflict between state and federal laws.

17. However, under the terms of the 1905 Compact at issue here, identification of the extent and limits of the riparian realm, "riparian jurisdiction," in the specific context of wharfing out, becomes relevant. To ascertain why the "riparian jurisdiction" and grants language of Article VII

---

[9] *See, e.g., Obrecht v. National Gypsum Co.*, 361 Mich. 399, 105 N.W.2d 143 (1960) (public trust, nuisance).

[10] *See Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25 (1866).

[11] "[I]t was recognized from the beginning that all riparian interests were subject to a dominant public interest in navigation." *United States v. Willow River Power Co.*, 324 U.S. 499, 507 (1945).

[12] Riparian landowners held their riparian rights and privileges subject to the public right to have migratory fish pass up rivers to their headwaters. *See* Gould § 188, at 358; Joseph K. Angell, *Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof* 89 (1826, reprint ed. 1983) ("Angell on Tide Waters"); Wiel § 905, at 945.

[13] U.S. Const. art. VI, § 2.

of the 1905 Compact might have been chosen, it is useful to note the historic situation of the law affecting wharfing out.[14]

18. In the late 19th and early 20th centuries, wharfing out into navigable waters – an incident of the ownership of riparian land[15] – was understood to have two elements that demanded state involvement: protection of the public right of navigation (usually implemented by setting a bulkhead line to mark the furthest permissible water-ward extent of wharfs and other structures) and permission to use submerged land below the high-water mark of navigable waters, which land was owned by the state.[16] The latter use was often implemented by a grant or lease of such land, as was the case in New Jersey. Under an 1871 New Jersey statute, riparian owners on tidal waters who wanted to build a wharf could obtain a lease, grant, or conveyance to state-owned lands in front of their riparian tracts by application to a board of riparian commissioners.[17] Some states, such as Delaware, however, seemed to recognize in this period that existing wharves would be protected so long they did not impede public rights such as that of navigation.[18] As to the first element, protection of the right of navigation, if the wharf interfered with the public right of navigation, it was considered a public nuisance. As to the second element, permission to use

---

[14] Nothing in this Report involves the meaning of the Article VII phrase "own side of the river." Instead, the analysis in this Report is based on my expertise in the history of riparian rights and laws and thus the interpretation of the "riparian" language in Article VII.

[15] "[O]wnership of the bed of the river . . . cannot be the foundation of a riparian rights properly so called, because the word 'riparian' is relative to the bank, and not to the bed of the stream, and the connection, when it exists, of property on the banks with property in the bed of the stream depends not upon nature, but on grant or presumption of law." Gould § 148, at 297.

[16] *See Shively*, 152 U.S. at 49-50; *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). "The right of property in the soil covered by tide waters, in all navigable rivers and arms of the sea within the limits of the state of New Jersey is vested in the state." *Gough v. Bell*, 22 N.J.L. 441, 1850 WL 4394, at *10 (Sup. Ct. 1850), *aff'd*, 23 N.J.L. 624, 1852 WL 3448 (Ct. Errors & Appeals 1852); *see Mayor of Newark*, 60 N.J. Eq. at 363, 45 A. at 986.

[17] 1871 N.J. Laws ch. 256, p. 44, § 1. The present version of the law is found in New Jersey Statutes Annotated § 12:3-10. Prior to the regulation of wharfing out by statute, "the owners of land bounding on navigable waters had an absolute right to wharf out and otherwise reclaim the land down to and even below low water, provided they did not thereby impede the paramount right of navigation." *Bell v. Gough*, 1852 WL 3448, at *23, *29 (Elmer, J.). But the "absolute right" was apparently only recognized down to the line of low water. *See id.* at *38 (Nevius, J.). The Wharf Act of 1851 required state approval to fill below the low-water line. *See* 1851 N.J. Laws, p. 335.

[18] "[I]n the case of a mere purpresture the court will not enjoin or abate it, unless it shall appear as a fact . . . to the injury of the public." *Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 1882 WL 2713, at *11 (1882).

submerged lands, if permission to use state submerged land on which to build a wharf was not granted or otherwise assured, the wharf was subject to removal as a trespass on sovereign property, historically known as a purpresture.[19]

19. Riparian landowners who desired to wharf out routinely sought prior authority for their wharf from the state as to both these matters.[20] In the ordinary case, there was no ambiguity about which state had jurisdiction over this riparian activity: the state in which the riparian land was located also owned the submerged bottomlands.[21] The failure to resolve New Jersey's challenge

---

[19] "If a littoral proprietor, without grant or license from the Crown, extends a wharf or building into the water in front of his land it is purpresture, though the public rights of navigation and fishery may not be impaired. If such a structure causes injury to the public right, it is a common nuisance and abatable as such[.]" Gould § 21, at 45 (footnotes omitted); *see also* Farnham's Law of Waters § 113, at 527. For a discussion of the traditional law relating to wharfing out, *see* Angell on Tide Waters at 125-33.

[20] The law in New Jersey from the legislation of 1851 to modern times, as set out in note 17, *supra*, is discussed in detail in *Bailey v. Driscoll*, 19 N.J. 363, 117 A.2d 265 (1955). State permission to extend facilities into the state's territory was authorized by grant or lease of land within the external boundaries of the riparian tract after 1871. In addition, the laws established bulkhead and pier lines to set an outer boundary beyond which improvement could not be made, in order to protect public rights of use in the waters, essentially the public right of navigation. In that way, both state proprietorship and the public's rights of use were recognized. At the same time, the authority of the federal government to control the navigation of navigable waters to the extent necessary for the regulation of interstate and foreign commerce was acknowledged. This history was similar to that in other states. *See* 1 Farnham's Law of Waters §§ 113b, 115, at 533, 554.

[21] *See* note 16, *supra*. Some states have granted specific tracts of land between high and low tide to the riparian owners (*e.g.*, *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913)) or, like Delaware, recognized generally that "title to riparian property extends from the upland to the low water mark," *City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004*, 607 A.2d 1163, 1168 (Del. Sup. Ct. 1992); *Harlan & Hollingsworth*, 1882 WL 2713, at *10. What is unusual here is that New Jersey owns the land between the high- and low-water marks (except to the extent it has granted that land away), and Delaware owns the land below the low-water mark. *See New Jersey v. Delaware*, 291 U.S. 361 (1934). These are the lands usually referred to as being in the public trust, or jus publicum. American public trust law is usually traced back to the 1821 New Jersey case of *Arnold v. Mundy*, 6 N.J.L. 1, 1821 WL 1269 (Sup. Ct. 1821), a case involving conflicting claims to ownership of oyster beds, in which the court upheld the state's ownership of land beneath tidal waters, in this much-quoted passage: "[T]he navigable rivers, where the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products . . . are common to all the people, and that each has a right to use them according to his pleasure,

to the boundary prior to the time of the 1905 Compact (or in the Compact itself) would have created an unusual set of potential problems for New Jersey with regard to its issuance of "grants, leases, and conveyances" to riparian landowners within the Twelve-Mile Circle, because New Jersey's claim to have jurisdiction on, over, and under the Delaware River within that area had been denied by Delaware.

20. New Jersey may have been uncertain as to which state's law governed the right to wharf out because the law was that "[i]n a case of wharfing out . . . '[t]he rights of a riparian owner upon a navigable stream in this country are governed by the law of the state in which the stream is located.' "[22] Thus, New Jersey could have feared that its prior grants, leases, and conveyances applied to land that might turn out to be in Delaware, and that structures upon those lands would become subject to scrutiny under the riparian standards that Delaware applied in its state.[23] Whether those standards might turn out to be more rigorous than those New Jersey had applied could not be known with certainty. Because, as Justice Cardozo later noted, "New Jersey in particular has been liberal in according" to riparians "the privilege of gaining access to a stream by building wharves and piers,"[24] New Jersey might have wished to protect the owners of existing wharves and structures.

21. At the time the 1905 Compact was being drafted, there were, according to New Jersey's Castagna Affidavit, only a handful of structures extending from New Jersey into Delaware. Insofar as the unresolved boundary question between the two states raised in a novel form the historic concern about purprestures and the states were concerned about which state's law of wharfing out applied to those landowners, it may explain the distinctive language chosen by the drafters of Article VII of the 1905 Compact. The law of wharfing out concerns a question of jurisdiction over a riparian right; thus, it would explain the use of the phrase "riparian jurisdiction." Moreover, because exercise of this riparian right under New Jersey law required a grant or lease of state-owned land, it would explain the phrase in Article VII "to make grants, leases, and conveyances of riparian lands and rights." Such language would also have been appropriate to other riparian property rights questions, such as which state's law governed accretions, or which state had jurisdiction to authorize diversions of water for use on riparian

---

subject only to the laws which regulate that use; that the property indeed vests in the sovereign, but it vests in him for the sake of order and protection, and not for his own use, but for the use of the citizen[.]" *Id.* at *9. For a brief historical discussion, *see* Moses M. Frankel, *Law of Seashore, Waters and Water Courses, Maine and Massachusetts* 125 (1969).

[22] 1 Wiel § 898, at 934 (quoting *Weems Steamboat Co. of Baltimore v. People's Steamboat Co.*, 214 U.S. 345, 355 (1909)).

[23] *See, e.g., Harlan & Hollingsworth*, *supra*.

[24] *New Jersey v. Delaware*, 291 U.S. at 375.

lands. Those concerns would be addressed by the phrasing "riparian jurisdiction of every kind and nature."

22. Such an arrangement would have been consistent with descriptions in the then-existing treatises (cited throughout this opinion), and the laws of New Jersey and Delaware, as to what was comprised within the category of riparian rights: e.g., the right of access to navigable depths via a wharf, the right to own accretions, or the right to divert from the river for use on riparian land.

23. Riparian law descriptions and definitions do not, however, describe the conduct that may be engaged in on riparian property. Such conduct is governed under the jurisdiction of the general police power. For example, one has a riparian right to use river water to irrigate a riparian tract, but there is no riparian right to grow marijuana or any other crop on the tract. One may have a riparian right to wharf out to navigable water so that a ship can tie up to the dock, but that does not create a riparian right to have, or not to have, gambling on the ship or dock, or to determine the safety rules for the ships that dock, whether or not they must be double-hulled, or have air-pollution controls on their emissions, for example. Similarly, nothing in the law governing the right to construct a wharf insulates activities to be engaged in on the wharf, such as those involved in the loading or unloading of particular cargoes, if they should constitute a nuisance or otherwise violate general laws for the protection of public health or safety. These are matters of general police power law governed by the sovereign that has general police power authority.

24. I have examined New Jersey's responses to Delaware's Requests for Admissions, as well as the riparian grants, leases, and conveyances issued by New Jersey between 1854 and 1920 discussed in the Castagna Affidavit. The distinction between that which is authorized under these exercises of riparian jurisdiction, and that which is within the scope of the general police power jurisdiction, is manifest in these documents. The various grants describing the land being transferred state that piers or other structures are to be built, and where they describe the intended uses do so in general terms, such as "he may deem proper and necessary for the improvement of his property or for the benefit of commerce";[25] or "for the accommodation of vessels navigating the same, and from time to time to rebuild and repair the same as may be necessary for the improvement of his property and the benefit of commerce";[26] or "to exclude the tide-water from so much of the land above described as lie under tide-water, by filling in or otherwise improving the same, and to appropriate the lands under water above described to exclusive private uses."[27] These actions exercising riparian jurisdiction do not include examination or regulation of the particular activities intended to be engaged in.

---

[25] Cited in Affidavit of Richard Castagna (reproduced as Appendix 5 to NJ Brief at 33a, ¶ (5)).

[26] *Id*. at 32a-33a, ¶ (4).

[27] *Id.* at 39a, ¶ (17).

25. The responses to Delaware's Requests for Admissions indicate a similar distinction. For example, New Jersey responded that "the grants do not expressly specify the precise business that can be carried on at any point in time"[28] or "the precise cargo that can be loaded or unloaded at any specific point in time."[29] It also stated that the authorization or restriction of any particular activity to be conducted on a wharf, pier, or like structure "would be under other State, federal or local laws, and not by the establishment of pierhead and bulkhead lines."[30] A person wishing to conduct a particular business activity on a wharf, in addition to receiving a riparian grant, would still have to comply with all other "applicable New Jersey laws[] and local laws."[31] To the best of my knowledge, the separation of authorities described in New Jersey's Responses to Requests for Admissions reflects the usual and traditional separation of the exercise of riparian rights from the exercise of state police power.

26. This distinction between riparian property law and general regulatory law has been drawn in many cases over the past century, though it has not arisen in the specific instance of two different states, one holding riparian jurisdiction and another holding general police power jurisdiction.[32] *Cummings v. City of Chicago*,[33] a case in the United States Supreme Court decided in the same period the 1905 Compact in issue here was being drafted, illustrates the separateness of the riparian realm of jurisdiction and that of the general police power, though it formally involved jurisdiction over riparian rights in the federal government and a claim of federal preemption. In that case, the United States regulated riparian landowners' wharfing out. The landowner there had complied with all the requirements of the federal permitting scheme that dealt with the building of a dock in the river, only to find that its project was blocked because it did not have an additional required permit from the City of Chicago. The riparian landowner claimed that, having complied with the wharfing out law, the further regulatory demand of the city under the police power was a violation of its property right, and the federal permitting system for wharfing out should be viewed as preemptive. Otherwise, the riparian owner suggested, it would have met all the requirements of the jurisdiction that governed riparian developments in the river and have

---

[28] New Jersey's Responses to Delaware's First Requests for Admissions, No. 5 (filed Sept. 8, 2006).

[29] *Id.*, No. 9.

[30] *Id.*, No. 3.

[31] *Id.*, No. 22.

[32] Other than the instant case, the case of *Virginia v. Maryland*, 540 U.S. 56 (2003), and another New Jersey case involving an interstate compact with New York, *see People v. Central R.R. Co. of New Jersey*, 42 N.Y. 283, 1870 WL 7713 (1870), the division of jurisdiction between states over rivers appears to be unprecedented.

[33] 188 U.S. 410 (1903).

fully implemented its riparian rights, only to be frustrated by the separate police power standards of the local government. The Court held that, merely because a company that wanted to build a dock had complied with all the detailed federal riparian regulation of wharfing out that had been imposed on the Calumet River in that case, that did not mean that "no jurisdiction or authority whatever remains with the local authorities."[34] The Court noted that, whatever the legitimate concerns of the federal government over the construction of wharves, the state also has its own internal police power to protect the interests of its citizens. Despite the extensive scope of the federal regulation there, and the claims that Congress had taken "possession" of the river, the Court indulged no such presumption, warning that the "river, it must be remembered, is entirely within the limits of Illinois, and the authority of the state over it is plenary."[35] Emphasizing the importance to a state of retaining regulatory jurisdiction over activities within its territory, the Court said that any congressional determination to abolish such state authority "would have been manifested by clear and explicit language."[36] One would expect the same standard to apply where a state is claimed to have divested itself of general police power jurisdiction over its territory.

27. The independence of the riparian and the police power realms is sharply drawn in the opinion of Justice Holmes in *Hudson County Water Co. v. McCarter*,[37] a case arising from New Jersey. The water company, a riparian landowner, sought to deliver to New York some water it was diverting from the Passaic River, in violation of a New Jersey law prohibiting such exports.[38] Justice Holmes characterized the case as one in which the water company was asserting that the anti-export law violated its riparian property rights.[39] The opinion is famous for its statement that

---

[34] *Id.* at 426. A similar point was made in a New Jersey case, where a municipality challenged a riparian landowner who was making a legitimate riparian use of the shore and who refused to obtain a city permit under the police power. The court said that "[t]he authority lodged in the [state] to make grants or leases of the state's riparian lands is not . . . inconsistent with the existence of the police power in the municipality in respect thereof." *Ross v. Mayor & Council of Edgewater*, 115 N.J.L. 477, 487, 180 A. 866, 872 (Sup. Ct. 1935).

[35] *Cummings*, 188 U.S. at 426-27.

[36] *Id.* at 430.

[37] 209 U.S. 349 (1908). The named plaintiff in that case, Robert McCarter, was both New Jersey's Attorney General and one of the New Jersey commissioners who negotiated the 1905 Compact.

[38] Notably, water has had a special place under the so-called dormant Commerce Clause. *See Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). *See also Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983).

[39] It had been strongly argued that what the company wanted to do was not within its riparian rights at all, *see McCarter v. Hudson County Water Co.*, 70 N.J. Eq. 695, 708, 65 A.

"[a]ll rights tend to declare themselves absolute to their logical extreme."[40] The decision centrally rests on a recognition of the separateness of the realms of the law of property and of the police power. Whatever the company's riparian rights may have been, the decision holds, they must nonetheless pass the independent test of the police power invoked to protect "the interests of the public."[41] "[T]he private property of riparian proprietors cannot be supposed to have deeper roots. . . . The private right to appropriate is subject . . . to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health."[42] Accordingly, the domain of property rights, whatever its scope, must nonetheless be tested against the distinct demands of the police power. As Justice Holmes thus made clear, the police power embodies a jurisdiction separate and apart from the head of jurisdiction that defines property rights.[43]

28. In the same respect, riparian landowners who had established mills in full compliance with the riparian law[44] could be compelled at some later time, in response to regulatory laws designed to protect or restore fisheries, to install fish ladders to allow the passage of migratory species, because riparian landowners held their riparian rights subject to the restrictions imposed to protect public rights under police power jurisdiction.[45] Over the years, public interests of various

---

489, 494 (Ct. Errors & Appeals 1906), *aff'd*, 209 U.S. 349 (1908), but Justice Holmes ignored those claims and used the decision to emphasize the separateness of authority over property and the authority of the police power.

[40] 209 U.S. at 355.

[41] *Id*.

[42] *Id*. at 356.

[43] "And these rights of the 'riparian owner' are not *common* rights, for they do not belong to his neighbor, who lies behind him on the main land, nor are they mere rights of adjacency to land belonging to the State, for mere adjacency to a mud flat belonging to the State lying inland would give no right in or over it; they are therefore *private* rights of the 'riparian owner' in the lands of the State lying in front of him beyond the 'shore;' which rights are his by the local common law of the State by reason of his adjacency." Opinion Concerning Riparian Rights at 8, Hon. George M. Robeson, Attorney General of New Jersey (1867).

[44] A dam erected for reasonable mill purposes is an incident of riparian landownership. *See* John Norton Pomeroy, *A Treatise on the Law of Riparian Rights* § 11, at 13 (1887); *McCarter*, 70 N.J. Eq. at 708, 65 A. at 494. But mill rights were sometimes viewed quite restrictively in light of the traditional riparian right to benefit from the continued natural flow of the stream. *See, e.g.*, *Delaney v. Boston*, 2 Del. (Harr.) 489, 1839 WL 165, at *4 (Super. Ct. 1839).

[45] *See* Gould § 187, at 358; Angell on Watercourses § 89, at 89; 1 Wiel § 905, at 945.

kinds have been imposed to restrict or prevent uses otherwise authorized pursuant to riparian landowners' proprietary rights.[46]

29. A modern state case, citing both *Hudson County* and *Cummings*, powerfully reinforces the distinction drawn in those decisions. In *Obrecht v. National Gypsum Co.*,[47] a riparian proprietor built a wharf in accord with its riparian rights and with the authority of the riparian permitting jurisdiction (also in that case the U.S. Corps of Engineers). But the use made of the wharf – loading and transporting gypsum rock – was challenged as a nuisance. The riparian landowner defended on the ground that it was operating pursuant to its duly permitted wharfing out riparian property right, and that the use it was making of the wharf could not be separately challenged under the state's nuisance or public trust laws. The court rejected that defense, noting the separate categories of riparian rights and public rights. Though the exercise of its riparian rights had received approval from the Corps of Engineers, which had jurisdiction to authorize "the construction of a massive and permanent loading dock . . . and the dredging of more than a mile deep channel,"[48] the riparian proprietor had to comply as well with state requirements for the protection of the public health and welfare. The *Obrecht* court also cited the Supreme Court's 19th-century decisions in *Yates v. Milwaukee*[49] and *Illinois Central Railroad v. Illinois*,[50] in which the Court observed that a riparian proprietor may access navigable waters and make a wharf or pier for that purpose, but nevertheless must also comply with general laws protecting public rights. *Obrecht* thus reiterates the firmly rooted principle that the entity with authority over riparian permitting deals with the limited issues of the property rights of the riparian owner and the physical extent of that right to the line of navigability, but not with the general scope of the police power.

30. The distinction between riparian rights and public rights drawn in *Obrecht*, as well as the importance to a state of issues affecting the public health and welfare, buttresses the likelihood that, insofar as the 1905 Compact may be construed as a transfer of any permanent authority by Delaware to New Jersey over waters within its boundaries, that authority would have been limited to administration of the property aspects of riparian landownership on the New Jersey shore, and

---

[46] *See, e.g., Colberg, Inc. v. State ex rel. Dep't of Public Works*, 67 Cal. 2d 408, 432 P.2d 3 (1967) (access to navigable waters cut off by highway bridge over navigable water); *Freed v. Miami Beach Pier Corp.*, 93 Fla. 888, 899, 112 So. 841, 845 (1927) (if they become a nuisance, wharves can be removed or abated); *State v. Central Vermont Ry., Inc.*, 153 Vt. 337, 351-52, 571 A.2d 1128, 1135-36 (1989) (wharves no longer meet public trust standard).

[47] 361 Mich. 399, 105 N.W.2d 143 (1960).

[48] 361 Mich. at 405, 105 N.W.2d at 145.

[49] 77 U.S. (10 Wall.) 497 (1871).

[50] 146 U.S. 387 (1892).

not to the far more extensive and significant administration of public rights and the general police power over the Delaware River and its environs as affected by activities related to use of wharves constructed, or to be constructed, from the New Jersey shore into the river.

Conclusion

31. For the above reasons, and assuming it was determined that New Jersey's "riparian jurisdiction" extended water-ward of the mean low-water mark on the easterly shore of the Delaware River within the Twelve-Mile Circle, it is my opinion that, in agreeing to the exercise of "riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights"on the part of New Jersey, those who drafted and approved the 1905 Compact did not intend to withdraw from Delaware regulatory or police power authority over uses or activities of those who might in the future use, or propose to use, wharves built out from the New Jersey shoreline beyond the territorial limits of New Jersey.

Respectfully submitted,

Joseph L. Sax

Date: Nov. 7, 2006

EXHIBIT A

Joseph L. Sax

James H. House & Hiram H. Hurd Professor (emeritus)

School of Law (Boalt Hall)

University of California (Berkeley)

Address

Boalt Hall (Law School)

University of California

Berkeley, California 94720

tel. (510) 642-1831

e-mail: saxj@law.berkeley.edu

Education:

A.B. Harvard University 1957

J.D. University of Chicago 1959

Admitted to Practice:

Michigan, District of Columbia (inactive), U.S. Supreme Court

Professional Experience:

Attorney, private practice, Washington, D.C. (1959-62)

Professor of Law, University of Colorado (1962-66)

Philip A. Hart Distinguished University Professor, University of Michigan (1966-86)

Counselor to the Secretary of the Interior, Deputy Assistant Secretary of the Interior (1994-1996)

Visiting Professor of Law:

University of Paris I (Panthéon-Sorbonne)

Stanford University

Order of the Coif Distinguished Visitor (Texas Tech., West Virginia, Nebraska)

University of Utah

University of Colorado

Centennial Distinguished Visitor, IIT-Chicago Kent College of Law

Virginia Environmental Endowment Professor, University of Richmond

Wallace S. Fujiyama Visiting Professor, Univ. of Hawaii

Honors and Awards (selected):

•Fellow, American Academy of Arts and Sciences

•Doctor of Laws (hon.), Illinois Institute of Technology

Chicago-Kent College of Law

•Professional Achievement Citation, University of Chicago Alumni Ass'n

•Elizabeth Haub Award, Free University Brussels, Gold Medalist

•Fellow, Center for Advanced Study in the Behavioral Sciences, Stanford

•Distinguished Water Attorney Award (Water Education Foundation, 2004)

•Cook Lecturer in American Institutions, University of Michigan

•Environmental Law Institute Award

•Wm. O. Douglas Legal Achievement Award, The Sierra Club

•Biennial Book Award, University of Michigan Press

•Conservationist of the Year, Audubon Society (Detroit)

•Resource Defense Award, National Wildlife Federation

•Distinguished Faculty Achievement Award, University of Michigan

•Environmental Quality Award, U.S. E.P.A.

•American Motors Conservation Award

Consultancies (selected)

In recent years, I have consulted/prepared reports/been an expert witness for: (1) United States Bureau of Reclamation; (2) Coachella Valley (California) Water District; (3) Los Angeles Department of Water and Power; (4) State of Mississippi; (5) County of Riverside, California; (6) City of Santa Cruz, California; (7) Council of Great Lakes Governors; (8) International Joint Commission (Great Lakes); (9) California State Water Resources Control Board; (10) City of Glendale, California; (11) Southern Nevada Water Authority; (12) County of Yolo, California; (13) State of Delaware (original jurisdiction suit in the U.S. Supreme Court); (14) United States (Department of State).

EXHIBIT B

Publications 1996-2006

Books

Playing Darts With A Rembrandt: Public and Private Rights in Cultural Treasures (Ann Arbor, Univ. of Michigan Press, 1999); paperback edition (2001); Japanese language edition (Iwanami Shoten, Tokyo, 2001).

Legal Control of Water Resources, 3d edition (with Barton H. Thompson. John Leshy & Robert H. Abrams) (St. Paul, West Pub. Co., 2000); 4th edition (2006).

"Legal and Policy Challenges of Environmental Restoration," ch. 10 in V.A. Sharp, Bryan Norton, & Strachan Donnelley, eds., Wolves and Human Communities (Wash., D.C., Island Press, 2001).

"Environmental Law and Regulation," in Common Law Common Values Common Rights: Essays on Our Common Heritage by Distinguished British and American Authors (American Bar Association/West Group, 2000).

Government Report

Review of the Laws Establishing the SWRCB's Permitting Authority Over Appropriations of Groundwater Classified as Subterranean Streams," California State Water Resources Control Board No. 0-76-300-0, Final Report, Jan. 19, 2002.

Articles

"Proposals For Public Land Reform: Sorting Out The Good, The Bad, and The Indifferent," 3 West/Northwest (Hastings College of the Law) 187 (1996).

"Property Rights Legislation In the Congress, Where It Stands and Where Its Going," 23 Ecology Law Quarterly 509 (1996).

"Using Property Rights to Attack Environmental Protection," 14 Pace Env. L. Rev. 1 (1996).

"New Departures in the Legal Protection of Biological Diversity: Implementing the Endangered Species Act," 27 Environmental Policy and Law 347 (August, 1997).

"Property Rights Legislation in the 104th Congress," 4 Env. L. News 10, No. 4 (Winter 1995-6).

"Perspectives on Ecosystem Management: Closing Remarks," 24 Ecology Law Quarterly 883 (1997).

"Evolution of the Public Trust Doctrine," in Gary E. Smith & Alexander R. Hoar, eds., The Public Trust Doctrine and Its Application to Protecting Instream Flows: Proceedings of a Workshop [held March 5-6, 1996] (Nat'l. Instream Flow Program Assessment, March, 1999).

(Alaska Dept. of Fish and Game, Div. Of Sport Fish, Research and Technical Services, 333 Raspberry Road, Anchorage, AK 99518-1599).

"Public Land Law in the 21st Century," in 45 Rocky Mountain Mineral Law Institute (1999) (Rocky Mtn. Min. Law Fan., 7039 East 18th Ave., Denver, CO 80220).

"Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History," 88 Calif. L. Rev. 2377 (Dec. 2000).

Reprinted in 32 Land Use and Environment Law Review ___ (2002) (collection of best environmental articles of the year).

Excerpt Reprinted in Freeman, et al., Cases and Materials on Environmental Law (Thompson West, 2006).

"Environmental Law and Regulation," in Common Law Common Values Common Rights: Essays on Our Common Heritage by Distinguished British and American Authors (American Bar Association/West Group, 2000).

"Not So Public: Access to Collections," 1 RAM, A Journal of Rare Books, Manuscripts, and Cultural Heritage 101 (#2, 2000).

"Issues in the Watershed Management Movement," in Watershed Management: A New Governance Trend (American Bar Association, Section of Environment, Energy, and Resources, San Diego, 2001) (paperback book and CD rom).

"Comment on John Harte's Paper, "Land Use, Biodiversity, and Ecosystem Integrity: The Challenge of Preserving the Earth's Life-Support System," Symposium, Environment 2000–New Issues for a New Century, 27 Ecol. L. Q. 1003 (2001).

"The Water Dilemma: Can Californians Bring Management of Their Rivers into Harmony with Today's Needs?," Defenders (The Conservation Magazine of Defenders of Wildlife), v. 76, No. 2 (Spring, 2001), pp. 20-24, 34-35.

"Implementing the Public Trust in Paleontological Resources," in Vincent L. Santucci & Lindsay McClelland, eds., Proceedings of the 6th Fossil Resource Conference (Geologic Resources Division Technical Report, NPS/NRGRD/GRDTR-01/01, September 2001) (Geological Resources Division, 12795 West Alameda Parkway, Academy Place, Room 480, Lakewood Colorado 80227, National Park Service D-2228, Sept. 2001)
available at http://www.aqd.nps.gov/grd/geology/paleo/pub/fossil_conference_6/sax.htm.

"The New Age of Environmental Restoration," 41 Washburn L.J. 1 (2001).

"We Don't Do Groundwater: A Morsel of California Legal History, 6 U.Denver Water Law Review 269 (No. 2, Spring 2003).

The Public Trust Doctrine, in Symposium, Managing Hawai'i's Public Trust Doctrine, 24 Univ. of Hawaii L. Rev. 1, 24 (2001).

"Using Property Rights to Attack Environmental Protection," 19 Pace Env. L. Rev. 715 (2002/Special Edition).

"Reflections on the Great Lakes," the 2d Annual Peter M. Wege Lecture, University of Michigan School of Natural Resources (Nov. 6, 2002), at www.css.snre.umich.edu.

"Public Interests and Common Concerns," Paper Delivered at the Workshop, Legal Tools for World Heritage Conservation, Siena, Italy, Nov. 11, 2002.

"Backyard Politics" in San Francisco Daily Journal (San Francisco and Los Angeles), Wed., Feb. 5, 2003, at 4. Reprinted as "Landowner's Lament: Time to Turn Off the Tears," in Planning & Law, American Planning Association, Planning and Law Division Newsletter (Summer 2004), at 4. Revised version published as "Property Rights in A Changing Land," Illinois Jurist (Spring 2004), at 26.

"The History of Water Law in the United States," Water Resources Center Archives (Univ. of Cal. Berkeley), June 2004, vol. 11, no. 1,
at http://www.lib.berkeley.edu/WRCA/pdfs/news111.pdf.

"Imaginatively Public: The English Experience of Art As Heritage Property," 38 Vand. J. Transnat'l L. 1097 (2005).

Review of Jordanna Bailkin, The Culture of Property: The Crisis of Liberalism in Modern Britain, 12 Int'l J. Cult. Property 443 (2005).

"Why America Has A Property Rights Movement," 2005 Ill. L. Rev. 513.

"The Unfinished Business of Environmental Law," IUCN 3rd Colloquium Lectures, Sydney, Australia (Cambridge Univ. Press, 2006, forthcoming).

"Environment and Its Mortal Enemy: The Rise and Decline of the Property Rights Movement," 28 U. Hawaii L. Rev. 7 (Winter 2005).

"The Realities of Regional Resource Management: Glacier National Park and Its Neighbors Revisited," 33 Ecol. L.Q. 233 (2006).

No. 134, Original
In the
Supreme Court
of the
United States

State of New Jersey

v.

State of Delaware

Expert Report of Carol E. Hoffecker, Ph.D.

My name is Carol E. Hoffecker, Ph.D. My address is 804 Cinnamon Drive, Hockessin, Delaware 19707. I am Richards Professor Emerita of History, University of Delaware, where I taught for approximately thirty-five years. I am the author of numerous books and articles dealing with aspects of Delaware history, including *Democracy in Delaware, The Story of the First State's General Assembly* (2004) and *Federal Justice in the First State: A History of the United States District Court for Delaware* (1992).

I have been assisted in preparing this report by Barbara E. Benson, Ph.D. Dr. Benson is the retired Executive Director of the Historical Society of Delaware and had served as an adjunct faculty member in the History Department of the University of Delaware from 1981-2003.

Neither I nor Dr. Benson has any financial interest in, or current employment or consulting arrangement with, any of the parties to this case other than having been

retained by the State of Delaware to review the claim made by the State of New Jersey, to provide my opinion as an expert on the background and historical context of the Compact of 1905 and to prepare this Expert Report.

Qualifications

Over more than forty years as a scholar and teacher, one of my principal interests has been research and teaching Delaware history, including the State's political history.

Information Required Pursuant to Rule 26(a)(2)(B)

My curriculum vitae is attached hereto as Exhibit A. Dr. Benson's curriculum vitae is attached hereto as Exhibit B.

All the data and information considered by me in forming the opinions herein, other than knowledge gained over many years of study in the field, are cited in this report.

I am being compensated for my work in preparing this report and for my testimony, if called, at the rate of $200 per hour. Dr. Benson is being compensated at the same rate. Our compensation is not contingent on, or related in any way, to the outcome of this case.

Scope of Assignment

I have been retained by the State of Delaware to provide an opinion as to the historical background and context of the Compact of 1905.

Summary of Opinion

The Compact of 1905 grew out of an interstate conflict concerning the regulation of fishing rights in the Delaware River. In 1871, Delaware's General Assembly adopted a law to tax out-of-state commercial fisherman in Delaware's waters. Since colonial

times, Delaware had claimed water rights and the subaqueous soil in the Delaware River to the low water mark within a twelve-mile circle measured from the town of New Castle, Delaware. In 1877, New Jersey brought suit in the United States Supreme Court to contest Delaware's boundary claim and its right to regulate fishing in the river. The case languished for many years until both states decided to discontinue the litigation, without prejudice, based on agreements set forth in an interstate compact, which has come to be known as the Compact of 1905. The Compact of 1905 should be viewed in the context of a particular historical moment in time. It was designed to resolve the fishing dispute that caused the litigation. It was not intended to infringe on Delaware's boundary or jurisdictional claims in other respects, as to which both states reserved their claims. Delaware's boundary claim was later confirmed by the United States Supreme Court in 1934. By that time, there were few fish in the Delaware River, and the states were no longer concerned with the fishing issues that had led them to enter into the Compact of 1905.

Opinion

Disputes over the commercial uses of the Delaware River and Bay have plagued relations between Delaware and New Jersey since colonial times. The two states' protracted cases before the United State Supreme Court can remind readers of fiction of the seemingly endless suit of *Jarndyce* v. *Jarndyce*, in Charles Dickens's *Bleak House*. Since the Age of Discovery, the Delaware River and Bay have provided a major entry into the east coast of the United States. Today they remain a major commercial link to the world for the cities of Trenton, New Jersey, Philadelphia, Pennsylvania, and Wilmington, Delaware. These waterways are also an essential part of the Atlantic

Basin's ecosystem and have been an important source of food to the people who have lived along their shores for many centuries. Those many uses have not always coexisted harmoniously. The Delaware River and Bay have served both Delaware and New Jersey well, yet these bodies of water continue to separate the two states in more ways than one. This report describes the historical background of some of those conflicts and how the states have attempted to resolve them over time.

Early Fishing on the Delaware

Long before the European settlement of the Delaware River Valley, Native Americans paddled their dugout canoes on the waters of the Lenape Wihittuck, or the river of the Lenape, as the great river was then called.[1] The Lenni Lenape lived on both sides of the river, which was their major transportation artery and an important source of food. As part of their annual cycle of the seasons, Lenni Lenape visited the shores of the river and its tributaries during the summer months to fish for shad, sturgeon, and other fin fish, as well as to harvest oysters and shellfish. The abundance of fish and oysters made fishing easy. During the spawning season for shad and sturgeon, Lenape men and boys came to the river as those fish moved from salt to fresh water and then back again. They used woven nets and wooden stakes to create fence-like weirs to capture the fish. Some of the Native Americans would wade into the river to drive the fish into the net, where others could spear or even catch their slippery prey with bare hands.[2]

---

[1] C.A. Weslager and Louise Heite, "History," in *The Delaware Estuary: Rediscovering a Forgotten Resource*, eds. Tracey L. Bryant and Jonathan R. Pennock (Newark, Del.: University of Delaware Sea Grant Program, 1998), p. 11.

[2] Ibid.; C. A. Weslager, *The Delaware Indians* (New Brunswick, N. J.: Rutgers University Press, 1972), esp. chap. 3, pp. 50-76. For an illustration of Lenape shad fishing, see Weslager and Heite, "History," p. 14. Eventually the river once known as the "river of the Lenape" came to be known as the Delaware River, and the Native Americans living there as Delaware Indians.

Western Europeans arrived in ever-increasing numbers in the seventeenth century to exploit and to assert their control over the Delaware River and Valley and the lands that surround it. For nearly a hundred years, the Dutch, the Swedes, and the English vied for control over part or all of the lands along the Delaware. Fur trading and whaling brought the first Europeans, but soon many could see the opportunities for financial advancement through exploitation of other natural resources. Most people immediately think of the trade in animal pelts, especially the highly prized beaver, but the variety and abundance of fin fish and shellfish under the water were also seen as a major commercial resource.[3]

Virtually every explorer and early settler commented on the abundance of the Delaware River. For example, Thomas Yong, sailing for England in 1634, waxed eloquent about the region of the Delaware. He compared the climate to that of Italy, and of the fish he noted, "heere is plenty, but especially sturgeon all the sommer time . . . ."[4] Peter Lindeström, who came about 1650 to the Delaware as part of the New Sweden Colony, had to describe shad for his masters in Stockholm: "a kind of large fish like the salmon, runs against the stream like a salmon . . . ; a very fine flavored and excellent tasting fish . . . ."[5] Within a year of his arrival on the Delaware, William Penn bragged to friends back in England about the bounty of the Delaware River. To John Aubrey he

---

[3] Two scholarly but highly readable introductions to colonization of the western shore of the Delaware River are John A. Munroe, *Colonial Delaware: A History* (Millwood, N.Y.: KTO Press, 1978) and C.A. Weslager, *The English on the Delaware, 1610-1682* (New Brunswick, N.J.: Rutgers University Press, 1967).

[4] "Account of Thomas Yong, 1634," in *Narratives of Early Pennsylvania, West New Jersey, and Delaware, 1630-1707*, ed. Albert Cook Myers (New York: Charles Scribner's Sons, 1912), p. 48.

[5] Peter Lindeström, *Geographia Americae*, trans. Amandus Johnson (Philadelphia: Swedish Colonial Society, 1925), p. 187.

wrote, "the sorts of fish in these parts are excellent and numerous. Sturgeon leap day and night that we can hear them . . . in our beds."[6] A month later he told the Earl of Sunderland that there were "fish in abundance, especially of Shad and Rock [striped bass], which are excellent here."[7]

In 1683 William Penn had every reason to enjoy, in a proper Quaker way, his enviable position as proprietor of not one, but two, English colonies in North America. Little did he know then how difficult, how litigious, his struggle would be to hold claim to his colonies and to pass them down to his heirs. Because of his father's wealth and position, William traveled in the upper circles of the English aristocracy. His conversion to the radical new religion of the Society of Friends pained and frustrated his father and often moved young Penn beyond the realms of elite society. His faith led him to many places, including the Mid-Atlantic region of North America. His first encounter with this colonial world came with West Jersey, an experience that he found fraught with both potential and pitfalls. He learned that colonial lands could be used to create areas of settlement for Quakers and other religious nonconformists, but he also learned various lessons about the legal dangers of both partnerships and the Crown.[8]

William Penn subsequently sought a grant of land from England's monarch to create his own colony on the opposite or western side of the Delaware River. King Charles II owed Penn a large debt for money borrowed from Penn's late father. Penn preferred land to cash, and North American land was much easier for Charles to spare

---

[6] William Penn to John Aubrey, June 13, 1683, *The Papers of William Penn,* 5 vols., eds. Richard S. Dunn and Mary Maples Dunn et al. (Philadelphia: University of Pennsylvania Press, 1981-1986), 2:395.

[7] William Penn to Earl of Sunderland, July 28, 1683, *The Papers of William Penn*, 2: 417.

[8] For a modern biography of William Penn, see Richard S. Dunn and Mary Maples Dunn, eds., *The World of William Penn* (Philadelphia: University of Pennsylvania Press, 1986).

than money. But such a grant had to fit a new colony into an area already partially carved up into the Colony of Maryland, granted to Lord Baltimore by Charles I in 1632, and the Three Lower Counties on Delaware, which the king's brother, James, duke of York, had seized from the Dutch in 1664. Imprecise knowledge of the area's geography, and its cartographic representations, made this grant tricky, and thereby began the controversy over the boundaries of Delaware.

Delaware's unusual shape and its claim to the Delaware River to the low-water mark on the eastern shore began with the royal grant of Pennsylvania. The Duke of York wanted to protect his major town and administrative center on the western side of the Delaware River, so his secretary, Sir John Werden, proposed a circle boundary from the town, New Castle, as a territorial buffer. The final determination of a twelve-mile circle was transferred just two years later, in 1682, by deed and lease to William Penn. Penn thus gained control of the western side of the Delaware River through two separately granted but contiguous colonies: the Province of Pennsylvania and The Three Lower Counties on Delaware.

Much time and attention, to say nothing of parchment, paper, and ink, have been lavished on the question of Delaware's boundaries for over 300 years. The Duke of York's "clouded title" to land on the western side of the river, as noted historian John A. Munroe so delicately termed it, accounts for those controversies. Lawyers, historians, and archivists have spent countless hours marshalling the documents and arguments used to assert the rights of one claimant over another, from William Penn and Charles Calvert, Lord Baltimore, to the states of New Jersey and Delaware. Legal decisions establishing and affirming the boundaries of the second smallest colony/state by size took from 1750

when the English Court of Chancery upheld the Penn claims over those of Lord Baltimore to the 1934 United States Supreme Court decision written by Justice Benjamin Cardozo upholding the State of Delaware's claim to the territory within the twelve-mile circle from New Castle to the low-water mark on the eastern shore of the Delaware River.[9]

The Nineteenth-Century Fishing Industry on the Delaware

While the colonial population expanded and territorial boundaries were adjudicated, the river of the Lenni Lenape became a major transportation corridor, and its fin fish and shellfish continued to be an important part of the local diet and commerce. By the middle of the nineteenth century fishing on the Delaware had become a profitable business, and newspapers in Philadelphia eagerly reported on the enormity of the annual catch.[10] Fishermen and fishing industries on the Delaware, like individuals and companies almost everywhere, reacted accordingly. Throughout history, when natural resources appear to be so plentiful as to be without limit, those involved in their exploitation see little reason for restraint. Exploitation, not conservation, becomes the operative mentality. The reasoning is always the same: if the harvest of a resource, like fish, is good, then more capital, more labor, and more tools will surely lead to greater exploitation and greater profits.

---

[9] For brief summaries of early boundary decisions, see, among many, Weslager, *English on the Delaware,* pp. 221-26, and Munroe, *Colonial Delaware*, pp. 79-84. The Duke of York's deed of feoffment to William Penn delineated the boundary thusly: "all that the Towne of NewCastle otherwise called Delaware and All that Tract of Land lying within the Compass or circle of Twelve Miles about the same scituate lying and being upon the River Delaware in America And all Islands in the same River Delaware and the said River and Soyle thereof lying North of the Southernmost part of the said Circle of Twelve Miles about the said Towne" (*State of New Jersey v. State of Delaware*, 291 U.S. 361, 364 (1934)).

[10] Quoted in *Delmarva Star* (Wilmington, Del.), Mar. 31, 1929.

The two fin fish of particular value to the Delaware River's nineteenth-century fishing industry were the favorites from time immemorial: the shad and the sturgeon. William Penn's beloved shad is one of the largest and most valuable members of the herring family. Shad, which can weigh as much as twelve pounds, live in the salt water of the Atlantic Ocean, but from age three to five onward they return to fresh water to spawn. Shad-spawning season on the Delaware is primarily April through June. Shad can be found along the Atlantic coast of North America from the Gulf of Saint Lawrence to Florida, but they are most abundant in the Delaware River and the Chesapeake Bay. Atlantic sturgeon are found from the Saint Lawrence River south to the Gulf of Mexico. At the height of the sturgeon industry, the Delaware fishery was the largest in America. Sturgeon can reach a length of ten to twelve feet and, like shad, live in salt water but travel to fresh water to spawn. Sturgeon spawning season on the Delaware is normally the months of May and June.[11]

The Delaware River's commercial fishing industry began and ended with shad. From the 1870s, shad fishermen on the Delaware found eager buyers. At first fishermen sold their catch from their boats, or their wives hawked them at local markets. Then buyers from all over the East Coast came to the major port towns. By the end of the nineteenth century, much of Delaware's shad catch was sent to distant markets in water-tank rail cars. As the shad industry boomed, its expenses increased. More men and boats took to the water, and the drift nets used to catch the shad got longer and longer, reaching up to a mile in length. Often fishermen worked cooperatively in groups, fishing in teams

[11] For an overview of the fish and fishing industry of the Delaware River and Bay, including shad and sturgeon, see Kent S. Price, Robert A. Beck, Steward M. Tweed, and Charles E. Epifanio, "Fisheries," in *The Delaware Estuary: Rediscovering a Forgotten Resource*, eds. Tracey L. Bryant and Jonathan R. Pennock (Newark, Del.: University of Delaware Sea Grant Program, 1998), pp. 71-89.

and sharing shoreline fishing shacks for eating and sleeping between trips. On the western shore of the river, the dominant shad-fishing area extended from Port Penn to Wilmington, while on the eastern shore, Penn's Grove was an important shad center. The shad catch in the Delaware increased dramatically: from about 3 million pounds a year in 1880 to nearly 15 million pounds in the early twentieth century. But then the shad industry fell as rapidly as it had soared. For the State of Delaware alone, the shad catch dropped 99 percent from 1896 to 1944. What brought about this collapse? One newspaper bluntly summed it up by saying, "killed off by greed and pollution."[12]

Initially, commercial fishermen on the Delaware viewed the huge, jumping sturgeon as a "nuisance" rather than an exploitable asset. Sturgeon surged upriver in spawning season in such huge numbers that people swore that the fish would actually jump into boats.[13] Shad fishermen hated sturgeon because the fish caused heavy damage, even destruction, when caught in shad nets. When shad fishermen saw sturgeon racing toward their nets, their best recourse was to try to take their nets in. Slowly a market grew for sturgeon meat, particularly smoked sturgeon, but the sturgeon really took off

---

[12] *Delmarva Star*, Mar. 4, 1923. No single comprehensive source on the history of shad fishing in the Delaware River exists, but a good understanding can be gained by reading Price, Beck, Tweed, and Epifanio, "Fisheries," pp. 71-77, who note that improved water quality and government regulations have recently significantly increased the shad population in the Delaware. This increase, however, has not created a similar return of a shad fishing industry because the competitive situation has changed. See also, James G. Horn, "The History of the Commercial Fishing Industry in Delaware" (B.A. thesis, University of Delaware, 1957), pp. 2-20; Jay L. Harmic, "History of Delaware's Shad Fisheries," in *Delaware Conservationist* (Spring 1963): 14-15; and a series of articles in Delaware newspapers, especially Wilmington *Journal-Every Evening*, Aug. 30, 1947, and Wilmington *Evening Journal*, Jan. 25, 1927.

[13] No single comprehensive source for the history of sturgeon fishing on the Delaware exists, but a good overview of the industry can be gained from John N. Conn, "The Sturgeon Fishery of Delaware River and Bay," in U.S. Commission of Fish and Fisheries, *Report of the Commissioner for the United States Commission of Fish and Fisheries for 1899* (Washington, D.C.: Government Printing Office, 1899), pp. 369-80; John A. Ryder, "The Sturgeon and Sturgeon Industries of the Eastern Coast of the United States . . . ," *Bulletin of the United States Commission of Fish and Fisheries for 1888* (Washington, D.C.: Government Printing Office, 1889), pp. 231-328; Price, Beck, Tweed, and Epifanio, "Fisheries," pp. 71-77; Horn, "Commercial Fishing Industry in Delaware," pp. 2-20; Wilmington *Every Evening*, Jan. 25, 1927.

when the price of caviar increased. The price of sturgeon eggs, or roe, jumped from 30 cents a pound in 1897 to $3.50 1922.[14] Now female sturgeon became truly valuable. Sturgeon vessels and nets appeared on the Delaware to compete with shad ships. Sturgeon fishermen often worked from scows fitted out with two cabins, a large one for communal living and a small one for butchering the catch and preparing the roe. Others fished from sailing ships known as sturgeon skiffs, which were larger than shad skiffs. Sturgeon fishermen drifted long gill nets, often using fifteen small boats working as a team. The center of the sturgeon industry on the western side of the Delaware was from approximately twenty miles north to twenty miles south of Delaware City, while Penn's Grove and Bayside were important sturgeon centers on the eastern shore. Fishermen sold locally, nationally, and particularly internationally for caviar. As market demand increased, so did the number of fishermen and the size of the catch, leading to the beginning of the end of the sturgeon industry on the Delaware. The number of nets might increase, but the catch per net began a steady decline as early as 1888. High prices, however, sustained some level of commercial sturgeon fishing on the Delaware into the 1930s. Once again, "greed and pollution" got the blame for the industry's demise; but in the case of sturgeon, over-fishing through greed was believed to be the greater culprit.

From the Fishing War of 1871 to the United States Supreme Court, Round 1

Not all of those who worked in the fishing industries or in the governments of the states in which fisheries operated remained oblivious to the imperative of sustainability. Without regulation and protection of a natural resource, fishing could not survive at a commercial level. As early as 1871 the federal government created the United States

---

[14] Price, Beck, Tweed, and Epifanio, "Fisheries," p. 75.

Commission of Fish and Fisheries to study why food fish in American waters were declining and how that decline could be turned around. From that commission came two major reports on the sturgeon industry of the Delaware River and Bay in 1888 and 1899.[15] At about the same time state governments with interests in the Delaware River and Bay began to enact legislation designed to protect the fishing interests of their citizens. New Jersey appointed Commissioners of Fisheries in 1870, and the following year Delaware's governor urged the legislature to appoint a study commission. The Delaware legislature subsequently approved the appointment of five fish commissioners in 1873.[16]

As commercial fishing became important at the beginning of the 1870s, both Delaware and New Jersey took an increasing interest in the Delaware River. Delaware Governor Gove Saulsbury included a section on fishing in his message of 1871 to the Delaware legislature concerning the conservation of the resource for the benefit of Delaware citizens.[17] "The laws of the state have not been adequate to the protection of

---

[15] Ryder, "The Sturgeon and Sturgeon Industries of the Eastern Coast of the United States . . . ," is a scientific study delineating the need to control over-fishing, protect habitat, and promote propagation; Conn, "The Sturgeon Fishery of the Delaware Bay and River" is a detailed history of the sturgeon industry to the end of the nineteenth century.

[16] *Revision of the Statutes of New Jersey, Published under the Authority of the Legislature* (Trenton: John L. Murphy, 1877), 425 [This law, passed in 1870 and amended in 1873 and 1874, was entitled "An act for the appointment of commissioners for the better protection of fishing interests of the state of New Jersey]; Gove Saulsbury, Governor's Message of Jan. 3, 1871, in Delaware, *Journal of the Senate*, 1871, pp. 16-17; *Laws of Delaware*, vol. 14, chap. 419, sec. 2, p. 281.

The laws cited above were not the first passed by either state relating to fin fishing. At least as early as 1808, New Jersey enacted concurrent legislation with Pennsylvania to regulate fishing on the northern portion of the Delaware River. This legislation, supplemented many times, was in effect at the time the State of New Jersey created fish commissioners (*Revision of the Statutes . . . , 1877*, pp. 426-33). The State of Delaware passed its first regulatory fishing law in 1829, an act to regulate and tax gill nets, but promptly repealed it a year later. Another law adopted a decade later made it illegal for nonresidents to hunt, fish, or take oysters "from, in, or near the waters of the Delaware River and Bay" (*Laws of Delaware*, vol. 7, chap. 181, p. 372, and vol. 9, chap. 216, p. 263).

[17] Saulsbury, "Message of Jan. 3, 1871," p. 17.

our oyster beds, planting grounds, and fisheries from depredation by non-residents . . . ."

The legislature, he wrote, has a duty

> to protect our inhabitants in the proximity to our rivers and streams, and the proprietors of the soil along our coasts, and all engaged in the business of fishing and culture of oysters, in all the rights which their location and business entitle them to, as it is to protect our fruit growers or the producers of any other of our staple crops.[18]

Governor Saulsbury's concerns relating to fishing were nothing new in Delaware. The state's first such law in the nineteenth century, passed in 1812, declared Delaware's waters off-limits to non-Delawareans. While this law was concerned with oysters and terrapin, the legislature's next protective effort, in 1839, prohibited all non-Delawareans from fishing and hunting in or near the "waters of the Delaware."[19] Clearly Delaware's lawmakers assumed ownership of the river, but equally clearly those laws lacked teeth, for funds were never allocated to enforce them.

New Jersey's fish commissioners approached their mandate from a perspective very different from that of Governor Saulsbury. In 1871 they recommended legislation to regulate fishing by day, season, and mesh size of net. They also sought a tax on drift nets, which met immediate opposition from fishermen. All of the commissioners' recommendations were passed by New Jersey's legislature on March 15, 1871, with the exception of the tax on fishing nets.[20]

---

[18] Ibid.

[19] *Delaware Laws*, vol. 9, chap. 216, pp. 263-65; *Delaware Laws,* vol. 4, chap. 209, pp. 568-69. In 1851, the legislature extended the law of 1839 to include all rivers and streams in addition to the Delaware River and Bay (*Delaware Laws,* vol. 10, chap. 569, pp. 564-65).

[20] *Laws of New Jersey,* Supplement to An Act to regulate the fisheries in the river Delaware, and for other purposes, Article 44, Mar. 15, 1871, p. 433.

New Jersey's legislators and fish commissioners approached fishing issues through the perspective of creating interstate agreements. The act was adopted as a supplement to legislation first passed in 1808 that had required the Commonwealth of Pennsylvania to pass an act of the same or similar wording before it took effect in New Jersey. Likewise, in 1871 New Jersey's fish commissioners sought Delaware's participation in creating a tri-state coalition on fishing laws. The commissioners, in fact, were most concerned with what New Jersey considered to be the southern portion of the Delaware River (that is the area of the river between the states of New Jersey and Delaware) because that area saw the most traffic in drift-net shad fishing. Thus, they sought, and received, permission from their governor to visit Delaware's legislators in Dover.[21] In some ways they counted their trip a success, for on March 28, 1871, the Delaware General Assembly passed an act that joined with New Jersey's law in regulating day, season, and mesh size of nets. But Delaware's legislators added a provision that addressed the issue raised by their governor. Section 1 of "An Act for the Protection of Fishermen" made it illegal for all non-Delaware residents to "catch or take fish of any kind in Delaware bay or river, or any of the creeks emptying into the same within the limits of the same" without a license. It would now cost non-Delawareans $20 per annum for a license.[22]

Instead of creating harmony between and among the governments and fishermen of the states bordering the Delaware River, this fishing law emanating from Dover in 1871 unleashed a tidal wave of ill will and litigation that has pitted New Jersey against

---

[21] *Third Annual Report of the Commissioners of Fisheries of the State of New Jersey, For the Year 1872* (Trenton: State Gazette, 1872), pp. 9-10.

[22] An Act for the Protection of Fishermen, *Delaware Laws,* vol. 14, chap. 72, pp. 84-87. A supplemental act in 1871 (vol. 14, chap. 73, p. 88) instituted a $5.00 license fee for state residents.

Delaware for over 130 years, as the protection of fish and fishermen morphed into a full-scale, recurring judicial argument on state boundaries so reminiscent to Delawareans of the earlier, and seemingly endless, boundary dispute among William Penn, Lord Baltimore, and the English Crown.

Delaware's fishing law of 1871 sought to protect the state's own fishermen and fishing industry by oversight and control of all of the Delaware River that it had claimed since 1682, during the Duke of York-William Penn era—all of the water, and its soil below, to the low-water mark on the eastern side of the river within the twelve-mile circle from the town of New Castle. To Delawareans this boundary was beyond discussion. Indeed, it appears that the State of Delaware considered the twelve-mile circle to be such a given that it did not bother to codify it until 1852, in response to the Pea-Patch Island dispute in the 1840s.[23]

To non-Delaware fishermen using the Delaware River, the out-of-state licensing provision of Delaware's law of 1871 was offensive. No matter who claimed to own the river, fishermen had always taken equal access for granted. News did not travel as fast as it does today, but once people heard, they were anxious and confused. What would be the practical implications? The answer came in the spring of 1872 and was a straight-forward application of the law, apparently initiated by Delaware's attorney general. On May 2, 1872, W.W. Pritchett, a constable in Wilmington, accompanied by an armed posse, took a steam tugboat to the eastern side of the Delaware River and arrested twenty-two New Jersey residents for fishing in the waters of the State of Delaware without

[23] "Of Sovereignty; Jurisdiction and Limits," chap. 1, sec. 1, *Revised Statutes of Delaware*, 1852, pp. 2-3. For the Pea-Patch Island case, see Justice Cardozo's discussion of *In re Pea Patch Island*, 30 F. Cas. 1123 (Arb. Ct. 1848) (No. 18311*). State of New Jersey v. State of Delaware II*, 291 U.S. 361, 377, 54 S. Ct. 407, 412-13 (1934).

licenses. The men were taken, some at gun point, to the district attorney in Wilmington, along with their eleven rowboats and fishing nets. When the fishermen told the district attorney that they had always fished on the river and never had had to have a license, he told them of the new law and gave them a choice of buying licenses and paying court costs or forfeiting their boats and nets and going to jail to await trial. Reluctantly the men bought licenses.[24]

Reaction to those arrests was swift. Within a week, New Jersey's governor, Joel Parker, issued a proclamation asserting the State of New Jersey's right to the Delaware River from its own shore to the middle of the river and the right of New Jersey fishermen to fish in those water without having to get licenses from the State of Delaware. Governor Parker then warned "all persons" (meaning, of course, Delaware officials) not to arrest New Jersey fishermen in the disputed area and urged New Jersey citizens to resist violence.[25] Governor Parker next wrote a letter to Delaware's governor that both asserted New Jersey's territorial claim to the eastern half of the Delaware River and announced his proclamation of the previous day. New Jersey, he said, believed the question of state boundary claims required judicial resolution.

A few days later, Governor James Ponder of Delaware responded to Governor Parker with a strong assertion of Delaware's right to the river within the twelve-mile

---

[24] Affidavits of John Q.A. Denny, George Stanton, and Job Barker, in Record, *New Jersey v. Delaware*, No. 1, (1877)) (excerpt), reprinted in Documents submitted by the State of Delaware to U.S. Supreme Court in *New Jersey v. Delaware III* on Oct. 27, 2005, Lodging, tab 1:44-47.

[25] Joel Parker, governor of the State of New Jersey, to James Ponder, governor of the State of Delaware, Trenton, May 9, 1872, in *Report of the correspondence between Govs. Parker and Ponder* . . . (Trenton: State Gazette, 1873), p. 3; "A Proclamation by the Governor of New Jersey," May 8, 1872, reprinted in Record, *New Jersey v. Delaware,* No. 1, p. 25.

circle. It was, said Governor Ponder, "not . . . an open question."[26] From Delaware's perspective, the law of 1871 was not at all a territorial assertion; it was enacted "for the purpose of aiding the propagation of certain fish which were fast becoming extinct," a law passed "at the suggestion and request of the fish commissioners of New Jersey. . . ."[27] As to judicial review, Governor Ponder asked for a proposal from his counterpart because he (Ponder) did not have the constitutional power to agree to arbitration.

Governor Parker got the final word in this particular flurry of correspondence. On May 22, he sent a letter to Governor Ponder that again denied Delaware's boundary claim. His proposal for judicial review was to pass the question to his attorney general.[28] So, the first salvo of the Delaware River fishing war, which started with a drawn gun, ended in a barrage of words and legal maneuvering.

Later, Governor Parker, Governor Ponder, and the attorneys general of the two states met. After a "free interchange" of ideas, the officials of both states agreed that Delaware would make no arrests east of the middle of the Delaware River while both governors urged their respective state legislatures to appoint three commissioners to settle the question of river jurisdiction.[29] After some to-ing and fro-ing, both legislatures agreed.

Delaware went first. On January 30, 1873, the legislature adopted joint resolutions to establish the six-man commission recommended by the governor. The

---

[26] James Ponder, governor of the State of Delaware, to Joel Parker, governor of the State of New Jersey, Dover, May 14, 1872, in *Report of the Correspondence between Govs. Parker and Ponder . . .* , p. 4.

[27] Ibid.

[28] Ibid., pp. 5-8.

[29] Governor's Annual Address, July 14, 1873, New Jersey, *Senate Journal*, pp. 47-48.

legislature agreed that the decision of the commission was to be final. Two weeks later the legislature added supplementary joint resolutions that clarified their intent: Delaware would not submit the boundary question, but only the right, and the extent of that right, of citizens of New Jersey to fish in the Delaware River within the twelve-mile circle.[30] To up the ante, the Delaware General Assembly then passed a supplement to the "Act for the Protection of Fishermen of 1871" instituting a tax for nonresidents on nets greater than 300 fathoms.[31]

New Jersey's legislature soon followed Delaware's by passing an act to appoint three commissioners to a joint commission to "negotiate and agree respecting territorial limits and jurisdictions of the two states." When the legislature learned of the precise wording of Delaware's supplementary resolutions of February 14, it, in turn, modified its original legislation after receiving a message from Governor Parker. The governor reminded the legislators that "the important practical question which interests most of our citizens is the right of fishing in the river Delaware, its nature and extent . . . ."[32] By a supplement approved March 11, New Jersey's legislature agreed, for the sake of expediency, to negotiate on the narrow issue of fishing rights.[33] Delaware responded to New Jersey's apparent willingness to negotiate within Delaware's more narrow parameters with a major olive branch. In joint resolutions of April 8, 1873, the Delaware

---

[30] Delaware, Legislature, Joint Resolutions, Jan. 30, 1873, Feb. 14, 1873, and Feb. 19, 1873, reprinted in Record, *New Jersey v. Delaware*, pp. 26-28.

[31] "A Supplement to the Act Entitled 'An Act for the Protection of Fishermen," vol. 14, chap. 419, Feb. 19, 1873, in *Revised Statutes of the State of Delaware . . . to . . .1874* (Wilmington: James and Webb, 1874), p. 281.

[32] Governor Joel Parker, Message to the Legislature, printed in New Jersey, *Journal of the Senate*, Mar. 5, 1873, p. 505.

[33] New Jersey, Legislature, Act of Feb. 26, 1873, and Supplement to Act, Mar. 11, 1873, reprinted in Record, *New Jersey v. Delaware III,* Lodging, tab 1, pp. 29-32.

legislature suspended the out-of-state fishing license section of the troublesome 1871 fishing protection act pending the outcome of the commission's negotiations. Moreover, if the commission decided favorably on Delaware's position, its state commissioners were authorized to agree to a mutual right of fishery. [34]

The new commission held meetings in the spring and summer of 1873. Delaware's three commissioners made several proposals to their counterparts from New Jersey, but since all of those proposals began with acceptance of Delaware's title to the river to the low-water mark on the eastern shore within the twelve-mile circle, the New Jersey commissioners declined to agree. The commission held three more unproductive meetings through June 1874. Then Delaware's commissioners presented their New Jersey counterparts with what in essence amounted to a closely argued legal brief, taking thirty-four pages to "prove" Delaware's title.[35] Eight months later Delaware's commissioners still had not received a response. Thus, they reported to their legislature that they did not believe the joint commission could ever come to a mutually agreeable settlement. [36]

In his message to Delaware's General Assembly in January 1877, Governor John P. Cochran reviewed the history of the joint commission. He said that the previous legislature of 1875 had construed New Jersey's long silence as "an implied abandonment of their case and a tacit relinquishment of their alleged claim of title and jurisdiction," so

---

[34] Delaware Legislature, Joint Resolution, Apr. 8, 1873, reprinted in Record, *New Jersey v. Delaware*, 32-37.

[35] *The Fishery Question Argument of the Delaware Commissioners* (Wilmington: James & Webb, 1874).

[36] Report of the Fishery Commissioners, in Delaware, *Journal of the Senate*, Feb. 2, 1875, pp. 211-12.

on March 18, 1875, Delaware lawmakers disbanded the commission.[37] The Delaware legislators then reinstated the out-of-state fishing license requirement of the 1871 act. According to New Jersey's attorney general, New Jersey knew nothing about those actions until a New Jersey citizen called Governor Joseph D. Bedle's attention to a notice placed in the Wilmington *Morning Herald* on March 15, 1876, announcing the need for fishermen to again secure licenses from Delaware. The attorney general asserted that Delaware had misconstrued New Jersey's silence, for its commissioners were, in fact, still wrestling with the issues on the table.[38]

Territorial title remained an unresolved issue, but of greater concern to New Jersey's governor was the return of Delaware's fishing license law. Governor Bedle invited Governor Cochran of Delaware to a meeting in Philadelphia in hopes of winning a postponement of the law's reinstatement. At their meeting the governors could not resolve the issues, so the only recourse left to the State of New Jersey was to seek resolution by the United States Supreme Court. And so it did in March 1877.[39]

Efforts to Reach a Settlement

In preparation for litigation, Delaware's General Assembly adopted joint resolutions proclaiming the state's ownership of, and exclusive jurisdiction over, the twelve-mile circle across the Delaware River to the low water mark on the New Jersey

---

[37] *First Biennial Message of His Excellency John P. Cochran, Governor of Delaware to the General Assembly, Session of 1877* (Wilmington, 1876 [*sic*]), p. 21; *Delaware Laws,* vol. 15, chap. 2249, pp. 254-55.

[38] Bill of Complaint, reprinted in Record, *New Jersey v. Delaware,* pp. 31-36. See also New Jersey, *Journal of the Senate,* Mar. 22, 1876, pp. 325-27 for letters of Governor Joseph D. Bedle and A. Browning for New Jersey Commissioners to governor of New Jersey.

[39] *First . . . Message of John P. Cochran . . .*, p. 22; *Laws of Delaware,* vol. 15, pt. 2, chap. 504, Jan. 26, 1877, pp. 641-42; *Third Annual Message of His Excellency Joseph D. Bedle, Governor of New Jersey to the legislature, Session of 1878*, Doc. No. 1 (Trenton, 1878), p. 23.

shore and authorizing the governor to employ counsel to defend the First State's position before the United States Supreme Court.[40] Governor John P. Cochran then appointed three of the state's most outstanding lawyers to represent the state in the suit. They were Thomas F. Bayard, George Gray, and George H. Bates. All were Democrats, then the majority party in Delaware. By 1885 only Bates, the son of a prominent Delaware jurist, Chancellor Daniel Moore Bates, and a former Speaker of the House of the Delaware legislature, was left. Bayard had gone on to become United States Secretary of State in Grover Cleveland's first administration, while Gray became a United States senator and then a federal judge. Preparation of the case was extremely time-consuming. Between 1901 and 1905, George Bates amassed piles of documents from the early colonial period. Some required translation; all had to be typed, edited for modern readers, and interpreted.[41]

In March 1877 the Supreme Court issued an injunction ordering Delaware to suspend the out-of-state license provision pending resolution of the litigation. The suit then languished for want of interest on the part of New Jersey, the complainant state, until the next fishing dispute arose. This time the source of the controversy lay south of the river, in the Delaware Bay. In 1885 Delaware authorities arrested and even jailed some fishermen in the upper Delaware Bay, confiscating their boats and nets.[42] Delaware argued that such arrests were permissible because the United States Supreme Court's injunction applied only to the contested portion of the Delaware River, that is, the area

---

[40] *Laws of Delaware*, vol. 15, chap. 504, pp. 641-42.

[41] George H. Bates to Attorney General Robert H. Richards, March 8, 1909, Bates Family Collection (hereafter B.F.C.), Historical Society of Delaware, Wilmington, Del. (hereafter H.S.D.).

[42] *Report of the Commissioners of the Fisheries of New Jersey, 1884-85* (Trenton: John J. Murphy, 1886), pp. 5-6 (quotation, p. 5); *New York Times,* Aug. 13, 1885.

within the twelve-mile circle. But where did the river and bay divide? The governors of New Jersey and Delaware agreed that their respective attorneys general should meet to determine the boundary line. With the assistance of scholars and lawyers, Attorney General John H. Paynter of Delaware and Attorney General John P. Stockton of New Jersey set the dividing line between river and bay to run from Cohansey Light in New Jersey west to Bombay Hook Point in Delaware. Once that agreement was reached, Delaware agreed to drop its charges against the fishermen, whose boats and nets had already been returned. Delaware continued to insist upon its citizens' exclusive fishing rights in its half of the Delaware Bay, but for all practical purposes Delaware does not seem to have enforced that position. Attorney General Stockton urged another conference between the two states to secure mutual fishing rights in all the waters of the Delaware Bay. Such a conference never took place, most probably because it did not prove necessary. With the acquiescence of both states to the concept of mutual fishing rights in the waters of the river and bay, fishing continued unmolested.[43] As Governor Joel Parker had reminded the New Jersey legislature more than a decade earlier, "the important practical question . . . is the right of fishing in the Delaware . . . ." [44] For the moment fishing rights were secure.

---

[43] *Report of the Commissioners of Fisheries*, p. 6; *Annual Report of the Attorney General of the State of New Jersey, for the Year 1887*, pp. 19-21; *Final Report of the State Geologist*, vol. 1: *Topography, Magnetism, Climate* (Trenton: John J. Murphy, 1888), pp. 83-84; *New York Times*, Aug. 13, 1885.

[44] New Jersey, *Senate Journal*, 1873, p. 505.

The Oyster Conflict Opens and Closes

Between 1871 and 1905, only once did an issue beyond fin fishing cause a ripple in the relationship of New Jersey and Delaware. The issue concerned oysters, and this time the aggressive assertion of legal rights came from New Jersey and not Delaware.

Oysters, like fin fish, had been an important part of the local diet since the time of the Native Americans, and they attracted as much attention from Western European explorers and settlers as did the Delaware River's shad and sturgeon. From earliest times, the governments of Delaware and New Jersey recognized the significance of this aqueous resource and passed laws to protect, preserve, and control an important food source and an increasingly valuable economic commodity. The main stimulus to commercial oystering in the Delaware Bay came in 1870 with the extension of the New Jersey Southern Railroad, a division of the New Jersey Central Railroad, to the Maurice River, a tributary of the Delaware Bay. With the railroad, the number of shucking houses increased, and New Jersey oysters could reach well beyond local and regional markets.[45]

Even without the railroad connection, New Jersey always had the advantage over Delaware because its oyster beds were larger than those of its neighbor to the west. Still, Delaware had significant oyster resources. Many families living along the Delaware Bay earned their livings from oystering. Delaware's oysters were most plentiful along the shores of Kent County from Leipsic to Bowers Beach, with the center at Port Mahon. With poorer train connections and smaller shucking houses, Delaware always lagged

---

[45] Mary Emily Miller, "The Delaware Oyster Industry," *Delaware History*, 14(1971): 239-41; James E. Valle, "Harvesting Oysters," in *The Delaware Estuary: Rediscovering a Forgotten Resource*, eds. Tracey L. Bryant and Jonathan R. Pennock (Newark, Del.: University of Delaware Sea Grant Program, 1998), p. 26; Donald H. Rolfe, "Bivalve, New Jersey: 'Long Reach Remembered, '" in *The Delaware Estuary: Rediscovering a Forgotten Resource*, p. 82.

behind New Jersey in the scale of its oystering operations. Indeed, as time went on, Philadelphians came to dominate Delaware's oyster beds. Philadelphia entrepreneurs sent sailing ships equipped with two-to-four dredges into the Delaware Bay. The ships took their cargoes directly to Philadelphia for shucking and transport.[46]

Philadelphia ships also dredged for oysters in the eastern half of the Delaware Bay, which led to the first complaints about territorial claims to oyster areas. In 1871, the Commonwealth of Pennsylvania issued a report "in Reference to the Oyster fisheries in Delaware Bay" in response to a law passed by New Jersey's legislature earlier that year.[47] According to Pennsylvania, the three states of Pennsylvania, New Jersey, and Delaware had enjoyed common usage of oystering areas since the 1830s.

Then in 1871 the New Jersey legislature passed a law to require every boat working in New Jersey's waters to buy a license. The license was available only to individuals who had been residents of New Jersey for at least six months. The law added a sliding scale of license fees ranging from $10 to $60, depending upon the size of the oyster boat, as well as multiple enforcement provisions such as the appointment of a "special officer" who would have the power of arrest.

Not to be outdone, Delaware's legislature passed similarly restrictive laws that same year. The state closed its oyster beds to non-Delawareans or non-owners of Delaware plantation rights. Legislators also added a licensing fee on boats dredging in public beds that was three times that charged by New Jersey. Finally came the

---

[46] Valle, "Harvesting Oysters," p. 26; Weslager and Heite, "History," p. 25; Mary Emily Miller, "The Delaware Oyster Industry: Past and Present" (Ph.D. diss., Boston University, 1962), pp. 142-44.

[47] Miller, "The Oyster Industry: Past and Present," pp. 133-34. The New Jersey law was entitled "An Act for the better enforcement in Maurice River cove and Delaware Bay of the act entitled 'An Act for the preservation of clams and oysters . . . '" (New Jersey P.L., 1871, p. 642). The original law was enacted on April 14, 1846.

enforcement provisions, which included a collector with arrest powers and the purchase of a watchboat.[48]

Aside from angering some in Pennsylvania, few jurisdictional problems appear to have arisen from the oystering legislation emanating from Trenton and Dover. One scholar noted no significant friction arising from the laws passed on both sides of the river. He found that for Delaware, the major result of the residency requirement was that members of New Jersey oystering families moved to Delaware to expand their operations, a migration that perhaps worked both ways.[49] In the last quarter of the nineteenth century, Delaware's oystermen voiced concern primarily about individuals who illegally dredged for oysters, "marauders" primarily from Pennsylvania. Eventually the conflict escalated to a level of combat and bloodshed. "Oyster pirates," as they came to be called, armed their boats with cannon and were able to overwhelm Delaware's watchboat and small, legal oyster boats.[50]

In 1887, Delaware's legislature passed a law that expanded the state's claim to oyster beds in the Delaware Bay. Until that time Delaware legislators had not asserted jurisdiction east of Blake's Channel.[51] Now they extended Delaware's jurisdictional claim to the oyster bed at Ship John Light. New Jersey responded by arresting two Delaware oystermen working in the Ship John bed. Prosecution was dropped when the

---

[48] *Laws of Delaware,* vol. 14, chaps. 9-14, pp. 11-25. Oyster plantations, according to Delaware's 1871 legislation, were available in one area located south of Reedy Island and west of Blake's Channel. Private citizens could obtain a plantation for the planting of oysters for an annual fee plus a boat license.

[49] Valle, "Harvesting Oysters," p. 26.

[50] Miller, "The Delaware Oyster Industry: Past and Present," pp. 137-40; Miller, "The Delaware Oyster Industry," 245-46.

[51] *Laws of Delaware,* vol. 18, pt. 1, chap. 248, p. 464.

State of Delaware agreed to a settlement through negotiation, which must have included a repeal of the law.[52] No attorney general files exist in the Delaware Public Archives for this period, but, according to the New Jersey attorney general's statement in his brief to the United States Supreme Court in 1933, calm was returned. Under those circumstances, it does not seem surprising that the question of oysters did not loom large in the Compact of 1905. Over time each state had enacted, amended, repealed, and rewritten dozens of acts to promote, protect, and regulate oystering. Each side had vested interests, which at the time of the writing of the Compact of 1905 were satisfied by the status quo.[53]

Construction into the River

Although Delaware consistently laid claim to the waters and subaqueous soils to low water on the New Jersey shore within the twelve-mile circle, the wharves, piers, and bulkheads along the New Jersey shore were never part of the debate in the nineteenth century. Delaware neither interfered with their construction, nor did it tax such structures on either side of the river.

Delaware and New Jersey pursued different policies regarding wharfage. New Jersey established extensive controls, but Delaware did not. Urbanization was the major

---

[52] Brief of Plaintiff, reprinted in Documents submitted by the State of Delaware to U.S. Supreme Court in *New Jersey v. Delaware III* on Oct. 27, 2005, Lodging, tab. 10, p. 373; *Laws of Delaware,* vol. 18, pt. 1, chap. 557, p. 679.

[53] The Delaware legislature created an oyster commission in 1909, and with the U.S. Bureau of Fisheries produced a report and a map entitled "Chart of Leased Oyster Bottoms, Delaware Bay, State of Delaware" that showed no Delaware oyster beds east of the Delaware Bay's main shipping channel (Delaware Oyster Survey Commission, *Report of Commission* [Baltimore: King Bros., n.d.]. Twenty years later, the situation had changed dramatically, with the Ship John oyster bed as the flash point. Wilmington's *Every Evening* subsequently termed it an "armed fight' between New Jersey and Delaware oystermen over rights to the beds from the ship channel to the middle of the bay (Oct. 9, 1933). By 1929 oysters had become one of the two issues of sufficient magnitude to New Jersey to lead that state to return to the U.S. Supreme Court. The other issue was wharfage. ("Report to Honorable Morgan F. Larson, Governor of New Jersey by William A. Stevens, Attorney General . . . ," 1929).

factor in explaining those differences. New Jersey had the major port cities of New York and Philadelphia opposite its watery borders, whereas Delaware had none. In 1851 New Jersey began taking control over its riparian lands by requiring that land owners obtain licenses from the state to build structures into New Jersey's waterways.[54] In 1864 the New Jersey legislature adopted "An Act to ascertain the rights of the state and of the riparian owners in the lands lying under the water of the bay of New York and elsewhere in the state."[55] It was the first of a series of laws, all of which traced their origins to the 1864 statute, by which New Jersey governed, sold, leased, and taxed submerged lands. The 1864 law explicitly focused on two urban areas: the waters along the Hudson River and New York Bay, and "the lands lying under the water of the Delaware river, opposite to the county of Philadelphia." Neither that law, nor those that followed, mentioned those parts of the Delaware River lying north or south of Philadelphia.

It is not surprising that New Jersey lawmakers concentrated their riparian laws on those parts of their state's waterways that were in contact with the major out-of-state commercial and industrial centers of New York City and Philadelphia. Those were the places where wharfage was most important and most lucrative. In 1871 New Jersey began the practice of committing the taxes it raised from those urban-area wharves to help support the state's public schools.[56]

By contrast, Delaware had no major urban centers lying across its portion of the Delaware River's eastern shore to prod it into licensing, controlling, or taxing wharves.

---

[54] New Jersey P.L., 1851, p. 335.

[55] New Jersey P.L., 1864, p. 681.

[56] New Jersey P.L., 1871, p. 98.

A search of the state's laws in the nineteenth century reveals a few acts whereby the legislature gave steamboat and railroad companies permission to build wharves as part of the powers granted to them in their acts of incorporation.[57] In addition, in the 1850s a few individuals requested private acts whereby the legislature concurred in their construction of wharves, but, in the absence of a legal requirement to get advance approval from Delaware, such requests soon disappeared from Delaware law books.[58] The state did not tax wharves that extended into the state's waters, nor did it require a state license to erect them.

The State of Delaware has never taxed real estate. Its counties tax real estate. Until the mid-twentieth century all three of Delaware's county governments were called "Levy Courts" because they set the levies on taxable real estate. A search in the Delaware Public Archives found no records from the nineteenth century to show whether or not the assessors from New Castle County, the county that includes the twelve-mile circle, included wharves extending from either the western or eastern shore of the Delaware River in their assessment of real estate. Theirs was a rather unsophisticated operation designed to raise the modest sums needed to support the county jail and a poor house, and to build bridges across creeks. It is not surprising that the assessors never ventured across the Delaware River to claim taxes from wharf-owners on the eastern shore.

---

[57] See, for example, *Laws of Delaware*, vol. 9, chap. 11, "An Act to Incorporate the Delaware Rail Road Company, pp. 17-26, and chap. 312, "An Act to Incorporate the Breakwater, Lewes, and Philadelphia Steam-boat Company," pp. 359-62.

[58] *Laws of Delaware*, vol. 11, chap. 463, p.528; chap. 398, p. 444.

The most important wharves extending from the New Jersey side of the Delaware River within the twelve-mile circle were associated with Delaware-based companies. Throughout most of the nineteenth century and well into the twentieth century, the Wilmington Steamboat Company, later called the Wilson Line, ran boats from Wilmington to Chester and Philadelphia, Pennsylvania. In the summer months the company also ran excursion boats from the west bank cities to a picnic grove at Penns Grove, New Jersey. In the 1920s an amusement park called Riverview Beach was added on the New Jersey shore of the river. Likewise, Delaware-owned ferry companies operated between Delaware and New Jersey until the Delaware Memorial Bridge opened in 1951.[59] The only industrial site with structures extending into the river from the New Jersey side within the twelve-mile circle was the Du Pont Company's Chambers Works. The Du Pont Company was, then as now, a Wilmington-based corporation.

Seeking a Settlement

The repeated postponements of *New Jersey v. Delaware I* stopped in 1901 when the Supreme Court's clerk alerted the parties that the Justices would wait no longer. Delaware had to decide to go forward or risk losing its boundary claim to the New Jersey shore. Neither Delaware's governor nor legislature hesitated to continue to press for vindication of the state's boundary rights. The legislature adopted a resolution whereby the attorney general and special counsel were "instructed to maintain the defense of said suit."[60] George Bates stopped all other business to concentrate on meeting the deadline to file an answer to New Jersey's Bill of Complaint.[61]

---

[59] See Richard V. Elliott, *The Saga of the Wilson Line, Last of the Steamboats* (Cambridge, Md.: Tidewater Publishers, 1970).

[60] *Laws of Delaware*, vol. 22, chap. 244, p. 531.

The work of meeting Supreme Court deadlines proved so onerous to both sides that in 1903 they agreed to appoint the two states' governors, attorneys general, and counsels as their commissioners in an attempt to find a settlement without recourse to further court proceedings. Whereas Delawareans had no experience with interstate compacts, New Jersey's leaders could look back to a great deal of such experience. The Garden State already had compacts with both New York and Pennsylvania regarding those states' respective contiguous watery boundaries: the New York harbor and the Delaware River, respectively. Those documents provided for boundaries through the middle of those waters and explicitly noted which state owned every island in between. Each state had jurisdiction over the area within its own boundary, except that authorities on either side of the waterway were permitted to cross those bounds to pursue, arrest, and remove back to their own state persons accused of committing crimes in the arresting officer's state.[62] Thus New Jersey had a template for what might constitute an interstate compact.

The Delawareans had no such experience, but George H. Bates was a seasoned negotiator who had dealt with obstinate opponents in delicate diplomatic situations. In 1885 Bates had gone to the Samoan Islands as the special agent of the United States government to help re-establish peace among warring chiefs who were being urged on by the competing governments of Imperial Germany and Great Britain. The United States also had significant commercial and naval interests in the Samoan Islands. Bates was

---

[61] Attorney General Herbert H. Ward to Governor John Hunn, Jan. 31, 1903, Delaware Public Archives, Dover (hereafter D.P.A.).

[62] New York Compact: N.J. Stat. sec. 52:28 *et. seq.*; Pennsylvania Compact: N.J. Stat. sec. 52:18-23 *et. seq.*

later one of three commissioners to represent the United States government at conferences with the Germans and British held in Washington, D.C., in 1887 and in Berlin in 1889 for the purpose of restoring peace in Samoa. Bates proved to be a vigorous negotiator on behalf of his country in dealing with such seasoned diplomats as Chancellor Otto von Bismarck of Germany. The representatives of the three powers all claimed to want a restoration of the *status quo*, whereby citizens of their countries could live and trade in the islands without fear that one of the other powers would stir up trouble. Bates's experience was thus appropriately germane to the business of negotiating on behalf of Delaware over the ownership and use of the Delaware River. [63]

Delaware's commissioners began their work by seeking the views of the people most concerned about the dispute: the state's fishermen. Those commercial fishermen, together with their New Jersey counterparts, constituted a major industry that employed 165 boats, each of which reportedly took in $550 weekly during shad season. In early March 1903, Delaware's commissioners, including George Bates, organized a meeting with Delaware fishermen in the coastal town of Delaware City. The meeting proved to be very instructive. One fisherman complained of his arrest by New Jersey authorities when he had been fishing for sturgeon near the Jersey shore. Most fishermen agreed, however, that although the river within the circle rightfully belonged to Delaware, New Jerseymen should be permitted to cast their nets wherever they pleased so long as they abided by Delaware's Sabbath and seasonal restrictions.[64]

---

[63] George Handy Bates Samoan Papers, University of Delaware Special Collections, Newark, Del. See particularly box 1, folder 13; box 2, folder 21; and box 3, folders 28-28.

[64] Wilmington *Evening Journal*, Mar. 4, 1903.

In light of such "live and let live" testimony from the fishermen, and considering the additional cost and effort of continuing the suit, the commissioners attempted to conclude a compact that would unify the states' conflicting fishing laws and thus end the case. As Delaware's Attorney General Herbert H. Ward put it to Governor John Hunn, "if the entire controversy between the two states can be settled out of court, it would seem the part of good reason to attempt to make such a settlement."[65]

The commission composed of the governors, attorneys general, and counsels of the two states, met in Philadelphia on March 12, 1903. The evidence is very scant, but it would appear that both sides came with ideas and language that they would like to see written into the compact. It is worth noting, for example, that Articles I and II, permitting each state to serve legal papers or make arrests on the entire breadth of the river, contain principles similar to New Jersey's compacts with New York and Pennsylvania.

The proposed document created in 1903 was designed to resolve the fishing issue, as detailed in Articles III, IV, and V, which proclaimed a common right of fishery, provided for the passage of uniform fishing laws in both states, and permitted the continuance of certain existing laws until adoption of the uniform legislation. The document also permitted the states to continue enforcing their laws with respect to two matters that had not been the subject of longstanding controversy: the oyster industry and the building of piers and wharves. But for the dispute in 1887, which had been resolved, the oyster industry had not been the cause of controversy between the states. In drafting the compact in 1903, Article VI was written to maintain the *status quo* of that industry. Likewise, with respect to Article VII, there was no evidence of a practical dispute with

[65] Ward to Hunn, Jan. 31, 1903, D.P.A.

regard to the construction of piers and wharves extending from the New Jersey shore that entered onto the portion of the Delaware River within Delaware's twelve-mile circle. At that time the modest piers on the New Jersey shore that entered into the twelve-mile circle served the interests of citizens of both states.

Article VIII of the 1903 compact stated that nothing would affect the "territorial limits, rights or jurisdiction of either state" relating to the river or the ownership of its subaqueous soil except as "expressly set forth" in the document. Through this provision, the states sidestepped the dispute over ownership within the twelve-mile circle, as to which the two states could never have reached agreement, and similarly deferred other jurisdictional questions that did not require resolution at the time. Each state preserved its claims in Article IX, which stated that the lawsuit was to be dismissed "without prejudice."

The effort to forge an interstate agreement proved fruitless, however, because the Delaware General Assembly ended its session too soon to take up the proposed compact.[66] The suit would go on, at least until 1905, when Delaware's legislators were next scheduled to meet.

The lawyers on both sides had no recourse but to carry on their preparations for the fast-approaching deadline to submit their briefs to the Supreme Court's Special Commissioner, Francis Rawle. Francis Rawle (1846-1930) knew George Bates very well. In 1895, at Rawle's request, Bates drafted a law regarding street railways that was adopted by the Delaware General Assembly. That same year, George Bates's son, Theodore, became a law clerk in Rawle's Philadelphia office. When Theodore

[66] Attorney General Herbert H. Ward to George H. Bates, Feb. 11, 1905, B.F.C., H.S.D.

committed suicide later that year, his father assumed responsibility for completing work that Rawle had assigned to his son.[67]

In developing his case Bates called several of Delaware's most distinguished elderly lawyers to appear at a hearing held in Salem, New Jersey. Those men all testified that going back as far as the 1840s, Delaware had exercised the right to arrest and try violators of Delaware state laws on the river, and that federal cases drawn from the river territory had been heard in the Federal District Court for Delaware.[68]

By the end of 1904 Bates's quest for evidence was nearly complete. The most pressing claim on his time was to organize the mass of historical documents he had collected. The clerk of the U.S. Supreme Court agreed to one final extension, to March 1, 1905, by which time the defense must present its evidence. New Jersey would then have until June 1, 1905, for rebuttal, and both parties were to have their arguments in the hands of Special Master Rawle by November 1, 1905.[69]

Adopting the Compact of 1905

It was in this context that Delaware's General Assembly met in Dover for its biennial session in January 1905. In his final month as governor, John Hunn told the assemblymen of his hope to end the long-smoldering case with New Jersey through "the appointment of a commission with full powers to settle the issue by arbitration." The "continuance of this suit," he said, "has been, and is likely to be, an extremely costly one

---

[67] See various letters in B.F.C., H.S.D., especially Francis Rawle to George Bates, Jan. 31, 1895; George Bates to F. Rawle, Feb. 14, 1895; Theodore Bates to F. Rawle, Jun. 1895; Elizabeth Bates to George Bates, Dec. 4, 1896.

[68] The State of Delaware had made it illegal for nonresidents to fish in Delaware waters in 1839 (*Laws of Delaware*, vol. 9, chap. 216, p. 263).

[69] James H. McKenney, Esq., Clerk, U.S. Supreme Court, to George H. Bates, n.d., B.F.C., H.S.D.

for the State, thousands of dollars having already been expended in its prosecution." He told the legislators that his recent communications with New Jersey officials convinced him that they, too, were willing to pursue "an amicable arrangement for a settlement" outside the judicial system. It is worth noting that the interconnection of reaching an "amicable settlement" with that of saving a large sum of the state's money must have been particularly appealing to a governor who was both a Quaker and a businessman.[70] Later that same month Governor Hunn sent a message to the legislature drawing their attention to the chaotic nature of the state's fishing laws. He admonished them that rationalizing the fishing laws "demands primary consideration in as much as it concerns the propagation and protection of one of the largest sources of food supply belonging to the people." He recommended the creation of a commission charged to draft "a uniform, reasonable, comprehensive, and plain bill" to be presented to the next meeting of the legislature in 1907.[71]

Delaware's outgoing attorney general, Herbert H. Ward, and his successor, Robert H. Richards, were in complete agreement with Governor Hunn regarding both the desirability of an interstate compact and the need to redraft Delaware's fishing laws. In February 1905 Ward notified George Bates that the Delaware General Assembly had adopted a joint resolution "of precisely similar terms to that of two years ago, with the addition of the words 'and bay.'"[72] The commissioners appointed to serve were to be Delaware's new governor, Preston Lea, a Republican and Quaker businessman like his predecessor, together with Ward himself, his successor as attorney general, Robert H.

---

[70] Delaware, *Journal of the Senate*, 1905, p. 93.

[71] Ibid., pp. 91-92.

[72] Herbert H. Ward to George H. Bates, Feb. 11, 1905, B.F.C., H.S.D.

Richards, and George Bates. The New Jersey legislature having passed a similar measure earlier that same week, the commissioners could begin their work promptly so as to complete their compact in time for the Delaware General Assembly to act on it before it adjourned.

Once again commissioners from the two states met in Philadelphia, where they made the minor adjustments to the two-year-old compact document noted above. The first difference was changing the term "Delaware River" to "Delaware River and Bay" in passages concerning the regulation of fishing in Article IV. The Compact of 1905 also added a provision whereby the states were to determine the dividing line between the river and bay and then mark that division with monuments on both shores.[73]

All was not the same, however. In the two years since he had been a member of the commission of 1903, George Bates had changed his mind about the idea of substituting a compact for a ruling by the United States Supreme Court. He had prepared what he regarded as an unimpeachable case in support of Delaware's title and was ready to present the First State's arguments to Special Master Rawle. Why then should Delaware agree to put aside the case before the United States Supreme Court?

Disagreements among Delaware's commissioners over the efficacy of adopting a compact in lieu of continuing the state's defense before the Supreme Court became public knowledge through the pages of the Wilmington *Every Evening*. The *Every Evening* was aligned with George Bates and his political party, the Democrats. Interestingly, Wilmington's leading Republican daily, the *Morning News*, largely ignored the compact issue.

---

[73] Delaware, *Journal of the Senate,* 1903, pp. 898-902; *Laws of Delaware,* vol. 23, chap. 5, pp. 12-17.

On March 2, 1905, the compact went to the Delaware Senate, where it was ratified by a unanimous vote without debate.[74] In the days that followed, the *Every Evening* published a daily barrage of editorials, articles, and letters to the editor hostile to the boundary compact. "Shall We Surrender All That We Have Contended For In The New Jersey Boundary Dispute?" the paper asked on the front page of the March 6 edition. The article that followed mirrored Bates's view that "no agreement should be made until the Supreme Court has judicially decided the underlying and basic question of territorial jurisdiction." The writer was not against establishing a fishing compact with New Jersey but thought that the compact should follow a ruling by the Supreme Court rather than serve as its substitute. The article also noted that some Delaware fishermen had been arrested and fined by New Jersey authorities, yet nothing in the compact provided for their reimbursement. "Shall we surrender . . . on the threshold of success?"[75]

The *Every Evening's* aggressive journalism drew a prompt response from Herbert Ward. The former state attorney general sent a letter to the editor that appeared just two days later. Ward wrote that the case had sprung from Delaware's "unwise legislation" in 1871. He contended that the proposed compact dealt solely with fishing rights and did nothing to affect Delaware's title to waters or soil within the twelve-mile circle.[76]

The next day's edition featured a letter from Alexander B. Cooper, a Democratic lawyer from New Castle. Cooper had made a close study of Delaware's historic

---

[74] Delaware, *Journal of the Senate*, 1905, p. 335.

[75] Wilmington *Every Evening*, Mar. 6, 1905.

[76] Ibid., Mar. 8, 1905.

boundaries that had convinced him that the colonial records supported Delaware's claim to the low water mark on the New Jersey shore within the twelve-mile circle. According to Cooper, the compact's language merely postponed an inevitable showdown before the United States Supreme Court over the First State's eastern boundary. Cooper also challenged the compact's supporters sanguine expectation that by endorsing the agreement Delaware could let New Jersey bear some of the cost of policing the river. Allowing authorities from both shores to arrest people on the river was certain to cause confusion, Cooper said. He ended with a grandiloquent flourish: "It is not a question of expense; it is a question of principle—the title to our lands, both under and above the water."[77] Cooper, like Bates, believed so firmly in the strength of the Delaware claim that he rejected the less expensive expedient of a compact with the uncertainty that might bring.

Not surprisingly, two days later Herbert Ward responded to Alexander Cooper's arguments. Ward recalled that as attorney general he had presented the almost identical compact to Delaware's House of Representatives two years before. He had then told the legislators that he was willing to continue to fight the case before the Supreme Court if that was what they wanted him to do, "but that my own judgment strongly favored the adoption of the compact . . . and thus avoiding the expense." Had the legislature taken his advice and acted at that time, Delaware could have saved substantial legal fees.[78] Whereas George Bates was eager to present his evidence in support of Delaware's title before the United States Supreme Court, Herbert Ward, who believed that the compact

[77] Ibid., Mar. 9, 1905.

[78] Ibid., Mar. 11, 1905.

did nothing to undermine Delaware's title, was determined to save the state the expense of further litigation.

Because of the public disagreements over the wisdom of ratifying the compact, the Delaware House of Representatives set aside an afternoon to hear all sides of the issue before the vote was scheduled. Perhaps because the event provided a venue for the compact's defenders to speak publicly, the Republican Wilmington *Morning News* covered the hearing in much greater detail than did the *Every Evening*.

At the hearing Alexander Cooper and George Bates urged the legislators to reject the compact while Attorney General Robert Richards and former attorney general Herbert Ward argued for its ratification. The compact's defenders said that the agreement would provide "an amicable solution to the problem without surrendering Delaware's rights or title to territory within the famous Twelve-mile Circle." Speakers on both sides of the issue agreed that continuing the suit before the Supreme Court was likely to cost the state between $15,000 and $20,000.

Herbert Ward and Robert Richards repeatedly assured members of the House of Representatives that ratification of the compact would not impact Delaware's clear title to the Delaware River within the twelve-mile circle. Ward explained that under the compact New Jersey would no longer be able to arrest Delaware fishermen. If a Delaware fisherman broke the law, he would be arrested and tried by Delawareans, in Delaware, the former attorney general said. In response to a question, Ward responded "that Delaware would have jurisdiction in criminal matters over the entire river to the New Jersey shore."

Placed on the defensive, George Bates stated his belief that the compact that he had participated in writing and had championed two years before was "unwise and a useless and serious blow to the dignity of Delaware." These words drew an equally patriotic declaration from Attorney General Richards, who professed to be second to none in his willingness to uphold Delaware's honor. But the state's honor was not the issue. Speaking for himself and his predecessor, Herbert Ward, Richards told the legislators, "we do advise you that we consider it is for the best interests of the state to adopt this compact without yielding a foot of property or title." He also reminded the House members that should they reject the compact he would be coming back to them to ask that they appropriate at least $10,000 to continue the suit.[79]

In all the news reports about the drafting and adoption of the compact, there is no record of any debate about the provisions of Articles VI and VII concerning regulation of the oyster and other shellfish industry or riparian rights. Issues concerning the oyster industry appeared to be settled, and riparian issues presented no problems since at that time Delaware did not regulate or tax structures built into the Delaware River on either side of the river.

Three days after the hearing the House ratified the compact with New Jersey by the close vote of seventeen to fourteen. Almost to a man, the Republicans voted "yea" while the Democrats voted "nay."[80]

---

[79] Wilmington *Morning News*, Mar. 15, 1905.

[80] Delaware, *Journal of the House of Representatives*, 1905, p. 783.

The Compact in the Context of its Time

The compact never rose to the prominence in Delaware politics that one might have assumed from the articles that appeared in the Wilmington *Every Evening* or from the partisan nature of the vote in the House of Representatives. Other issues were riveting the attention of politically-minded Delawareans. In March 1905 all eyes focused on efforts to rescind Delaware's infamous Voter Assistance Law. That law had a curious history that explains a good deal about the state's politics during the first decade of the twentieth century.

Delaware had been a border state during the Civil War: that is, it was a slave state that remained loyal to the Union. In the post-war years the Democrats were the major party in Delaware, although the Republican Party was strong among businessmen, especially in Wilmington. In 1889, after years in the minority, a split among the Democrats allowed the Republicans to claim control of the General Assembly.

The GOP triumph meant that Republican legislators could choose Delaware's next United States senator. Party stalwarts were astonished when a man who was a complete unknown in state politics appeared in Dover and announced that he must be the Republicans' choice. The man was John Edward O'Sullivan Addicks, a Philadelphia-based owner of municipal gas works, who was known as the "Napoleon of Gas." To claim citizenship in Delaware, Addicks bought a house in Claymont, the state's northern-most town.

In his quest for a seat in the United States Senate, Addicks proved to be rich, unscrupulous, and persistent. When persuasion failed in 1889, he resorted to spending large sums of money to elect Republican legislators who would be beholden to him,

particularly in rural parts of the state where the Democrats had been dominant. Delaware's Voter Assistance Law allowed Addicks's lieutenants to enter the voting booth with voters and thus make sure that Addicks got the votes he had paid for.

The Addicks phenomenon helped make the Republicans Delaware's major party, but it also split the party into two fiercely rival groups. To the acute frustration of all, in legislative session after session neither side had the votes to elect its candidate for the United States Senate seat. In 1903 the factions finally worked out a compromise that allowed one of Addicks's followers to be elected, but this did not satisfy the gas king.

In 1905 Addicks made what proved to be his final attempt to secure election. Once more he failed, and thereafter, his money exhausted, he dropped from the political scene, setting the stage for the emergence of the du Pont family as the major force in Delaware's Republican politics.

In 1905 amid cries denouncing corruption and "wholesale bribery" or shouting "Addicks or nobody" it was hard to concentrate legislators' attention on a mere fishing compact.[81] Yet, as the Assembly was riveted on those more compelling political concerns, it did find time on March 23, 1905, to appoint commissioners to confer with their counterparts in New Jersey regarding the two transcendent issues in the compact: drafting uniform fishing laws and delineating the boundary between the Delaware River and the Delaware Bay. Among Delaware's three commissioners was Alexander B.

[81] Carol E. Hoffecker, *Democracy in Delaware: The Story of the First State's General Assembly* (Wilmington: Cedar Tree Books, 2004), pp. 120-25, 138-39.

Cooper, who became president of the "Delaware Commissioners, (Delaware-New Jersey Fisheries Compact)," as the commission's letterhead read.[82]

At the initial meeting of the joint commission held in Philadelphia on December 15, 1905, the six commissioners unanimously agreed to a resolution requesting their respective governors to seek a delay in Congressional ratification of the compact "until the Commission shall make further request."[83] The governors of both New Jersey and Delaware agreed to the commissioners' request.[84] But the postponement created new problems because of the constraints of the various state and national governmental bodies dealing with both the lawsuit and the compact. Two governors, two state legislatures, the United States Congress, and the United States Supreme Court all operated on differing schedules and with different time limitations.

Those time constraints, coupled with the large number of participants, sometimes led to miscommunications and hard feelings. For example, on March 14, 1906, Walter Hayes, secretary of the Delaware commissioners, sent Hiram R. Burton, Delaware's Congressman, a copy of the joint commissioners' resolution of December 15, 1905, asking for Congressional delay in ratification of the compact. Delaware's Attorney General Richards had also written to Burton to request such a delay.[85] Just a day earlier,

---

[82] *Laws of Delaware*, vol. 23, pt. 1, chap. 6, pp. 17-20. See various correspondence using the letterhead, such as Alexander B. Cooper to Walter H. Hayes, Esq., January 29, 1907.

[83] Minutes of Meeting, Dec. 15, 1905, Delaware Commissioners, Delaware-New Jersey Fisheries Compact, Minute Book, 1905-1908, D.P.A.

[84] E.C. Stokes to H.C. Loudenslager, Mar. 14, 1906, New Jersey State Archives, Trenton, N.J. (hereafter N.J.S.A.)

[85] Walter H. Hayes to Hiram Burton, Mar. 14, 1906, Delaware Commissioners, Delaware-New Jersey Fisheries Compact, Letter Book, 1905-1908, D.P.A.; [Robert H. Richards] to Hiram R. Burton, Jan. 19, 1907, National Archives, Washington, D.C. (hereafter N.A.) There is no signature, but attribution is confirmed by internal dating, content, and style of letter.

however, it appears that at least some New Jersey leaders were so eager to secure ratification that they had encouraged Senator John Kean to rush the compact bill through the United States Senate without even informing his Delaware colleague of his action.[86] This apparent cross-purpose of activity led to telegrams between commissioners and their Congressmen. Delaware's commissioners alleged "bad faith" on the part of New Jersey. Congressman H.C. Loudenslager sought clarification from Trenton.[87] William J. Bradley, one of New Jersey's fish commissioners and head of the New Jersey Senate, wrote to his Delaware counterpart on the joint fishing commission that he believed that Kean's action was due to "some misunderstanding."[88]

Meanwhile, the work of the joint fishing commission went forward. Commissioners on both sides of the river held public meetings in the spring of 1906 to solicit the opinions of the states' fishermen about what the fishing regulations should contain. They found the views of the fishermen of the two states to be quite "harmonious."[89] At a meeting of the joint commission on October 10, 1906, the Delaware commissioners were first to present their version of an appropriate uniform fishing law. [90] New Jersey acted more slowly to draft a proposal, too slowly from the perspective of the Delaware commissioners, whose legislature was scheduled to meet in

[86] Because of the Addicks dispute, Delaware had but one elected U.S. senator in 1907.

[87] Telegram, H.C. Loudenslager to E.C. Stokes, Mar. 14, 1906, N.J.S.A.

[88] William J. Bradley to Alexander B. Cooper, Mar. 19, 1906, D.P.A.

[89] Minutes of Meeting, May 8, 1906, Delaware Commissioners, Delaware-New Jersey Fisheries Compact, Minute Book, D.P.A.

[90] Minutes of Meeting, Oct. 10, 1906, ibid.

January 1907.[91] When the New Jersey document was completed, it was found to be incongruent with the Delaware draft. The joint body then met twice in January 1907 in an effort to bring the two proposed laws into uniformity.

On January 16, 1907, the six members of the joint fishing commission agreed that they had created the uniform fishing laws demanded by the compact and were ready to present them to their respective state legislatures. They wrote to their governors that Congress could now ratify the compact.[92] Three days later, Robert H. Richards, Delaware's Attorney General, informed Congressman Burton that it was now "necessary" that the Compact be ratified before the expiration of the February 1, 1907, deadline set by the United States Supreme Court.[93] On January 19, the same day he had written to Burton, Richards also wrote to the chairman of the House Judiciary Committee to say that, speaking on behalf of the government of Delaware, he urged the House of Representatives to move promptly to ratify the compact. Richards explained that "the object and purpose of this compact was to settle certain matters concerning fisheries which had been the cause of the litigation for years pending in the Supreme Court."[94]

Attorney General Richards was at pains to point out that the compact had gained the support of both states' legislatures. He added that "It does not purport to settle any of the boundary line between the two states," and went on to say "but on the other hand, [the compact] expressly provides that the boundary line between the two states shall not in

---

[91] Alexander B. Cooper to William J. Bradley, Jan. 5, 1907, D.P.A.

[92] Minutes of Meeting, Jan. 16, 1907, Delaware Commissioners, Delaware-New Jersey Fisheries Compact, Minute Book, D.P.A. The commissioners met again several days later to complete minor adjustments.

[93] [Richards] to Burton, Jan. 19, 1907, N.A.

[94] Attorney General Robert H. Richards to Chairman, Judiciary Committee, U.S. House of Representatives, Jan. 19, 1907, D.P.A.

any wise be affected by the compact." Robert Richards's desire for speedy action in the United States House of Representatives was fulfilled when, on January 24, 1907, the House ratified the New Jersey-Delaware Compact.

On April 23, 1907, the Delaware General Assembly approved "An Act Providing Uniform Laws to Regulate the Catching and Taking of Fish in the Delaware River and Bay between the State of Delaware and the State of New Jersey."[95] New Jersey's legislature approved a comparable, but not identical, law on May 7, 1907.[96]

With passage of the fishing laws, the members of the joint commission's work was over. If preserving the health of the fishing industry on the Delaware River and Bay was the ultimate goal of the new laws, then the commissioners bore a heavy burden. In their final report, Delaware's commissioners noted "the undoubted fact of the gradual disappearance of the shad ... and the almost total disappearance of the valuable sturgeon industries." They focused blame on two factors: the destruction of small food fish by menhaden fishermen and industrial pollution. The commissioners suggested that the menhaden fishing problem could be resolved by restricting its season to the summer months. To the pollution problem they offered no remedy.[97]

The commissioners had also fulfilled their mandate under Article IV of the compact to place monuments to mark the division of the Delaware River and Bay on both shores. In June 1906 the members of the Joint Commission boarded a tug boat that took them down the Delaware River to locate the place that they would declare to be the end

---

[95] *Laws of Delaware*, vol. 24, pt. 1, chap. 146, pp. 272-81.

[96] New Jersey P.L., 1907, chap. 131, p. 302.

[97] Report of the Commissioners to the Del. Gen. Assembly, 1906.

of the river and beginning of the bay. Their efforts were thwarted by the soggy marshland soil on either side, but not by any disagreement concerning where the imaginary line should be drawn. They settled on places of adequately fast land, one near Liston's Point on the Delaware side and another near the mouth of Hope Creek in New Jersey. In those places monuments to delineate the mouth of the Delaware River could be erected without fear of their sinking.[98]

Perhaps finally the troublesome and costly issues that had sprung from Delaware's fishing law of 1871 could be put to rest, but it was not to be. As early as 1909 Governor Preston Lea told the legislators in Dover that "unfortunately, certain modifications were made in the bill as passed by the General Assembly of Delaware so that it does not conform to the bill prepared by said Joint Commission and which was passed by the state of New Jersey."[99] Put simply, in spite of so much effort, the two states' fishing laws were not uniform, and they were destined to become even less so in the years to come. The mandate in Article IV of the compact for the passage of uniform laws never happened, not within the two year requirement of the compact—or ever.

The Post-Compact Era

Legislative memory was short. Members of Delaware's General Assembly seldom served for more than one or two terms. In the years after 1907 the state government focused its attention on the large-scale tasks of providing modern roads and highways for the increasing number of automobiles and providing modern schools, including high schools, for the state's youth. In that environment, the Compact of 1905

---

[98] *Report of Delaware Commissioners on Delaware and New Jersey Fisheries Compact* (no place, no date), pp. 6-8. D.P.A.

[99] State of Delaware, *Biennial Message of His Excellency Preston Lee, Governor, to the General Assembly convened at Dover on Tuesday, The Fifth Day of January, 1909*, p. 25, D.P.A.

quickly receded into hazy memory. No one complained when the legislatures of either state made changes in their respective fishing laws; and the Delaware River within the twelve-mile circle came to be seen as a commercial highway rather than as a source of food.

A letter from New Jersey's attorney-general, John W. Wescott, to Herbert H. Ward dated July 3, 1914, demonstrates how quickly memory of the compact had faded. The little that Wescott knew about the agreement had come in garbled form from an older colleague. The attorney-general falsely claimed that Delaware had never even tried to pass a fisheries law subsequent to the 1905 Compact. Wescott went on to observe that New Jersey had recently changed its fishing law and suggested that Delaware adopt that same law. Thus, he said, the two states might yet achieve uniform laws. Delaware did not respond, and New Jersey never pursued the issue.[100]

In the mid-1920s jurisdiction over oyster beds in the Delaware Bay became an issue. The Compact of 1905 had not established an east-west boundary between the states in the Delaware Bay. Article VI of the compact had merely allowed both states to maintain their laws respecting oysters. In 1925, the arrest of Delaware oystermen by New Jersey for working in water claimed by both states set in motion a series of steps that led to another joint commission. According to the joint resolution of the Delaware legislature, the commission was charged with creating "the final adjustment of all controversies relating to the boundary line between said States and to their respective

[100] John W. Wescott to Herbert H. Ward, Trenton, N. J., July 3, 1914.

rights in the Delaware River and Bay.[101] After that commission failed, New Jersey decided to put the state's land claims to the final test in the United States Supreme Court. In its bill of complaint New Jersey claimed title to the subaqueous soil of the Delaware River and Bay to the ship channel, specifically including the area within the twelve-mile circle. In addition to maintaining its ownership of the river within the twelve-mile circle, Delaware also claimed the boundary below the circle along the center of the waterway as measured from shore to shore. Delaware would finally get the day in court to put the boundary question to rest that George Bates and Alexander Cooper had desired back in 1905.

Unlike the dilatory movement of the similar case filed in 1877, this time the process moved forward quickly. William L. Rawls, Esq., of Baltimore, Maryland, was appointed special master in 1930 and promptly began hearings in 1931. Oral arguments were completed in the fall of 1932, and Special Master Rawls filed his report with the United States Supreme Court on October 9, 1933. To keep abreast of this speedy schedule Delaware's counsel, Clarence Sutherland, made extensive use of the documentary evidence that George Bates had collected nearly thirty years before.[102]

The special master gave something to both sides. He accepted Delaware's contention that the Penn grant had given the First State the river's subaqueous soils within the twelve-mile circle. On the other hand, he rejected Delaware's claim to the

---

[101] *Laws of Delaware*, vol. 35, chap. 243, p. 644, reprinted in Documents submitted by the State of Delaware to U.S. Supreme Court in *New Jersey v. Delaware III* on Oct. 27, 2005, Lodging, tab 4, pp. 20-21.

[102] Clarence Sutherland to the Hon. Percy Warren Green, Attorney General of Delaware, July 3, 1935, D.P.A.

geographic center below the circle in favor of New Jersey's assertion that the dividing line was the ship channel.

On February 5, 1934, Justice Benjamin Cardozo announced the Supreme Court's final decree, which upheld the special master's rulings on both counts. After a careful review of the documentary evidence from colonial times Justice Cardozo concluded that the twelve-mile circle did indeed extend to the low water mark on the New Jersey shore. He also took pains to refute New Jersey's contention that by agreeing to the Compact of 1905 Delaware had abandoned its claims to the river waters and subaqueous soils within the twelve-mile circle.

Justice Cardozo wrote, "We are told that by this compact the controversy was set at rest and the claim of Delaware abandoned. It is an argument wholly without force. The compact of 1905 provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect to civil and criminal process, and for concurrent rights of fishery. Beyond that it does not go."[103] In closing, Justice Cardozo reiterated the court's opinion that "Within the twelve-mile circle, the river and the subaqueous soil thereof up to low water mark on the easterly or New Jersey side will be adjudged to belong to the State of Delaware, subject to the Compact of 1905."[104]

What might the words "subject to the Compact of 1905" have meant, taken in historical context? The compact had been created to address conflict over the rights of commercial fishermen of New Jersey and Delaware, particularly within the twelve-mile circle. The compact's major goal had been the creation of uniform fishing laws, yet,

---

[103] *New Jersey v. Delaware*, 291 U.S. 361, 377-378.

[104] Ibid., 385.

despite the compact, such laws never came into being. In the years that followed the Supreme Court's decree of 1934, various officials in both Delaware and New Jersey occasionally brought the uniform law issue to the attention of other officials in their respective states, but neither side rose to the challenge to address those suggestions.[105] The reason is clear: by the 1930s few if any commercial fishermen cast their nets within the twelve-mile circle because there were few fish to be caught there. Commercial fishing had moved downstream to the Delaware Bay and Atlantic Ocean.

There was also the question of jurisdictional rights in the waters and subaqueous soils of the circle. In his final report to Delaware's attorney general, Clarence Sutherland, Delaware's special counsel in the Supreme Court case, mused that the state might consider taxing wharfs on the New Jersey shore.[106] But nothing came of that idea, perhaps because in Delaware real estate taxes were levied by the counties, not the state.

Conclusion

Viewed in historical context, the Compact of 1905 addressed the most pressing and divisive issue of the time, which was fishing rights in the Delaware River. The compact did not attempt to resolve other issues, it merely deferred them with language that permitted the *status quo* to continue. As George Bates told the United States Supreme Court when he made oral argument on behalf of both state's joint application for suspension of proceedings in February 1906, "the compact . . . [was] not a settlement of the disputed boundary, but a truce or *modus vivendi*. . . . Its main purpose is to

[105] See, for example, State of New Jersey Board of Fish and Game Commissioners to the Hon. A. Harry Moore, Governor of New Jersey, February 14, 1939; memo from Delaware Assistant Attorney General Jeremy W. Homer to Nathan Hayward, III, Director, Office of Management, Budget and Planning, October 28, 1977, 1977 WL 25804 (Del. A.G.), opinion number 77-033.

[106] Sutherland to Green, Jul. 3, 1935, D.P.A.

provide for enacting and enforcing a joint code of laws regulating the business of fishing in the Delaware River and Bay."[107]

Respectfully submitted,

Carol E. Hoffecker

Carol E. Hoffecker, Ph.D.

Date: November 9, 2006

[107] Statement of reasons submitted orally for the joint application of counsel on both sides for suspension of proceedings until the further order of the Court, reprinted in Documents submitted by the State of Delaware to U.S. Supreme Court in *New Jersey v. Delaware III* on Oct. 27, 2005, Lodging, tab 7, [p. 10].

EXHIBIT A

CAROL E. HOFFECKER

ADDRESS *804 Cinnamon Drive*
Bon Ayre
Hockessin, DE 19707 *(302) 239-6724*

CURRENT POSITION

Richards Professor and Alison Professor, University of Delaware, Emerita, 2003
Richards Professor of History, University of Delaware, 1982
Alison Professor, University of Delaware, 1998

PREVIOUS POSITIONS

Instructor, Sweet Briar College (1963-66)
Visiting Assistant Professor, Northeastern University (1967-68)
Junior Resident Scholar, Eleutherian Mills Historical Library (1968-69)
Coordinator, Hagley Graduate Program (1970-73)
Assistant Professor, University of Delaware (1973-75)
Associate Professor, University of Delaware (l975-82)
Chairperson, Department of History, University of Delaware (1983-88)
Associate Provost for Graduate Studies, University of Delaware (1988-95)

EDUCATION

B.A. (with Honors)	*University of Delaware, 1960*
M.A.	*Radcliffe College, 1962*
Ph.D.	*Harvard University, 1967*

PUBLICATIONS

Books

Readings in Delaware History (editor), University of Delaware Press, 1973.
Wilmington, Delaware: Portrait of an Industrial City, 1830-1910, University of Virginia Press, 1974.
Brandywine Village: the Story of a Milling Community, Old Brandywine Village, Inc., 1974.
Delaware: A Bicentennial History, W. W. Norton, 1977.

Wilmington: A Pictorial History, Donning Company Publishers, 1982.
Corporate Capital: Wilmington in the Twentieth Century, Temple University Press, 1983.
Books, Bricks, Bibliophiles: The University of Delaware Library, (with John A. Munroe), University of Delaware Press, 1984.
Delaware, Small Wonder, State of Delaware and Harry N. Abrams, Inc. 1984.
Delaware, the First State, Mid-Atlantic Press, 1988.
Federal Justice in the First State: A History of the United States District Court for Delaware, 1992.
Beneath Thy Guiding Hand: A History of Women at the University of Delaware, the University of Delaware, 1994.
New Sweden In America, ed, University of Delaware Press, 1995.
Unidel, A Foundation For University Enrichment, University of Delaware, 1996.
Honest John Williams, U.S. Senator from Delaware, University of Delaware Press, 2000.
Familiar Relations: the du Ponts and the University of Delaware, University of Delaware, 2000.
Democracy in Delaware, The Story of the First State's General Assembly, Cedar Tree Books, 2004.
The Delaware Adventure (with Barbara E. Benson), Gibbs Smith Publishers, 2006.

Articles

"Nineteenth Century Wilmington: Satellite or Independent City?" Delaware History, April, 1972.
"Church Gothic: A Case Study of Revival Architecture in Wilmington, Delaware," Winterthur Portfolio, 1972
"The Politics of Exclusion: Blacks in Late Nineteenth Century Wilmington, Delaware," Delaware History, April, 1974.
"The Diaries of Edmund Canby, A Quaker Miller," Delaware History, October, 1974, and spring-summer, 1975.
"Four Generations of Jewish Life in Wilmington," in Delaware and the Jews, Jewish Historical Society of Delaware, 1979.
"The Land of the Middle Brow Amateur" in Artists in Wilmington, 1890-1940," Delaware Art Museum, 1980.
"Water and Sewage Works in Wilmington, Delaware, 1810-1910," Public Works Historical Society, 1981.
"Delaware's Woman Suffrage Campaign," Delaware History, spring-summer, 1983.
"The Emergence of a Genre: The Urban Pictorial History," Public Historian, 1983.
"George Read: Father of the Delaware State," with Richard R. Cooch, Delaware Lawyer, Fall 1987.
"Benjamin Ferris and the Perils of Liberal Religion," Quaker History, Spring 1988.
"Delaware," Encyclopedia Britannica, 1998.
"John James Williams (1904-1988)," Scribner Encyclopedia of American Lives, 1998.
"Introduction," University of Delaware, A Celebration, 1998.
"Emily P. Bissell," American National Biography, 1999.

"The Changing Look of Delaware," Picturing Delaware, University of Delaware Library, 2001.
"William V. Roth," Scribner Encyclopedia of American Lives, 2005.

GRANTS RECEIVED

Harry S. Truman Library Research Grant, 1963
Eleutherian Mills-Hagley Foundation, Junior Resident Scholar, 1968-69
National Endowment for the Humanities Research Grant, 1977-80
T. Wistar Brown Fellowship, Haverford College, 1986

PRIZES AND AWARDS

Richards Professor of History, 1982
Joseph P. delTufo Award, Delaware Humanities Forum, 1989
Goldey-Beacom College, Honorary Doctorate, 1993
Hall of Fame of Delaware Women, 1993
E. Arthur Trabant Institutional Award for Women's Equity, 1997-98
Francis Alison Professor, 1998
University of Delaware Medal of Distinction, 1998
CASE Professor of the Year for Delaware, 1999
University of Delaware Alumni Wall of Fame, 2001

SERVICE

Board of Managers, Wilmington Institute Free Library, 1974-79
Historical Records Advisory Board, State of Delaware, 1976-87
Historical Society of Delaware, Board of Trustees, 1979-88
State Records Advisory Task Force, 1984-96
National Endowment for the Humanities, review panelist and project reviewer, various years
Rockwood Museum Planning Task Force, New Castle County, 1999-2000
Rockwood Museum Advisory Committee, 2000-05
Delaware Geographic Names Committee, 2001-
Editor, Delaware History, periodical of the Historical Society of Delaware, 1995-
In addition, I give talks and speeches on Delaware-related subjects to a wide variety of organizations throughout the state, usually about twenty per year.

UNIVERSITY SERVICE (selected examples)

University Women's Studies Executive Committee, with brief interruptions from 1972-2000
Vice-president, University Faculty Senate, 1980-81
President, University Faculty Senate, 1981-83
Coordinator, University Roundtable on Secondary Education, 1984-85

University President's Advisory Council, 1981-83
Winterthur Graduate Program Executive Committee, 1983-85
Hagley Museum and Library Advisory Committee, 1983-88
Council on Program Evaluation, 1985-1992
Middle States Re-accreditation Committee, 1989-1992, 1999-2000
Chair, University's Project Vision Implementation Committee, 1990
Chair, University Ad Hoc Committee on General Education, 1997-2000
University of Delaware Press Board, 1997-2001
President Phi Beta Kappa Honorary, UD Chapter, 1999-2000
Chair, Commission on the Status of Women, 1999-2000
Chair, Faculty Senate Committee on Student and Faculty Honors, 1999-2000

EXHIBIT B

BARBARA E. BENSON

804 Cinnamon Drive
Bon Ayre
Hockessin, Delaware 19707
302-239-6724
bcde1@verizon.net

Historical Consultant (September 2003--)

Provides a range of strategic planning, management, writing, and design assistance to individuals, businesses, and nonprofit organizations.

Recent Projects:

- Co-author, *The Delaware Adventure (Gibbs Smith, 2006), a social-studies textbook*
- Curator, 300th Anniversary Exhibition on Delaware General Assembly, Delaware Public Archives (2003)
- Space planning and exhibition creation, Rehoboth Beach Historical Society (2003--)
- Strategic planning and Director's Search Committee, Hagley Museum and Lihrary (2003--)

Historical Society of Delaware

- *Executive Director*, (1990—2003)
- *Managing Editor of Delaware History*, **Historical Society of Delaware** (1977—2003)
- *Director of Library and Publications* (1980-1990)

Responsibilities: chief staff and administrative officer for a private, nonprofit state historical organization (founded in 1864) with three principal museum sites, a major manuscript and reference library, and four additional historical properties used for a variety of purposes; educational programs serving over 50,000 adults and children a year; and publications program.

University of Delaware

- *Adjunct Associate Professor* (1989--2003)
- Adjunct Assistant Professor (1981-1989),

Responsibilities: Teaching H200, History and Government of Delaware, H206 Survey of United States History, 1865-Present, H268 History Seminar for Undergraduate Majors, H411 History Seminar; H603 Public History, H667 Seminar in Historical Editing, H803 Writing Seminar in the History of the Delaware Valley.

Hagley Museum and Library

- *Assistant to the Director of the Library* (1973-19s75)
- *Editor of Publications* (1975-1980)

EDUCATION:

Ph.D., *American History*, Indiana University, 1977
Areas of specialization: economic history; regional history. Dissertation: "The Development of Michigan's Lumber Industry, 1837-1870"
M.A., *American History*, Indiana University, 1969
B.A., *History*, Beloit College, 1965

COMMUNITY SERVICE:

New Castle County Historic Review Board, Chairperson, 2003--

New Castle County Personnel Committee board member, 2000 –2003

New Castle County Rockwood Advisory Committee, Chairperson, 2000--2005

African American Museum of Delaware, Board Member, 1999--2003

New Castle County Taskforce Committee on Rockwood Museum, 1999

Wilmington Rotary Club, Board of Directors, 1997-1999

YWCA, Centennial Committee, 1994

Delaware Humanities Forum (the state-based agency of the National Endowment for the Humanities), council member, 1987-90; 1990-94; chairperson, 1992-94; vice-chairperson, 1990-1992; chairperson, grants review committee, 1988-1992; outside evaluator, 1980-1987

Delaware State Tourism Advisory Board, gubernatorial appointment, 1988-1991; 2002--

Association of Delaware Historical Societies, secretary-treasurer, 1985-1995

Delaware Heritage Commission, member of publications committee, 1984-1988; scholarship judge, 1986-94, ex-officio member of board, 1993--

Sister Cities of Wilmington, member of board of directors, 1986-96; official delegate to Kalmar, Sweden, 1985

Lectures and Workshops for state and local groups (1991--), including schools, church groups, patriotic organizations, genealogical societies, school districts, public libraries, museums, and historical societies in all three counties.

PROFESSIONAL/SCHOLARLY ACTIVITIES:

Delaware State Records Commission, gubernatorial appointment, 1988--2000

Delaware State Historical Records Advisory Board (state-based program of the National Historical Publications and Records Commission), member, 1986-89, 1990-93, vice-chair, 1994--2000

American Association of State and Local History, state representative for awards committee, 1985-91; state membership chair, 1996--2003

Hagley Museum and Library, McShain Editorial Board, 1993-94

Museum Council of Philadelphia, board member, 1991-92

Delaware Historic Preservation Review Board, member, 1990-93, 1993-97

Institute of Museum Services, grants reviewer, 1986, 1987, 1988, 1991, 1992, 1993, 1994, 1996, 1997, 1999, 2001

Mid-Atlantic Regional Archives Conference, member of governing board, 1982-1984, 1984-1986; chairperson of nominating committee, 1985-1986; conference speaker and commentator, 1985 ("Getting Published"), 1986 ("Collecting African-American Sources"), 1988 ("Conservation for Small Organizations"), 1989 ("Designing and Constructing Archival Storage Facilities")

Salisbury State University, workshop leader, 1989

Taft Seminar at University of Delaware, 1989, 1990, 1991 presented papers on government in Delaware

New Sweden Conference, University of Delaware, 1988, chair and commentator for session on archival sources in Scandinavia and America

New Jersey Historical Commission Annual Symposium, 1988, chair and commentator for session on Swedish and Finnish Migration

Delaware Valley Eighteenth-Century Society, 1987, presented paper on Delaware in the 1780s

University of Delaware, History of Technology Speakers Series, 1987, presented a paper on the underwater archaeology of the Kronan

Delaware State House Symposium, chairperson of sessions, 1977, 1984, 1986

Central Michigan University, Clarke Memorial Lecturer, Clarke Historical Library, 1983

Consultant on Collections, Exhibitions, and Publications
Chesapeake Bay Girl Scouts Council; Mrs. Lammot du P. Copeland; Hershey Archives; History Store, Inc.; Greater Harrington Historical Society; Laurel Historical Society; Lewes Historical Society; Milford Museum; Rockwood Museum

American Library Association, Rare Books and Manuscripts Preconference, 1985 panelist, library exhibits and the public

Consultant to Video Projects

Whispers of Angels, Teleduction, 2001
Slavery in Delaware, WHYY-TV, 1997
Celebrate 75, Celebrate 75 Video Production, 1995
Wilmington in the Age of Confidence, WHYY-TV, 1990-92
1968 – The Siege of Wilmington, WHYY-TV, 1989
New Sweden: An American Portrait, Dick Young Productions for Swedish Tobacco Company, 1988

PUBLICATIONS:

The Delaware Adventure (Gibbs Smith Publishers, 2006)

"New Castle County Courthouses," in *Delaware Lawyer* (2003)

"Delaware in World War II," in *Delaware History* (vol. 23, 1995-96)

Co-editor, *New Sweden in America* (University of Delaware Press, 1996)

Wilmington and Beyond with Michael Biggs (Jared Press, 1990)

Logs to Lumber: The Development of the White Pine Lumber Industry in Michigan (Clark Library Press of Central Michigan University, 1989)

Editor, *Arriving in Delaware: The Italian-American Experience* by Priscilla Thompson (History Store and Italo-Americans United, 1989)

Editor, "Colonial and Revolutionary Delaware," in *Dictionary of Colonial and Revolutionary America* (Sachem Press, 1989)

"Joshua Clayton" and "Henry Latimer," *Delaware Medical Journal* (April, 1989)

Contributor, *A Historical Dictionary of American Industrial Language*, ed. William H. Mulligan, Jr. (Greenwood Press, 1988)

Introduction and text for Michael Biggs, *Delaware...A Photographic Journey* (Jared Press, 1986)

"Delaware's First 'Doctor': Tyman Stidham and the Tools He Used," *Delaware Medical Journal* (Oct. 1986)

Contributor, *The Craft of Public History*, ed. Robert Pomeroy and David Trask (Greenwood Press, 1983)

"Profile of Delaware," "Thomas F. Bayard," and "Bayard Family" in *World Book Encyclopedia*, 1985-86, 1990

Editor, *The Engineer as an Agent of Technological Transfer in the Nineteenth Century* (Eleutherian Mills Historical Library, 1975)

Book reviews and conference report in *Indiana Magazine of History*, *Business History Review*, and *Technology and Culture*

AWARDS AND HONORS:

Who's Who in America, 1991-2003

New Castle County Historic Review Board, Achievement Award, 2003

City of Wilmington, Certificate of Recognition, 2003

Delaware State Society of the National Society of the Daughters of the American Colonists, Certificate of Recognition, 1989

Council for the Advancement of Citizenship and the Center for Civic Education Bicentennial Leadership Award, 1988

Delaware Teacher Center Award, 1988

Royal Recognition Medallion, King Karl XVI Gustav of Sweden, 1988

Official Visitor from Wilmington to Kalmar, Sweden, Sister Cities Program, 1985

No. 129, Original

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND

Defendant.

SPECIAL MASTER'S
MEMORANDUM OF DECISION NO. 4
(Subject: Virginia's Motion for Partial Summary Judgment)

July 10, 2001

I. INTRODUCTION

For well over two hundred years tensions have existed between the State of Maryland and the Commonwealth of Virginia. The core source of the dispute—the location of the boundary between those States—has generated subsidiary questions focused on navigation, jurisdiction, and fisheries issues along the Potomac River ("Potomac" or "River"). By compact,[1] arbitration,[2] and litigation,[3] the States have sought resolution of these conflicts. Despite their best efforts, disputes continue to arise requiring resort to the courts. This is the most recent.

Commencing on January 4, 1996, Virginia's Fairfax County Water Authority sought permits from Maryland for its construction of a drinking water intake structure extending some 725 feet from the Virginia shore into the Potomac at a location above the tidal reach of the River. The tortured history of the processing of those permit applications through Maryland's administrative and judicial venues is of only tangential relevance at this stage of the proceedings. Frustration with the lack of progress caused Virginia to seek leave to file a Bill of Complaint in the Supreme Court of the United States. The Court granted Virginia's motion on May 30, 2000, and referred the matter to me as Special Master on October 10, 2000.[4]

Virginia included in its prayers for relief a request that the Court:

> Declare that Virginia's right to use the Potomac River and to construct improvements appurtenant to the Virginia shore applies upstream of the tidal reach of the Potomac River, as established by Clause IV of the Black-

---

[1] Compact of 1785 ("Compact" or "1785 Compact"), 1785-86 Md. Laws ch. I, 1785 Va. Acts ch. XVII; Potomac River Compact of 1958 ("1958 Compact"), 1958 Md. Laws ch. 269, 1959 Va. Acts ch. 28, Pub. L. No. 87-783, 76 Stat. 797 (1962).
[2] Black-Jenkins Award of 1877 ("Black-Jenkins Award" or "Award"), 1878 Md. Laws ch. 274, 1878 Va. Acts. ch. 246, Act of March 3, 1879, ch. 196, 20 Stat. 481.
[3] *Virginia v. Maryland*, No. 12, Original, 355 U.S. 269 (1957).
[4] 120 S. Ct. 2192 (2000); 121 S. Ct. 294 (2000).

Jenkins Award of 1877, Article VII of the Compact of 1785, and Article VII, Section 1, of the Potomac River Compact of 1958.[5]

Maryland has denied that the 1785 Compact, or any other authority, gives Virginia any rights in or to the River above tidewater. On December 8, 2000, Virginia filed a Motion for Partial Summary Judgment ("Motion"), claiming that its rights of access to the Potomac granted in the 1785 Compact, confirmed in the Black-Jenkins Award, and preserved in the 1958 Compact, apply to the entire length of the River, including its major length above the tidal reach.[6]

Virginia's Motion raises a single issue:

> Do the rights of access[7] guaranteed to Virginia and its citizens by the Compact of 1785, confirmed in the Black-Jenkins Award of 1877, and preserved in the Potomac River Compact of 1958, extend to the entire length of the River on Virginia's border, in its non-tidal as well as its tidal reach?

After careful consideration of the parties' briefs and oral argument, I conclude that the Supreme Court, in its decision in *Maryland v. West Virginia*, 217 U.S. 577 (1910), decided the issue before me in Virginia's favor, and I therefore find that Virginia's Motion can be resolved on that basis alone. However, even in the absence of that authority, I reach the same conclusion—that Virginia's rights extend along the entire River—because I find that the 1785 Compact unambiguously shows that Virginia has rights of access to the Potomac, including the right to erect structures appurtenant to the

---

[5] Bill of Complaint, Prayer for Relief, ¶ 1.

[6] According to the certificate of the Associate Director for Water Resources for the Interstate Commission on the Potomac River Basin, the Potomac River has an entire length of approximately 383 statute miles, of which nearly 70%, or approximately 266 statute miles, is nontidal. *See* Declaration of Roland C. Steiner, Virginia Brief in Support of Motion for Partial Summary Judgment ("Va. Br."), Appendix Tab 3.

[7] The rights of access granted in the 1785 Compact include "making and carrying out wharfs and other improvements" along "the shores of Patowmack river." 1785 Compact, Article VII. Similarly, the Black-Jenkins Award granted to Virginia's citizens the "right to such use of the River [along its south shore] beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership." Black-Jenkins Award, Article IV.

shore, along the entire length of its boundary with Maryland. The Black-Jenkins Award of 1877 and the 1958 Compact, as well as consultation of contemporaneous historical sources, if such consultation were required, independently confirm that conclusion. I also conclude that Virginia has not lost its access rights under the doctrine of acquiescence and prescription.

Accordingly, after proceedings before me are complete, I will recommend to the Supreme Court that Virginia's Motion be granted.

Although I conclude that the Court's decision in *Maryland v. West Virginia* is determinative, it would be irresponsible for someone in my position to ignore the factual and legal bases for that decision. Accordingly, I will also discuss, in the context of each argument made by Maryland, underlying events that compelled the Court's conclusion in 1910 and compel my conclusion today. These bedrock events are (1) the Compact that Maryland and Virginia solemnly made in 1785 and that Congress later approved,[8] (2) the Black-Jenkins Award of 1877 and the accompanying Opinion[9] of the arbitrators resulting from the joint submission to binding arbitration by Maryland and Virginia of their boundary dispute and their joint subsequent approval of the Award, and (3) the Potomac River Compact of 1958, in which the States preserved the very rights that were

[8] Virginia and Maryland entered into the Compact prior to the adoption of the United States Constitution. Therefore, Congress did not approve it pursuant to the Constitution's Compact Clause, U.S. Const. art. I, § 10. However, the Supreme Court held in *Wharton v. Wise*, 153 U.S. 155, 172-73 (1894), that Congressional approval of the Black-Jenkins Award "render[ed] the compact of 1785 ... thus consented to by congress, free from constitutional objections, if any that were valid had previously existed.... [Congressional] consent, taken in connection with the conditions upon which the [Black-Jenkins Award] was authorized, operated as an approval of the original compact, and of its continuance in force under the sanction of congress."

[9] Board Of Arbitrators To Adjust The Boundary Line Between Maryland And Virginia: Opinions And Award of Arbitrators On The Maryland And Virginia Boundary Line (M'Gil & Witherow 1877) ("Opinion" or "Black-Jenkins Opinion").

guaranteed to Virginia in the 1785 Compact and are now at the core of the present dispute.

II. ANALYSIS

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure and the Supreme Court precedents construing that Rule, although not controlling, serve as useful guides in ruling on a partial summary judgment motion in an original action. *See Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993); Supreme Court Rule 17.2. Summary judgment is appropriate when the pleadings and other materials show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. Rule Civ. Proc. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "[I]n ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all *justifiable* inferences are to be drawn in [that party's] favor.'" *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)) (alteration in original) (emphasis added).

Here, it is important to keep in mind that "[t]he summary judgment procedure is a method for promptly disposing of actions ... in which only a question of law is involved." 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2712, at 198 (1998).

> It necessarily follows from the standard set forth in the rule that when the only issues to be decided in the case are issues of law, summary judgment may be granted. For example, if the only issues that are presented involve the legal construction of statutes or legislative history or the legal sufficiency of certain documents, summary judgment would be proper....
>
> The fact that difficult questions of law exist or that the parties differ on the legal conclusions to be drawn from the facts is not in and of

> itself a ground for denying summary judgment inasmuch as refusing to grant the motion does not obviate the court's obligation to make a difficult decision; a denial merely postpones coming to grips with the problem at the cost of engaging in a full-dress trial that is unnecessary for a just adjudication of the dispute. Therefore, when the only question is what legal conclusions are to be drawn from an established set of facts, the entry of a summary judgment usually should be directed.

Id. § 2725, at 404-12 (footnotes omitted).[10]

B. *Maryland v. West Virginia*, 217 U.S. 577 (1910)

This original action is not the first time that sovereign states have called upon the Supreme Court to settle rights to the Potomac River. West Virginia was carved out of Virginia's territory in 1863.[11] In 1891, Maryland brought an original action against West

[10] Maryland has argued that partial summary judgment on Virginia's Motion is inappropriate because discovery is necessary to create a more complete record and it is not appropriate to treat in an "abbreviated fashion" the over two hundred years of history involved in this case. (Transcript of Oral Argument, April 16, 2001, at 62-63; 93-98 ("Oral Arg. Tr.")). Maryland makes this argument despite the fact that this case is now some fourteen months old and, by its own admission at oral argument, both States have "combed the historical papers." (Oral Arg. Tr. at 71). In sum, Maryland has not made a sufficient showing that any further gathering of facts or evidence is warranted before I render a recommended decision on the question of law before me.

At oral argument, Maryland stated its intention to take the opportunity to make a "more full and complete record." (Oral Arg. Tr. at 97-98). In a letter to the Special Master on April 20, 2001, Maryland simply argued that expert testimony ought to be presented to amplify the "selected" record and that testimony on the police power issue may have some bearing on the tidal/non-tidal issue that is before me at this time. However, the expert testimony that Maryland suggests is necessary amounts to no more than the expert's opinion regarding the implications of the use of the term "navigable" and the meaning of the unambiguous language of the Compact when placed in its historical context. Maryland has already made those arguments and has had ample opportunity to support them and its other arguments through the research of its two expert historians, two briefs with voluminous exhibits, and full oral argument.

Maryland also stated that there are "statutes" Virginia has not included in its papers, but Maryland attached just one to its letter of April 20, 2001. (Even the one statute attached does not add to the relevant evidence—a licensing scheme for Virginia boats-for-hire is not a "regulation[] which may be necessary for the preservation of fish...or for preserving and keeping open the channel and navigation [of the River]" and is thus not within Article VIII of the 1785 Compact. This is in contrast to the Potomac Company legislation and the concurrent 1896 legislation regarding fishing in the non-tidal Potomac, both of which fit squarely within Article VIII.) Similarly, the prospective evidence to which Maryland refers in its April 20 letter regarding the negotiation of the 1958 Compact and how the two States have patented land beneath the Potomac ought to have been brought forth during Maryland's repeated opportunities to do so. It is not sufficient to defeat summary judgment to suggest that there are relevant categories of evidence that the opponent has not been able to present. Maryland has had the burden (and ample opportunity) to put forth that evidence in either of its briefs, at oral argument, or appended to its April 20 letter. Finally, the police power issue has been reserved for subsequent proceedings. The necessity of presenting evidence on that issue will be addressed at the appropriate time.

[11] *See Virginia v. West Virginia*, 220 U.S. 1, 26 (1911).

Virginia to fix the boundaries between the two States.[12] In *Maryland v. West Virginia*, 217 U.S. 577 (1910), the Court established the north/south boundary between the States at the low-water mark on the Potomac's southern bank. Although the Court noted that the original chartered southern boundary had been the high-water mark on the Virginia shore of the Potomac, it concluded that that boundary had been altered to low-water mark by prescription. The prescriptive low-water mark, the Court noted, was declared *after* West Virginia was created, when Virginia and Maryland submitted the boundary question to binding arbitration, leading to the so-called Black-Jenkins Award of 1877. Although Virginia's rights of access to and use of the River were not specifically before the Court in the West Virginia cases, the Court's opinion cannot be read in any way other than as concluding that the 1785 Compact applies to the entire River. This conclusion is compelled because:

First, West Virginia's frontage on the Potomac is totally non-tidal.

Second, as the Court noted, West Virginia "is but the successor of Virginia in title." 217 U.S. at 578.

Third, West Virginia, in its brief on the final decree, by extensively quoting from the arbitrators' Opinion, brought the 1785 Compact as well as the Black-Jenkins Award and its acceptance by Maryland to the Court's attention. After quoting at length from the Opinion, West Virginia's brief stated:

> It will be noted that the arbitrators were of opinion that the compact of 1785 applied to the whole course of the river above the Great Falls as well as below; therefore it applies to that part of the River between Maryland and West Virginia, and whilst West Virginia was not a party to this arbitration, and is not bound by the award, yet the State of Maryland is bound by it and has accepted it so far as the Potomac River lies between her and Virginia and it would seem that she cannot with very good grace ask for a different line to be established between her and West Virginia, having brought about through this arbitration the establishment of the low water-mark as the limit of her territorial rights under her charter, and under her compact with Virginia. Upon exactly the same state of facts

[12] *See Maryland v. West Virginia*, 217 U.S. 1, 22-23 (1910).

existing between her and West Virginia, she would seem to be estopped to ask for a different decision from this Court.

Brief of Counsel for West Virginia on Points Involved in the Settlement of the Final Decree, *Maryland v. West Virginia*, at 5 (May 14, 1910).

Fourth, the Court quoted liberally and favorably from the Black-Jenkins Award by "eminent lawyers," *id.* at 579, noted the "elaborate opinion" the arbitrators rendered, *id.*, and quoted excerpts from the arbitrators' Opinion, including:

> [S]he [Virginia] expressly reserved "the property of the Virginia shores or strands bordering on either of said rivers (Potomac or Pocomoke) and all improvements which have or will be made thereon." By the compact of 1785, Maryland assented to this, and declared that "the citizens of each state respectively shall have full property on the shores of the Potomac, and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements."

Id. at 580 (quoting Virginia Constitution of 1776 and 1785 Compact, Art. VII).

Fifth, the Black-Jenkins "elaborate opinion" to which the Court referred includes the arbitrators' firm conclusion that although they were "not authority for the construction of this compact [of 1785]" they could not "help being influenced by [their] conviction ... that it applies to the whole course of the river above Great Falls as well as below." Black-Jenkins Opinion at 16.

Sixth, the Court quoted the arbitrators' conclusion:

> "Taking all together, we consider it established that Virginia has a proprietary right on the south shore to low water-mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a common highway.
>
> To that extent Virginia has shown her rights on the river so clearly as to make them indisputable."

217 U.S. at 580 (quoting Black-Jenkins Opinion at 16).

Seventh, having discussed the Opinion and the Award as aforesaid, the Court continued:

> The compact of 1785 (See Code of Virginia, vol. 1, title 3, chap. 3, 13, p. 16) is set up in this case, and its binding force is preserved in the draft of decrees submitted by counsel for both states. We agree with the arbitrators in the opinion above expressed, that the privileges therein reserved respectively to the citizens of the two states on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac river shall extend to high-water mark. There is no evidence that Maryland has claimed any right to make grants on that side of the river, and the privileges reserved to the citizens of the respective states in the compact of 1785, and its subsequent ratifications, indicate the intention of each state to maintain riparian rights and privileges to its citizens on their own side of the river.
>
> This conclusion gives to Maryland a uniform southern boundary along Virginia and West Virginia, at low-water mark on the south bank of the Potomac river to the intersection of the north and south line between Maryland and West Virginia, established by the decree in this case. This conclusion is also consistent with the previous exercise of political jurisdiction by the states respectively.

Id. at 580-81.

Eighth, Maryland submitted a draft decree that contained language which the Court incorporated in the final decree, as follows:

> Fourth. That this decree shall not be construed as abrogating or setting aside the compact made between commissioners of the state of Maryland and the state of Virginia at Mount Vernon, on the 28th day of March, 1785, and which was confirmed by the general assembly of Maryland, and afterwards by act of the general assembly of Virginia, passed on the 3d day of January, 1786, but the said compact, except so far as it may have been superseded by the provisions of the Constitution of the Unites States, or may be inconsistent with this decree, *shall remain obligatory upon and between the states of Maryland and West Virginia, so far as it is applicable to that part of the Potomac river which extends along the border of said states*, as ascertained and established by this decree.

Id. at 585 (emphasis added).

Thus, the Supreme Court has provided in its *Maryland v. West Virginia* decision an authoritative answer to the question before me by quoting favorably from the Black-Jenkins Award and Opinion, by noting that the 1785 Compact's "binding force" was preserved in the draft decrees submitted by both West Virginia *and Maryland*, by specifically stating that the privileges reserved in the 1785 Compact to the citizens of Maryland *and Virginia* "on the shores of the Potomac" were inconsistent with Maryland's claim to a high-water boundary and by ordering that the 1785 Compact "shall remain obligatory" on Maryland and West Virginia, whose joint border is entirely in the non-tidal section of the Potomac. The words "shall remain obligatory" were offered by Maryland itself in its proposed decree. *See* Decree Proposed by the State of Maryland, *Maryland v. West Virginia*, at 5 (Apr. 20, 1910). If the Court had believed that the Compact of 1785 was inapplicable above the tidal reach, the Court could not have decreed that the rights granted under that Compact "shall remain obligatory" between Maryland and West Virginia.

The Court's intention in *Maryland v. West Virginia* is made even more clear in its statement, after quotation from the Opinion accompanying the Black-Jenkins Award, that:

> There is no evidence that Maryland has claimed any right to make grants on th[e Virginia] side of the river, and *the privileges reserved to the citizens of the respective states in the compact of 1785, and its subsequent ratifications, indicate the intention of each state to maintain riparian rights and privileges to its citizens on their own side of the river.*

Id. at 580-81 (emphasis added). In the context of the case between Maryland and *West* Virginia, whose frontage on the River is totally in its upper, non-tidal reach, this passage plainly refers to the entire length of the river, not some segment of it. Even more

importantly, it is inconceivable that the Court would expressly discuss riparian rights on both sides of the River as dealt with in the 1785 Compact, and favorably incorporate passages from the arbitrators' Opinion accompanying the Black-Jenkins Award, if the Court did not believe, as the arbitrators had believed, that Virginia had access rights along the entire River, rights that passed to West Virginia upon its separation from Virginia.

Pointing to the words "so far as it is applicable to that part of the Potomac river which extends along the border of said states," Maryland argues that because the Compact does not apply above the tidal reach, the Court's decree that the Compact "shall remain obligatory" between Maryland and West Virginia is of no effect. (Md. Br. at 63; Md. Sur. Br. at 14). Even setting aside the fact that Maryland put these very words in its proposed decree, this suggestion—that the Court would expressly preserve an obligation that did not exist, and refer to an obligation that never existed as one that "shall *remain*"—would render the Court's statement nonsensical and meaningless. The only sensible reading of the decree is that the Court intended to preserve between Maryland and West Virginia obligations laid down by such parts of the 1785 Compact that by their plain terms and subject matter had application to the non-tidal reach of the Potomac River along Maryland's border with West Virginia. The cautionary language in the decree simply recognizes that certain portions of the Compact were not geographically applicable to West Virginia because their subject matter was relevant only to the Chesapeake Bay, the Pocomoke River or the tidal reach of the Potomac River.

I thus conclude that the question of Virginia's rights of access to and use of the Potomac River above its tidal reach has already been decided by the Court in Virginia's

favor in *Maryland v. West Virginia*, 217 U.S. 577 (1910). I will accordingly recommend to the Court that Virginia's Motion for Partial Summary Judgment be granted.

In other circumstances, it might be sufficient to stop at this point. However, since this is a recommended decision only, and since Virginia was not a party to *Maryland v. West Virginia*, I will, in the interest of judicial economy, address the underlying issue as if the Court had not already decided it.

The analysis begins with the language of the Compact of 1785.

C. The Compact of 1785

Efforts that led to the 1785 Compact began as early as 1777, when Virginia and Maryland each appointed Commissioners to settle the two States' respective rights to the Chesapeake Bay and the Potomac and Pocomoke Rivers.[13] The Commissioners appointed in 1777 never met, however, because Virginia would not meet with Maryland until Maryland ratified the Articles of Confederation,[14] and then the Revolutionary War intervened.[15]

After the end of the War, Maryland (in December 1784) and Virginia (in January 1785) incorporated the Potomac Company, through joint legislation passed in almost identical language. The Company's purpose was "the extension of the navigation of Patowmack river, from tide water to the highest place practicable on the North branch" in order to promote commerce to the west, particularly to the Ohio River and ultimately the

[13] *Journal of the House of Delegates of the Commonwealth of Virginia*, October Session, 1777, at 65, 74 (White ed. 1827) ("*Journal of the Virginia House of Delegates* (1777)"); *Votes and Proceedings of the Senate of the State of Maryland*, October Session, 1777, at 10, 25, 27-30 ("*Votes and Proceedings of the Maryland Senate* (1777)").

[14] 2 *The Papers of George Mason* 755 (Robert A. Rutland et al., eds. 1970) ("Rutland, *Mason Papers*") (Letter from George Mason to Edmond Randolph dated October 19, 1782).

[15] *Id.* at 813 (Ed. note).

Mississippi River and the Gulf of Mexico.[16] During the same period of time, Maryland (in January 1785) and Virginia (in June 1784) again appointed Commissioners to settle issues of navigation of and jurisdiction over the Potomac River. The Commissioners—Daniel of St. Thomas Jenifer, Thomas Stone, and Samuel Chase for Maryland and George Mason and Alexander Henderson for Virginia—met at Mount Vernon from Friday, March 25, 1785, through Monday, March 28, 1785.[17] Their conference produced the 1785 Compact and Maryland and Virginia both ratified the Compact later that year.

The question presented here is one of law—an interpretation of a compact between sovereign States. As both a contract and a statute, this interstate Compact is interpreted by using customary rules of contract interpretation and statutory construction.[18] By one of those rules, where the language of the Compact is clear and unambiguous, that language is conclusive and no evidence extrinsic to the Compact needs consideration. *See Kansas v. Colorado*, 514 U.S. 673, 690 (1995). Only if a compact is ambiguous may resort to extrinsic evidence be had, including compact negotiations and related indications of the parties' intent. *See Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991); *Texas v. New Mexico*, 462 U.S. 554, 568 n.14 (1983); *Arizona v. California*, 292 U.S. 341, 359-60 (1934). Thus we begin with the question of the ambiguity *vel non* of the Compact.

---

[16] Potomac Company Charter, 1784 Md. Laws ch. XXXIII, Preamble, 1784 Va. Acts ch. XLIII, Section 1 ("Potomac Company Charter").

[17] 2 John C. Fitzpatrick, *The Diaries of George Washington* 354 (1925) ("Fitzpatrick").

[18] *See Kansas v. Colorado*, 533 U.S. ___ (2001) ("A compact is a contract. It represents a bargained-for exchange between its signatories and 'remains a legal document that must be construed and applied in accordance with its terms.'" (quoting *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)) (O'Connor, J.,

1. *The Language of Article VII*

The Compact was entered into by both States and subsequently approved by Congress.[19] Article VII of the Compact defines the rights that Virginia and its riparian owners have to and along the Potomac above the tidal reach. It provides:

> The citizens of each state respectively shall have full property in the shores of *the Patowmack river* adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of *the river*, but the right of fishing in *the river* shall be common to, and equally enjoyed by, the citizens of both states; provided, that such common right be not exercised by the citizens of the one state to the hindrance or disturbance of the fisheries on the shores of the other state, and that the citizens of neither state shall have a right to fish with nets or seanes on the shores of the other.

1785 Compact, Article VII (emphasis added).

Other Articles of the Compact address other issues: some, by their terms, apply only to the tidal portion of the River; others concern matters along its entire length. Article VII is clearly in the latter category. The language of Article VII is clear, unambiguous, and susceptible of only one interpretation, *viz.*, that it applies to the entire length of the Potomac. It gives to the citizens of *each* State "full property in the shores of *the Patowmack river* adjoining their land, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements." (emphasis added). It protects for all citizens of *both* States property rights in their lands adjoining the River, the privilege of making improvements so as not to obstruct navigation, and the right of fishing in the River so as not to hinder fisheries on the shore of the other State. Article VII in no way expressly, or even by implication, limits the

---

concurring in part and dissenting in part); *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) ("a congressionally approved compact is both a contract and a statute").

[19] *See supra* note 8.

reach of its grant to the tidal portion of the River. There is nothing in its plain language to suggest that its drafters or its legislative enactors intended to so restrict its scope. In the absence of limiting language, it is improper to import the interpretation that Maryland urges. *See New Jersey v. New York*, 523 U.S. 767, 811 (1998) ("[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms." (quoting *Texas v. Mexico*, 462 U.S. 554, 564 (1983) (alteration in original)).

Despite the use of the unlimited term "Patowmack River" in Article VII, Maryland has urged that by its plain language Article VII applies only to the tidal reach of the River because (a) the term "Patowmack River" was understood in 1785 to mean only the tidal Potomac (Oral Arg. Tr. at 69, 87) and (b) the words "shores," "navigation," and "wharves" used in Article VII demonstrate that Article VII applies only to the tidal Potomac because those words were not then used in a non-tidal context (Md. Br. at 48-53; Oral Arg. Tr. at 84-85, 98-99).

Maryland has offered no evidence in support of its first argument, simply asserting that its historian experts Prof. Hoffman and Dr. Littlefield "have shown [that] no need existed to state in the Compact that it applied only to the tidal portion of [the] Potomac because that was the clear understanding that governed at that point in time in history." (Oral Arg. Tr. at 69). Maryland first raised that point during oral argument. However, other than to draw the legal conclusion that a tidewater focus in some articles of the Compact meant that the term "Patowmack River" referred to only the tidal Potomac, neither expert suggested that "Patowmack River" in 1785 meant only the tidal

Potomac and there is no other evidence to support it.[20] Thus, no basis exists for that conclusion. To the contrary, the evidence shows that the term "Patowmack River" in 1785 was not used only to refer to the tidal Potomac. When the Legislatures or the Commissioners wanted to distinguish or specify a section of the River, they did just that.[21]

---

[20] Even if its experts had opined that "Patowmack River"—without more—meant solely the tidal reach of the River, I would have rejected that opinion in the absence of record evidence of *facts* to prove it. Maryland has cited no authority for the proposition that the Court may accept the opinions of experts on legal questions. (Oral Arg. Tr. at 113-15). At oral argument, Maryland stated that the opinions of its experts could be considered as "consistent with the Federal Rules of Evidence" as long as they provide bases for their conclusions. However, the Federal Rules of Evidence allow for expert opinions only on matters for the trier of fact, i.e., issues of fact. *See* Fed. R. Evid. 702, 704; *see also Edwards v. Aguillard*, 482 U.S. 578, 595-96 (1987) ("The existence of 'uncontroverted affidavits' does not bar summary judgment. Moreover, the postenactment testimony of outside experts is of little use in determining the Louisiana Legislature's purpose in enacting this statute. [N]one of the persons making the affidavits ... participated in or contributed to the enactment of the law or its implementation. The District Court, in its discretion, properly concluded that a Monday-morning 'battle of the experts' over possible technical meanings of terms in the statute would not illuminate the contemporaneous purpose of the Louisiana Legislature when it made the law. We therefore conclude that the District Court did not err in finding that appellants failed to raise a genuine issue of material fact, and in granting summary judgment.").

The historical documents filed with the Hoffman and Littlefield affidavits are accepted as accurate reproductions for purposes of this Motion. However, I could not accept the Hoffman and Littlefield legal conclusions about what the Compact means. Prof. Hoffman argues that because the neogitators intended equivalent treatment for the Potomac and the Chesapeake, "it follows that both states had the same kind of navigation in mind for the rivers as for the bay, namely, seagoing or 'tidewater' navigation ...." Hoffman Aff. at 30. Prof. Hoffman later argues that "[e]ven though some of [the] words [such as lighthouse and piracy] could have conceivably been used in the context of inland navigation, taken together their *preponderant connotation* is seagoing and tidewater transportation." *Id.* at 62 (emphasis added). Because of their focus on tidewater, Prof. Hoffman concludes, "[t]he commissioners ... would have had no confusion about the scope of their task" [i.e., to negotiate about only the tidewater reach of the Potomac]. *Id.* at 63. These legal and interpretive conclusions require speculative leaps of faith unsupported by the language of the Compact and therefore could not be accepted even if they were legally appropriate.

Dr. Littlefield argues that "the Potomac Company's officials, others who interacted with the company, and contemporaneous observers all believed that the Potomac Company had the sole authority to regulate the Potomac River above tidewater and that the 1785 Compact did not apply to that part of the Potomac." Littlefield Aff. at 20. Even accepting all that as true would not help answer the question before me—the intent of the Compact's negotiators. The post-Compact "belief" on the part of "contemporaneous observers" would not override the clear and unqualified language of the Compact applying to the entire Potomac without limitation. Nor could I conclude from the absence of any evidence of officials' or shareholders' belief that the Compact applied to the non-tidal reach of the River, Littlefied Aff. at 19, that the Compact's application is limited to the tidal reach. That is a speculative conclusion that the language of the Compact rebuts.

[21] *See* Letter to President of the Executive Council of the Commonwealth of Pennsylvania from George Mason et al. (Enclosure 2 to Letter to the Speaker of the House of Delegates, dated March 28, 1785), 2 Rutland, *Mason Papers*, at 822 ("[I]t is in Contemplation of the said two States to promote the clearing & extending the Navigation of Potomack, from tide-Water, upwards ...."); Journals of the House of Burgesses of Virginia 1766-1769, at 314 (John Pendleton Kennedy ed. 1906) ("*Ordered*, That Leave be given to bring

In support of its second argument—that the plain language of the Compact manifests an intent that it apply only to the tidal reach—Maryland relies on cases decided by its own courts to interpret the words "shores," "navigation," and "wharves" in Article VII. Maryland overstates the precedential and persuasive force of these cases—*Binney's Case*, *United States v. Great Falls Manufacturing Co.*, *O'Neal v. Virginia and Maryland Bridge Co. at Shepherdstown*, and *Middlekauff v. LeCompte*.[22]

No state court decision can provide a controlling interpretation of the Compact. In a controversy between States, only the United States Supreme Court can make such a ruling.[23] Moreover, *Binney's Case*, *O'Neal*, and *Great Falls Manufacturing* were all decided prior to the Black-Jenkins Award of 1877.[24] In their Opinion accompanying the Award, the arbitrators specifically disagreed with *Binney's Case*, and in Clause IV of the Award they expressly found that Virginia had access rights by prescription along the entire length of the River to the low-water mark, including full rights to make improvements appurtenant thereto. Maryland later accepted the Award, including its Clause IV.[25] *Middlekauff*, the final and most recent Maryland case, was decided after the United States Supreme Court's controlling decision in *Maryland v. West Virginia*, 217 U.S. 577 (1910), but inexplicably failed even to mention that authority. These facts

---

in a Bill for clearing and making navigable the River *Potowmack*, from the great Falls of the said River, up to Fort *Cumberland* ....").

[22] *See Binney's Case*, 2 Bland 99 (1829), *United States v. Great Falls Manufacturing Co.*, Circuit Court for Montgomery County, Maryland, *reprinted as* Sen. Doc. 42, 35th Cong., 2d Sess. (1859), *O'Neal v. Virginia and Maryland Bridge Co. at Shepherdstown*, 18 Md. 1 (1861), and *Middlekauff v. LeCompte*, 132 A. 48 (1926).

[23] *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

[24] Subsequent proceedings relating to *Great Falls Manufacturing*, including *Great Falls Mfg. Co. v. United States*, 16 Ct. Cl. 160 (1880), *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884), *Great Falls Mfg. Co. v. Garland*, 25 F. 521 (D. Md. 1885), and *Great Falls Mfg. Co. v. Garland*, 124 U.S. 581 (1888), have no bearing on the issue raised by Virginia's Motion.

[25] 1878 Md. Laws ch. 274.

destroy any weight the Maryland state court cases might have had in the context of the present controversy.

Furthermore, the record contains ample evidence of the contemporaneous use of the terms "navigation" and "shores" to apply to non-tidal waters.[26] Perhaps the most telling use occurred in December 1785, the same year the Compact was crafted, when an act of the Virginia legislature ceded land for Kentucky statehood. That legislation provided in relevant part:

> *Seventh.* That the use and *navigation* of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States; and the respective jurisdictions of this commonwealth, and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which may possess the opposite *shores* of the said river.[27]

The Ohio River is non-tidal.

Based upon the legal standards applicable to compact interpretation, I conclude that Article VII by unambiguous language is applicable to the entire River.

2. *Context of Article VII in the Compact*

Looking beyond Article VII, analysis of the other Articles of the Compact confirms the plain reading of Article VII. The Compact has many provisions that by their terms have no restriction to the tidal reach. For example, Article VI provides that "[t]he

---

[26] *See, e.g.*, The Potomac Company Charter ("An Act for...extending the navigation of the river Patowmack"); *Report of the Maryland and Virginia Commissioners* (Dec. 28, 1784), *reprinted in* 2 *The Papers of George Washington (Confederation Series)* 237 (W.W. Abbot & D. Twohig eds. 1992) ("removing the obstructions in the River Potomack and making the same capable of Navigation from Tide Water as far up the North Branch of the said River as may be convenient and practicable will increase the Commerce of the Commonwealth of Virginia and State of Maryland"); 1772 Va. Acts ch. XXVII (establishing a ferry crossing "from the land of the right honourable the earl of Tankerville, in Loudoun County, in the tenure and occupation of John Farrow and Alexander Reame, over Potowmack river, to the opposite shore, in Maryland").

[27] 8 *The Papers of James Madison* 450, 452 (Robert A. Rutland et al., eds. 1973) ("Rutland, *Madison Papers*") ("An Act Concerning Statehood for the Kentucky District" (Dec. 22, 1785)) (emphasis added).

river Patowmack shall be considered as a common highway for the purpose of navigation and commerce to the citizens of Virginia and Maryland, and of the United States, and to all other persons in amity with the said states trading to or from Virginia or Maryland." (emphasis added). This "common highway" is not restricted to any segment of the River and the Compact nowhere suggests that it is. The same can be said of: the Preamble (reciting that it is intended to regulate and settle the "*jurisdiction and* navigation of Patowmack and Pocomoke Rivers," without limitation); Article VIII (providing for concurrent regulations for the preservation of fish in *the river Patowmack* and for keeping open the channel and navigation of the River); Article X (providing for the jurisdiction of each State "over *the river Patowmack*" for crimes and offenses);[28] Article XI (allowing seizure of property for violations of commercial regulations for persons "carrying on commerce in Patowmack . . . river[]" and setting forth rules for service of process); and Article XII (permitting a citizen of one State, owning land in the other, to transport his produce or effects to the other side of the River free of any duty) (all emphasis added). Each of these provisions straightforwardly applies to the "river," that is, the entire Potomac, without limitation. Moreover, in every instance, the authors and enactors of the Compact referred to either the "River Patowmack," "river," or "rivers." Not one single modifier is used to limit the scope of the Compact to a small portion of the River. There are provisions that plainly speak to the tidewater portion of the River, *see, e.g.*, Articles IV and IX, but there are several others that unqualifiedly apply to the entire River. It is inconceivable that the drafters and enactors could have intended to restrict these provisions to only a portion of the River without saying so or that they would have

[28] The inclusion in Article X of jurisdiction over "piracies," which most commonly occur in oceans and parts thereof, such as the Chesapeake Bay, does not restrict Article X to tidewater, for it more broadly

left such important substantive matters unresolved as to any portion of the River, least of all the nearly seventy per cent of its length above tidewater.

Nevertheless, Maryland claims that the non-tidal Potomac was a "non-navigable" river above the tidal reach in 1785. Therefore, Maryland asserts, it was privately owned by Maryland citizens as a matter of law, and (1) granting fishing or construction rights to Virginians would have violated the private property rights of Maryland citizens without compensation (Md. Br. at 53-59; Oral Arg. Tr. at 83-84); and (2) Articles VIII (concurrent legislation regarding fishing); X (jurisdiction over crimes) and XI (service of process) have no application above the tidal reach and crimes in that section would be subject to the jurisdiction of the Maryland county in which the given act took place. (Md. Br. at 48-53; Oral Arg. Tr. at 101-103). The record amply demonstrates that both the premises underlying Maryland's argument and the conclusions drawn from those premises are incorrect.

Among the rights that the Compact preserves is a right for the public to fish in the River. Maryland's stated position is that, as a "non-navigable" and thus privately owned river above the tidal reach, the non-tidal Potomac was exclusively owned by Maryland citizens, subject only to a right of public transportation. (Oral Arg. Tr. at 80-81). Maryland thus argues that protection of fisheries rights for citizens of both States would have been inconsistent with private ownership and the drafters would not have deprived Maryland riparian owners of such rights without providing compensation rights. Nothing in the Compact does anything other than *confirm* existing rights in or on the River. The Compact neither addressed ownership of the bed of the River nor altered ownership of

---

includes all "crimes and offenses."

the shores of the River.[29] This makes perfect sense, not because, as Maryland argues, the Compact would have violated settled private property rights if it applied above tidewater, but rather because ownership of the bed of the River was still unsettled in 1785[30] and the Compact was not intended to address that question. There was no need to include compensation for a taking and the absence of such a provision from the Compact proves nothing.

For its claim that the non-tidal Potomac was non-navigable in 1785, Maryland relies on the application of English common law in the United States as expressed in an *1824* treatise.[31] In response, Virginia cites numerous instances of commerce on the Potomac above tidewater prior to 1785 to prove that the Potomac was as a matter of fact navigable.[32] Virginia also cites numerous contemporaneous instances, the Potomac Company Charter among them, that use the word "navigation" in connection with non-tidal waters.[33] Both parties cite cases decided after 1785 to support their respective positions.[34] It is unclear what the drafters themselves would have understood to be the *legal* definition of the word "navigable." The legal definition of navigability was unsettled or, at best, in flux in 1785.[35] That uncertainty, in connection with contemporaneous usages of the word "navigation" in specific reference to non-tidal

---

[29] For the same reason, the rule of strict construction of any State's purported relinquishment of territorial rights has no application here. (Md. Br. at 44-47).

[30] *See Marine Railway & Coal Co. v. United States*, 257 U.S. 47, 63-64 (1921) (1785 Compact "left the question of boundary open to long continued disputes").

[31] Maryland cites and discusses *Angell on Watercourses* (1824 and 4th ed. 1854). Md. Br. at 55-56.

[32] Va. Br. at 46-49.

[33] *See supra* notes 26-27 and accompanying text.

[34] Those cases include *The Montello*, 87 U.S. (20 Wall.) 430 (1874); *The Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557 (1870); *The Propeller Gennessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851); *Peyroux v. Howard*, 32 U.S. 324, 331 (1833); *Middlekauff v. LeCompte*, 132 A. 48 (Md. 1926); and *Binney's Case*, 2 Bland 99 (1829).

[35] *See* Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 Fla. St. U. L. Rev. 511, 587-605 (1975).

waters,[36] undercuts any inference that the drafters intended by the use of the word "navigation" that the Compact apply only to the tidal reach of the River. It also undercuts Maryland's argument that Maryland citizens as a matter of law owned the bed of the River and that, the Compact, if applied to the non-tidal reach, would have been at odds with that ownership.

Even assuming that Maryland's contention were correct and that the courts both in Maryland and in Virginia at the time would have *legally* defined certain waters as "navigable" (and thus publicly owned) by reference to tidality alone, that assumption begs the question. The question is not what the *law* of navigability was in 1785 but rather what the men who drafted and enacted the Compact intended when they used the words "River Patowmack" and "navigation". There is nothing to permit—much less compel—a reasonable inference that the use of the word "navigation" was intended by the drafters and enactors to define "River Patowmack" by a *legal* definition of navigability and to restrict—by implication—the term "Patowmack River" to tidewater. It is much more likely that the "navigability" that concerned them was navigability in fact. There is no reason to think that they would have wanted to prevent obstructions to navigation in only one section of the River and would have used a legal definition to accomplish that unlikely limitation without saying so.

Furthermore, in focusing on the word "navigation," Maryland dismisses the use of the word "jurisdiction" in the Preamble's phrase "navigation and jurisdiction." Maryland relies on the Maryland Circuit Court's opinion in *United States v. Great Falls Manufacturing Co.*[37] for the proposition that, notwithstanding the use of the term

[36] *See supra* notes 26-27 and accompanying text.
[37] *See supra* note 22.

"jurisdiction," Article VII is the only Article that "'could be construed as applying to the river above tide.'" Md. Br. at 50-51 (quoting *United States v. Great Falls Manufacturing Co.* at 7).[38] Thus, the argument is that because some provisions have tidewater as their principal focus, the complete Compact applies only to tidewater even if some provisions by their plain terms apply to the entire River. Maryland thus seeks to overcome the plain meaning of Article VII by suggesting that the draftsmen and enactors of the Compact should have included language making crystal clear their intent to make the Compact applicable to the non-tidal portion of the River. This, according to Maryland, is because emphasis on activity affecting the tidewater portion of the Potomac shows that the term "river Pawtomack," no matter where or how it is used, meant only the tidewater portion.[39] That cart is indeed before the horse. As demonstrated above in this section, it is simply not the case that all, or even most, of the Compact's Articles are limited to tidewater. Without that premise, there is no support for Maryland's contention.

The use of the terms "naval office," "naval officer," "sailing," "harbor," "port," "wharf," "quarantine," "ballast," "lighthouse," "beacon," and "piracy" also does not support the proposition that the Compact has no application beyond the tidal portion of the River. In context, and read carefully, some Articles may have more applicability or even total applicability to the tidal portion while others, by their terms, clearly apply to the entire River. Even accepting as true that the Compact's drafters were principally concerned with tidal waters does not prove *a fortiori* that the Compact was intended to apply exclusively to such waters.

---

[38] The court specifically refers to Article IX, but clearly means Article VII.

[39] *See, e.g.*, Hoffman Aff. at 60 ("If the commissioners had wanted the Compact to refer to inland portions of the Potomac, they almost certainly would have used the phrase 'inland navigation,' or specified 'above tidewater.'").

In sum, contract interpretation and statutory construction rules permit no conclusion other than that Article VII of the Compact by its clear language grants Virginia the authority to "make" and "carry out" "improvements" from the Potomac shore adjoining its lands along the entire Potomac, provided that its improvements do not obstruct or injure the navigation of the River. Analysis of the remainder of the Compact only affirms that conclusion.

3. *Historical Context of the Compact*

Maryland has also argued that whether or not the Compact is ambiguous, resort must be had to extrinsic documents to place the Compact in its proper historical context. (Oral Arg. Tr. at 68).[40] It bases that argument on analogies to the Court's interpretation of royal charters and grants as well as the United States Constitution.[41] However, Maryland has cited no authority to contradict the rule for *interstate compacts* that where the language of the compact is clear and unambiguous, that language is conclusive and no evidence extrinsic to the compact need be considered.[42]

---

[40] Maryland has also argued that historical documents should be consulted because the Compact's language is ambiguous. (Oral Arg. Tr. at 68.) Either way, the conclusion is the same.

[41] *See Vermont v. New Hampshire*, 289 U.S. 593, 605 (1933) (construing an order of the King-in-Council to determine the Vermont/New Hampshire boundary); *Rhode Island v. Massachusetts*, 45 U.S. 591, 629 (1846) (construing an ambiguous charter from the King of England and the Council of Plymouth to the Plymouth Colony); *Martin v. Waddell*, 41 U.S. 367, 411 (1842) (construing a charter from the King of England to the Duke of York); *Rhode Island v. Massachusetts*, 37 U.S. 657, 723 (1838) (construing the scope of the Court's original jurisdiction under the Constitution).

[42] *See Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (stating that a Compact is a statute and a contract and that the Court has looked to legislative history and other extrinsic material when required to interpret a statute that is ambiguous); *Texas v. New Mexico*, 462 U.S. 554, 568 (1983) (looking at negotiating history where the compact itself did not expressly address the relevant issue); *United States v. Texas*, 339 U.S. 707, 715 (1950) (stating that in original actions, the Court is always liberal in allowing full development of the facts, and introduction of evidence in a hearing is essential where the meaning of documents was to be found in diplomatic correspondence, contemporary construction and the like, but declining to require such a hearing because the text of the Congressional resolution was clear); *Arizona v. California*, 292 U.S 341, 359-60 (1934) ("when the meaning of a treaty is not clear, recourse may be had to the negotiations, preparatory works, and diplomatic correspondence of the contracting parties to establish its meaning").

Nevertheless, for purposes of completeness and thoroughness, a discussion of contemporaneous documents and subsequent events follows. This review confirms exactly the same conclusion—the rights guaranteed by Article VII of the Compact apply to the entire Potomac. It should be clearly understood, however, that because I have found the Compact unambiguous on its face, this additional review is not compelled.[43]

a. Negotiation of the 1785 Compact

Efforts to resolve Potomac River-related questions sputtered and faltered until, after cessation of hostilities with the British, the coalescence of mutual concerns regarding jurisdiction over and navigation on the Rivers Potomac and Pocomoke and Chesapeake Bay led to the two States' adoption of substantially similar resolutions authorizing negotiations for regulation of the Potomac. Virginia's 1784 resolution read:

> Whereas, great inconveniences are found to result from the want of some concerted regulations between this State and the State of Maryland, touching the jurisdiction and navigation of the river Potomac;
> Resolved, That George Mason, Edmund Randolph, James Madison, jun., and Alexander Henderson, Esquires, be appointed commissioners; and that they, or any three of them, do meet such commissioners as may be appointed on the part of Maryland; and, in concert with them, frame such liberal and equitable regulations concerning *the said river*, as may be mutually advantageous to the two States; and that they make report thereof, to the General Assembly.[44]

The joint 1784-85 resolutions had been preceded by an attempt to the same end that, for various reasons, had not succeeded. On December 10, 1777, Virginia had

---

[43] *See Garcia v. United States*, 469 U.S. 70, 75 (1984) ("Notwithstanding petitioners' argument to the contrary, we are satisfied that the statutory language with which we deal has a plain and unambiguous meaning. While we now turn to the legislative history as an additional tool of analysis, we do so with the recognition that only the most extraordinary showing of contrary intentions from those data would justify a limitation on the "plain meaning" of the statutory language. When we find the terms of a statute unambiguous, judicial inquiry is complete, except in "'rare and exceptional circumstances.'" (quoting *TVA v. Hill*, 437 U.S. 153, 187 n. 33 (1978) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)))).

[44] *Journal of the House of Delegates of the Commonwealth of Virginia* at 84 (1784) (White Ed. 1828) ("*Journal of the Virginia House of Delegates* (1784)") (emphasis added).

appointed Commissioners to meet with Maryland "in order to adjust the rights of the use, and navigation of, and jurisdiction over, the Bay of Chesapeake, and *the Rivers* Patowmack and Pocomoke."[45] In response, on December 21, 1777, Maryland similarly appointed Commissioners whose instructions charged them to endeavor to obtain agreement "that the use and navigation of the *Rivers Patowmack and Pocomoke* shall be free to the subjects of both States, and to all other persons trading to either State, and that *the said Rivers* be considered as a common highway, free to all persons navigating the same."[46] That resolution reflected the November 25, 1777 sentiment of the Maryland Senate, which proposed a letter to the Assembly of Virginia stating that the legislatures of each State ought to confirm "the free navigation and use of *the Rivers Patowmack and Pocomoke*, and of that part of the Bay of Chesapeake within the limits of Virginia, together with the jurisdiction, as heretofore respectively exercised by each State."[47] In the 1777 resolutions, as in the 1784-85 resolutions themselves, the instructions spoke of the "River Patowmack" without modification or limitation.

There is nothing in the voluminous documentation submitted by the parties to indicate that any of the negotiators ever expressed any opinion that the phrase "River Patowmack" in the Compact had anything other than its natural meaning; namely, the entire River. Although George Mason and Alexander Henderson, the two Commissioners who negotiated the Compact of 1785 on Virginia's behalf, did not see Virginia's 1784 authorizing resolution before they negotiated the Compact, their assumption about what the resolution authorized demonstrates that they in fact negotiated about Virginia's rights

---

[45] *Journal of the Virginia House of Delegates* (1777) at 74 (emphasis added).
[46] *Votes and Proceedings of the Maryland Senate* (1777) at 30 (emphasis added).
[47] *Id.*

to the entire River. Mason's letter of August 9, 1785, to James Madison, written over four months after negotiating the Compact, states his belief, one apparently shared by his fellow negotiator Alexander Henderson, that the negotiators' authority was the same as it had been in the 1777 resolutions, and that that authority extended to negotiating jurisdiction over the entire River, not just a portion of it:

> [I]t was natural for us to conclude that these last Resolutions had pursued the Style of the former respecting the Jurisdiction of the two States; as well as that this Subject had been taken up, upon the same Principles as in the year 1778;[48] when Comrs. were directed to settle the Jurisdiction of *Chesapeake Bay & the Rivers Potomack & Pocomoke*; in which Sentiments, Mr. Henderson, from what he was able to recollect of the Resolutions, concurred.[49]

Given the understanding by George Mason and his fellow Virginia negotiator that their charge was "to settle the Jurisdiction . . . of the River[] Potomack," without qualification as to length, it is most unlikely that Mason and Henderson would have negotiated a compact that applied only to less than one third of the River and would have done so without giving any indication in the Compact of that crucial limitation.

Before the Compact was negotiated and before he had seen the Compact as drafted, James Madison had written letters in which he focused on the tidal stretch of the Potomac and on Chesapeake Bay.[50] From those letters, Maryland argues that the phrase

---

[48] Mason is plainly referring to the December 1777 resolutions.

[49] 2 Rutland, *Mason Papers*, at 827 (Letter from Mason to Madison (Aug. 9, 1785) (emphasis in original)).

[50] *See* 8 Rutland, *Madison Papers*, at 20 (Letter from Madison to Jefferson (Apr. 25, 1784)) ("Among others I suggested to your attention the case of the Potowmac, having in my eye the river below the head of navigation. It will be well I think to sound the ideas of Maryland also as to the upper parts of the N. branch of it. The policy of Ba[l]timore will probably thwart as far as possible, the opening of [it]; & without a very favorable construction of the right of Virginia and even the privilege of using the Maryland bank it would seem that the necessary works could not be accomplished." (alterations in original); *Id.* at 225 (Letter from Madison to Jefferson (Jan. 9, 1785)) ("This Resolution [regarding communication to Pennsylvania about leave to clear a road from the Potomac to waters connected with the Ohio River] did not pass till it was too late to refer it to Genl. Washington's negociations with Maryland. It now makes a part of the task alloted to the Commissrs. who are to settle with Maryd. the jurisdiction and navigation of Potowmac below tide water."); *Id.* at 268 (Letter from Madison to Jefferson (Apr. 27, 1785)) ("I understand that Chase and Jennifer on the part of Maryland, Mason & Henderson on the part of Virginia have had a meeting on the

"River Patowmack" in the Compact necessarily was intended to apply to only the tidal portion of the River. The letters James Madison wrote to Thomas Jefferson on April 25, 1784, January 9, 1785, and April 27, 1785 shed no light on the language of the Compact. Unlike his parenting role for the United States Constitution, Madison, although appointed as a commissioner, was not present at the Mount Vernon conference of March 25-28, 1785, at which the Virginia and Maryland representatives drafted the Compact, and had no participation in the drafting of the Compact language. No document suggests that after that language was drafted Madison or any negotiator ever expressed an opinion limiting the natural scope of the phrase.

The meaning of the Compact cannot be derived from the views of a single individual who took no part in drafting it. Even for negotiators:

> It is beyond cavil that statements allegedly made by, or views allegedly held by, "those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body," are of little use in ascertaining the meaning of compact provisions.

Oklahoma v. New Mexico, 501 U.S. 221, 236-37 n.6 (1991) (quoting *Arizona v. California*, 292 U.S. 341, 360 (1934)); *cf. Garcia v. United States*, 469 U.S. 70, 76 (1984) ("We have eschewed reliance on the passing comments of one Member, and casual statements from the floor debates." (citations omitted)). Madison was even further removed. He was not even "engaged in negotiating" the Compact.

---

proposition of Virga. for settling the navigation & jurisdiction of Potowmack below the falls, & have agreed to report to the two Assemblies, the establishment of concurrent jurisdiction on that river & Chesapeak.").

Even assuming that Madison believed the Compact that was being negotiated in 1785 would apply only to the tidal reach of the Potomac,[51] his letters cannot undo what the Compact as negotiated and enacted actually says. There is no evidence that any one of Madison's letters was ever communicated to any Compact negotiator or to anyone else other than the addressee, Thomas Jefferson. Only his last letter (that to Jefferson of April 27, 1785) was written after the Compact was actually negotiated and drafted, and even that letter was based on only second-hand reports of the Compact that had been negotiated.[52] As of the time Madison wrote that letter, he had still not seen the Compact or discussed it with any of the Commissioners who negotiated it. There is no sign that, when Madison learned of the terms of the Compact as negotiated, he raised any objection to its full reach (which stood in contrast to the portion of the River mentioned in his prior letters) and there is no evidence that anyone in the Virginia legislature ever believed that the Compact they ratified applied to anything less than the full length of the Potomac River.[53] Without any showing that either the negotiators or the legislative bodies that ultimately adopted the Compact shared Madison's limiting view (if he held such), his letters are not helpful in determining the intent of the negotiators in drafting, or of the legislators in approving, the Compact.

---

[51] Madison's letter of April 25, 1784, suggests that he thought it wise to reach some agreement about the non-tidal reach of the Potomac River as well. *See supra* note 50.

[52] Madison's letter states that he "understands" that the negotiators met and that "[t]he most amicable spirit is said to have governed the negociation." 8 Rutland, *Madison Papers*, at 268 (Letter from Madison to Jefferson (Apr. 27, 1785)).

[53] Madison did guide the Compact through the Virginia Assembly through "adroit floor management," 2 Rutland, *Mason Papers*, at 814 (Ed. note), but there is no evidence that Madison believed, after he had seen the Compact, that it was limited to the tidal reach. Nor is there any evidence that he shared such a view with the other legislators or that they agreed with him.

b. The Potomac Company

In the same period of time that Maryland and Virginia were commissioning the negotiation of the 1785 Compact, the two States, by joint legislation, chartered the Potomac Company to improve navigation in the non-tidal part of the River. Although substantially contemporaneous, neither the Compact nor the Potomac Company Charter mentions the other. From this, Maryland syllogistically argues that:

> The legislatures and the prominent people involved in both projects were aware of the Compact and Charter language.
>
> Neither document mentions the other and the Company's records contain no reference to the Compact.
>
> Therefore, the Charter was intended to apply only above the tidal reach and the Compact was intended to apply only to the tidal reach.

Analysis of the Compact and the Charter does not support Maryland's argument. The two documents are by no means mutually exclusive. They are entirely compatible and were meant to work together.

The language of and circumstances surrounding the Potomac Company Charter show clearly that, not only do the Charter and the Compact have no necessary incompatibility, the Charter drives home the Compact's intended applicability to the entire River. The Charter, by its express terms, applies only above the tidal reach of the River. The Compact conspicuously has no such limitation. The Company's purpose was, by the terms of its authorizing legislation, to "open and extend" the navigation of the Potomac. Both legislatures obviously wanted the Potomac Company to achieve the intended result and desired that, if that goal were reached, the non-tidal stretch of the River would remain open to navigation. The stated goal of Article VI of the Compact was thus to maintain the Potomac River as a "common highway ... for navigation." Likewise,

the Potomac Company Charter declared the River, after the payment of tolls, a public highway. To accomplish its goal, the Potomac Company was granted the ability to raise capital and fund its projects through subscriptions and was given the limited power to impose tolls at three specified points on the River in amounts that the States specifically prescribed.[54] Thus, the Potomac Company was already available in concept to supplement the 1785 Compact by performing specific work necessary to fulfill some of its goals.

In addition, Article VIII of the Compact provided that any legislation "necessary for preserving and keeping open the channel and navigation [of the River]" must be jointly enacted by the compacting States. The Potomac Company, chartered by concurrent legislation of Maryland and Virginia for the very purpose of opening and keeping open to navigation the river channel from "tide water to the highest place practicable on the north branch,"[55] is completely compatible with, and facilitates, Articles VI and VIII of the Compact. The only reasonable conclusion is that, in accordance with the Compact's stated goal of keeping the River open for navigation, the States that chartered the Company and nearly contemporaneously negotiated the Compact intended that the Compact apply to the entire River to keep it open to navigation for all time.

One of the Compact's negotiators, as well as the Supreme Court itself much later, expressed the very same view. Thomas Stone, a Maryland negotiator of the 1785 Compact, wrote to George Washington:

> It gives me much pleasure to know that our act [of Maryland] for opening the navigation of Potomack arrived in time to be adopted by the Assembly of Virginia. If the scheme is properly executed I have the most sanguine expectation that it will fully succeed to the wishes of those who

[54] Potomac Company Charter, Arts. II and IX.
[55] *Id.*, Preamble.

> are anxious to promote the wellfare of these States and to form a strong chain of connection between the western and Atlantic [state] governments. Mr. Jenifer, Johnson, Chase and myself are appointed commissioners to settle the jurisdiction and navigation of the bay and the rivers Potomack and Pocomoke with the commissioners of Virginia. We have also instructions to make application to Pennsylvania for leave to clear a road from Potomack to the western waters.

Letter from Thomas Stone to George Washington (Jan. 28, 1785), *quoted in* John M. Wearmouth, *Thomas Stone National Historic Site Historic Resource Study* 47-48 (1988) (alterations in original)). Stone clearly saw the Potomac Company, the upcoming compact negotiations with Virginia, and the plans to make application to Pennsylvania as complementary pieces of the same mission. Much later the Supreme Court expressed the same thought in *Marine Railway & Coal Co. v. United States*, 257 U.S. 47, 64 (1921):

> [W]ith a view to opening up a route to the West [the Compact] provided in Article 6 that the Potomac should be considered as a common highway for the purposes of navigation and commerce to the citizens of Virginia and Maryland.

One common goal was to make the Potomac a highway from the Chesapeake to the West. Thus, as noted in a letter of a Compact negotiator and later in the Court's statement, the two documents work together to achieve some of the same goals and are by no means mutually exclusive.

Maryland asserts that comparing the language of the Potomac Company Charter with that of the 1785 Compact demonstrates in three different ways that the Compact does not apply above the tidal reach. It first argues that the charges permitted by the Compact and the Charter, respectively, are not the same because they pertain to different sections of the River. (Md. Br. at 41-42.) Thus, Maryland says, the Charter authorized the collection of tolls on commodities transported through the locks and canals it was to

build while the Compact eliminated the right to impose tolls and also limited the right to impose "port duties" and other charges. The simple answer, however, is that the Compact did not eliminate the right to impose tolls. Article I of the Compact recites that Virginia will not impose any tolls "on any vessel whatever sailing through the capes of Chesapeake bay to the State of Maryland or from said State to said capes outward bound." No sleight of hand can transform that language into something inconsistent with permitting the Company to impose tolls at three locations on the non-tidal part of the River. The fact that certain portions of the Compact are directed to the tidal reach of the Potomac cannot be twisted into a conclusion that the entire Compact was intended to apply exclusively to the tidal reach. A review of the Compact language in Articles II, III, IV, V, and VI compels the very same conclusion.[56]

Maryland's second argument is that Article XII of the Compact and Section X of the Charter are irreconcilably in conflict. That argument likewise fails on examination. Charter Section X permitted the Company to collect tolls at three specified locations on the River. Compact Article XII, as subsequently enacted, gives "citizens of either state having lands in the other . . . full liberty to transport to their own state the produce of such lands, or to remove their effects, free from any duty, tax or charge whatsoever." The Compact provision is strictly limited to a citizen who owns land in the other State and to

[56] Article II is an undertaking by Maryland that Virginia's vessels may enter Maryland's rivers "as a harbour, or for safety against an enemy without the payment of any port duty, or any other charge." This Article says nothing about the imposition of tolls upon the transport of commerce up and down the River. Article III exempts vessels of war from the payment of any port duty or other charge. Article IV exempts from the payment of any port charge any vessel smaller than a certain size belonging to Virginians or Marylanders that is trading from one State to the other and has only produce of those States on board. Article V, which deals with merchant vessels navigating "the River Patowmack," proportionately divides the tonnage rates according to the commodities carried to or taken from a particular state. Article VI names the River Patowmack as a common highway but says nothing either way about the imposition of tolls. These Articles contain no prohibition on tolls and the focus of several of these Articles on the tidewater

the transportation of his own property to the State of his citizenship. It does not provide a wide exemption for tolls for all transportation by all persons on all parts of the River and, therefore, does not constitute an "irreconcilable conflict" with the Charter. Rather, it is a narrow exception, capable of conflict with the Charter only by use of an active imagination that conjures up the unusual circumstance where a Maryland or Virginia resident wants to transport produce or effects from the land he owned in the non-resident State, up or down the River through one of the three toll points of the Potomac Company, to the State of his citizenship. Even then, it is simply a deliberate and narrow exemption from tolls for a very limited class. In the face of the other overwhelming evidence, that very rational exemption is a slender reed upon which to rest a conclusion that the Charter and the Compact are in hopeless conflict if the Compact applies to the entire River.[57]

Maryland's third argument is that Section XIX of the Charter is duplicative of Article XII of the Compact. Compact Article XII, as noted, governs transportation across the River of goods produced on lands in one State that are owned by a citizen of the other State. Charter Section XIX is not similarly tied to land ownership. It simply provides that the produce carried or transported *through locks or canals* may be sold free from any duties *other* than those imposed for similar commodities of the State in which they

---

portion of the River neither limits the scope of the term "river Patowmack" in Article V nor constitutes a limitation of the Compact's scope to the tidal reach of the River.

[57] Nor do the condemnation provisions in the Potomac Company Charter, 1784 Md. Acts, ch. 33, §§ 11, 12; 1785 Va. Acts ch. 43 §§ 11, 12, demonstrate that the Compact and the Charter were to be mutually exclusive. The argument that compensation provisions similar to those in the Potomac Company Charter would appear in the Compact if it applied above tidewater completely ignores the reason condemnation powers were necessary in the Charter. The Potomac Company needed the condemnation powers in order to condemn *shore land* of riparian owners. Ownership of the riverbed had not been settled in favor of Maryland citizens as of 1785. Nor is there evidence that the Compact drafters thought that it had. There is thus no reason to conclude that the Compact drafters would have thought that by granting fishing or construction rights to Virginians, the Compact would violate any private property rights of Maryland citizens, thus requiring condemnation powers in the Compact. The inclusion of a condemnation provision was necessary in the Potomac Company Charter but not in the Compact.

happen to be landed. The sections address different subject matter and are in no way duplicative.

The nature of the Charter vis-à-vis the Compact must be kept in mind. The projects and the purpose of the Potomac Company are by nature and design of limited scope and duration.[58] As men of affairs, the Compact negotiators certainly recognized both the limited nature and the speculativeness of the Company's undertaking. After all, the Compact was drafted at a time when the success of the Potomac Company and its length of existence were matters of great uncertainty—the Potomac Company had not yet held even its first meeting. The Compact of 1785, in contrast, is a document intended to govern the jurisdiction and regulation of the Potomac indefinitely, and is therefore broader in scope. In the terms of the Maryland resolution, the Compact negotiators had been given "full power, in behalf of [the] state, to adjust and settle the jurisdiction to be exercised by the said states respectively, over the said waters [including "the river Patowmack"] and the navigation of the same."[59] Several of the Compact's broader and more basic regulatory provisions, which are not duplicated in the Charter, demonstrate the Compact's much broader scope.[60] That broader scope in subject matter and in likely

[58] Maryland has argued that the Potomac Company's rights to its tolls "for ever" indicate the intention of longevity for the Potomac Company Charter. Md. Sur. Br. at 8-9. This interpretation ignores the substantial contingencies expressly placed on that right. *See, e.g.*, 1784 Md. Laws ch. 33, § 17 (tolls allowed only if the Company makes the river capable of navigation by vessels drawing one foot of water); § 18 (Company receives no benefit unless it begins work within one year and navigation is improved as contemplated in the Charter within three years from Great Falls to Fort Cumberland and within ten years from Great Falls to tidewater).

[59] 1784-85 Md. Acts, Resolutions Assented to November Session, 1784, Resolution 12.

[60] Those provisions include Articles VII (protecting property rights along the shores of the River, the right to make improvements extending into the River, and the public right of fishing), VIII (providing for concurrent legislation to preserve fish and keep the River open for navigation), X (setting forth jurisdictional rules for crimes), and XI (allowing seizure of property for violations of commercial regulations for persons "carrying on commerce in Patowmack ... river[]" and setting forth rules for service of process).

longevity explain what little, if any, duplication may be found between the Compact and the Charter.

In short, Maryland's comparison arguments amount to no more than an assertion that because the Charter applied above the tidal reach the Compact could not. To state the argument is to rebut it.

D. Subsequent History of the Compact of 1785

1. *Black-Jenkins Award of 1877*

The activities of 1785 addressed issues of jurisdiction and navigation but did not address the long-simmering boundary dispute between the States. The precise location of the boundary was still undetermined and remained so until, in 1874, the two States submitted the "true line of boundary" to binding arbitration by a panel including Jeremiah S. Black, William A. Graham, and Charles A. Jenkins.[61] On January 16, 1877, the arbitrators issued their Award, sometimes referred to as the "Black-Jenkins Award," and their accompanying Opinion. The arbitrators placed the Potomac River boundary at the low-water mark on the Virginia shore.[62] Both States ratified the Award in 1878, and Congress gave its consent the following year.[63]

The Black-Jenkins Award provides an independent basis for concluding that Virginia's right to build improvements appurtenant to the southern shore of the Potomac extends to the entire length of the River. Clause IV of the Award granted to Virginia "a right to such use of *the River* beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding the navigation or

[61] 1874 Va. Acts ch. 135; 1874 Md. Laws ch. 247; 1875 Va. Acts ch. 48. When Graham died in 1875, J.B. Beck replaced him. 1875 Va. Acts ch. 48.
[62] Black-Jenkins Opinion at 15-16, 18.
[63] *See* 1878 Md. Acts ch. 274; 1878 Va. Acts ch. 246; Act of March 3, 1879, ch. 196, 20 Stat. 481.

otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five." (emphasis added). That Award is not by its terms restricted to any portion of the River and must be read to mean what it plainly says.[64]

Even if the language of the Award were not clear enough on its own, its authors made perfectly clear in their Opinion that the Award applied to the entire length of the River. Although the arbitrators noted that they were "not authority for the construction of this compact, because nothing which concerns it [was] submitted to" them, they went on to say: "but we cannot help being influenced by our conviction (Chancellor Bland notwithstanding) that [the Compact] applies to the whole course of the River above the Great Falls as well as below."[65]

Significantly, the Opinion makes clear that the arbitrators independently based their Award in Clause IV on the doctrine of prescription[66]—that as a result of Virginia's use of the river bank to the low water mark "from the earliest period of her history,"[67] she had earned the rights upheld in Clause IV. Although the arbitrators believed they entered their Award "agreeably to the Compact of 1785," the arbitrators also found, independent of the Compact of 1785, that Virginia had gained the right "to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian

---

[64] Black-Jenkins Award, Clause IV (emphasis added). The phrase "agreeably to the compact of seventeen hundred and eighty-five" shows that the arbitrators believed the Award, based on prescription, subject to the requirement of not impeding navigation or fishing on the opposite shore, was entirely consistent with the rights and limitations in Compact of 1785. Exclusion of over two-thirds of the river's length from those rights would require clear expression.

[65] Black-Jenkins Opinion at 16.

[66] *See Smoot Sand and Gravel Corp. v. Washington Airport, Inc.*, 283 U.S. 348, 350-51 (1931) (Black-Jenkins Award held that the low-water mark for the boundary was established by prescription and prescription was a sufficient basis for the decision, independent of the 1785 Compact).

[67] Black-Jenkins Opinion at 15.

ownership" as a result of its continuous use of the south shore of the River for a great many years.[68]

2. *1896 Joint Legislation*

In complete accord with Clause IV of the Black-Jenkins Award, the treatment of the Compact by both States later in the 19th Century further undercuts Maryland's argument that the Compact does not apply above the tidal reach. In 1896, Virginia and Maryland (along with West Virginia) passed concurrent legislation to protect certain fish in the River.[69] This legislation, exactly the type of concurrent State action contemplated in Article VIII of the Compact, *both specifically referred to the Compact and expressly applied only to the non-tidal reach of the River*. The adoption of this legislation demonstrates both States' recognition of the Compact's applicability above tidewater.

3. *Potomac River Compact of 1958*

Some forty-five years after the *West Virginia v. Maryland* decision, Virginia sought and was granted leave to file an original action against Maryland. *Virginia v. Maryland*, 355 U.S. 269 (1957). Retired Justice Stanley F. Reed, acting as Special Master, persuaded the parties to settle their dispute amicably. The Potomac River Compact of 1958 resulted. It was adopted by both States and duly consented to by Congress.[70] Although it superseded the 1785 Compact, it specifically preserved the rights—including access rights—granted in the 1785 Compact's Article VII.

The 1958 Compact preserved the rights of Article VII of the 1785 Compact by providing that:

---

[68] *Id.* at 15-16.
[69] 1896 Va. Acts ch. 627; 1896 Md. Laws ch. 427.
[70] *See supra* note 1.

> The rights, including the privilege of erecting and maintaining wharves and other improvements, of the citizens of each State along the shores of the *Potomac River* adjoining their lands shall be neither diminished, restricted, enlarged, increased nor otherwise altered by this compact, and the decisions of the courts construing that portion of Article VII of the Compact of 1785 relating to the rights of riparian owners shall be given full force and effect.[71]

This provision plainly applies to the entire Potomac River, not to any segment of it, and placement of that language in the context of the entire 1958 Compact corroborates that conclusion. Article II of the 1958 Compact specifically establishes the limited "territory in which the Potomac River Fisheries Commission shall have jurisdiction," whereas Article VII, Section 1 applies without limit to the "Potomac River." The specific limitation of the Potomac River Fisheries Commission's jurisdiction to "those waters of the Potomac River enclosed within the ... described area," 1958 Compact, Art. II, carries the strong implication that other provisions of the Compact that by their terms apply generally to the "Potomac River" are free of any geographic limitation whatever.[72]

E. Maryland's Claim of Acquiescence by Virginia

Finally, Maryland contends, citing Maryland judicial decisions and positions allegedly taken with regard to them by the Virginia legislature and the Virginia Attorney General, that Virginia has in the past acquiesced in Maryland's present position on the issue now before me and that the doctrine of acquiescence and prescription bars Virginia's claim.

---

[71] 1958 Compact, Article VII, Section 1 (emphasis added).

[72] The portion of Article VII, Section 1 that gives effect to "the decisions of the courts construing that portion of Article VII of the Compact of 1785 relating to rights of riparian owners," protects those decisions as to private riparian owners in either compacting State who have litigated those rights and accepted the results. However, such decisions could affect this dispute between sovereigns only to the extent they were rendered by the Supreme Court of the United States. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). Thus, the Compact statement giving "full force and effect," as applied to the decisions of either State's courts, cannot transform those decisions into binding authority against the other State in this original action.

Application of the doctrine of acquiescence and prescription can cause a state to lose its rights and foreclose a claim it could otherwise assert against another State. *See, e.g., Nebraska v. Wyoming*, 507 U.S. 584, 595 (1993); *Illinois v. Kentucky*, 500 U.S. 380, 388 (1991). However, that doctrine does not here bar Virginia from asserting that the Compact applies to the entire length of the Potomac River. No evidence has been presented that Virginia has ever acquiesced in any claim by Maryland or in any holding of any Maryland court that Virginia has no access rights above the tidal portion of the Potomac.

In its assertion of acquiescence and prescription, Maryland relies on decisions of the Maryland courts expressing the view that the Compact applies only to the tidal reach of the Potomac. As previously discussed,[73] all of these cases except one were decided prior to the Black-Jenkins Award of 1877. Virginia could not have acquiesced in Maryland's exclusive jurisdiction over the non-tidal reach of the Potomac River when the Virginia/Maryland boundary was yet to be finally determined, when it was still a subject of controversy between the States and when it was later to be submitted to binding arbitration by *both* States. Furthermore, the Black-Jenkins arbitrators, in their Opinion, expressly rejected the conclusion reached by Maryland courts and, in Clause IV of their Award by plain language applying to the entire length of the River, preserved Virginia's access rights under Article VII of the Compact and in addition declared the doctrine of prescription as an independent legal basis for those rights.[74] Consequently, no possible

[73] *See supra* notes 22-25 and accompanying text.
[74] *See* discussion *supra* Part II.D.1.

claim of acquiescence or prescription can be based on any of the Maryland cases decided prior to 1877 when the Award was issued and accepted by both States.[75]

The adoption by Maryland and Virginia in 1896 of concurrent legislation regarding freshwater fishing above Little Falls underscores this conclusion.[76] If Maryland had believed that the Compact did not apply above tidewater, and that as a consequence Virginia had no rights in the River above the tidal reach, Maryland would have had no reason to join Virginia in enacting such joint legislation that specifically referred to the Compact and applied *only* to the *non-tidal* portion of the River.

In the same way, the one Maryland case decided after 1877 on which Maryland relies does not justify application of the acquiescence doctrine against Virginia. The Court of Appeals of Maryland decided, in *Middlekauff v. LeCompte*, 132 A. 48, 50 (Md. 1926),[77] that Maryland did not need the concurrence of Virginia to prohibit the use of fish pots in the non-tidal stretch of the River because the Compact did not apply to that portion of it. Virginia and its citizens, who were not parties in the case, could not have appealed the decision.[78] Virginia's Attorney General, however, notified Maryland that he

---

[75] In addition to case law, Maryland points to an 1804 debate of the U.S. House of Representatives on a bill to dam the Potomac channel on the Virginia side of a mid-river island near the District of Columbia. *See* 14 *Annals of Congress*, 712-22, 792-811. Contrary to Maryland's contention, a careful reading of the entire debate reveals no evidence that Representative John Randolph of Virginia, the bill's most active opponent, had any thought that the 1785 Compact applied exclusively to the tidal reach. Representative Randolph used the phrase "above the tide water" not with reference to Virginia's Compact rights, but rather with reference to the recital contained in Virginia's 1789 Act ceding territory to the District of Columbia. Randolph did not argue that Virginia had no Compact rights above tidewater. Rather, Randolph's argument was that the Virginia legislature had intended to cede territory "above the tide water" that was "within her limits," a phrase that Randolph took to mean "exclusively within Virginia." Based upon the legislative language, Randolph thus argued that the Virginia Legislature had not intended to cede any of its rights to the Potomac because "[t]he river Potomac was the joint property of the States of Maryland and Virginia under compact between those States," *id.* at 711, and therefore, not "within her limits." At another point, he "demanded to be shown the conveyance by which Virginia had relinquished her concurrent jurisdiction over the Potomac," suggesting no limitation to any part of the River. *Id.* at 717.

[76] *See* 1896 Va. Acts ch. 627, 1896 Md. Laws ch. 427; *supra* Part II.D.2.

[77] *See supra* note 22.

[78] The individuals involved in the suit were all citizens of Maryland or West Virginia. *Middlekauff*, 132 A. at 48.

disagreed with the case and Maryland's limitation of the concurrent legislation to only the tidal reach of the River and pointedly stated that Virginia continued to believe that the Compact and the concurrent legislation adopted by Maryland and Virginia applied to the entire length of the Potomac.[79] Thus, Virginia specifically did not acquiesce in *Middlekauff* and continued to dispute Maryland's position. Finally, *Middlekauff* failed even to mention what I consider the controlling authority, *Maryland v. West Virginia*, 217 U.S. 577 (1910), and some thirty years after *Middlekauff*, Maryland joined in the 1958 Compact that expressly preserved Virginia's rights under Article VII of the Compact of 1785.

These circumstances dispose of Maryland's claim of acquiescence.

III. CONCLUSION

The Supreme Court's controlling decision of *Maryland v. West Virginia* establishes that Virginia's rights of access to the Potomac River, including its right to build improvements appurtenant to the Virginia shore, apply to the entire length of the boundary between Virginia and Maryland. Even without that authority, the plain language of Article VII of the Compact of 1785 (as later preserved in the Potomac River Compact of 1958) unambiguously secures for Virginia the right to make improvements connected to the Virginia shore along the entire Potomac River so long as those improvements do not obstruct navigation. When consulted, the contemporaneous documents and circumstances surrounding the negotiation and adoption of the Compact only affirm that conclusion. I also reach the same decision based on the authority of

[79] *See* Letter from John R. Saunders, Attorney General of Virginia, to Swepson Earle, Commissioner of the Maryland Conservation Department (June 23, 1927), *reprinted in* 1927 Report of the Attorney General of Virginia, at 182.

Clause IV of the Black-Jenkins Award of 1877. Upon the conclusion of the proceedings before me, I will recommend that the Court grant Virginia's Motion for Partial Summary Judgment.[80]

Ralph I. Lancaster, Jr.
Special Master

[80] By its counterclaim, Maryland contends that the construction of improvements appurtenant to the Virginia shore of the Potomac is in any event subject to regulation by Maryland by virtue of its police power. That issue is not before me on Virginia's Motion, but must be resolved before I report my recommended decision on this original action to the Supreme Court.

Number 134, Original

In The
SUPREME COURT of the UNITED STATES

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

Before the Special Master
The Hon. Ralph I. Lancaster, Jr.

CERTIFICATE OF SERVICE

The Undersigned hereby certifies that on this 27th day of November counsel for the State of New Jersey caused true and correct copies of the Motion to Strike the Expert Report of Joseph Sax and The Legal Conclusions in the Expert Report of Carol Hoffecker and the letter-brief and exhibits in support of the motion to be served upon counsel for the State of Delaware in the manner indicated below:

BY ELECTRONIC MAIL AND THREE COPIES BY FIRST CLASS MAIL

David Frederick, Esq.
Kellogg, Huber, Hansen, Todd, Evans and Figel PLLC
1615 M Street
Suite 400
Washington, D.C. 20036
Email: Dfrederick@khhte.com

BY ELECTRONIC MAIL AND TWO COPIES BY FIRST CLASS MAIL

Collins J. Seitz, Esq.
Connolly Bove Lodge & Hutz LLP
The Nemours Building
1007 North Orange Street
Suite 878
Wilmington, DE 19801
Email: cseitz@cblh.com

STUART RABNER
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Barbara L. Conklin
Barbara L. Conklin
Deputy Attorney General

R.J. Hughes Justice Complex
25 West Market Street
P.O. Box 112
Trenton, New Jersey 08625
(609) 984-6811