

SUPREME COURT OF THE UNITED STATES

NO. 134, ORIGINAL

STATE OF NEW JERSEY,)
)
 Plaintiff)
)
 V.)
)
 STATE OF DELAWARE,)
)
 Defendant)

ORIGINAL

ORAL ARGUMENT before

SPECIAL MASTER RALPH I. LANCASTER, JR., ESQ., held at the U. S. Courthouse, Collins J. Seitz Courtroom, 601 Market Street, Philadelphia, Pennsylvania, on February 22, 2007, commencing at 10:00 a.m., before Claudette G. Mason, RMR, CRR, a Notary Public in and for the State of Maine.

APPEARANCES:

For the State of New Jersey:

RACHEL J. HOROWITZ, ESQ.
 EILEEN P. KELLY, ESQ.
 WILLIAM E. ANDERSEN, ESQ.
 GERARD BURKE, ESQ.
 DEAN JABLONSKI, ESQ.
 AMY C. DONLON, ESQ.

For the State of Delaware:

JOSEPH R. BIDEN, III, ESQ.
 DAVID C. FREDERICK, ESQ.
 SCOTT K. ATTAWAY, ESQ.
 COLLINS J. SEITZ, JR., ESQ.
 MATTHEW F. BOYER, ESQ.
 RYAN P. NEWELL, ESQ.
 MAX B. WALTON, ESQ.
 JENNIFER OLIVA, ESQ.

Also Present: MARK E. PORADA, ESQ.

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PROCEEDINGS

SPECIAL MASTER: Please be seated. Good morning again, counsel.

Before we begin, I would ask those of you who have cell phones or pagers to make sure that they're turned off. The arguments are very important and going to be very complex, and I know that the ringing of those things can be distracting.

Counsel, would you please enter appearances starting with New Jersey. And once again, as we have in the past, Ms. Horowitz, if you would introduce all of the lawyers who are here, even those who are not going to be speaking.

MS. HOROWITZ: Certainly. This is Rachel Horowitz, Deputy Attorney General appearing for the State of New Jersey.

(Discussion off the record.)

MS. HOROWITZ: Okay. And with me is Eileen Kelly, Deputy Attorney General; also William Andersen, Deputy Attorney General; Gerard Burke, Assistant Attorney General; Dean Jablonski, Deputy Attorney General; and Amy Donlon, Deputy Attorney General.

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SPECIAL MASTER: Thank you very much,
Ms. Horowitz.

Mr. Frederick?

MR. FREDERICK: Thank you.

David Frederick for the State of Delaware.
With me at counsel table are Attorney General
Joseph R. Biden, III, Scott K. Attaway, Collins J.
Seitz, Jr. On the back row, Matthew Boyer, Ryan
Newell, Max Walton and Jennifer Oliva of the
Attorney General's office.

SPECIAL MASTER: Thank you, Mr. Frederick.

Counsel, as we discussed in chambers, I
understand that Ms. Horowitz will be speaking for
New Jersey. Mr. Frederick will be speaking for
Delaware. And for the record, I understand that
Ms. Horowitz would like an hour for her opening
argument and reserve an hour for rebuttal and
Mr. Frederick would like an hour and a half for
his opening argument and a half hour for rebuttal.

There was some mention of surrebuttal in the
chambers. If counsel feel that is necessary, I
will be prepared to accommodate it. I will draw
the line at sur-surrebuttal.

And as I indicated in chambers, because of
the importance of this matter to both states and

1 because of the complexity of some issues, I will
2 not be rigid in the timing allocation. I would --
3 however, while I would not tell competent counsel
4 or even suggest to competent counsel how to direct
5 their argument, I would remind you that I have
6 read and digested the 200-plus pages of briefing
7 that you have submitted; and while I won't pretend
8 that I have read every single word on every single
9 page of the 6500-some-odd additional documents
10 that you have submitted, I have read those to
11 which you have cited, and I have scanned the rest.
12 So I am familiar with the record, and I would just
13 simply suggest that you focus your argument on the
14 points that you think are most important.

15 We will plan to start with Ms. Horowitz. We
16 will go for an hour or less if Ms. Horowitz
17 doesn't take the full hour. We will break then
18 for 10 minutes. And while I have said that I will
19 not be rigid with regard to the argument, 10
20 minutes on a recess is 10 minutes. And we will
21 start again then at approximately 11:10 with
22 Mr. Frederick and run, if you use your full hour
23 and a half, until about 12:40. We will then take
24 a break for lunch for an hour -- and that would be
25 60 minutes -- and we will be back here and start

1 again and then finish up with the rebuttal.

2 With that -- oh, one other housekeeping
3 detail, Ms. Horowitz. Mrs. Mason is, as you have
4 come to realize, a very good reporter; but I have
5 told her that if you drop your voice in the course
6 of the argument or if you think that this is a
7 sprint instead of a marathon and start talking so
8 rapidly that even she can't keep up with you, that
9 she is free to interrupt so that the record will
10 be complete.

11 Ms. Horowitz?

12 MS. HOROWITZ: Thank you, Mr. Lancaster.

13 Before I begin I would just like to briefly
14 call your attention to some exhibits that we have
15 here which I'll be referring to. The first one is
16 on the easel. And that is a blow-up of the figure
17 that was attached to Mr. Castagna's affidavit
18 depicting the various riparian grants and leases
19 issued in the twelve-mile circle outshore of low
20 water as discussed in his affidavit.

21 Secondly, we have copies of the 1877 pierhead
22 and bulkhead lines outshore of low water in the
23 twelve-mile circle and, also, the 1916 pierhead
24 and bulkhead lines outshore of low water in the
25 twelve-mile circle. These were also exhibits in

1 the previous proceeding before the Court and are
2 figures attached to the Castagna report and
3 referenced in the affidavit. And I have copies
4 here that -- of the pierhead and bulkhead lines
5 that if I could approach and just --

6 SPECIAL MASTER: Sure.

7 MS. HOROWITZ: -- provide you.

8 1877. 1916.

9 Thank you.

10 This is New Jersey's motion for summary
11 judgment that Article VII of the Compact of 1905
12 provides New Jersey with exclusive state
13 jurisdiction over the construction, maintenance
14 and use of riparian improvements extending from
15 New Jersey's shoreline into the twelve-mile
16 circle. New Jersey is entitled to summary
17 judgment based on the Compact's plain language
18 which is fully supported by the parties' conduct
19 for the 117 year period from 1854 to 1971. That
20 plain language also shows it was the states'
21 intent in 1914 that each state have sole
22 jurisdiction over its waterfront property owners
23 and over their riparian rights.

24 And if I may briefly sum up the parties'
25 conduct, from 1854 to 1971 New Jersey exercised

1 exclusive continuing state jurisdiction over
2 riparian improvements extending from the shoreline
3 into the twelve-mile circle. That practice began
4 in 1854 when New Jersey enacted legislation that
5 allowed Thomas Broadway to construct a pier on
6 tidally-flowed lands outshore of low water with
7 the restriction that the pier not impede
8 navigation. The practice continued on an ongoing
9 basis through legislation adopted by New Jersey
10 from 1854 to 1871, and then after 1871 through
11 grants of tidally-flowed lands to owners of
12 property abutting the Delaware River, additional
13 legislation and setting of pierhead and bulkhead
14 lines outshore of low water which included the
15 1877 pierhead and bulkhead lines which are a
16 figure to Mr. Castagna's affidavit or, excuse me,
17 his report.

18 In 1905, in settlement of New Jersey versus
19 Delaware I, Delaware agreed through the Compact
20 Article VII that New Jersey could continue its
21 practice of exercising riparian jurisdiction of
22 every kind and nature and could continue its
23 practice which it started in 1854 of making
24 grants, leases and conveyances of riparian lands
25 and rights on New Jersey's side of the Delaware

1 River.

2 New Jersey, therefore, kept exercising
3 ongoing riparian jurisdiction of every kind and
4 nature within the twelve-mile circle including
5 pierhead and bulkhead lines that were set outshore
6 of low water in 1916 -- and that's the figure
7 attached to Mr. Castagna's report -- adopting
8 legislation in 1914 through the form of the
9 Waterfront Development Law and applying that law
10 to proposed improvements in the twelve-mile
11 circle.

12 And we do have in our appendix several
13 examples of that predating New Jersey versus
14 Delaware II, and those are pertinent to DuPont and
15 to Mr. Acton.

16 New Jersey continued its ongoing practice of
17 issuing grants of underwater lands outshore of low
18 water. And if I may, in looking at the exhibit
19 that's on the board, the numbers 1 through 10, I
20 believe, represent the grants predating 1905.

21 In the 1930's, in New Jersey versus
22 Delaware II, Delaware agreed once more that
23 New Jersey had the right to continue exercising
24 riparian jurisdiction of every kind and nature.
25 The Supreme Court, therefore, termed --

1 interpreted the Compact as providing for
2 the enjoyment of riparian rights and held that
3 the New Jersey/Delaware boundary within the
4 twelve-mile circle was subject to the Compact.
5 And, of course, the Court issued its decree making
6 the boundary without prejudice to the rights of
7 the states or to the rights of persons claiming
8 under the states by virtue of the 1905 Compact.

9 As a result of that decree and making the
10 boundaries subject to the Compact, after New
11 Jersey versus Delaware II New Jersey once more
12 continued its longstanding practice of exercising
13 exclusive state jurisdiction of every kind and
14 nature over the improvements from its shoreline
15 into the twelve-mile circle. And that continued
16 until 1971 when for the first time Delaware tried
17 after 117 years to also regulate that improvement.
18 Nevertheless, New Jersey also continued to
19 regulate those improvements without interference
20 by Delaware until 2005 when this lawsuit was
21 filed.

22 And if I may, on the exhibit on the board,
23 the numbers 11 through 35 correspond to riparian
24 grants issued by New Jersey from 1906 through
25 1929; and the numbers 36 through 44 represent the

1 grants or leases after 1933 up to the present.

2 In 2005, as we know, Delaware for the first
3 time preemptively tried to deny an improvement
4 that New Jersey had not even yet reviewed. And
5 Delaware also required a developer to whose
6 predecessor New Jersey had already granted
7 underwater lands to obtain Delaware's approval for
8 the use of those lands to construct an historic
9 pier. And in our view, given the long-standing
10 practice of the party and the plain language in
11 the Compact this was a clear violation of the
12 Compact, and we proceeded to file this original
13 action.

14 Now, if I can focus on a couple of points in
15 the plain language. Of course, as we briefed,
16 it's our view that Article VII plainly allowed New
17 Jersey to continue on the side of the river that
18 abuts New Jersey to exercise complete ongoing
19 governmental authority over riparian improvements
20 and that that article also allowed New Jersey to
21 continue on its side of the river to convey those
22 property rights that were reasonably related to
23 the exercise of riparian rights.

24 Article VII contains broad authority for New
25 Jersey to govern and legislate with respect to the

1 riparian improvements extending from its
2 shoreline. As we briefed and as I don't believe
3 is in dispute, riparian rights were and are
4 associated with the ownership of land abutting
5 navigable waters and include the right to wharf
6 out into the channel for navigation and the right
7 to reasonably use the running water in front of
8 the waterfront property for manufacturing,
9 agriculture and other activities in-shore that
10 require use of or access to water.

11 Riparian rights were never limited to the
12 area in-shore of low water given the
13 quintessential riparian right of wharfing out
14 which, of course, requires access to deep water
15 for commercial purposes. Riparian rights always
16 were subject to a limited -- by the public rights
17 of navigation and fishing and could be regulated
18 and restricted to protect those public rights and
19 resources. We discussed this at length in our
20 brief, and it is also reflected in the Farnham
21 treatise that we included in our appendix.

22 Therefore, in our view riparian jurisdiction
23 of every kind and nature clearly includes police
24 power regulatory authority that is exercised to
25 promote public health, safety and welfare.

1 SPECIAL MASTER: Ms. Horowitz, excuse me. Am
2 I correct in my understanding that there is no --
3 that you have been unable to find any
4 contemporaneous notes, writings, cases, statutes
5 defining the phrase riparian jurisdiction?

6 MS. HOROWITZ: We have not found anything
7 defining riparian jurisdiction. Of course, there
8 are many things that address the term riparian as
9 well as many things that address the term
10 jurisdiction, which clearly means governmental
11 authority or sovereign authority to govern and
12 regulate and legislate.

13 SPECIAL MASTER: But if we have no source to
14 turn to as to what the drafters meant when they
15 put the words riparian jurisdiction in there, how
16 can New Jersey say that that phrase is not
17 ambiguous?

18 MS. HOROWITZ: I think it's not ambiguous
19 when it's combined with the term continue, which
20 is also used in Article VII. Article VII says New
21 Jersey can continue on its side of the river to
22 exercise riparian jurisdiction of every kind and
23 nature.

24 SPECIAL MASTER: But if we don't know what
25 they meant by riparian jurisdiction, how do we

1 know what they meant when they said continue
2 riparian jurisdiction?

3 MS. HOROWITZ: What they meant was that the
4 status quo of 1905, which was that New Jersey had
5 been issuing grants and licenses outshore of low
6 water and taking control of its waterfront
7 property owners and whether they could or could
8 not wharf out, what they meant was that was an
9 accepted practice, that that could continue, that
10 everyone agreed that could continue.

11 SPECIAL MASTER: Well, clearly, the Compact
12 says that New Jersey can continue exercising
13 riparian jurisdiction. My question really is
14 directed as to -- and I think I'm correct that
15 both sides have said that there are no
16 contemporaneous notes, no case law, no statutes,
17 that there is nothing that would -- we could point
18 to that would tell us -- it appears, does it not,
19 that the drafters simply created a phrase out of
20 whole cloth?

21 MS. HOROWITZ: I think they combined two
22 terms that are very well understood. So I'm not
23 sure I would agree that they created something out
24 of whole cloth. I think they took two concepts
25 that are very well understood and put them

1 together. And I think clearly that -- when that
2 is also combined with the second phrase in Article
3 VII which refers to continuing to convey riparian
4 lands and rights and so forth, I think the obvious
5 import of the article as a whole is that each
6 state would be able to control the riparian rights
7 that are associated with ownership of waterfront
8 property. That was an extremely well accepted
9 concept at that time. It was not -- it was not
10 controversial, as I think Delaware agrees.

11 And if I may, just to pick up on that, unless
12 you have another question --

13 SPECIAL MASTER: Yes.

14 MS. HOROWITZ: -- I think that, as I have
15 stated, use of the word continue is very
16 important. It does show an agreement as to the
17 status quo. The status quo at that time which is
18 not disputed, I don't believe, is that riparian
19 rights on the New Jersey side of the river were
20 governed -- governed and addressed exclusively by
21 New Jersey. Delaware was not setting pierhead and
22 bulkhead lines on the New Jersey side of the
23 river, although they did do that on the Delaware
24 side of the river. Delaware was not granting any
25 riparian rights or leases or licenses or anything

1 on the New Jersey side of the river.

2 SPECIAL MASTER: Let's pause there for a
3 moment. Both competent counsel have suggested
4 that the eight commissioners who drafted this
5 Compact were bright, experienced, talented, some
6 with legal background, and experienced in areas
7 related to the subject matter of the Compact. So
8 these people used the word exclusive in Articles
9 I, II and IV of the Compact. If they meant
10 riparian jurisdiction to be -- whatever it is --
11 to be exclusive for New Jersey, why did they not
12 say so?

13 MS. HOROWITZ: I think they -- they produced
14 the same effect by using the term every kind and
15 nature. I'm not sure I -- I don't see any
16 distinction or difference between every kind and
17 nature and exclusive. Every kind and nature means
18 all, everything, all of a kind. There is nothing
19 left over once you exercise jurisdiction.

20 SPECIAL MASTER: Doesn't of every kind and
21 nature describe the scope, but who can exercise
22 riparian jurisdiction?

23 I'm having trouble, as you can tell, with the
24 fact that the drafters and certainly New Jersey
25 was aware of the 1834 Compact in which the word

1 exclusive was used a number of times. So here
2 we have competent, experienced people who know
3 how to draft documents; and they used exclusive
4 in three other articles, and they don't use it in
5 Article VII. So help me here.

6 MS. HOROWITZ: Well, again, I think that
7 every kind and nature is -- is no different in the
8 context of Article VII than exclusive. And also,
9 when we go back again and look at the entirety of
10 the article, we see that they're referring to what
11 has been going on by using the word continue.

12 The other thing that I think makes it clear
13 that each state was to -- was going to take care
14 of its own waterfront owners and their rights is
15 use of the word own side of the river, which is an
16 obvious reference with respect to New Jersey to
17 New Jersey's side -- the side of the river that's
18 next to New Jersey, and with respect to Delaware
19 to the side of the river that's next to Delaware.

20 And, again, we think that that term was
21 crafted so that each state would have complete
22 jurisdiction over its property owners and their
23 rights with the shoreline starting as the starting
24 point for the geographic scope, if you will, and
25 the navigation channel starting to the ending

1 point -- I'm sorry, the navigation channel serving
2 as the end point.

3 In other words, by confining each state to
4 its own side of the river the intent was that New
5 Jersey would not be able to reach across the water
6 to regulate the rights of Delaware residents just
7 as Delaware would not be able to reach across the
8 water to interfere with the rights of New Jersey
9 property owners or residents. It certainly did
10 not mean that New Jersey's own side of the river
11 ended at low water.

12 I think if you look at the other articles of
13 the Compact, you see that they allocate
14 jurisdiction in an evenhanded, equal fashion; and
15 we don't believe that Article VII is any exception
16 to this approach.

17 SPECIAL MASTER: So that New Jersey's answer
18 is that every kind and nature is synonymous with
19 exclusive?

20 MS. HOROWITZ: Yes. That's right.

21 I think, in addition, if we look at other
22 articles of the Compact, we can see that there's a
23 clear intent to leave piers and wharves that are
24 attached to one side under the sole jurisdiction
25 of that state. For example, as we indicated in

1 our brief, Articles I and II do not allow Delaware
2 to serve process on vessels attached to New Jersey
3 or to a dock or wharf extending from New Jersey;
4 and New Jersey, of course, cannot serve process on
5 vessels that are similarly attached to Delaware.
6 It's the clear intent from our view combining
7 those two things is that we're -- wharves and
8 piers extending from one side or the other are
9 under the sole jurisdiction of the side of the
10 river -- of the state to whose shore they're
11 attached.

12 Now, if I may, I think the other parts of the
13 Compact, to pick up on your question, also shed
14 light on Article VII and indicate or support what
15 I have said about every kind and nature and what
16 it means. Articles I and II I have already
17 discussed. Article III, I think, also sheds light
18 on Article VII because Article III, of course,
19 provides for a common right of fishing, but does
20 contain an exception for previously-granted
21 fishing rights, in other words, a sort of
22 grandfathering situation. Article VII, of course,
23 does not do anything like that, meaning that there
24 is to be ongoing regulatory authority conferred by
25 Article VII as opposed to simply a freezing in

1 time or a grandfathering of what's already in
2 place. Article IV, I think, also illuminates
3 Article VII because there the states pledge to
4 adopt uniform fishing laws. In other words, they
5 did provide in that article for concurrent
6 regulation. And, of course, Article VII does not
7 contain anything of that nature. On the contrary,
8 Article VII talks about the laws of the respective
9 states meaning, again, that each state will apply
10 its laws to the riparian activities of its
11 property owners.

12 And I think this is implicit, if you will,
13 from the definition of riparian rights and their
14 association with the ownership of waterfront
15 property which obviously is located in either one
16 state or another.

17 SPECIAL MASTER: Well, VII has two sections.
18 One is the riparian jurisdiction section; and the
19 other one is the rights section, as I have come to
20 call it, to convey, lease, whatever the language
21 is. Is it New Jersey's position that it
22 currently, right now, has the right to convey
23 interests in the subaqueous soil westerly of the
24 boundary?

25 MS. HOROWITZ: Yes. It's our position that,

1 yes, we do have the right to determine whether
2 someone can build a dock, wharf, pier, water
3 intake, water outflow or anything that extends
4 from the shoreline out into the river that makes
5 use of the water in some fashion. And in order to
6 do that you need to be able to convey the right or
7 interest or whatever that allows use of the space
8 or occupancy of the space. And we contend that
9 is -- shows Article VII is very all-encompassing
10 in the sense that it identifies both the property
11 interests that are associated with the riparian
12 rights as well as the jurisdiction to govern the
13 rights themselves.

14 SPECIAL MASTER: I'm not talking about
15 jurisdiction now.

16 MS. HOROWITZ: Right.

17 SPECIAL MASTER: I'm talking about the right
18 to convey title to the subaqueous soil that is now
19 clearly Delaware's.

20 MS. HOROWITZ: I think it -- at the very
21 least it's the right to occupy the space with a
22 pier, dock, wharf, water intake structure, water
23 outflow structure.

24 SPECIAL MASTER: If I understand Delaware's
25 position correctly, it is that they don't quarrel

1 with the right to wharf out. Mr. Frederick can
2 correct me when I -- when he makes his argument.
3 But I think it's the jurisdiction over the
4 activities on that wharf after it is constructed.

5 But my question is more specific. It's
6 directed to convey, lease language. And is it
7 your position that the Compact still gives New
8 Jersey the right to convey title?

9 MS. HOROWITZ: Yes. And that's because the
10 boundary was made subject to the Compact. The
11 boundary is specifically recognizing that the
12 Compact exists. The Compact remains in force and
13 in effect and is going to continue even after the
14 boundary is set.

15 And, of course, the decree is without
16 prejudice to the states' rights under the Compact,
17 meaning that the Compact remains in force and is,
18 if you will, an exception to Delaware's
19 territorial jurisdiction in that sense.

20 SPECIAL MASTER: Go ahead.

21 MS. HOROWITZ: And, of course, Article IX of
22 the Compact very clearly says that the Compact is
23 binding in perpetuity, which would, of course,
24 include Article VII since that was one of the
25 aspects of jurisdiction that was addressed in the

1 Compact and was not excepted out of the Compact.

2 SPECIAL MASTER: The specific language I'm
3 referring to is to make grants -- make grants,
4 leases and conveyances of riparian lands and
5 rights. I put rights aside for the moment. It is
6 New Jersey's position then that despite the
7 establishment of the boundary and the sovereignty
8 of Delaware over the subaqueous soil, that New
9 Jersey still has the right to make grants, leases
10 and conveyances of riparian lands?

11 MS. HOROWITZ: That's our position because
12 the Compact -- I'm sorry, the decree recognized
13 the Compact; and the boundary is subject to the
14 Compact.

15 SPECIAL MASTER: Thank you.

16 MS. HOROWITZ: So, yes, we do believe that it
17 remains in force.

18 And if I may, just to go back, the other --
19 in addition to the plain language, we think the
20 parties' ongoing course of conduct for the 117
21 years up until 1971 is also very strong evidence
22 of what was intended in 1905. And conduct becomes
23 important in this case because they -- New Jersey
24 was allowed to continue what it had been doing;
25 so, of course, we need to understand what New

1 Jersey had been doing.

2 As I have stated previously, New Jersey had
3 started in 1854 to exercise jurisdiction over its
4 riparian owners and over their wharfing out
5 activities and so forth, something that went on
6 uninterrupted until at least 1971.

7 And I don't want to go through the various
8 things that New Jersey did up until 1905 because
9 they're in our appendix, and we discussed them
10 extensively.

11 SPECIAL MASTER: Thank you.

12 MS. HOROWITZ: They're in the Castagna
13 affidavit and so forth.

14 But one point I would like to make is that
15 when the Compact was approved by New Jersey and
16 Delaware in 1905, everyone understood what New
17 Jersey had been doing; and that's because in New
18 Jersey versus Delaware I, New Jersey's complaint
19 included allegations that the wharves and piers
20 and so on had been constructed on its shoreline
21 and included allegations about having a right of
22 access and passage to the ocean --

23 (Discussion off the record.)

24 MS. HOROWITZ: Well, as I was saying, New
25 Jersey's complaint raised riparian issues, if you

1 will. And Delaware in its response and in its
2 answer did not deny that these improvements
3 existed. It did -- it simply argued that even if
4 they did exist, it did not mean that New Jersey
5 had territory that extended out past low water,
6 that New Jersey had title to the underwater lands
7 outshore of low water.

8 And from 1903 going into 1905, of course,
9 there was evidence put on in New Jersey versus
10 Delaware I by New Jersey's Attorney General and
11 Delaware's Attorney General. And New Jersey's
12 evidence included all of the things that -- the
13 various things that are mentioned again in the
14 Castagna affidavit and the Castagna report,
15 included the various grants that had been made,
16 included the legislation that had been enacted,
17 included the pierhead and bulkhead lines that had
18 been set outshore of low water in Salem and
19 Gloucester Counties in the twelve-mile circle.

20 So it was very clear, I think, to the states
21 in 1905 when they approved the Compact what was
22 going on. They had a clear frame of reference
23 when they agreed that New Jersey can continue to
24 do what New Jersey had been doing with respect to
25 riparian jurisdiction.

1 The other conduct that, of course, in our
2 view very strongly supports our interpretation is
3 what New Jersey did after the Compact was
4 approved. And, again, after the Compact was
5 approved, New Jersey on an ongoing basis continued
6 to issue grants and approvals for activities
7 outshore of low water, docks and piers and so on.
8 I won't go into those again. They are in our
9 appendix. They're discussed in the affidavit of
10 Richard Castagna and in the report and so on and
11 so forth. But this was a very active period for
12 New Jersey, and I'm talking about the period from
13 1906 through 1929. It was probably the most
14 active period.

15 So when the states came back in New Jersey
16 versus Delaware II, again, I think everyone had a
17 clear understanding of what had gone on. And even
18 if they didn't, you had a bit of a repeat
19 situation in New Jersey versus Delaware II, by
20 which I mean that New Jersey's complaint, again,
21 raised riparian issues. New Jersey, again, talked
22 about the improvements that had been located
23 outshore of low water on its shoreline and
24 presented the same exhibits in evidence that we
25 have been discussing in our briefs and in the

1 affidavits and so on and so forth.

2 So, again -- and then at that point, of
3 course, Delaware took the position or its counsel
4 took the position that, of course, New Jersey had
5 the ability to do this and that Delaware, of
6 course, had agreed that the rights of New Jersey
7 owners to wharf out and so on and so forth were
8 within the purview of New Jersey and that Delaware
9 had ceded -- that was their term -- all that right
10 to regulate those activities to New Jersey. And
11 Delaware thought or represented at that time that
12 that was a very sensible thing to do. That was a
13 practical thing to do. They acknowledged that
14 this had been going on. Their -- they made it
15 very clear that their boundary claim would not
16 prejudice New Jersey because, of course, they
17 recognized that the Compact was in force, that the
18 Compact protected riparian rights, that the
19 Compact protected New Jersey's ability to control,
20 if you will, access to the water from its
21 shoreline and use the water from its shoreline
22 which are, again, quintessential riparian
23 activities and rights.

24 One last point I would like to make; and this
25 is on the -- on prescription and acquiescence. We

1 think that the language is clear. We think that
2 the conduct is clear. We think that Delaware's
3 statements in New Jersey versus Delaware II
4 prevent it from now taking the inconsistent
5 position or what we believe to be the inconsistent
6 position that it is now taking.

7 Also, even if that is not accepted -- which
8 we think it should be -- we think under
9 prescription and acquiescence there is a 117 year
10 period when New Jersey was operating in the
11 fashion that it was without any interference by
12 Delaware and with Delaware's apparent agreement to
13 that, both in -- by way of agreeing to the Compact
14 in the first place and, secondly, through
15 Delaware's statements in New Jersey versus
16 Delaware II.

17 Also, there are other instances where
18 Delaware agreed to this. Specifically in the
19 1950's, Delaware's Highway Department tried to
20 assert jurisdiction over an improvement that
21 DuPont was proposing to extend outshore of low
22 water. DuPont counsel brought to the attention of
23 the Highway Department the Compact of 1905 and
24 asserted that under that Compact, New Jersey had
25 jurisdiction over this and not Delaware. Delaware

1 counsel for the Highway Department then agreed and
2 concurred with the opinion of DuPont.

3 DuPont was not in any particular -- did not
4 have any particular interest that either New
5 Jersey or Delaware prevail, if you will; but it
6 was saying it simply wanted to make sure that
7 whoever had jurisdiction was the one from whom it
8 got approval, and in its view that was New Jersey.

9 You had a similar occurrence in 1971 with
10 DuPont when Delaware tried to lease underwater
11 land to DuPont that DuPont had already been
12 granted by New Jersey and, again, in 1981. You
13 also had the Federanko case in 1958 where the New
14 Jersey Supreme Court held that New Jersey had
15 jurisdiction over a gambling offense that occurred
16 on the Pennsville Pier, and that was by virtue of
17 Article I of the Compact. And the opinion of the
18 New Jersey Supreme Court indicates that Delaware
19 filed an amicus in that matter and agreed with New
20 Jersey's position.

21 So these are instances where up until the
22 very, very recent past we believe Delaware's
23 conduct and activities have been at variance with
24 what it is now asserting.

25 In addition, I think it's very clear that

1 prescription and acquiescence certainly cannot run
2 against New Jersey. Starting in 1971 Delaware has
3 been active in this area as well as New Jersey;
4 but New Jersey has never been inactive, and the 34
5 year period from 1971 is far too short to deprive
6 New Jersey of its rights under the Compact.

7 SPECIAL MASTER: While you're on the subject
8 of positions taken by Delaware, would you care to
9 address the Keystone, Fort Mott and Crown Landing
10 positions taken by New Jersey?

11 MS. HOROWITZ: Sure. Certainly.

12 Those are very recent activities, so we
13 don't think that they illuminate, as we have
14 stated in the brief, what was intended in 1905.
15 With respect to the Keystone -- and we don't
16 think they're entitled to very much weight, and
17 much more weight should be given to what came
18 before 1905 since the word continue is used in
19 Article VII, as well as what happened leading up
20 to New Jersey versus Delaware II since that
21 boundary was made subject to the Compact, and
22 there was a focus on the Compact with respect
23 to what rights it did or did not convey to New
24 Jersey.

25 The other point to be made about the Keystone

1 situation is that New Jersey did state in that
2 scenario that under the Compact of 1905 it had the
3 ability to lease the entire area of the pier
4 which, of course, goes out 1600 feet, even though
5 that was in Delaware. So New Jersey's position I
6 don't think was -- to that extent was not
7 inconsistent at all with what the Compact says or
8 what New Jersey had been doing up until then.
9 And, in fact, I'm not aware of any scenario where
10 New Jersey has taken the position that it can't
11 lease these underwater lands or allow their
12 occupancy. That has never happened.

13 The other point about Keystone is that that
14 was, as described by Stephen Whitney in his
15 correspondence to Delaware, quote, a prototype to
16 try to flesh out the details of what might happen
17 were the states to better coordinate their
18 activities. And we know that that was an
19 experiment, a prototype, that did not continue.
20 It had not happened up until 1991 when Mr. Whitney
21 decided let's try this out as a prototype, and it
22 really has not happened since then.

23 The Fort Mott situation I think is a little
24 bit different than the other situations because
25 there you do have a ferry service that's being

1 conducted. The ferry landing is at the base or at
2 the foot, if that's the correct term, of the pier
3 that extends out from the Fort Mott State Park in
4 New Jersey. And it -- part of that project was
5 to, A, rehabilitate the pier and, B, re-establish
6 or establish ferry service. The ferry service is
7 taking place at the end of the pier, which is in
8 Delaware, and also to -- to Fort DuPont and Fort
9 Delaware, both of which are in Delaware and I
10 believe are Delaware state parks. So we think
11 that is a slightly different animal, if you will,
12 from the other things that had gone on out until
13 then.

14 And there was cooperation in that case
15 between New Jersey and Delaware given that they
16 were reestablishing a historic pier and a ferry
17 service and having, if you will, almost a joint
18 park project scenario occurring in that.

19 With respect to the Crown Landing situation,
20 New Jersey initially took a particular position;
21 and the individual that did that, Mr. Risilia, was
22 deposed. And he indicated that he never heard
23 about the Compact. He knew nothing about it. And
24 it was brought to his attention later on. And
25 after it was brought to his attention, of course,

1 New Jersey corrected the statements that had been
2 made previously; and we have gone on the record
3 after that to correct that.

4 I don't believe that those activities do
5 anything to undermine our position. They were not
6 undertaken by attorneys. They were not undertaken
7 by people that had any -- any awareness of the
8 Compact. And they certainly can't obliterate the
9 impact and effect of the 117 years before 1971 or,
10 indeed, activities through the '70's by New Jersey
11 and through the '80's when there was ongoing
12 regulatory jurisdiction exercised by New Jersey
13 separate and apart from Delaware and without
14 any -- I don't believe, any reference to needing
15 Delaware's approval for any of the activities that
16 were occurring outshore of the New Jersey
17 boundary.

18 I think that I have addressed the major
19 points that I would like to make. I would be
20 happy to answer any further questions that you
21 would have.

22 SPECIAL MASTER: Would you -- Delaware has
23 suggested, if I understand their position
24 correctly, as an alternative to the exclusive
25 jurisdiction argument, concurrent or dual

1 jurisdiction in two states. Would you care to
2 address that issue?

3 MS. HOROWITZ: We think that's not -- that is
4 in conflict with Article VII. And we don't
5 understand how jurisdiction of every kind and
6 nature to one state on its own side of the river
7 means concurrent. And furthermore, as I have
8 already indicated, there are other parts of the
9 Compact where concurrent is specifically provided
10 for, such as in the fishing section where it talks
11 about uniform laws that the states pledge to adopt
12 after which those will become the sole fishing
13 laws and after which there will be concurrent
14 legislation about fishing. But Article VII has
15 nothing of that nature within it.

16 Also, if I can go back to New Jersey versus
17 Delaware II, Delaware's counsel during that time,
18 Mr. Southerland, did not mention anything about
19 concurrent jurisdiction. He said that he thought,
20 very sensibly and practically, Delaware had ceded
21 all the right to regulate riparian rights to New
22 Jersey. Those were his words; and those were
23 repeated, after which the border, as I have
24 stated, was made subject to the Compact.

25 So given all that, we don't agree that

1 there's concurrent jurisdiction.

2 SPECIAL MASTER: Mr. Southerland was somewhat
3 prescient, wasn't he, in his comments in his
4 report on July 3, 1935 to the Attorney General as
5 to what the future held as to the interpretation
6 of the Compact and what the two states would find
7 themselves facing?

8 That's just a --

9 MS. HOROWITZ: He did, and then I think he
10 went on to talk about taxes and who got taxed and
11 who didn't; and he didn't address what I'm talking
12 about here, which is who gets to approve or
13 disapprove construction of -- of structures that
14 are needed to take advantage, if you will, of the
15 waterfront location. That is what we're talking
16 about.

17 SPECIAL MASTER: So if I understand
18 correctly, it's your position that, A, based upon
19 the Compact language in Article VII, specifically
20 the words every kind and nature, the Compact gave
21 exclusive jurisdiction to New Jersey, and that
22 New Jersey versus Delaware II did not affect that
23 at all, particularly because it says, subject to
24 the Compact?

25 MS. HOROWITZ: Yes.

1 SPECIAL MASTER: That's an overly simplistic
2 summary, but that's your position?

3 MS. HOROWITZ: Yes, that's our position. We
4 think that subject to the Compact means what it
5 says, subject to the Compact -- the boundary is
6 subject to the Compact. The Compact obviously
7 remained in force following the boundary
8 determination.

9 SPECIAL MASTER: There is one -- in your
10 opposition brief you wrote, even if the Compact
11 did not exist, Delaware would not have the right
12 to control access to and use of the river within
13 the twelve-mile circle and to thereby effectively
14 apply its law to proposed uses of the shoreline
15 within New Jersey. That's a quote.

16 And would you explain that to me. I was
17 puzzled by that.

18 MS. HOROWITZ: That is based on the various
19 cases that we cited in that section having to do
20 with equal use of rivers by two sovereigns and so
21 on and so forth. And I don't think Delaware
22 has -- Delaware has stated that they are not
23 depriving New Jersey of access. They have stated
24 that, however, the effect of what they're doing is
25 to deprive it of access because they're in effect

1 determining who may have access and who may not
2 have access. They have a law that says no
3 industrial uses within their coastal zone meaning
4 if you're an industry and you're within New Jersey
5 and you want to bring products in and out using a
6 dock, wharf or pier, according to Delaware it is
7 likely that you cannot do that.

8 SPECIAL MASTER: Well, let's suppose that
9 this project goes forward and a vessel is moored
10 and -- at the dock or wharf or pier, whatever it
11 is; and it effectively by discharge is polluting
12 the river. Delaware has, under your position, no
13 say in that pollution, can't stop the pollution?

14 MS. HOROWITZ: Delaware can certainly respond
15 to the pollution and can certainly take steps to
16 deal with the pollution. That is no different
17 from a situation where the ship is traveling on
18 the river, and it discharges.

19 SPECIAL MASTER: So where is --

20 MS. HOROWITZ: Because what happens is that
21 once the spill hits the water and it travels, then
22 I think whatever state it's in certainly can deal
23 with it. But what Delaware cannot do is say to a
24 ship that is traveling to a New Jersey pier --
25 cannot say, stop; we won't allow -- let you get to

1 that pier. We will not let you use that pier.

2 SPECIAL MASTER: Who has pilotage control?

3 MS. HOROWITZ: I don't know. There is a
4 Board of Pilotage. And I'm sure that someone in
5 this room probably can answer that question, and I
6 would be happy to get back to you.

7 SPECIAL MASTER: Delaware has no say in the
8 pilotage of vessels going to the pier or wharf?

9 What I'm trying to find out is where is the
10 line here?

11 MS. HOROWITZ: I think Delaware does have say
12 to the extent that there's not a federal
13 preemption, if you will.

14 SPECIAL MASTER: So there is some concurrent
15 or dual jurisdiction.

16 Would New Jersey --

17 MS. HOROWITZ: On the water. Certainly on
18 the water.

19 SPECIAL MASTER: On the water.

20 MS. HOROWITZ: On the water. But once that
21 ship is attached to the pier, under Articles I and
22 II that's under the jurisdiction of whatever state
23 the pier extends from.

24 On the water is a different situation, and
25 we're not contending that this riparian

1 jurisdiction covers the water. We're talking
2 about extensions from the shoreline out into the
3 water by people that are occupying New Jersey
4 territory, undisputedly within New Jersey and that
5 want to make use of their waterfront location.
6 Again, the quintessential riparian activity and
7 right. That's what we're arguing about.

8 SPECIAL MASTER: Thank you.

9 MS. HOROWITZ: Thank you.

10 SPECIAL MASTER: Mr. Frederick, would you
11 prefer to start; or do you want to take a 10
12 minute break now?

13 It's immaterial to me. If you start and
14 you're going to use an hour and a half, we're
15 going to have to interrupt your argument at some
16 point to take a 10-minute break. So either way.

17 MR. FREDERICK: I'm happy to start now.

18 Thank you, Mr. Lancaster. And may it please
19 the Court, this case involves the State of
20 Delaware's sovereign power within its boundaries.
21 That's what this case is about. It was -- the
22 dispute was precipitated by a private company, BP,
23 which wants to build a multi-billion dollar
24 liquified natural gas facility that rests
25 predominantly on Delaware submerged lands within

1 the twelve-mile circle. And rather than build the
2 facility a couple of miles away outside the
3 twelve-mile circle and, therefore, outside
4 Delaware's submerged lands, BP wants to put the
5 facility on Delaware.

6 35 years ago when El Paso proposed a similar
7 project, Delaware determined that the project was
8 inconsistent with its Coastal Zone Management Laws
9 and rejected the project. New Jersey acquiesced
10 in that decision and continued to work with
11 Delaware, recognizing that for projects that
12 extended onto Delaware's submerged lands, Delaware
13 had an obvious interest in protecting its
14 environment and in protecting the lands for the
15 right and enjoyment of its people.

16 Indeed, New Jersey obtained tens of millions
17 of dollars from the United States Government on
18 two express representations. The first was that
19 Delaware applied on its side of the boundary for
20 projects that emanate from New Jersey, and the
21 second was that LNG facilities specifically would
22 require the concurrence of both states.

23 Now, New Jersey has a change of heart. Even
24 now that Delaware has reached the same conclusion
25 with respect to BP's project that it did with the

1 El Paso project, and it proposes to do away with
2 decades of cooperative efforts between the states
3 by insisting on exclusive jurisdiction over
4 wharves and structures that extend from New Jersey
5 into Delaware. It bases that claim on a series of
6 ever-changing interpretations of the 1905 Compact.

7 And I will allude to one additional change
8 that New Jersey has proposed just this morning to
9 how the Compact should be construed; but
10 fundamentally, the case boils down to two discrete
11 issues. The first is whether Delaware gave up any
12 sovereign power within its borders by virtue of
13 the 1905 Compact with respect to riparian
14 projects. And the second is whether, if Delaware
15 agreed in Article VII to permit riparian
16 structures to encroach beyond the boundary, the
17 phrase riparian jurisdiction should be construed
18 to give New Jersey exclusive jurisdiction over
19 such projects.

20 Both questions should be answered no.
21 Delaware specifically reserved all of its
22 territorial rights in Article VIII of the Compact
23 which reserves those rights unless otherwise,
24 quote, expressly set forth herein.

25 Ms. Horowitz argues for a number of minutes

1 about the Compact, never once mentions Article
2 VIII of the Compact, which is an express
3 reservation of tidal jurisdiction and incidents of
4 sovereignty. In their briefs they only mention
5 Article VIII three times, twice as a very minor
6 response to the arguments we put forth. But
7 Article VIII indicates clearly that the states
8 were preserving their jurisdictional rights and
9 their sovereignty within their boundaries and that
10 the border was not being resolved as a result of
11 the 1905 Compact.

12 With respect to the phrase riparian
13 jurisdiction, it is most sensibly understood to
14 concern those incidents of state power that
15 directly permit the exercise of riparian rights
16 such as --

17 SPECIAL MASTER: Excuse me, Mr. Frederick.
18 As I asked Ms. Horowitz, am I correct in my
19 understanding that neither side has been able to
20 point to any specific notes -- contemporaneous
21 notes, statute, case law, anything that would
22 define riparian jurisdiction?

23 MR. FREDERICK: That's correct. The only
24 place where we found the phrase, Mr. Lancaster,
25 was in an off-topic or off-point reference where

1 the phrase riparian jurisdiction was used to
2 describe a state as recognizing the basic common
3 law rights of riparian law.

4 As you are probably aware, different states
5 have had different origins of their riparian
6 rights; and in the western states, which have not
7 derived from the English common law right of --
8 riparian rights, the origins of that law is
9 different. And so when the treatise writers were
10 writing in the late 19th Century and they would
11 refer to a riparian jurisdiction, it was a
12 shorthand reference to a state that had recognized
13 the English common law. But it was not a way to
14 define the exercise of state power over riparian
15 rights. And that is what is at issue in this
16 case.

17 SPECIAL MASTER: All right.

18 MR. FREDERICK: And in fact, that is why we
19 asked Professor Sax to provide an expert report in
20 this case because we could not find any indication
21 that riparian jurisdiction was a term of art. And
22 because of his 40-year study of the subject and
23 his expertise on what constitutes riparian, we
24 believed that he was best situated to provide
25 assistance to this Court through his expert report

1 on what riparian jurisdiction would have meant in
2 the times.

3 Now, before going into the various arguments
4 that I would like to make about the Compact, I
5 want to take just a couple of minutes to sketch
6 what we regard as some of the relevant history
7 leading up to the 1905 Compact.

8 From its earliest days, Delaware has
9 zealously protected its territorial rights within
10 the twelve-mile circle. William Penn directed his
11 subordinates to insist upon the title to the
12 river, soil and islands thereof according to
13 grant. He got into litigation with Lord Baltimore
14 over precisely where that title was in 1750 in a
15 way that was resolved satisfactorily to him. In
16 the 1820's Delaware and New Jersey began a dispute
17 over title to submerged lands within the
18 twelve-mile circle.

19 If I could refer to New Jersey's exhibit, if
20 counsel will permit, the green island there is Pea
21 Patch Island down just opposite Delaware City; and
22 that was -- gave rise to litigation ultimately
23 arbitrated in this city in Independence Hall a few
24 blocks from here in which the arbitrator there
25 recognized that the deed that Delaware had made

1 over to the United States was valid under the
2 grants that had been given to William Penn.

3 And then, of course, in the 1870's when a
4 fishing dispute gave rise to the litigation
5 leading to New Jersey versus Delaware I, Delaware
6 zealously protected its soil and its rights
7 therein. The Delaware governor said that
8 protecting all lands within the twelve-mile circle
9 are regarded by Delaware as, quote, paramount to
10 any which may be claimed by any other state.

11 So what Justice Cardozo wrote for the Court
12 in 1934 about the historic dispute is still and
13 undoubtedly has always been true. He said the
14 Colony of Delaware as defined by the patent to
15 William Penn was the one that declared its
16 independence in 1776 and that succeeded in 1783 to
17 any fragment of ownership abiding in the Crown.
18 In resuming the title to uncultivated lands -- and
19 he's there talking about the submerged lands --
20 its people, quote, had no thought of modifying the
21 ancient boundaries, of relinquishing one foot of
22 soil above the waters or below.

23 So as we get to New Jersey versus Delaware I,
24 it is absolutely recognized by the Justices of the
25 Supreme Court, by the Delaware legislature, by the

1 leaders -- politically elected leaders of Delaware
2 to fight for Delaware sovereignty within the
3 twelve-mile circle of Delaware's submerged lands.

4 Now, the dispute before this Court now
5 concerns whether Delaware actually gave up
6 regulatory jurisdiction within the twelve-mile
7 circle in the 1905 Compact prior to the final
8 resolution of the boundary line. New Jersey seeks
9 to enjoin a critically important environmental
10 protection law enacted more than three decades ago
11 by Delaware. So the task for the Court and your
12 task, sir, is to construe the 1905 Compact and
13 determine what it means and what it was actually
14 intended to accomplish.

15 And I would like to start, if I could, with
16 where you picked up in your questions, which is
17 what does the phrase riparian jurisdiction
18 sensibly mean in light of what problems the
19 drafters of the Compact were trying to resolve.

20 And those drafters, as you pointed out, were
21 men experienced in the law. They were experienced
22 drafters. George Bates on the Delaware side was
23 an experienced diplomat. He had negotiated
24 treaties for the United States involving Samoa.
25 The governor of New Jersey and the governor of

1 Delaware were involved, as were the Attorney
2 Generals of both states. So these were people who
3 were very experienced in negotiating, in reaching
4 compromises, in drafting language.

5 Robert McCarter on the New Jersey side argued
6 the leading riparian law case in New Jersey,
7 Hudson versus McCarter, that went up to the
8 Supreme Court establishing a very important
9 principle for us in this case, which I'll explain
10 more about in due course, concerning what
11 difference there was between a riparian right and
12 the police power of the state.

13 So as these drafters are negotiating, they
14 are people of experience. They chose words very
15 carefully. And more importantly, they had context
16 because New Jersey had negotiated a Compact that
17 was similar in certain respects with New York; and
18 it had negotiated a Compact with Pennsylvania over
19 its boundary lines. But at the time, contrary to
20 what New Jersey asserts here with its depiction of
21 these various grants, there was not significant
22 wharfing out activity prior to the Compact.

23 Irrespective of the number of grants that New
24 Jersey asserts, the number of actual structures
25 was relatively few, three that we have been able

1 to talk about here, arguably built before 1905.
2 Two of them we don't dispute. They were both very
3 short and short-lived piers. One was the Barber
4 wharf, and the other was the Guest wharf. The
5 third, the Pennsgrove Pier, New Jersey has not put
6 evidence into this record establishing
7 conclusively that it was, in fact, built before
8 1905.

9 So the record before you is that there were
10 undisputedly two very short wharves as of 1905,
11 and the record is not clear whether they even
12 encroached beyond the low water mark. That's how
13 short they were.

14 And with respect to grants, in deposition New
15 Jersey witnesses concede and acknowledge that
16 there would have been no way for Delaware even to
17 be aware of the grants of land that New Jersey was
18 making and would, even to this day, have any basis
19 of knowing.

20 So let me set the stage briefly. As we get
21 to 1903, the litigation between the two states had
22 been raging for several decades. The Court is
23 getting somewhat restless about state of progress
24 of the case; and it contacts the parties and says,
25 you know, Delaware, file your answer.

1 And the parties have a classic decision. Do
2 we continue with the litigation, or do we try to
3 reach some type of truce or some type of
4 agreement.

5 And as they negotiate in 1903, it's clear
6 that what is happening is they want to resolve the
7 fishing dispute that had given rise to the
8 litigation to begin with; and so Articles I
9 through IV in dealing with the fishing dispute are
10 attempting to reach an accommodation so that
11 fishermen from both states are able to exercise
12 their commercial rights within the river. But
13 then when they get to Articles V through VIII,
14 it's clear they are reserving the boundary
15 question that had given rise to New Jersey versus
16 Delaware I.

17 And so when George Bates submits the Compact
18 to the Supreme Court explaining that the suit
19 should be dismissed, these are the words that he
20 uses. He says, in a joint submission by Delaware
21 and New Jersey counsel, he says, the main purpose
22 of the Compact was to provide for enacting and
23 enforcing a joint code of laws regulating the
24 business of fishing in the Delaware River and bay.
25 He then explains that the 1905 Compact "was not a

1 settlement of the disputed boundary." It was a
2 "truce or modus vivendi." And that phrase, as we
3 explain in our briefs, was a way of maintaining
4 the status quo. It was a standstill agreement
5 because the two states recognized that they should
6 not continue to litigate over this if they can
7 resolve the fishing dispute.

8 SPECIAL MASTER: Mr. Frederick, let me use
9 the obverse of the question that I put to
10 Ms. Horowitz. As I said, both states have in
11 their briefs underscored the experience, the
12 talents of the eight drafters of this -- bright,
13 experienced, talented, knowledgeable, all those
14 words that you used; and you this morning have
15 just said that they chose their words very
16 carefully. That was your phrase.

17 Now, if these bright, experienced, talented,
18 knowledgeable men who chose their words very
19 carefully intended that the Compact be basically a
20 standstill agreement, as you have just suggested,
21 or as Bates suggested, a truce or modus vivendi,
22 why didn't they say so? Why didn't they put in a
23 phrase that said until the boundary be
24 established, for example?

25 It's a very easy phrase to put in there.

1 MR. FREDERICK: Well, they did. That's
2 Article VIII. What they said in Article VIII was
3 that -- and I can quote it for you.

4 SPECIAL MASTER: Well, I'm having the same
5 trouble with that argument as I have with the
6 exclusive argument. The word exclusive is used in
7 Articles I, II and IV; it wasn't used in VII.
8 These talented men could as easily have said,
9 Article VII, until the boundary is established.
10 And they didn't say it. If they left it by
11 implication, certainly I don't understand why they
12 did that.

13 MR. FREDERICK: Certainly hindsight is always
14 20/20. But the point --

15 SPECIAL MASTER: Sometimes.

16 MR. FREDERICK: The point here, I think,
17 that's important to take away is that by expressly
18 reserving, quote, territorial limits, rights or
19 jurisdiction of either state, which they did in
20 Article VIII, they were -- and unless expressly
21 set forth herein, they were basically saying we're
22 keeping things as they are except insofar as we
23 have dealt with them in other articles.

24 And in Articles I through IV they use
25 different geographical indicators. They use low

1 water mark to low water mark. They use eastern
2 half, western half, middle of the river. They
3 didn't use those words in Article VII.

4 SPECIAL MASTER: In your words, they chose
5 their words carefully?

6 MR. FREDERICK: I think that oftentimes a
7 modus vivendi is used for words that may not
8 always be so clear.

9 SPECIAL MASTER: But Bates was using that
10 phrase with regard to the boundary and their
11 inability to agree on the boundary, but not with
12 regard to riparian jurisdiction.

13 MR. FREDERICK: He used it in the entire
14 Compact though. And if you even look at the
15 fishing dispute which had not been resolved and
16 was subject to the enactment by both states of
17 uniform laws, that was a modus vivendi as well. I
18 think Bates was describing the entire Compact in
19 that way.

20 SPECIAL MASTER: Is it Delaware's position
21 that the entire Compact was intended to implode
22 when the boundary was established?

23 MR. FREDERICK: No, because Articles I, II
24 and III provide certain rights and powers that
25 would occur irrespective of the boundary line.

1 SPECIAL MASTER: So it was only Article VII
2 that was intended to implode when the boundary was
3 established?

4 MR. FREDERICK: No. Even Article VII doesn't
5 implode. What it provides though is a definition
6 and delineation of where each state could exercise
7 or continue to exercise its riparian jurisdiction.

8 And if I could take a moment here,
9 Mr. Lancaster, I think it's really important to
10 deal with this every kind and what was riparian at
11 the time. Because the leading treatise writers --
12 Farnham, he describes certain riparian rights.
13 But he also describes differences among different
14 jurisdictions as to what was recognized as a
15 riparian right. And those rights he talked about
16 were things like wharfing out, the right -- the
17 usufructuary right to withdraw water, the right to
18 build an embankment, the right to cut ice. Those
19 kinds of things were riparian rights. Critically
20 though, not every state recognized them. And, in
21 fact, there were key differences among the states.
22 And he says this at volume 1 of his treatise on
23 page 279.

24 And so I think the way -- best way to
25 understand of every kind and nature is a

1 description of what riparian rights people could
2 exercise among the various states and
3 jurisdictions.

4 SPECIAL MASTER: But it doesn't say riparian
5 rights. It says exercise riparian jurisdiction.

6 MR. FREDERICK: Of every kind and nature.

7 SPECIAL MASTER: Yes.

8 MR. FREDERICK: And that is a reflection of
9 the difference between the two states and how they
10 handled riparian rights.

11 And this is absolutely critical from our
12 perspective for you to understand because there
13 were three key differences between how Delaware
14 used jurisdiction over riparian and how New Jersey
15 did. The first was New Jersey made grants;
16 Delaware did not. The second, Delaware sold --
17 sorry, New Jersey sold submerged lands; Delaware
18 did not. The third was that New Jersey claimed
19 state ownership up to the high water mark;
20 Delaware did not. Delaware claimed to the low
21 water mark. So taking into account these
22 differences, it would be perfectly natural for
23 commissioners experienced in the laws of their
24 respective states to pick expansive language, of
25 every kind and nature and riparian jurisdiction,

1 keeping in mind that Delaware had a very
2 permissive common law way of allowing riparian
3 proprietors to exercise their riparian rights,
4 whereas, New Jersey had a more regulatory
5 approach.

6 And this was not something unique to the
7 twelve-mile circle, Special Master. It was
8 probably derived from the Hudson River where
9 there were very early developments in the
10 New York/New Jersey boundary area.

11 SPECIAL MASTER: I understand that in the
12 context of defining rights, riparian rights.
13 Where I have some difficulty following it is in
14 the insertion of that into the phrase riparian
15 jurisdiction.

16 MR. FREDERICK: Well, if, for instance, a
17 state is permitting riparian owners to exercise
18 their rights down to the low water mark, that
19 would be the jurisdiction permitted in Delaware.
20 It would not be permitted in New Jersey. In New
21 Jersey you had to get permission beyond the high
22 water mark because those were state lands. If in
23 New Jersey you wanted to exercise your right, you
24 had to get a grant. In Delaware you did not. So
25 it was the difference in the exercise of state

1 power that was critical as these two states got
2 together to figure out what to do about the
3 existing wharves and wharves that would be built
4 out until the boundary line was settled.

5 SPECIAL MASTER: All of which brings us back
6 to the definition of riparian jurisdiction.

7 MR. FREDERICK: And I think that Professor
8 Sax in his expert report talks about those two key
9 incidents of state power that go into allowing a
10 private riparian owner to exercise private rights.
11 And the first was where, on state lands, not on
12 state lands or moving into state lands. And the
13 second is how far, pierhead, bulkhead lines,
14 things like that that would affect the public
15 right of navigation and the public easement of
16 navigation.

17 And so, you know, in smooshing the two words
18 riparian, which had a well known right -- meaning,
19 together and jurisdiction, which basically is
20 talking about state power, what Professor Sax
21 explains is that that phrase together is talking
22 about the power of the states to recognize the
23 rights of riparian landowners.

24 Now, by contrast, as your questions of
25 Ms. Horowitz pointed out, the 1834 Compact took a

1 very different approach. In that Compact, in 11
2 different places the Compact uses the phrase
3 exclusive jurisdiction. It did not do that here.
4 In Article III of that Compact there is exclusive
5 jurisdiction for New Jersey over wharves and
6 piers. And they didn't use that language in this
7 1905 Compact either.

8 Even though the boundary was drawn to the
9 middle of the river, the compromise struck in 1834
10 was New York got exclusive jurisdiction over the
11 entire waterway, but Delaware got exclusive
12 jurisdiction over the wharves and piers except
13 with respect to health and quarantine laws.

14 So the drafters that New Jersey had used
15 before understood that these differences in
16 language meant difference things. But what New
17 Jersey wants to persuade the Court now is that the
18 phrase riparian jurisdiction of every kind and
19 nature is, in fact, synonymous with the phrase
20 exclusive jurisdiction.

21 SPECIAL MASTER: Well, to use your word, we
22 have sort of schmoozed the two arguments.

23 MR. FREDERICK: Smooshed.

24 SPECIAL MASTER: Smooshed, whatever it is.

25 MR. FREDERICK: That's fine.

1 SPECIAL MASTER: You choose your words
2 carefully. You sort of smooshed, whatever the
3 word is, your two arguments; that is, the riparian
4 rights and the exclusive argument. And I think
5 there's a difference between the two, although you
6 smooshed them together.

7 MR. FREDERICK: Well, I wanted to respond to
8 the questions that you had raised first.

9 SPECIAL MASTER: Fine.

10 MR. FREDERICK: Because those are areas of
11 obvious concern, and I wanted to deal with them.
12 But if I could unpack them now, our first argument
13 is that the phrase own side of the river was
14 dealing with the boundary line. At the time of
15 the 1905 Compact the two states had a different
16 view of where the boundary was. Delaware had a
17 view that it was up to the low water mark, New
18 Jersey to the middle of the river.

19 Own side of the river, which was a unique
20 phrase in that usage, we think is best understood
21 in light of the boundary line, particularly in
22 light of the position New Jersey has staked out
23 today, which is that after New Jersey versus
24 Delaware II, they continue to get to sell Delaware
25 land. The position they have taken today is that

1 they can sell Delaware land right up to the
2 navigable channel.

3 And if that is true, then it is hard to see
4 how the defined boundary line that this Court
5 worked so hard to understand in 1934 has any
6 meaning at all because it will constantly be
7 changing every time within the twelve-mile circle
8 New Jersey conveys or grants for money a riparian
9 submerged land. And that cannot be correct
10 because when -- the Court was clear in saying that
11 this was the boundary line under Penn's deed, and
12 then it used the phrase subject to the 1934 --
13 1905 Compact, that is most sensibly understood to
14 reflect to Articles I through III where the
15 drafters had said from low water mark to low water
16 mark or on the eastern half, you know, you can
17 exercise certain rights and privileges. And the
18 Court was not intending to upset any of those
19 agreements that had been struck between the
20 parties.

21 And in light of New Jersey's position today,
22 I think it's very clear that own side is best
23 understood as the boundary line because that
24 agreement read in conjunction with Article VIII
25 where differences to jurisdiction and title had to

1 be expressly set forth herein, there is nothing
2 express about Article VII saying that Delaware is
3 giving up the right of New Jersey to convey, you
4 know, half of the lands in the twelve-mile circle
5 that are submerged and thereby continue to alter
6 the boundary line. That is not express in Article
7 VII. Yet, that's the duty of Article VIII that
8 Article VIII imposes on the future operations of
9 the parties.

10 That Article VIII was also agreed upon
11 against a long backdrop of law that made
12 absolutely clear that states do not exercise
13 powers beyond their boundaries, that states have
14 full sovereignty within their boundaries, that
15 conveyances of land in disputed territory -- and
16 I'm now referring to the Coffee v. Groover case --
17 that lands conveyed in disputed areas by a state
18 to a private person are invalid if the boundary is
19 later found to show that the state lacked the
20 power to make that conveyance. Coffee had been
21 decided prior to the 1905 Compact. It was
22 background law that the drafters presumably would
23 have been aware of.

24 And so when they said continue to exercise,
25 it was allowing for the riparian proprietors to be

1 able to continue to exercise their rights; but it
2 was not intended to be a permanent conveyance of
3 submerged lands from Delaware to New Jersey. As
4 Southerland pointed out, it was a way to protect
5 private rights owners.

6 Delaware had always had a permissive right to
7 wharf out. It was not Delaware's intent to
8 restrict the rights of wharf owners on the New
9 Jersey side, but that is a distinct question from
10 the effect on the boundary or conveyances of
11 Delaware submerged lands. Delaware can be
12 perfectly permissive in allowing people to wharf
13 out so long as those uses are in conformity with
14 other Delaware laws, but that doesn't affect the
15 boundary line; and it doesn't affect other
16 jurisdictional rights that Delaware can exercise
17 within its proper boundaries.

18 And that's what our position is with respect
19 to the first issue, that Delaware by long-standing
20 precedent can exercise its jurisdiction all the
21 way up to the boundary line and that nothing in
22 Article VII was intended to alter that general
23 background rule. And as to that, New Jersey has
24 very little to say. New Jersey doesn't dispute
25 those cases. New Jersey doesn't cite or discuss

1 Coffee v. Groover or even engage with the
2 background commonsense notion that Delaware could
3 recognize the rights of wharfers out in the
4 interregnum period between 1905 and 1934 without
5 their being deemed purprestures. And that phrase,
6 which I have difficulty pronouncing, was the
7 notion that the state could say to the riparian
8 landowner, hey, you didn't have a right to build a
9 wharf there. We're going to tear it out.

10 And to the extent that the drafters would
11 have been concerned at all about the two very
12 short piers that had been built as of 1905, it
13 would have been Delaware's recognition that those
14 piers would not be deemed purprestures. That's
15 how Professor Sax explains the continue to
16 exercise language in light of the ongoing boundary
17 dispute.

18 Now, I think New Jersey argues that it would
19 be illogical to think that it would agree to this
20 kind of arrangement if the boundary was, in fact,
21 at the low water mark because what would the
22 riparian proprietors be able to get. But I think
23 the simple answer to that lies in Delaware's
24 permissive common law and the notion that riparian
25 rights fundamentally are personal property rights

1 or rights of property that the owner has as
2 opposed to jurisdiction rights. And here it is
3 true that the phrase riparian jurisdiction is
4 unusual in what we have been able to ascertain;
5 but the fundamental focus should be the riparian
6 landowner and what effect these principles and
7 agreements should have on -- on that landowner.
8 And the notion that Southerland recognized in the
9 arguments before this Court were that the riparian
10 landowners' rights were to be -- were going to be
11 protected because Delaware had always recognized
12 these kinds of rights to wharf out. But that is a
13 distinct question from who has the ultimate power
14 to decide whether or not those rights should be
15 allowable and under what state's law should
16 govern.

17 Now, if I could move to the second argument
18 that we have advanced, that is that even if the
19 Court were to take the view that New Jersey was
20 granted a right to make certain allowances for
21 riparian landowners that would extend across the
22 Delaware boundary, Delaware still has power under
23 its traditional police powers to police the uses
24 on the wharves that might be built. This -- and
25 we have already gone over some of these principles

1 here; but the basic notion is that -- if I could
2 analogize to zoning law or zoning permits law,
3 what happens on land is that a state says a
4 private landowner, you know, can zone this for --
5 zone for residential use or for commercial use.
6 And those basic principles do define the extent of
7 the use. If you can think of riparian
8 jurisdiction as analogous to that, because the
9 state is saying you can only build out a certain
10 amount or you can only build out to a certain part
11 of the state's submerged lands, that's
12 functionally the same as a height restriction on a
13 building. And -- but that doesn't mean that if
14 you have a permit to build a building, that you
15 can engage in all sorts of other violations of
16 law, whether they be environmental or criminal or
17 other civil violations.

18 And all Delaware is asserting here is the
19 right to exercise its full sovereign powers of
20 police power within its boundaries, which would be
21 perfectly natural in the land context for a
22 building.

23 SPECIAL MASTER: Let me see if I can
24 crystallize my own thinking based on what you just
25 said.

1 Assume I'm a riparian landowner in 1904 in
2 Salem County within the twelve-mile circle, and
3 assume that New Jersey, because of its laws, as I
4 understand it, has deeded to me ownership of the
5 tidelands fronting on my -- on my land. 1904, do
6 I have a right to wharf out?

7 MR. FREDERICK: Yes, you have a right to
8 wharf out.

9 SPECIAL MASTER: Free of all regulation or
10 subject to regulation?

11 MR. FREDERICK: Subject to regulations.

12 SPECIAL MASTER: By whom?

13 MR. FREDERICK: Subject to the regulations
14 imposed by the sovereign within whose boundary
15 you're --

16 SPECIAL MASTER: 1904 now.

17 MR. FREDERICK: 1904, where the boundary is
18 disputed.

19 SPECIAL MASTER: Right.

20 MR. FREDERICK: I think the assumption would
21 be that you are subject to New Jersey laws.

22 SPECIAL MASTER: Now, go to 1905. The
23 Compact is enacted. Anything changed?

24 MR. FREDERICK: Well, I don't -- I think that
25 there is an additional agreement formalized that

1 says that the state can continue to exercise. Our
2 position would be that Delaware acknowledged for
3 this interregnum period until the side, the
4 boundary, had been determined, that things could
5 continue as they had before.

6 SPECIAL MASTER: So that it basically
7 confirmed New Jersey's right to regulate riparian
8 owners as they wharfed out as they had been doing?

9 Continue was the word that was used, right?

10 MR. FREDERICK: Yes. That's correct.

11 SPECIAL MASTER: All right. Now, let's
12 fast-forward to 1934 and '35. The decree, did
13 that change anything?

14 MR. FREDERICK: Yes.

15 SPECIAL MASTER: And how does it change it?

16 And I understand your sovereignty argument
17 here. I understand that you say because of the
18 fact that the boundary was established by the '34
19 decision and the '35 decree, that New Jersey
20 had -- that Delaware has sovereignty and,
21 therefore, has regulatory authority. If I could,
22 without being blasphemous, say the Lord giveth and
23 the Lord taketh away. I understand what the Lord
24 giveth to Delaware. Now, how did the Lord take
25 away from New Jersey?

1 MR. FREDERICK: Well, it -- I think that
2 it -- going back to the background principle on
3 sovereignty read in conjunction with the phrase
4 riparian jurisdiction of every kind and nature,
5 the jurisdiction that was agreed to be continued
6 was the jurisdiction to allow riparian owners to
7 exercise their riparian rights. It was never
8 intended to be exclusive jurisdiction over all
9 incidents and activities that were to occur on a
10 wharf.

11 So once the boundary had been settled -- and
12 recall that what had caused the clash to begin
13 with was a difference in the enforcement of laws
14 on the Delaware River because Delaware was
15 enforcing its fishing license, okay. So
16 fast-forward to 1934 where the boundary is set.
17 Delaware gets to exercise its sovereignty up to
18 that boundary line unless you accept the
19 proposition that New Jersey can allow wharfers out
20 to continue.

21 SPECIAL MASTER: I understand that. But you
22 have told me before that as of 1904 and 1905 New
23 Jersey had the right to regulate. And I'm asking
24 you how did that get taken away?

25 MR. FREDERICK: Well, where --

1 SPECIAL MASTER: It's subject to the Compact.
2 How did that get taken away?

3 MR. FREDERICK: Well, I shouldn't say -- I
4 think that it's incorrect to think of it in terms
5 of giving and taking away, if I may respectfully
6 disagree with your analogy. What is occurring is
7 uncertainty. It is uncertain.

8 SPECIAL MASTER: And still today.

9 MR. FREDERICK: I hope after this there will
10 be less uncertainty.

11 SPECIAL MASTER: One way or another, there
12 will be.

13 MR. FREDERICK: I am not -- I am not
14 conceding that Delaware would not have had
15 regulatory jurisdiction. All I'm saying is that
16 because the boundary had not been set at the low
17 water mark, there was uncertainty. And because
18 Delaware was -- had basically permissive rules and
19 laws with respect to wharfing out, it was an
20 unsettled question. It was an unsettled question,
21 Mr. Lancaster, really up until the 60's and 70's
22 when both states began to enact Coastal Zone
23 Management Laws.

24 So I don't think that you can take away from
25 this exchange what would have happened to the

1 hypothetical wharf owner because, frankly, it was
2 a hypothetical that didn't occur. And it didn't
3 occur until the states were enacting their Coastal
4 Zone Management Laws and imposing particular
5 permitting regulations on the rights within their
6 boundaries and doing it in a shared and
7 cooperative manner.

8 So my answer to you is that that uncertainty
9 was clarified as a result of the boundary
10 decision.

11 SPECIAL MASTER: So you now would go back and
12 amend your answer about 1904 and say because there
13 was uncertainty, Delaware had jurisdiction as
14 well; it just wasn't exercising it?

15 MR. FREDERICK: I think that's probably a
16 better way of expressing it. I didn't mean to
17 imply that as a matter of regulatory jurisdiction,
18 New Jersey had sole and exclusive power. Simply
19 that as a matter of real politique, that was what
20 was happening.

21 And that though was not a question of
22 prescription or acquiescence as the Court in the
23 boundary decision declared. So Ms. Horowitz, when
24 she talks about all these grants and wharves that
25 had been built, the Court said that was an

1 argument wholly without force.

2 SPECIAL MASTER: So the fact that the Court
3 placed the boundary where it did, if I understand
4 your argument, took away New Jersey's jurisdiction
5 or claim for jurisdiction at that point?

6 MR. FREDERICK: Beyond its boundary, that's
7 correct. New Jersey -- and we have never --

8 SPECIAL MASTER: Where does it say that --

9 MR. FREDERICK: Well --

10 SPECIAL MASTER: -- in the decision or the
11 decree?

12 MR. FREDERICK: It is the background
13 principle of law that a state cannot exercise its
14 power beyond its boundary.

15 SPECIAL MASTER: But the Court -- yes, but
16 the Court itself didn't deal with anything but the
17 boundary question in '34.

18 MR. FREDERICK: That's correct.

19 SPECIAL MASTER: It didn't deal with the
20 question we're addressing here, or you and I would
21 not have met.

22 Thank you.

23 MR. FREDERICK: No, but if I could say this
24 much more on that subject, Mr. Lancaster, the
25 point I think that's important to take away is

1 that the Court understood that with the boundary
2 came incidents of sovereignty and jurisdiction and
3 power; and certainly both sides recognize that.

4 You alluded to a letter that Mr. Southerland
5 wrote in 1935 after the boundary decision in which
6 the subject of taxation comes up. And immediately
7 upon the decision in 1934 the two states are
8 getting commissioners and appointing to have
9 debates and talks and negotiations over what to do
10 in light of the fact that the boundary within the
11 twelve-mile circle is now the low water mark.

12 So both states contemporaneously recognize
13 these very questions of who has power over these
14 wharves is there.

15 SPECIAL MASTER: That's why we're here.

16 MR. FREDERICK: And Mr. Southerland also
17 recognized at the time that both states had a
18 different view of the meaning of Article VII.

19 SPECIAL MASTER: He did.

20 MR. FREDERICK: I want to just briefly
21 mention that the two precedents that are most on
22 point for showing the exercise of police power as
23 distinct from a riparian landowner's authority,
24 both argue in favor of Delaware's position. Those
25 cases are Hudson versus McCarter and Cummings

1 versus the City of Chicago.

2 In the Hudson case, the Court held that a
3 riparian landowner's right to draw out the water
4 did not supersede, but was subject to a police
5 power regulation prohibiting the sale of that
6 water, which had been lawfully acquired, pursuant
7 to riparian rights for sale out of state. And in
8 upholding that right, the Court said a riparian
9 landowner's rights are subject to the general
10 police powers of the state. That had been well
11 established as long ago as Shively versus Bowlby
12 and the Webber case and articulated many times by
13 the Court as a background principle.

14 The other case that's important is Cummings
15 versus Chicago because in that case what the Court
16 held was that the local building permits required
17 for a riparian wharf owner applied to the
18 construction of a pier. The wharf owner
19 challenged that to the Supreme Court saying that
20 because we have gotten the necessary permits from
21 the Corps of Engineers under the Rivers and
22 Harbors Appropriations Act of 1899, the -- we
23 don't have to comply with these local police
24 rules. The Supreme Court said, no; you do.

25 SPECIAL MASTER: But both of those cases,

1 Mr. Frederick, simply say that an authority, a
2 state, a municipality has authority to regulate.

3 MR. FREDERICK: Absolutely correct. And
4 that's why you then go to the background principle
5 that states get to enact their laws and their
6 sovereignty up to their boundary lines.

7 It would be a strange rule if you would take
8 the phrase riparian jurisdiction of every kind and
9 nature, transform it into exclusive jurisdiction,
10 and then say that the police power Delaware can
11 exercise throughout its boundary is subject to
12 forfeiture every time New Jersey wants to allow
13 somebody to wharf out.

14 SPECIAL MASTER: But if I understand your --
15 Delaware's alternative argument is that the states
16 at least have concurrent or dual jurisdiction
17 here; is that correct?

18 MR. FREDERICK: It is a dual jurisdiction
19 based on their police powers, right.

20 SPECIAL MASTER: And is it Delaware's
21 position that if there were dual or concurrent
22 jurisdiction, it would be identical and
23 coextensive in both states?

24 MR. FREDERICK: No, because the pier is
25 extending from one place, New Jersey, into another

1 place, Delaware. Delaware does not assert
2 jurisdiction to regulate on the New Jersey side of
3 the boundary. All we're saying is that our police
4 powers allow us to regulate on the Delaware side
5 of the boundary.

6 And that's the Hudson -- the bridge case that
7 we cited, the Henderson Bridge case, where the
8 Court said that the State of Indiana surely cannot
9 tax beyond the low water mark of the bridge
10 because that's in Kentucky; it's not in Indiana.

11 SPECIAL MASTER: But if Delaware prevails
12 here or if the Court were to ultimately find that
13 there is dual or concurrent jurisdiction, doesn't
14 that give Delaware a veto over New Jersey's right
15 to control improvements extending from the New
16 Jersey shore beyond the boundary?

17 MR. FREDERICK: It gives Delaware the right
18 to exercise powers over those wharfers as they are
19 occurring on Delaware's submerged lands.

20 SPECIAL MASTER: And that's effectively a
21 veto.

22 MR. FREDERICK: El Paso was vetoed. There is
23 no dispute about that. There is no dispute that
24 New Jersey acquiesced in that veto.

25 SPECIAL MASTER: And Crown Landing would be

1 vetoed?

2 MR. FREDERICK: Crown Landing is a prohibited
3 bulk transfer facility under the Delaware Coastal
4 Zone Law.

5 That is not to say, however, that other
6 riparian uses that Delaware might -- that New
7 Jersey might seek to exercise in which the
8 permitting authority has to be gleaned from
9 Delaware as well as New Jersey wouldn't allow
10 those to continue. And, in fact, New Jersey
11 itself, as they acknowledge here with Fort Mott,
12 the State Government of New Jersey applied to the
13 State Government of Delaware for a permit to
14 extend the Fort Mott project into Delaware; and
15 Delaware was happy to permit that.

16 Now, I would like to draw your attention,
17 because we have only alluded to it a little bit in
18 the briefs; but I think it is important for you in
19 understanding what New Jersey's state of riparian
20 law would have been, the 1867 opinion of Attorney
21 General Robeson, New Jersey's Attorney General,
22 because there he says -- and this is in our
23 appendix at page 910. I think the opinion
24 actually starts a little earlier in 905. But
25 where at 910 he says, quote, riparian rights in

1 common with every other kind of property in the
2 state are liable to be impaired or taken for
3 public uses by virtue of the superior authority
4 which resides in the Government to be exercised
5 for the common benefit of the whole people.

6 So the Attorney General's official opinion as
7 of 1867 in New Jersey was that riparian rights of
8 every kind and nature did not swallow up all of
9 the other powers of the state. In fact, it was
10 the opposite.

11 SPECIAL MASTER: The language isn't riparian
12 rights of every kind and nature. It's riparian
13 jurisdiction of every kind and nature.

14 MR. FREDERICK: Indeed. But riparian
15 jurisdiction, of course, has to be understood in
16 light of what is riparian. And riparian is
17 subordinate to the state's police powers, not just
18 the right of nuisance for a navigational
19 impediment, but for any other kind of prescription
20 because if, under the theory that New Jersey
21 posits, New Jersey asserts exclusive jurisdiction
22 over every wharf and pier; but, of course, that's
23 not how the Compact is worded. That's the way
24 it's worded for New York and New Jersey, but not
25 here.

1 And, in fact, their own admissions,
2 Mr. Lancaster, also doubly make this clear. They
3 admit that the bulkhead and pierhead lines are not
4 established to allow or disallow particular
5 activities on a wharf, pier or like structure.
6 They admit that its riparian grants do not
7 expressly specify the precise business that can be
8 carried on in any point in time. They admit that
9 its riparian grants do not specify the precise
10 cargo that can be loaded or unloaded at any
11 specific time. They admit that a person wishing
12 to conduct business activity on a wharf would have
13 to comply with all other applicable New Jersey
14 laws or local laws irrespective of having received
15 a riparian grant. Those are in the requests for
16 admissions and the discovery papers set forth in
17 the appendix in 41, 49 and following.

18 So their own practices contradict their
19 argument now that riparian jurisdiction is somehow
20 a greater encompassing power because the riparian
21 jurisdiction as they exercise it is to give grants
22 to allow people to wharf out. But their own
23 witnesses in their Tidelands Bureau and elsewhere
24 say, look, they have got to comply with other
25 laws.

1 And that's all we're saying that those laws,
2 once the project is in Delaware, have to comply
3 with Delaware's laws as well.

4 SPECIAL MASTER: I will -- I should have
5 thought of this when Ms. Horowitz was up; but I
6 will ask her when she returns. Whose burden -- we
7 have competing identical summary -- basically
8 identical summary judgment motions here. Who has
9 the burden of satisfying the Court on the
10 definition of riparian jurisdiction?

11 MR. FREDERICK: As the moving party for a
12 permanent injunction, New Jersey has the burden to
13 show that.

14 SPECIAL MASTER: Thank you.

15 (Discussion off the record.)

16 MR. FREDERICK: I would like to now address
17 the judicial estoppel argument, and I think I can
18 do that very briefly.

19 New Jersey has the burden for judicial
20 estoppel to show that the Supreme Court of the
21 United States took into consideration statements
22 about regulatory jurisdiction in deciding the
23 boundary line. And there is no evidence in the
24 Supreme Court's decision that it did so.

25 So regardless of what you think about

1 Mr. Sutherland's statements, there was no reliance
2 by the Justices on anything to do with regulatory
3 jurisdiction over wharves as a basis for the
4 boundary line decision. So, therefore, the second
5 point of the New Hampshire versus Maine test
6 cannot be satisfied.

7 I think we have gone through in our briefs
8 the various reasons why those statements are not,
9 in fact, inconsistent; and I can discuss them now
10 if you like. But I'm happy to rest on the briefs
11 because there is not a basis for judicial estoppel
12 here.

13 Now, if I could turn to the prescription and
14 acquiescence arguments, New Jersey argues quite
15 extensively here that it is entitled to this
16 jurisdiction as a result of the supposed
17 long-standing acquiescence by New Jersey as to
18 these grants in the permission of these wharves.
19 They acknowledge, however -- and this is buried at
20 footnote 23 of their brief on page 40 -- that they
21 know of no case that's held that prescription can
22 alter a federally and Congressionally-approved
23 Compact.

24 And I think, again, they have the burden to
25 show there to be legal support for an argument

1 about prescription on the basis of activities from
2 Delaware and that those activities can transform a
3 Congressionally-enacted statute. They cannot meet
4 that burden, nor can they show in light of the
5 1934 boundary decision in which the Justices took
6 into account the wharfing out and the riparian
7 grant activity as of that time and said that is
8 not a basis for changing the boundary. And it
9 surely cannot be the case if it doesn't change the
10 boundary, it changes the jurisdiction that can be
11 exercised within that boundary.

12 So then we're left with the period between
13 roughly 1935 and 1971 where they say that that's
14 where New Jersey's claim for prescription stops
15 because they acknowledge over the last 35 years
16 they have allowed Delaware to exercise regulatory
17 jurisdiction. I have several brief points about
18 that. No. 1, it's far too short a period for
19 prescription. And, secondly, it is a period
20 that's interrupted even further by the enactment
21 of laws in the 1960's by Delaware that exercise
22 jurisdiction over Delaware's coastal zone
23 including within the twelve-mile circle.

24 So we're now to a period that's roughly 25
25 years, which obviously is too short for a

1 prescription; and they're left with a statement by
2 a private lawyer who is retained by the Highway
3 Department in Delaware who is not aware of a 1955
4 Delaware Attorney General opinion that expressly
5 tells the Highway Department you don't have the
6 authority to make these grants.

7 And that's their claim for prescription. It
8 is insufficient as a matter of law.

9 In closing, I would like to say the following
10 points. The Delaware environmental laws are
11 critically important. This is a fragile coastal
12 zone that has long been recognized as such, and
13 those environmental laws can in no way be deemed
14 riparian. They apply regardless of the kinds of
15 activities.

16 What New Jersey seeks to assert here is
17 exclusive jurisdiction that would divest Delaware
18 of the power to enforce its environmental laws in
19 this critical zone. Their injunction is broadly
20 way overbroad in going not only to activities on a
21 wharf, but as your question about pilotage pointed
22 out, also to vessels as they move to a wharf that
23 they intend to use, if you look at the statement
24 of proposed relief that they have requested. But
25 one of the oldest statutes in the United States,

1 which I'm sure you're aware of, provides for
2 pilotage laws that are unique to the states and
3 divests the Federal Government of the right to
4 preempt state pilotage laws. And Delaware within
5 its boundaries and within its waters has the right
6 to impose pilotage requirements. New Jersey is
7 now asserting today for the first time that
8 Delaware does not have that right pursuant to the
9 1905 Compact.

10 And when you add up these various points, if
11 it had been known to the Delaware legislators that
12 New Jersey could continue to sell Delaware land,
13 that New Jersey could keep Delaware from
14 exercising its environmental laws and other laws,
15 that New Jersey could keep Delaware from
16 exercising its historic pilotage requirements,
17 this Compact never would have been enacted.

18 It wasn't enacted in 1903, not because of
19 concerns about jurisdiction, but simply because it
20 got to the Delaware legislature too late for a
21 proper debate on the topic. But it certainly
22 would not have been enacted had the sweeping
23 assertions of power that New Jersey now asserts
24 should be permitted under the Compact, had that
25 been known or contemplated.

1 Moreover, New Jersey has no answer to the
2 point that it got this great power, but Delaware
3 got nothing in return. And a Compact drafted the
4 way these Compacts are drafted, one state gets
5 something, and another state gets something else;
6 but on this point of critical power, that it would
7 have the function of creating uncertainty on the
8 boundary line, Delaware got nothing. And that
9 reading, we submit, defies the law and common
10 sense.

11 Thank you.

12 SPECIAL MASTER: Thank you very much,
13 Mr. Frederick. It is now about 10 minutes of
14 12:00. We will recess until 10 minutes of 1:00.

15 (A recess was taken from 11:50 p.m. to
16 12:50 p.m.)

17 SPECIAL MASTER: Be seated, please.

18 We're back on the record again, this time for
19 rebuttal. Neither counsel used her or his full
20 time; so I think we have plenty of time left for
21 rebuttal, an hour and a half or more left here.
22 So take what time you think is necessary.

23 Ms. Horowitz?

24 MS. HOROWITZ: Thank you, Mr. Lancaster.

25 The first thing I would like to address from

1 Mr. Frederick's argument and also responding to
2 some of your questions goes to the phrase every
3 kind and nature and how that relates or doesn't
4 relate to the word exclusive. And as we argued
5 previously, we think that every kind and nature of
6 jurisdiction is -- we don't see the difference
7 between that and the term exclusive.

8 The commissioners did not use the term
9 exclusive. They used every kind and nature. They
10 also did not use the word concurrent, although
11 they did that elsewhere. So that clearly they
12 were not looking to split jurisdiction with
13 respect to riparian matters on one side of the
14 river between the two states.

15 They also provided in the article addressing
16 common fishing laws that there would be, as I
17 argued previously, concurrent legislative
18 authority with respect to that area, which, of
19 course, they did not do in Article VII.

20 And turning last to the New Jersey versus New
21 York Compact of 1834 where the word exclusive was
22 used, the explanation for that is because in that
23 particular Compact New York was given "exclusive"
24 jurisdiction of the waters in that particular part
25 of the Hudson River; therefore, it became

1 necessary to use the term exclusive when referring
2 to New Jersey's carving out of jurisdiction over
3 its wharves and piers. So there was a symmetry
4 there.

5 And likewise, in this Compact there is a
6 symmetry with respect to allocation of
7 jurisdiction in each and every article, as I
8 argued previously. The symmetry is that -- is
9 expressed in geographic terms; and as we argued
10 before, own side of the river means the same thing
11 on the Delaware side as it does on the New Jersey
12 side. Had the commissioners intended own side to
13 mean the boundary as it may hereafter be set, of
14 course, they would have used that terminology. It
15 was a simple thing to do.

16 Lastly, on the issue of exclusive and whether
17 there was a -- some sort of implicit desire on the
18 part of New Jersey or Delaware to make its
19 riparian jurisdiction or the rights of riparian
20 owners subject to the jurisdiction of the other
21 state, there is nothing in that article that
22 provides for that. It's silent. And given that
23 scenario, we think that the Court's decision in
24 Virginia versus Maryland is instructive on that
25 point where the Court concluded that since there

1 was silence in that particular article in Virginia
2 versus Maryland, quote, the Court thought that,
3 quote, each state was left to regulate the
4 activities of her own citizens.

5 And, of course, we agree with that. We think
6 that was obviously what was intended in Article
7 VII was that New Jersey would have jurisdiction,
8 as we argued before, over its riparian owners and
9 their assertion of property rights and riparian
10 rights and ability to use the river as Delaware
11 would have jurisdiction on its side of the river.
12 And we think that's the import of that article as
13 a whole.

14 Delaware is arguing that it should not be
15 understood to have given up its sovereignty
16 because it did not do so in clear and unmistakable
17 terms. We don't think that particular argument,
18 as we stated in our opposition brief, is germane
19 here because at the point when the Compact was
20 drawn up, the boundary was disputed. There was no
21 boundary. There was a disputed boundary. That
22 dispute went back to the early 1800's at least.
23 And while Delaware may have felt strongly that its
24 boundary as it was at the low water, New Jersey
25 certainly felt equally strongly in the opposite

1 direction.

2 Whatever case law existed on the topic was
3 not binding on New Jersey; and certainly the
4 boundary was an open issue. Therefore, the
5 unmistakability doctrine does not come into play
6 because this was not a knowing -- this was not an
7 explicit cession on the part of anyone. This was
8 a settlement, a practical accommodation, an
9 allocation of jurisdiction in a sensible way, as
10 Delaware's counsel Southerland said in New Jersey
11 versus Delaware II.

12 The other point I would like to make on that
13 topic is that, in fact, the term jurisdiction does
14 connote sovereignty and is a reference to
15 sovereign authority. So the use of that term does
16 mean that there was -- by the commissioners --
17 does mean that they were looking to address to a
18 certain extent at least an aspect of sovereignty;
19 namely, regulatory authority over riparian owners
20 and their rights and their ability to exercise
21 their rights.

22 Along that same line, there is nothing in the
23 Compact's history or in the language of Article VII
24 that indicates that the use of the term riparian
25 jurisdiction of every kind and nature was meant to

1 leave open the possibility that some -- at some
2 point 100 years later or so Delaware would seek to
3 assert jurisdiction of some kind over the riparian
4 rights and jurisdiction of New Jersey. There is
5 absolutely nothing in the article that indicates
6 that. It is made binding in perpetuity by Article
7 IX of the Compact.

8 Also, the boundary was made subject to that
9 article as well as to the remainder of the Compact
10 through the Court's decision in New Jersey versus
11 Delaware II.

12 I think it's inconceivable that in 1904 --
13 1903, 1904 New Jersey would have thought that the
14 term jurisdiction of every kind and nature,
15 riparian jurisdiction of every kind and nature
16 meant that at some later date that New Jersey's
17 jurisdiction with respect to riparian matters
18 could be overridden by Delaware and that Delaware
19 could use that sort of authority to effectively
20 landlock certain New Jersey facilities because
21 their use would have been prohibited if located on
22 the Delaware side of the river. I don't think
23 that concept shows up anywhere in the history of
24 this Compact; and it is just completely
25 counterintuitive to the -- to the language that

1 was used as well as to the state of affairs in
2 1905.

3 The boundary -- I'm sorry, the Compact was
4 not a truce. It was a settlement as to certain
5 issues. The boundary was left unsettled; but that
6 does not mean that the things that were expressly
7 addressed in the Compact were left open to be
8 addressed or to be changed when the boundary came
9 into play. There is absolutely nothing in the
10 Compact that says that.

11 Article VII does expressly address the issue
12 of riparian jurisdiction and, therefore, Article
13 VIII does not override Article VII because Article
14 VIII simply relates to things that weren't
15 addressed. Riparian jurisdiction clearly was
16 addressed.

17 SPECIAL MASTER: And, of course, that
18 argument succeeds if the Court accepts your
19 conclusion that Article VII provides exclusive
20 jurisdiction to New Jersey?

21 MS. HOROWITZ: Yes. That's correct.

22 And, again, in our view had there been an
23 intent to subject New Jersey's riparian owners to
24 regulation by Delaware, that would have been made
25 explicit as it was in other parts of the Compact

1 where, for instance, there's a common right of
2 fishery and there is to be concurrent legislation
3 that will be binding on everyone. And that simply
4 was not done in Article VII, which we think means
5 that the clear implication in the language of that
6 is that New Jersey would on its own side of the
7 river apply its respective laws to its citizens
8 that were wharfing out and exercising other sorts
9 of riparian rights and engaging in other riparian
10 activities.

11 SPECIAL MASTER: Regardless of where the
12 boundary was set?

13 MS. HOROWITZ: Correct. And even if that
14 weren't the case, which we think it is, the
15 boundary, of course, was made subject to the
16 Compact. And that can only mean that the Compact
17 provisions survive the boundary and endure and
18 last on; and any other interpretation would render
19 meaningless the terms subject to the Compact and
20 would also render meaningless the portion of the
21 decree that says it's without prejudice to the
22 rights of New Jersey. New Jersey would be
23 extremely prejudiced if all of a sudden a Compact
24 that was supposedly surviving the boundary was
25 obliterated, which seems to be the argument that's

1 being made here.

2 SPECIAL MASTER: Well, my understanding from
3 Mr. Frederick is that Delaware does not take the
4 position that the entire Compact imploded, only
5 that a -- Article VII is not -- does not provide
6 exclusive jurisdiction and that the 1934 decision
7 in Delaware -- New Jersey versus Delaware II,
8 which clearly gives Delaware sovereign rights over
9 the subaqueous soil to the low water mark on the
10 New Jersey shore, therefore, provides Delaware
11 with jurisdictional rights in that area.

12 That's my understanding of the argument. I
13 may be wrong, but I think that's --

14 MS. HOROWITZ: It may provide it with
15 jurisdictional rights, but those rights do not
16 include the ability to override New Jersey's laws
17 and New Jersey's riparian laws and so forth and
18 the rights that were conferred on New Jersey by
19 Article VII.

20 And, again, we are not disputing jurisdiction
21 as to the water. We are speaking about riparian
22 jurisdiction, which is a separate issue.

23 One other point I would like to make on
24 prescription and acquiescence -- oh, before I
25 leave that topic, I would like to discuss for a

1 moment the argument that riparian jurisdiction
2 somehow is limited to somehow defining riparian
3 rights but not regulating or restricting those
4 rights. And I must say that I don't understand
5 that argument at all. I don't see -- we don't
6 understand how it is possible to regulate or
7 define riparian rights without also delineating
8 what the limits are on the exercise of that right.

9 And if we go back to 1903, 1904, 1905, it's
10 very clear that certainly from New Jersey's
11 perspective it understood jurisdiction over
12 riparian rights to include police power regulatory
13 type authority. Mr. McCarter, whose brief was
14 cited by Delaware, as well as the opinion of the
15 Court that resulted from that case that
16 Mr. Carter -- McCarter participated in, to us says
17 that riparian jurisdiction includes the
18 jurisdiction to determine to what extent riparian
19 rights can be exercised, to what extent they must
20 be limited to protect the public, to prevent
21 nuisances, to prevent encroachments into navigable
22 waters, to protect the waters, to protect public
23 resources in the waters and so forth. We think
24 that's all part and parcel of the same
25 jurisdiction and is not something that is

1 separated out.

2 And, again, had -- we don't see anything in
3 the Compact that indicates that by saying
4 jurisdiction and riparian jurisdiction of every
5 kind and nature it was ever anticipated that
6 decades later all of a sudden an overlay of
7 separate jurisdiction strictly to protect the
8 public or to limit riparian rights would be
9 imposed by Delaware, particularly when the term
10 own side of the river is used. It's not a
11 reference to boundary. It's a reference to one
12 side of the river that's next to one state versus
13 one side that's next to the other. It's an equal
14 division in the way in which it's used.

15 SPECIAL MASTER: If the Court -- ultimately
16 the Court will decide this. If the Court were to
17 conclude that it was dual or concurrent
18 jurisdiction, as Delaware has suggested as an
19 alternative argument, in your opinion should that
20 be coextensive jurisdiction?

21 And I appreciate that you're not prepared to
22 go there, and you don't concede that it could be.
23 I'm just asking you as a hypothetical.

24 MS. HOROWITZ: I don't think -- I don't see a
25 basis for it to be coextensive. I understand

1 Delaware's argument to be that they have
2 jurisdiction to their border and not beyond. So I
3 don't see where it would be coextensive. What you
4 would have is you would have a bifurcation where
5 New Jersey would decide that someone got to do
6 something down to the boundary; and then Delaware
7 could then veto whether that would extend further
8 into Delaware, which would completely obliterate
9 the riparian rights which New Jersey was
10 interested in protecting through this Compact and
11 which Delaware argued in New Jersey versus
12 Delaware II would be protected and which Delaware
13 said was the purpose of this Compact was to
14 recognize those rights and to protect them and
15 where Delaware represented to the Court that New
16 Jersey would not be prejudiced because its rights,
17 of course, were protected with respect to the
18 riparian rights by this Compact.

19 SPECIAL MASTER: As I understood
20 Mr. Frederick's response to my question -- the
21 same question, he said there would be
22 jurisdiction -- assuming there were dual or
23 concurrent jurisdiction, there would be
24 jurisdiction up to the boundary; and then it would
25 revert from that point on -- jurisdiction to New

1 Jersey and then from that point on in Delaware.

2 MS. HOROWITZ: Right.

3 SPECIAL MASTER: Now, assume, again, with me
4 that the Court, which is the ultimate decider
5 here, decided that it was concurrent or dual
6 jurisdiction. Is it New Jersey's position that
7 that should be coextensive jurisdiction?

8 MS. HOROWITZ: Meaning each state would have
9 jurisdiction over the entire structure?

10 SPECIAL MASTER: Yes.

11 MS. HOROWITZ: No. Certainly, Delaware would
12 not have jurisdiction inside of the New Jersey
13 boundary.

14 SPECIAL MASTER: Where would the line be
15 drawn?

16 MS. HOROWITZ: Assuming that they decided
17 that, which we disagree with, of course.

18 SPECIAL MASTER: I understand.

19 MS. HOROWITZ: I don't see where the line
20 could be drawn anywhere but at the boundary
21 because there is nothing in the Compact that gives
22 Delaware any jurisdiction in-shore of the
23 boundary.

24 And one of our problems with what is going on
25 here is that the import -- one of the effects of

1 what -- of the approach Delaware is taking is that
2 it does effectively allow them to determine what
3 goes on inside of New Jersey's border because if
4 someone cannot use the waters to bring in and out
5 products because the particular facility that is
6 receiving the projects is something that would not
7 be allowed if -- on the Delaware shore, we don't
8 understand how that is not a taking away of New
9 Jersey's jurisdiction within its own boundary,
10 which is an obvious concern and problem from New
11 Jersey's perspective.

12 Going to prescription and acquiescence, of
13 course, we are not -- we are arguing that the
14 Compact is clear. The language is clear. And in
15 any event, there is a very long-standing conduct
16 by New Jersey of 117 years. Delaware does not
17 dispute that. They simply say that in the last 24
18 years or 30 years or whatever, something else has
19 happened.

20 That's clearly too short a period to upset
21 the rights that New Jersey received under the
22 Compact even if you assume that those rights can
23 be upset. And, of course, we don't necessarily
24 assume that in the first instance because this is
25 a federal law. It was approved by Congress. And

1 as we stated in the footnote, which Mr. Frederick
2 brought your attention to, we're not aware of
3 anything that says that you can use -- lose a
4 federal right that's in a Compact approved by
5 Congress through prescription and acquiescence.

6 So assuming you can, New Jersey certainly did
7 not. New Jersey did not have anything to lose in
8 the first instance.

9 Delaware claims that there was acquiescence
10 on the part of New Jersey in the El Paso matter.
11 I think we already addressed that in our brief,
12 but New Jersey did not acquiesce. New Jersey
13 was -- did -- never even received an application
14 from El Paso. El Paso withdrew its application
15 before anything became final. At least that was
16 El Paso's take on the situation. And New Jersey's
17 Commissioner of Environmental Protection, Richard
18 Sullivan, indicated in a letter to Delaware that
19 if New Jersey were to receive an application,
20 which it had not received to that point, it would
21 take -- look at the entire project. So we don't
22 understand how that's acquiescence.

23 The last point I would like to make is on
24 the -- the Sax report which Mr. Frederick cited at
25 some length. As you know, we moved to strike that

1 report. We continue to argue that it should not
2 be considered. But in any event, Mr. Sax is --
3 Professor Sax's conclusions about what may or
4 might or could have been intended by riparian
5 jurisdiction are complete speculation. There
6 is -- as you pointed out in your question early
7 on, there are -- is nothing in the record that --
8 where the commissioners explain exactly what they
9 mean by riparian jurisdiction other than to look
10 at those terms riparian and jurisdiction and then
11 put them together and put them together with every
12 kind and nature and with the term continue and
13 with the term respective laws and look at the rest
14 of the Compact, all of which we have done and all
15 of which has led us to the conclusion that under
16 Article VII, New Jersey and not Delaware gets to
17 determine whether improvements extending from its
18 shore into the river that are to be used by
19 in-shore facilities to make -- take advantage of
20 the waterfront location, that is New Jersey's
21 decision to make. It is not Delaware's decision
22 to make. And the Compact did not provide for any
23 sort of regulatory override by Delaware in those
24 instances.

25 Unless you have further questions, I would

1 like to reserve the remainder -- or I would like
2 to have the ability for some surrebuttal if I --

3 SPECIAL MASTER: We'll approach the
4 surrebuttal when we -- when Mr. Frederick has
5 finished and see what we have to address.

6 I was struck, as I was listening to you, both
7 counsel, talk about the meaning of riparian
8 jurisdiction, which is what -- where we pivot on
9 this thing by. If I'm correct, I think it was
10 Horace who said it was a callida junctura, a hot
11 joining of words. And clearly, I think that can
12 be applied in this context.

13 But thank you very much.

14 MS. HOROWITZ: May I make one last point
15 here?

16 SPECIAL MASTER: Sure.

17 MS. HOROWITZ: And this goes back to Virginia
18 versus Maryland, which we think is instructive on
19 another point, since you raise the issue of
20 jurisdiction. That was a Compact where the term
21 jurisdiction was not even used. Nevertheless,
22 the Court held that, in fact, that language which
23 referred simply to riparian rights conferred
24 jurisdiction or police power, regulatory
25 authority, permitting authority on Virginia, not

1 on Maryland. We think that is certainly the case
2 here where the term jurisdiction is used.

3 So we think it's much clearer in our case
4 than it was even in Virginia versus Maryland that
5 this is a governmental authority sovereign type
6 right that exists in New Jersey by virtue of the
7 inclusion in the Compact of the term jurisdiction.

8 SPECIAL MASTER: I have, as you know, some
9 familiarity with Virginia versus Maryland.

10 MS. HOROWITZ: Yes.

11 SPECIAL MASTER: Thank you.

12 MS. HOROWITZ: Thank you.

13 SPECIAL MASTER: Mr. Frederick?

14 MR. FREDERICK: Thank you, Mr. Lancaster.

15 I think I would like to start with Virginia
16 versus Maryland because I understand that case
17 somewhat differently than Ms. Horowitz. The
18 Court's holding was not that Virginia had police
19 power over riparian rights but, rather, that its
20 citizens by virtue of the 1783 Compact's -- or
21 1785 Compact's wording that the citizens of each
22 state respectively shall have full property was a
23 conferring of the right of riparian usufructuary
24 right to withdraw water. So the question the
25 Court had was not about which state had police

1 power but, rather, whether the citizens could
2 enjoy their full riparian rights. And that was
3 confirmed in the Black-Jenkins award of 1877 in
4 which Maryland explicitly recognized the riparian
5 rights of the landowners who had riparian rights
6 on the Virginia shore.

7 So the question there wasn't about police
8 power; it was about riparian rights. Thus
9 signaling the problem that you identified in our
10 particular case over the meaning of riparian
11 jurisdiction.

12 But before I get to that, I want to draw two
13 other distinctions between Virginia versus
14 Maryland and this case. One, the words shall have
15 are quite different from the words may continue to
16 exercise. Shall have traditionally has been
17 thought to be a conferring of full rights and a
18 permanent cession, if you will, of jurisdiction or
19 a grant or the powers, whatever the subject matter
20 may be.

21 And the words shall have do appear in the
22 1905 Compact. And they appear -- and if I could
23 draw your attention to Article III of the Compact,
24 which we set forth in the addendum to our brief at
25 the very back. But the very bottom of Article III

1 of the Compact says, quote, each state shall have
2 and exercise exclusive jurisdiction within said
3 river to arrest, try and punish its own
4 inhabitants for violation of the concurrent
5 legislation relating to fishery herein provided
6 for.

7 So what the drafter said was go off and draft
8 your uniform laws; and then when you do that, each
9 state, quote, shall have and exercise.

10 Now, just a couple of articles later they did
11 not use the words shall have and exercise. They
12 used the words may continue to exercise. And I
13 think that that is a critical difference in terms
14 of showing the permanency of what the drafters
15 intended to convey because shall have was intended
16 to be for all time, whereas, may continue on its
17 own side of the river, continue to exercise,
18 reflects the standstill agreement that the parties
19 had entered into by virtue of the 1905 Compact.

20 SPECIAL MASTER: Isn't it just as likely that
21 shall have was simply prospective and that
22 continue is simply intended to recognize an
23 existing power?

24 MR. FREDERICK: No. In fact, I think that
25 the way the other parts of the Compact are worded

1 they are intended to vest rights that are
2 uncertain. So that with respect to fishery, shall
3 have and enjoy a common right of fishery, which is
4 reflected at the beginning of Article III, was
5 intended to confirm how things would be.

6 Now, it is certainly true temporally that
7 there is a future reference; but more than just in
8 terms of a temporal recognition, the word have and
9 shall have has traditionally in Compacts been
10 viewed as a reflection of permanent rights as
11 opposed to the kind of modus vivendi reflected in
12 the words may continue to exercise.

13 Now, I would like to tackle the riparian
14 jurisdiction question because I think that's
15 really where the nub of this case is all about.
16 And if I could, I think that just to make sure, I
17 would like to spend some significant amount of my
18 rebuttal time on this point, Mr. Lancaster.

19 SPECIAL MASTER: Fine.

20 MR. FREDERICK: Riparian jurisdiction is best
21 understood in what Professor Sax in his expert
22 report says -- and I'm now looking at our appendix
23 at page 4281. He says there, quote, in paragraph
24 10, riparian jurisdiction embraces jurisdiction
25 only over the incidents of riparian land

1 ownership, such as authorization to build a wharf
2 to access navigable waters far enough to permit
3 the loading and unloading of ships, and the right
4 to own accretions. Authority to make grants,
5 leases, and conveyances of riparian lands and
6 rights is the concomitant power to make available
7 state-owned lands beneath navigable waters needed
8 to implement those.

9 SPECIAL MASTER: Because?

10 MR. FREDERICK: The state owns it. The state
11 controls it. That jurisdiction is empowered and
12 invested in the state itself; and in New Jersey's
13 practices -- and the only evidence in the record
14 to reflect this is that New Jersey's practice in
15 the 1800's leading up to 1905 was for a regulatory
16 body, the Bureau of Tidelands, to make a grant to
17 sell this particular batch of state-owned land so
18 that the riparian owner could extend -- could
19 wharf out to navigable waters. It was a
20 jurisdiction, a state power, to determine the
21 extent of the riparian rights owners' exercise of
22 rights. And that state power came both in the
23 form of making grants as well as in determining
24 the size and shape of the wharves.

25 The whole point about the pierhead and the

1 bulkhead lines was that there was a regulatory
2 body that was deciding how long can the pier be,
3 how far out can a -- an embankment be constructed
4 along the shoreline. And that jurisdiction
5 invested in the state was in design to protect the
6 state's power to use state-owned land by the
7 riparian landowner.

8 So the phrase riparian jurisdiction of every
9 kind and nature is really best understood as the
10 state exercising its regulatory authority over
11 what incidents of riparian rights the riparian
12 landowner can exercise.

13 And this is best understood, I think, if I
14 could refer the Court to the Attorney General's
15 report from Mr. Robeson, who was the Attorney
16 General of New Jersey in 1867, and in our appendix
17 at page 911 he has a nice distinction and a nice
18 explanation of how these rights and these powers
19 differ.

20 And let me explain how he goes about
21 analyzing this problem because he says, when the
22 state, because it controls the submerged lands,
23 allows there to be a building out or decides that
24 there cannot be a building out, it triggers two
25 different and distinct clusters of rights. On the

1 one hand are the rights of the public which may be
2 for the common defense or for the protection of
3 the public health and safety.

4 This is at 911.

5 SPECIAL MASTER: Yes.

6 MR. FREDERICK: And he says, if the state
7 determines that the riparian landowner is
8 inflicting some damage to the public defense --
9 I'm in the first column. I'm at the point where
10 he says that these rights are rights of private
11 property and cannot be taken for private uses.
12 And then he goes on from there; and he says, in
13 their nature they are themselves subject to the
14 right of navigation and the great public uses for
15 defense and public safety -- fortifications,
16 arsenals, breakwater, lighthouses are examples of
17 this class of public uses -- and that they may be
18 taken for other public uses upon compensation
19 rendered.

20 So what he's saying is that there are certain
21 rights that a riparian landowner in exercising
22 those rights is subject to the state jurisdiction
23 for what would be noncompensable reasons.

24 On the other hand, if the state says, we
25 don't like you; and we don't want you to be able

1 to build out to navigable waters or we don't want
2 you to be able to wharf out at all, he says that
3 would be subject to the powers of the Constitution
4 with respect to takings.

5 So if you think of the phrase riparian
6 jurisdiction in this way, what their own Attorney
7 General is saying is that if the riparian
8 landowner violates laws that are designed for the
9 public safety, like environmental laws that would
10 restrict discharges of hazardous material or the
11 carrying of hazardous materials or fuels and the
12 like, it is a noncompensable regulation that is a
13 police power overriding the riparian right the
14 landowner has.

15 On the other hand, if the state simply says
16 you can't exercise your right to wharf out or you
17 can't go -- we're not going to allow you to go to
18 navigable waters, that would be subject to
19 compensation. So the riparian jurisdiction in
20 effect is which state is responsible for making
21 those distinctions between the powers that would
22 restrict a riparian right owner's exercise of its
23 riparian right to wharf out or be subject to the
24 police powers of the state for the greater common
25 good or for the greater defense.

1 And that distinction was not just understood
2 by New Jersey's Attorney General; it was also
3 understood by the Supreme Court in a series of
4 cases that didn't address specific holdings but
5 talked about how the right of riparian rights is a
6 private right subject to the state's greater
7 interest.

8 So when we talk about riparian jurisdiction,
9 we're really talking about a couple of things, the
10 state's ability to decide how far out can the
11 wharf go, can the individual owner take out so
12 much water that it might impinge an adjoining
13 riparian owner's usufructuary right, can the
14 riparian owner build an embankment in such a way
15 that would intrude or encroach on an adjoining
16 riparian landowner's lands, and things of that
17 nature. They go to the exercise of riparian
18 rights and the power of the state to determine
19 whether or not an individual or a particular
20 landowner can exercise those rights in a way that
21 would be an impermissible riparian use.

22 The grants that they issued -- New Jersey
23 issued throughout the 19th Century confirmed this.
24 As Professor Sax notes in his report -- and he
25 went through all of these grants. He said they

1 were all consistent with the notion of a
2 distinction between a simple right of wharfing out
3 and what the riparian landowner does on the wharf
4 once he has built his pier. And so -- and this is
5 at 4287.

6 So when he -- when we look at the evidence in
7 the record, there is absolutely no evidence that
8 New Jersey understood its riparian jurisdiction as
9 exercised by the Bureau of Tidelands, which was
10 the regulatory body that exercised riparian
11 jurisdiction, as doing anything other than saying,
12 Mr. X, you can build your wharf 500 feet out from
13 the shore or, Mr. Y, you can build your pier 600
14 feet out from the shore; but none of those grants
15 say anything about what the riparian owner was
16 doing with the wharf. Those were all classic
17 state police powers.

18 And their expert Mr. Castagna says nothing
19 about uses. All he says is that the exercise of
20 New Jersey's classic riparian jurisdiction was to
21 decide whether or not a grant should be given and,
22 if so, how big an area of submerged lands it
23 should encompass or how long out the wharf should
24 be. He, in fact, in his deposition says expressly
25 that he didn't know what the uses would be of the

1 land and what laws would be subject to the pier.

2 And so when you are looking at the words
3 riparian jurisdiction and struggling to get a
4 meaning and looking at the contemporary evidence
5 at the time these drafters were trying to put this
6 Compact together, you have to take into account
7 the fact that all of the grants they have
8 submitted into evidence say nothing about riparian
9 uses. And according to their own Attorney General
10 in 1867, there is a perfectly good reason for
11 that, which is that the riparian landowner would
12 have been subject to the general police powers of
13 the state and that if those powers concerned the
14 public safety or the common defense, they would be
15 noncompensable. If the powers were defined to be
16 something else, it might be that there would be a
17 taking for Constitutional purposes of that
18 riparian landowner's riparian right.

19 But that is how riparian jurisdiction makes
20 sense in the context of the times, in the problems
21 that the drafters were trying to wrestle with, and
22 how the practice has been used from the 1851 Wharf
23 Act that New Jersey enacted all the way, really,
24 up to the present time.

25 The -- the evidence that Ms. Horowitz

1 mentioned in her opening about the piers and
2 wharves and such was really not evidence at all
3 because at the time the Compact was drafted in
4 1903, the evidence had not been put in. It was
5 certainly put in before 1905. But I think what
6 she was referring to was that their complaint --
7 the New Jersey complaint had identified wharves
8 and piers and dikes, I believe, were the three
9 physical structures of riparian. But when the
10 drafters used the phrase of every kind and nature,
11 they surely didn't -- they surely intended to
12 encompass the usufructuary rights of bathing in
13 the river or cutting ice in the river or pulling
14 out water from the river because those were
15 subjects that were being litigated in New Jersey
16 at the time.

17 In the 1905 draft or Compact, Commissioner
18 Mr. McCarter was litigating over the usufructuary
19 right of drawing water. So when they used the
20 phrase of every kind and nature, they simply meant
21 to include all kinds of riparian exercises and the
22 jurisdiction of the state to determine whether or
23 not an individual riparian owner could exercise
24 that right. But that was not a synonym for
25 exclusive jurisdiction because in the very

1 previous article I just mentioned in Article III,
2 they used the phrase exclusive jurisdiction. And
3 they didn't use that in Article VII. And I think
4 there is a perfectly clear reason why they did
5 not, because they weren't intending to confer a
6 permanent right on the states until the boundary
7 had been settled.

8 And that was why they used the word own side
9 as opposed to shore, which was a physical
10 geographical thing meaning the difference between
11 the high water mark and the low water mark. They
12 used the word shore in three other articles. They
13 didn't use the word bank, which was another
14 geographical describer. They used the word side.

15 And if we are neighbors and we are arguing
16 about where the boundary line is and, you know, my
17 neighbor has parked his car in a place where it's
18 unclear where the boundary is and I say, you may
19 continue to park your car, and then the boundary
20 is determined to be farther away, I have got the
21 right to say you can't park your car on my
22 property anymore. That's what a property right
23 is. That's where a boundary line is drawn and
24 determined.

25 And Article VII by its use of the words may

1 continue on its own side of the river to exercise,
2 to continue to exercise, is simply a reflection of
3 that reality that the border was going to make a
4 difference, that the boundary determination was
5 going to affect sovereign rights, and that those
6 sovereign rights would be allowed to be exercised
7 in full.

8 Now, I do want to address the backup argument
9 that we have made --

10 SPECIAL MASTER: Before you do that, just a
11 couple of questions. Am I being too simplistic if
12 I suggest that the first part of the argument you
13 just made can be restated to say that riparian
14 jurisdiction does not include police powers?

15 MR. FREDERICK: Yes.

16 SPECIAL MASTER: Yes, I am being too
17 simplistic?

18 MR. FREDERICK: Yes, you are, respectfully.

19 SPECIAL MASTER: All right. Then tell me
20 why.

21 MR. FREDERICK: Because the police powers
22 encompass all of the powers of the state to
23 determine the public safety. And one of the
24 incidents of riparian restriction was whether or
25 not there would be an impediment to the public's

1 right and easement of navigation. So in some of
2 the cases it is sometimes referred to as an
3 exercise of the police power to shorten the wharf
4 because it encroaches on the rights of navigation.

5 SPECIAL MASTER: So riparian jurisdiction
6 does include some exercise of police powers?

7 MR. FREDERICK: It does include some exercise
8 of police powers; but it is not -- it is not -- it
9 is limited in its scope.

10 SPECIAL MASTER: But if it's that complex,
11 that is, that without definition -- further
12 definition you have to say -- you have to do the
13 kind of analysis that we're going through here in
14 order to decide which particular power is included
15 and which particular power is not included, why
16 weren't these experienced drafters more specific?

17 MR. FREDERICK: Because they were trying to
18 resolve a lawsuit that was about something else.

19 SPECIAL MASTER: Or because they couldn't
20 agree on any other term?

21 MR. FREDERICK: They could not agree on
22 defining this in a way that from time immemorial
23 would govern the rights of the states. And that's
24 why, when you go back to the default rules, the
25 boundary matters. Ms. Horowitz says today the

1 boundary matters.

2 And so if you were to accept the notion that
3 Article VII gave New Jersey the right of
4 jurisdiction to decide that BP can build its wharf
5 2,000 feet out into the twelve-mile circle, our
6 alternate argument is that that right of riparian
7 jurisdiction to decide that the wharf can go out
8 2,000 feet does not give New Jersey exclusive
9 jurisdiction to decide every use on the wharf.

10 And so to go back to the questions you have
11 asked about, concurrent jurisdiction and the like,
12 I don't think, respectfully, there is a legal
13 basis for a conclusion that what the drafters
14 intended in Article VII was concurrent
15 jurisdiction in the classic sense that both states
16 exercise concurrent jurisdiction in Pennsylvania
17 and New Jersey over the Delaware River on that
18 boundary. What I think that you -- where you get
19 to concurrent jurisdiction in this context is you
20 would say the following -- and this is an
21 alternative argument; this is not our principal
22 submission.

23 SPECIAL MASTER: I understand.

24 MR. FREDERICK: But you would say New Jersey
25 has the right to tell BP build your 2,000 foot

1 wharf. Delaware does not have the authority to
2 say it should be 1500 feet or it should be 1200
3 feet or it shouldn't be built at all. That would
4 be New Jersey's right, if you will, under that
5 article.

6 However, because the project crosses the
7 boundary and Delaware gets to exercise its police
8 powers with the subset of riparian jurisdiction
9 limited, Delaware gets the right to impose and
10 enforce its environmental laws on the activities
11 of BP on that wharf.

12 SPECIAL MASTER: And New Jersey has no
13 jurisdiction over the activities on that wharf?

14 MR. FREDERICK: It has no jurisdiction over
15 the uses and activities of the wharf once it has
16 exercised the riparian jurisdiction to make a
17 grant of land and to allow the bulkhead line to be
18 drawn in a certain way and to give the approval
19 that the wharf can be built; that is correct.
20 Because that's all that is encompassed within
21 riparian jurisdiction. That's what Robeson --
22 Attorney General Robeson was talking about.
23 That's what the cases talk about. That's what
24 Professor Sax's expert report talks about.

25 SPECIAL MASTER: So, again, we come back to

1 the specific definition of riparian jurisdiction?

2 MR. FREDERICK: Well, we come back to
3 understanding -- and it's not -- Mr. Lancaster,
4 the Court, I think, frequently wrestles with
5 combinations of words and struggles to give them
6 meaning in light of the context of the times and
7 the problems that were confronted. And as I say,
8 our principal submission that side means boundary
9 is not one that Ms. Horowitz chose to exercise any
10 of her rebuttal time to rebut and to deal with in
11 any kind of principal way.

12 So the simple way out of this case from the
13 Court's perspective would be to say they used
14 Article VII as a modus vivendi. They allowed the
15 riparian owners to get grants from the State of
16 New Jersey; but that once the boundary line was
17 determined, that was where each state could
18 exercise its power.

19 But if you were to recommend to the Court
20 that it not go with our principal submission and
21 it were to go with our backup submission, there is
22 ample support legally for the notion that riparian
23 rights and the jurisdiction over their rights
24 encompasses a quite limited subset of the state's
25 power of regulation. And that quite limited

1 subset is not intended to be the all-swallowing
2 whale but, rather, to be quite limited in its
3 focus because, after all, Article VIII says that,
4 quote, nothing herein contained shall affect the
5 territorial limits, rights or jurisdiction of
6 either state of, in or over the Delaware River or
7 the ownership of the subaqueous soil thereof
8 except as herein expressly set forth.

9 So if the Court were to conclude that the
10 words may continue on its own side of the river to
11 exercise riparian jurisdiction was intended to
12 extend beyond the boundary, Article VIII would
13 confine the scope of that jurisdiction to a quite
14 limited degree because there isn't anything
15 expressed in Article VII that would expand the
16 scope of that jurisdiction. Particularly --
17 particularly in light of the other parts of the
18 Compact that used the words exclusive jurisdiction
19 and the fact that the 1834 Compact had been very
20 clear in saying New Jersey has exclusive
21 jurisdiction over piers, wharves, et cetera.

22 SPECIAL MASTER: I have no trouble following
23 your argument, Mr. Frederick; but I note that each
24 time you get to the same point, you slide from
25 jurisdiction into exclusive jurisdiction. And I

1 think there is a difference in the argument and
2 the approach here between the question of whether
3 the jurisdiction, if there is jurisdiction, is
4 exclusive and whether there is jurisdiction, and
5 if you care to address that.

6 MR. FREDERICK: I'm not sure I follow the
7 question.

8 SPECIAL MASTER: Well, you -- I understand
9 your argument about exclusive jurisdiction, the
10 argument that exclusive doesn't appear. It does
11 appear here; it doesn't appear here. If they
12 wanted to say exclusive, they could have said
13 exclusive. I understand your argument about the
14 limit of riparian jurisdiction under your
15 definition. But each time you start talking about
16 riparian jurisdiction and its definitional limits,
17 the next sentence is that's why there was no
18 exclusive jurisdiction.

19 MR. FREDERICK: Well --

20 SPECIAL MASTER: And I think there is a
21 distinction between the two.

22 MR. FREDERICK: There absolutely is a
23 distinction between the two, and that distinction
24 is dispositive in the case. Exclusive
25 jurisdiction is a far more encompassing set of

1 powers that a state may exercise over a riparian
2 owner's rights.

3 SPECIAL MASTER: But isn't it -- the argument
4 that it's exclusive riparian jurisdiction,
5 whatever riparian jurisdiction is? Isn't that the
6 argument that New Jersey is making?

7 MR. FREDERICK: No. They're making a
8 different argument.

9 SPECIAL MASTER: Well, tell me.

10 MR. FREDERICK: They're making the argument
11 that riparian jurisdiction of every kind and
12 nature is a synonym for exclusive jurisdiction.
13 They're not asserting just the right to tell BP
14 you can build your wharf 2,000 feet.

15 SPECIAL MASTER: I understand that. But
16 if -- if the Court were to find that there's no
17 exclusive jurisdiction, but there is riparian
18 jurisdiction, then we're back again to the
19 definition of riparian jurisdiction. And I -- I
20 think there are two -- I understand the
21 coalescence that you just mentioned; but I think
22 there are two separate questions here. Is the
23 riparian jurisdiction exclusive, and what is
24 riparian jurisdiction in either event?

25 And my concern here was that you slide from

1 one into the -- I'll back up on that thing so I
2 don't hit it again -- you slide from one into the
3 other.

4 MR. FREDERICK: Well, we have attempted to
5 address our arguments to the practical reality
6 that when a riparian landowner on the New Jersey
7 shore within New Jersey's boundary wants to wharf
8 out, it would obviously look to New Jersey's
9 authorities for permission to use two states'
10 lands, okay, the New Jersey land from the high
11 water mark to the low water mark, and then from
12 the low water mark on the Delaware lands, okay.

13 And what Professor Sax says in his report is
14 that if you were to assume that there was riparian
15 jurisdiction and that the phrase may continue to
16 exercise was a shorthand for New Jersey had
17 already allowed wharfing out past the low water
18 mark, and so that should be permitted to continue,
19 that would be obviously an encroachment on
20 Delaware's boundary sovereignty. But that would
21 be a reading of may continue to exercise that a
22 Court, if it were to reject our principal
23 submission, could conclude.

24 So if I understand your question, under that
25 reading New Jersey would have exclusive riparian

1 jurisdiction; but exclusive riparian jurisdiction
2 is not exclusive jurisdiction because New Jersey
3 could continue to say to the Barbers and the
4 Groves and the other people who wanted to wharf
5 out, yes, you can go beyond the low water mark to
6 500 feet. That is a grant that we will give you
7 or that is a power that we will continue to give
8 you, and Article VII allows us to continue to
9 exercise that jurisdictional power. And our point
10 is even if they could do that after 1905 and
11 especially after 1934, they couldn't dictate that
12 their law would apply to every conceivable use on
13 the wharf because that was far more expansive than
14 how riparian jurisdiction in any of its
15 permutations could have been understood.

16 Does that help explain the difference?

17 SPECIAL MASTER: So we come back again to the
18 definition of riparian jurisdiction?

19 MR. FREDERICK: Yes, absolutely.

20 SPECIAL MASTER: Thank you.

21 MR. FREDERICK: No. I mean, I can't provide
22 greater help for you than that, unfortunately,
23 Mr. Lancaster. And it is why we --

24 SPECIAL MASTER: Right.

25 MR. FREDERICK: -- retained an expert who has

1 been looking at water law and studying water law
2 for 40 years to provide an expert opinion.

3 And I would note that there is no
4 countervailing expert on New Jersey's side.
5 Rather, they have a person from their, you know,
6 bureau that makes riparian grants who testifies in
7 deposition that he doesn't know what they're doing
8 on the wharves. And, yet, their argument is that
9 that phrase somehow gives them power to divest
10 Delaware of its authority to exercise police power
11 for public safety within its boundaries.

12 I would like, finally, just to address the
13 equities point that Ms. Horowitz addresses. She
14 says that it is somehow unfair that Delaware would
15 be exercising veto power in this way and that they
16 are landlocking New Jersey. The history, ever
17 since Delaware enacted its Coastal Zone Laws, was
18 one of cooperation between the two states. And in
19 the one incident, El Paso, she says El Paso did
20 not apply to New Jersey. El Paso asked for a
21 status decision from Delaware. The very same kind
22 of regulatory approval that BP asked for the Crown
23 Landing project. And the status decision made by
24 the Delaware officials was that this would be an
25 impermitted -- an unpermitted use because it was a

1 bulk transfer facility expressly prohibited by the
2 Delaware Coastal Zone.

3 So regardless of whether El Paso then went to
4 New Jersey or not, the nub of it is that New
5 Jersey recognized that and worked cooperatively
6 with Delaware.

7 We are not saying that this Crown Landing
8 project can't be built somewhere else in New
9 Jersey. Our position is that it can't be built in
10 Delaware. And if it's moved 2 miles up the river
11 or if it's moved 20 miles down the river and it's
12 within New Jersey's sole jurisdictional control,
13 presumably the Federal Government has something to
14 say about it; but if it's not in Delaware's
15 submerged lands, then the equities of our
16 assertion of regulatory authority are obviously
17 quite different.

18 The problem here though is that BP has
19 fixated on a place on the New Jersey shore where
20 the Supreme Court decided in 1934 the boundary is
21 the low water mark, and Delaware has that
22 sovereign power right up to the low water mark.
23 And it's because of BP's intransigence in not
24 moving this project somewhere else that the Court
25 is left to wrestle with the meaning of the words

1 riparian jurisdiction.

2 But in terms of equities, I think the
3 equities are quite clear that a state can exercise
4 its powers within its boundaries to protect its
5 citizens; and that's what Delaware seeks to have
6 the Court order here.

7 Thank you.

8 SPECIAL MASTER: Before you sit down,
9 Mr. Frederick, just for the record, in a footnote
10 in one of your briefs, I think you said -- and I'm
11 not quoting you directly -- that --

12 (Pause)

13 MR. FREDERICK: I'm sorry.

14 SPECIAL MASTER: No, no. That's all right.
15 I'm used to being in your position. And when
16 somebody hands me up a note, I want to read it.

17 I think in one of your footnotes in one of
18 your briefs you said that Delaware is taking no
19 position on the unenforceability issue that was
20 initially raised by Delaware. Am I correct?

21 MR. FREDERICK: That's correct.

22 SPECIAL MASTER: And then, secondly, you will
23 remember that when I issued -- I think it was CMO
24 order 7, Delaware asked for an amendment. And I
25 amended it in CMO 8 to include an acquiescence and

1 prescription claim by Delaware. That has not been
2 briefed or argued here. Do I take it then that
3 that is waived?

4 MR. FREDERICK: We have determined that
5 our -- the evidence on which we have would not be
6 sufficient for a motion for summary judgment as a
7 matter of undisputed fact. So the record as it
8 stands at this time is not one that would support
9 a motion for summary judgment.

10 SPECIAL MASTER: Which is a way of reserving
11 your rights for another day, but acknowledging
12 that at least at this point that's not an issue
13 that I have to deal with?

14 MR. FREDERICK: That's correct.

15 SPECIAL MASTER: All right. Thank you.

16 You have read your note. Do you want to say
17 something else?

18 MR. FREDERICK: Yes, thank you. I do want to
19 say one thing.

20 In the question about fisheries and the
21 meaning of shall have being prospective, my
22 colleagues remind me that citizens have been
23 exercising a common right of fishery since the
24 Court had entered its injunction as of 1877 that
25 barred Delaware from enforcing its fishing laws.

1 So one could not fairly read the words shall have
2 and exercise in Article III as merely prospective
3 but, rather, as preserving in a permanent form the
4 rights the Court had recognized by virtue of that
5 1877 suggestion -- injunction.

6 So I think that, respectfully, the temporal
7 characteristics that you were pointing out do not
8 necessarily hold with respect to Article III's use
9 of shall have and exercise; and those words
10 obviously are different from may continue to
11 exercise.

12 SPECIAL MASTER: Always nice to have
13 associates.

14 MR. FREDERICK: Thank you. Indeed.

15 SPECIAL MASTER: Thank you very much,
16 Mr. Frederick.

17 Ms. Horowitz, I see you sort of lifting your
18 pad down there. We're now at the point where you
19 asked to be indulged in surrebuttal. Do you want
20 surrebuttal?

21 MS. HOROWITZ: Yes. I have just a couple, if
22 I may.

23 SPECIAL MASTER: Okay.

24 MS. HOROWITZ: A couple very quick things.

25 SPECIAL MASTER: Quick, okay. We'll see

1 whether Mr. Frederick wants some; but, remember, I
2 said no sur-surrebuttal.

3 MS. HOROWITZ: I just want to make a very
4 quick point about the distinction that is trying
5 to be drawn here between jurisdiction over
6 property rights versus more general jurisdiction
7 exercised to protect public rights and just very
8 quickly point out that in Article VII there are
9 two things that it talks about. It talks about
10 riparian jurisdiction, and then it goes on to talk
11 about conveyances of lands and rights. So
12 obviously there is a distinction being made in
13 that article. And each state on its own side of
14 the river gets to do both with respect to riparian
15 matters. That's just one quick point.

16 Another point that I would like to make is
17 that I think that Article -- going back to Article
18 I where it says that there cannot be service of
19 process by Delaware on a vessel that is attached
20 to a New Jersey pier; and, likewise, New Jersey
21 can't go and serve process if the vessel is
22 attached to Delaware. So, again, I just very
23 quickly want to make that point. Clearly, the
24 framers intended that the piers would be governed,
25 if you will, by the entity to whose shore they

1 were attached.

2 On the issue of the nature of riparian
3 jurisdiction, I just would like to point out that
4 the Attorney General opinion that was cited by
5 Mr. Frederick is from 1860-something -- 1867. Of
6 course, in 1869 New Jersey adopted its first
7 riparian law. In 1871 it applied it throughout
8 the state, including twelve-mile circle. And
9 under that law there no longer was the right to
10 wharf out except if you got permission from the
11 state.

12 So whatever was said in that opinion about
13 compensating or not compensating, I think after that
14 opinion was done the legislature decided that it
15 would exercise jurisdiction, if you will; and
16 there wasn't even the right to wharf out except by
17 statute if the governmental entity told you --
18 gave you permission to do that. And that was a
19 regulatory sort of authority because the decision
20 on whether to allow the use of underwater lands or
21 not must involve a decision about whether it's in
22 the public interest for those underwater lands to
23 be used for the particular purposes asserted.

24 Now, of course, in 1904 everyone thought,
25 understood that building something, a wharf,

1 et cetera, for commerce was the quintessential, if
2 you will -- quintessential public purpose. I
3 think that's in Farnham. And he seems to suggest
4 that if you don't do that or use it for some other
5 purpose, that that is almost an abuse, if you
6 will, of your identity as a riparian owner,
7 something to that effect.

8 The other point I just would like to make
9 very quickly is that in 1914 New Jersey did adopt
10 its Waterfront Development Law which was cited in
11 our brief. That did say that if you wanted to
12 construct a wharf-front development, you needed a
13 permit from the state. That was implied in the
14 1930's when New Jersey versus Delaware II was
15 decided. So at that point you had in place in New
16 Jersey both pieces of Article VII. You had the
17 regulatory piece expressly in its own statute; and
18 you had the property piece, if you will, in the
19 other statutes that predated that.

20 Before the Compact, the riparian statutes
21 that are already in Title 12 were serving as the
22 regulatory and the property type function; and
23 then those two functions were separated out. But
24 I think that Article VII was meant to address both
25 aspects of it just in its plain language and also

1 in the practices of the parties both before and
2 after 1905.

3 I appreciate the opportunity for the
4 surrebuttal. Thank you very much.

5 SPECIAL MASTER: Mr. Frederick?

6 MR. FREDERICK: We have nothing further.

7 SPECIAL MASTER: Thank you.

8 One moment. I have an associate, too.

9 Well, we're finished with the oral argument.

10 I want to thank counsel very much. As you
11 know, in prior phone conferences I have commended
12 counsel. I want now publicly, again, to commend
13 counsel on their civility and their cooperation
14 throughout this process but, most of all, for the
15 quality of the work which I have been the
16 beneficiary of. The briefing, the oral argument
17 today in what is obviously a very important matter
18 to both states and to some extent very complex has
19 been extraordinary. And I mean that sincerely.

20 You have -- you have brought this from my
21 appointment to the conclusion of your part of this
22 work in some 13 months. By way of comparison, in
23 New Jersey versus Delaware II the Special Master
24 took a total of 28 months to get to this point.

25 Now, that's not intended to be critical of

1 him. He had some very difficult issues to deal
2 with. But I mention it for two purposes. First,
3 to underscore, again, what a fine job both states
4 have done here and, second, to assure you that I
5 do not intend to take another 15 months to
6 complete my part of the work.

7 I couldn't help noticing that there was a
8 recent newspaper article which quoted unnamed New
9 Jersey officials as saying that they expect my
10 report to be filed four to six weeks from today.
11 They must know something that I don't know; but
12 all I can tell you for the record is that now that
13 the record is complete, I will turn to it
14 immediately. I will take the matter under
15 advisement. I will file my report as soon as I
16 possibly can.

17 And I have complete expectations that one way
18 or another I will see you all in the Supreme Court
19 because I cannot satisfy both sides in this very
20 important matter.

21 Counsel, is there anything -- anything
22 further?

23 Ms. Horowitz?

24 MS. HOROWITZ: Nothing further.

25 Thank you.

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SPECIAL MASTER: Mr. Frederick?

MR. FREDERICK: Nothing further.

SPECIAL MASTER: Well, then we will stand
adjourned.

And, counsel, again, thank you very much.

(Concluded at 1:57 p.m.)

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CERTIFICATE

I, Claudette G. Mason, a Notary Public in and for the State of Maine, hereby certify that the foregoing pages are a correct transcript of my stenographic notes of the above-captioned Proceedings that were reduced to print through Computer-aided Transcription.

I further certify that I am a disinterested person in the event or outcome of the above-named cause of action.

IN WITNESS WHEREOF I subscribe my hand this 1st day of March, 2007.

Claudette G. Mason

Notary Public

My Commission Expires
June 9, 2012.