

**In The  
Supreme Court of the United States**

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STATE OF NEW JERSEY,

*Plaintiff,*

v.

STATE OF DELAWARE,

*Defendant.*

---

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

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**MOTION OF STATE OF NEW JERSEY TO STRIKE DELAWARE'S ISSUES OF FACT  
NO. 1, 2, 6, 8, AND 9 AND TO PRECLUDE DISCOVERY ON THESE ISSUES, AND  
BRIEF IN SUPPORT OF MOTION**

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Plaintiff, State of New Jersey, by its Attorney General, hereby moves to strike Delaware's Issues of Fact No. 1, 2, 6, 8 and 9 and to preclude discovery on these issues. In support of this motion, plaintiff shall rely on the brief filed herewith.

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March 20, 2006

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## SUMMARY OF ARGUMENT

Delaware has identified as an issue of fact “the relation of BP’s commercial interests in obtaining regulatory approval of the Crown Landing project to New Jersey’s decision to bring this action” (DE Issue of Fact No. 2) and has indicated that it will use this issue to challenge the basis upon which the Supreme Court has exercised original jurisdiction over this controversy. Delaware also has asserted that this Court’s jurisdiction over this dispute remains a viable legal issue. (DE Issue of Law No. 1.) According to Delaware, if it is able to establish a relationship between BP’s interests and New Jersey’s decision to bring this action, it will be entitled to dismissal of this case, on the basis that New Jersey’s claims fail to establish a case or controversy in which New Jersey is the real party in interest. However, these arguments were raised and extensively briefed in the context of New Jersey’s initial motion seeking leave to file this action, and were rejected by the Court when it granted New Jersey’s motion. Consequently, Delaware should not be permitted to relitigate this issue.

Further, Delaware’s issue of fact No. 2 is irrelevant to the argument for which it is advanced, or to any other issue in this case. New Jersey clearly has a justiciable interest in the enforcement of its rights under the Compact of 1905, which, viewed objectively and standing alone, calls for the exercise of the Supreme Court’s original jurisdiction.

Delaware also has identified four issues of fact relating to the “scope and status” of the BP/Crown Landing Project and other pending projects within the Twelve-Mile Circle (DE Issues of Fact No. 1, 6, 8, 9) and has stated that it intends to pursue discovery concerning these matters. These issues, however, are irrelevant to the fundamental legal issue in this case: the States’ respective rights under Article VII of the Compact of 1905. Because the “scope and status” of



any proposed projects in this area is irrelevant to the meaning of Article VII, discovery on such matters is unnecessary and should not be permitted.

New Jersey therefore moves for an order striking Delaware's Issues of Fact No. 1, 2, 6, 8, and 9 as irrelevant to this case. New Jersey also seeks an order precluding Delaware from pursuing discovery directed to these issues.

### STATEMENT OF FACTS

#### A. *New Jersey v. Delaware I and the Compact of 1905.*

The Compact of 1905 resulted from a dispute over the States' competing claims of sovereignty and jurisdiction in the Delaware River. In 1871, Delaware enacted a law that required non-residents to obtain a Delaware license to fish in the River. (Record, No. 11, Orig., Pl. Ex. 161 at 10.) When Delaware arrested New Jersey fishermen pursuant to this law in 1872, New Jersey's Governor protested this infringement upon the State's authority and issued a proclamation asserting New Jersey's claim to jurisdiction over the eastern half of the Delaware River. (*Id.* at 7, 10.)

When the States' efforts to settle the dispute proved unsuccessful, New Jersey filed suit here to determine the boundary line in the Delaware River. (*Id.* at 23-25.) This Court granted New Jersey leave to file a bill of complaint ("*New Jersey v. Delaware P*") (Record, No. 1, Orig., at 5), and issued a preliminary injunction restraining Delaware "from imposing any tax, assessment or imposition whatsoever, by way of license fee or otherwise, upon any citizen or resident of the State of New Jersey . . . for right or authority to fish in the river Delaware, as they have heretofore been accustomed . . . until this court shall make other order to the contrary." (*Id.* at 53-54; NJ Petition ¶ 7; DE Answer ¶ 7.) This Court's preliminary injunction order explained

that “for a long period of time, to wit, more than seventy years last past, the State of New Jersey has claimed and exercised jurisdiction over the easterly portion of the river Delaware to the middle of the same . . . .” (Record, No. 1, Orig.at 53; NJ Petition ¶ 7; DE Answer ¶ 7.)

With the preliminary injunction in place, the case lingered for over twenty-five years. In 1903, the States appointed commissioners to resolve the dispute. (Record, No. 11, Orig., Pl. Ex. 161 at 25-33; NJ Petition ¶ 8; DE Answer ¶ 8.) The commissioners met in Philadelphia on March 12 and 14, 1903, and they negotiated the text of what later became the Compact of 1905. (Record, No. 11, Orig., Pl. Ex. 161 at 29-31; NJ Petition ¶ 8; DE Answer ¶ 8.)

The Compact did not establish the boundary line, but it did resolve numerous jurisdictional issues. (NJ Petition ¶ 11; DE Answer ¶ 11.) The Compact established the authority of each State to serve criminal and civil process on the River (Articles I, II). (NJ Motion to Reopen, App. 2a-3a.) It addressed common fishing rights and laws (Articles III-VI). (*Id.*, App. 3a-5a.) Article VII, at issue in this case, confirmed each State’s riparian rights and jurisdiction to regulate such rights. (*Id.*, App. 5a.)

Specifically, Article VII stated:

Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian land and rights under the laws of the respective States. (*Id.*, App. 5a.)

Article VIII of the Compact provided: “[n]othing herein contained shall affect the territorial limits, rights or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.” (*Id.*)

Article IX provided that, once approved by the States and ratified by Congress, the Compact “shall be and become binding in perpetuity upon both of said States; and thereupon the

suit now pending in the Supreme Court . . . shall be discontinued . . . without prejudice.” (*Id.*, App. 6a.)

Delaware approved the Compact on March 20, 1905, 23 Del. Laws ch. 5 (1905), and New Jersey did so the next day. 1905 N.J. Laws ch. 42, p.67. Congress ratified the Compact on January 24, 1907, with the proviso that “nothing contained therein shall be construed to impair or in any manner affect any right or jurisdiction of the United States in and over the islands or waters which form the subject of said agreement.” Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907). *New Jersey v. Delaware I* was then dismissed without prejudice. 205 U.S. 550 (1907).

**B. *New Jersey v. Delaware II.***

Although the 1905 Compact resolved many issues, the boundary line remained undetermined. In 1925 and 1926, a dispute over the ownership of an oyster bed in the Delaware Bay south of the Twelve-Mile Circle rekindled the controversy. (Record, No. 11, Orig., Pl. Ex. 107, 108.) The parties were again unable to resolve the dispute (which had been left open by Article VI of the Compact of 1905), (*id.*, Pl. Ex. 5), and this Court granted New Jersey leave to file suit to determine the line along the entire boundary, both within and below the Twelve-Mile Circle (“*New Jersey v. Delaware II*”). *See* 279 U.S. 825 (1929). The Court appointed a Special Master, who submitted his report on October 9, 1933. 55 S.Ct. 934 (1933). Both States filed exceptions.

On February 5, 1934, the Court confirmed the Special Master’s report. 291 U.S. 361, 385 (1934). Within the Twelve-Mile Circle, the Court set the boundary line at the mean low-water line on the New Jersey shore, “subject to the Compact of 1905.” *Id.* South of the Twelve-Mile Circle, the Court set the line at the middle of the main shipping channel. *Id.* The Decree

was “without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . .” 295 U.S. 694, 699 (1935).

**C. New Jersey’s Exercise of Riparian Jurisdiction.**

New Jersey has regulated its riparian lands, including within the Twelve-Mile Circle, since the 1800s. Before 1851, State riparian lands were regulated primarily through local custom. (*See* NJ Motion to Reopen, App. 28a.)<sup>1</sup> In 1851, the Legislature enacted the Wharf Act, which required riparian landowners to obtain permission from their counties for development that would extend past the mean low-water line. 1851 N.J. Laws 335. The Wharf Act also provided that such permission could not be granted if the development would hinder navigation. *Id.*

In 1864, the New Jersey Legislature (“Legislature”) created the Board of Riparian Commissioners, the earliest predecessor to the current Tidelands Resource Council. N.J. Stat. Ann. § 12:3-1 (1979) (enacted in 1864). Since its formation, the Tidelands Resource Council and its predecessors have determined whether to convey riparian lands or rights and have imposed regulatory conditions on such conveyances. (*See* NJ Motion to Reopen, App. 28a, 29a.)

In 1914, the Legislature enacted the Waterfront Development Law. N.J. Stat. Ann. § 12:5-3 (1979). The law required that permits be obtained from the Board of Commerce and Navigation (later made part of the Department of Environmental Protection) to build structures on riparian lands or to legalize structures already in place. *Id.*

From its earliest days, the State of New Jersey has applied its regulatory system to lands on the New Jersey side of the Delaware River within the Twelve-Mile Circle. Indeed, on at least eight occasions from 1854 to 1905, the New Jersey Legislature and then the Board of Riparian

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<sup>1</sup> Citations to “NJ Motion to Reopen” refer to New Jersey’s Motion to Reopen and For a Supplemental Decree, filed on July 28, 2005.

Commissioners approved various riparian grants extending below the mean low-water line in the Twelve-Mile Circle area. (*See* NJ Motion to Reopen, App. 29a, 31a-36a, 54a.) And from 1905 to the present, New Jersey has exercised its riparian jurisdiction in this area on at least thirty-three occasions by approving State tidelands conveyances within the Twelve-Mile Circle. (*Id.*, App. 29a, 36a-51a, 54a.)

In recent decades, the Legislature has further expanded New Jersey's regulation of riparian lands, including those within the Twelve-Mile Circle, by imposing additional regulatory and permitting requirements. (*Id.*, App. 56a-57a, 62a-63a, 67a-68a.) New Jersey has applied these expanded requirements to various activities located outshore of the low-water line within the Twelve-Mile Circle. (*Id.*, App. 58a-60a, 63a-64a, 70a-72a.)

**D. Delaware's Recent Regulation of Structures on New Jersey's Shore.**

Contrasted with New Jersey's long-standing exercise of jurisdiction over riparian improvements extending from the New Jersey shoreline in the Twelve-Mile Circle, Delaware's assertion of jurisdiction has been relatively recent. In fact, in 1957 and 1958, the Delaware State Highway Department acknowledged that, under Article VII of the Compact of 1905, Delaware lacked riparian jurisdiction over the construction of improvements appurtenant to the New Jersey side of the River within the Twelve-Mile Circle. (*See* NJ Motion to Reopen, App. 87a-89a, 102a-110a; NJ Petition ¶ 20; DE Answer ¶ 20.) Delaware at that time conceded that such improvements were subject solely to New Jersey's authority. (*Id.*)

In more recent years, however, Delaware has asserted jurisdiction over such projects on the New Jersey side. In 1971, Delaware adopted the Delaware Coastal Zone Act, 58 Del. Laws ch. 175 (1971), codified at Del. Code Ann. tit. 7, §§ 7001-7013 (2005) (the "DCZA"). The DCZA declares that it is Delaware's policy "to prohibit entirely the construction of new heavy

industry in its coastal areas, which industry is determined to be incompatible with the protection of that natural environment in those areas.” *Id.* § 7001. The DCZA prohibits “bulk product transfer facilities” in the coastal zone, except for those in the Port of Wilmington. *Id.* §§ 7002(f), 7003. Industrial development other than that of heavy industry requires a permit issued by the Secretary of the Delaware Department of Natural Resources and Environmental Control (“DNREC”). *Id.* § 7004.

In 1986, Delaware enacted the Subaqueous Lands Act, 65 Del. Laws ch. 508 (1986), codified at Del. Code Ann. tit. 7, §§ 7201-7217 (2005) (the “DSLAs”). The DSLA provides that “[n]o person shall deposit material upon or remove or extract materials from, or construct, modify, repair or reconstruct, or occupy any structure or facility upon submerged lands or tidelands without first having obtained a permit, lease or letter of approval from the Department.” *Id.* § 7205(a). The DSLA also provides “[t]here shall be no appeal of a decision by the Secretary to deny a permit on any matter involving state-owned subaqueous lands.” *Id.* § 7210.

Delaware has applied these laws to a limited number of projects on the New Jersey side of the River. For example, DNREC issued a DSLA permit on September 30, 1991 and a DCZA permit on December 13, 1991 to Keystone Cogeneration Systems, Inc., now known as Logan Generating Company, L.P. (“Logan”) to construct a pier and water intake structure in the Delaware River to service a 225-MW coal fired power plant in New Jersey. (*See* NJ Motion to Reopen, App. 96a; NJ Petition ¶ 23; DE Answer ¶ 23.) In 1996, as part of a joint project to reestablish historical ferry service between the two States, the New Jersey Division of Parks and Forestry obtained a DNREC subaqueous lands lease for construction of a pier adjacent to Ft. Mott State Park in Salem County, New Jersey. (NJ Motion to Reopen, App. 93a-94a.) And, as

set forth below, within the past year Delaware has actually invoked these laws to block a project on New Jersey's side.

**E. The Present Controversy.**

To New Jersey's knowledge, the only applicant since 1991 for a DCZA permit for the construction of an improvement appurtenant to the New Jersey shore has been Crown Landing LLC, an affiliate of BP America, Inc., whose DCZA application was denied within the last year.

In the case of Crown Landing, Delaware withheld a DCZA permit in March 2005, effectively blocking the project. (NJ Motion to Reopen, App. 137a-142a; NJ Petition ¶ 30; DE Answer ¶ 30.) Crown Landing is seeking to construct and operate a liquefied natural gas ("LNG") import terminal and re-gasification facility in Logan Township, New Jersey. (NJ Motion to Reopen, App. 133a-134a.; NJ Petition ¶ 26; DE Answer ¶ 26.) The LNG facility will be located entirely within New Jersey, but the project depends on an unloading pier extending into the Delaware River approximately 2,000 feet beyond the low-water mark. (NJ Motion to Reopen, App. 134a-135a; NJ Petition ¶ 26; DE Answer ¶ 26.) The facility is supported by the New Jersey Board of Public Utilities as a means to increase the "vital" supply of natural gas to New Jersey. (NJ Motion to Reopen, App. 82a, 137a, 150a-151a.)

Crown Landing initially applied for a DSLA permit for the pier in September 2004, but Delaware declined to issue the DSLA permit until Crown Landing first obtained a DCZA permit. (*Id.*, App. 138a; NJ Petition ¶ 28; DE Answer ¶ 28.) Accordingly, on December 7, 2004, Crown Landing submitted to the Secretary of DNREC a request for a status decision that the Crown Landing pier was permitted by the DCZA. (NJ Motion to Reopen, App. 139a; NJ Petition ¶ 29; DE Answer ¶ 29.) On February 3, 2005, the Secretary determined that the LNG facility was an "offshore bulk transfer facility" as well as a "heavy industry use" specifically prohibited by the

DCZA. (NJ Motion to Reopen, App. 139a, 146a-147a; NJ Petition ¶ 29; DE Answer ¶ 29.) He also concluded that the “on-shore storage tanks essential to the operation of the facility,” although located in New Jersey, “are prohibited structures.” (NJ Motion to Reopen, App. 147a; NJ Petition ¶ 29; DE Answer ¶ 29.) The Secretary explained that, “[d]espite the benefits that increased LNG imports might bring, placement of this facility within the boundaries of Delaware is, in my opinion, clearly a prohibited use within Delaware’s coastal zone.” (NJ Motion to Reopen, App. 139a-140a, 147a.) On March 30, 2005, the Delaware Coastal Zone Industrial Control Board affirmed the Secretary’s decision. (NJ Motion to Reopen, App. 140a; NJ Petition ¶ 30; DE Answer ¶ 30.) The decision has now become final. (NJ Motion to Reopen, App. 140a-141a NJ Petition ¶ 30; DE Answer ¶ 30.)

Similar to Delaware’s permitting actions under the DCZA, only a few applicants have requested DSLA approvals for improvements on the New Jersey side of the River. (*See* NJ Motion to Reopen, App. 86a.) Within the past year, DNREC approved a DSLA permit for Fenwick Commons, LLC, for the renovation of a marina and piers appurtenant to “The Riverwalk at Penns Grove,” a redevelopment project in the Borough of Penns Grove, New Jersey, (*id.*, App. 94a-95a, 131a-132a), and also issued Fenwick Commons a determination, pursuant to § 307 of the federal Coastal Zone Management Act, 16 U.S.C. § 1456 (the “FCZMA”), that its project was consistent with Delaware’s coastal zone management plan (NJ Motion to Reopen, App. 94a).

Fenwick Commons notified Delaware on May 6, 2005, that “financing considerations” compelled it to obtain the Delaware permit in order to proceed with the project. (*Id.*, App. 94a-95a, 131a-132a; NJ Petition ¶ 32; DE Answer ¶ 32.) But Fenwick Commons nonetheless stated: “the issue as to ownership of lands is in dispute as to the Riparian Grants from the State of New



Jersey . . . . Our position is that we will leave the issue of riparian rights and Delaware ownership to be resolved at a different time and in a different for[u]m.” (*Id.*)

**F. Federal Review of the BP/Crown Landing Project.**

As Delaware explained in its initial brief to the Court, in addition to the reviews conducted by New Jersey and Delaware, the BP/Crown Landing Project also is being reviewed by the Federal Energy Regulatory Commission (“FERC”) in accordance with § 3(a) of the Natural Gas Act, 15 U.S.C. § 717b(a).<sup>2</sup> FERC is serving as the lead agency conducting the federal environmental review of the BP/Crown Landing Project and is cooperating with other federal agencies such as the National Oceanic and Atmospheric Administration (“NOAA”), the Fish and Wildlife Service (“FWS”), and the Environmental Protection Agency (“EPA”). (DE Opposition at 17.) As part of the review process, FERC released a draft Environmental Impact Statement (“EIS”) for the BP/Crown Landing Project on February 18, 2005, and has received comments on the draft EIS from various federal agencies and from New Jersey and Delaware. (*Id.* at 17-19.)

**PROCEDURAL HISTORY**

In April 2005, New Jersey set forth its position concerning its rights under the 1905 Compact in a letter from the chief counsel to the Governor of New Jersey to his Delaware counterpart. (NJ Motion to Reopen, App. 17a; NJ Petition ¶ 41; DE Answer ¶ 41.) In May 2005, the legal counsel to the Governor of Delaware responded with a letter disputing New Jersey’s claims of exclusive riparian jurisdiction over improvements extending from the New Jersey shore in the Twelve-Mile Circle. (NJ Motion to Reopen, App. 21a; NJ Petition ¶ 42; DE

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<sup>2</sup> Further reviews also are required by the Army Corp of Engineers under § 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and § 404 of the Clean Water Act of 1977, 33 U.S.C. § 1344, and from the U.S. Coast Guard, pursuant to Coast Guard regulations, 33 C.F.R. Pts. 66 and 127.

Answer ¶ 42.) In light of this ongoing dispute between the States over the interpretation of the 1905 Compact and the States' respective jurisdiction under the Compact, the Governor and the Attorney General of New Jersey authorized the filing of an original action in this Court to enforce New Jersey's rights under the 1905 Compact. (NJ Petition ¶ 3.)

New Jersey then initiated this action by filing its Motion to Reopen and For a Supplemental Decree ("Motion to Reopen") on July 28, 2005. In its Motion to Reopen, New Jersey sought leave from the Court to file a Petition to reopen No. 11, Original, in order to obtain a supplemental decree enforcing New Jersey's rights under Article VII of the 1905 Compact. New Jersey sought a declaration that Article VII grants New Jersey exclusive riparian jurisdiction over improvements extending from the New Jersey shoreline into the Delaware River within the Twelve-Mile Circle. (NJ Motion to Reopen at 1.) In the alternative, New Jersey sought leave to initiate a new original action and have its Petition treated as a Bill of Complaint. (*Id.* at 34.)

In support of its Motion to Reopen, New Jersey argued that the Court should exercise its original jurisdiction to resolve the dispute between New Jersey and Delaware concerning the rights of the respective States under the 1905 Compact. (*Id.* at 1-2.) New Jersey argued that this dispute merited the Court's consideration because (1) the matters in controversy are grave and important, (2) no alternative forum is available to resolve the dispute, and (3) Delaware's assertion of jurisdiction over improvements extending from the New Jersey shoreline presents a justiciable case or controversy. (*Id.* at 17-22.) On the merits, New Jersey argued that the language of Article VII was clear and unambiguous and that the dispute should be resolved without reference to a Special Master because the fundamental issue in the case – interpretation

of the language of Article VII of the 1905 Compact – turned on purely legal issues. (*Id.* at 22-34.)

Delaware filed its response to New Jersey’s Motion to Reopen on October 27, 2005 (“DE Opposition”). In its opposition, Delaware raised several arguments against the Court’s exercise of its original jurisdiction over this dispute. (DE Opposition at 22-35.) First, Delaware argued that New Jersey’s motion did not fall within the Court’s retained jurisdiction from the 1935 Decree. (*Id.* at 23-25.) Next, Delaware argued that New Jersey had failed to establish a case or controversy because the injury to New Jersey was purely speculative until all federal and state agencies had completed their reviews of the BP/Crown Landing Project. (*Id.* at 25-29.) Delaware also argued that there was no actual case or controversy between the States because BP, not New Jersey, was the real party in interest. (*Id.* at 30-32.) Finally, Delaware argued that, even if the Court were to find that it had original jurisdiction over the dispute, it should decline to exercise that jurisdiction because an alternative forum was available to BP to challenge the Delaware permit denial. (*Id.* at 32-35.) On the merits, Delaware disputed many of New Jersey’s arguments concerning the legal and factual background of the 1905 Compact, disagreed with New Jersey’s arguments concerning the meaning of Article VII, and argued that appointment of a special master would be appropriate should the Court decide to hear the case. (*Id.* at 35-78.)

On November 28, 2005, the Court exercised its original jurisdiction over this dispute, denying New Jersey’s Motion to Reopen but granting its alternative motion for leave to file a Bill of Complaint. *See New Jersey v. Delaware*, 126 S.Ct. 713 (2005). The Court docketed the case as No. 134, Original, and ordered that Delaware have thirty days to file an answer. *Id.*

On December 28, 2005, Delaware answered the Bill of Complaint. At the same time, Delaware filed a Motion for Appointment of a Special Master (“DE Special Master Motion”). In

support of its Motion, Delaware argued that a special master should be appointed, in light of the lengthy and complex historical and legal background of the dispute between the States, to assist the parties with discovery, refine the issues for the Court's consideration, and recommend a disposition of the case. (DE Special Master Motion at 4-5.) Delaware identified several areas of historical inquiry for which discovery would be required. These areas were (1) the drafting history of the 1905 Compact, (2) the record in *New Jersey v. Delaware I*, (3) the legal context of the 1905 Compact, and (4) the States' course of conduct since 1905. (*Id.* at 5-8.) Delaware also argued that it required discovery concerning the "status and scope" of the BP/Crown Landing Project in order to determine whether the scope of the Project was within the contemplation of the parties at the time of the 1905 Compact. (*Id.* at 9.)

On January 23, 2006, the Court granted Delaware's Motion for Appointment of a Special Master and appointed Ralph I. Lancaster, Jr., Esq. as Special Master. *See New Jersey v. Delaware*, 126 S.Ct. 1184 (2006).

On February 3, 2006, the Special Master conducted an initial telephone conference with the parties. During that conference, Delaware indicated that it would be seeking discovery concerning the "scope and status" of the BP/Crown Landing Project. (Transcript at 26-27). New Jersey disputed the relevance of such information and, at the Special Master's invitation, stated that it would be filing a preliminary motion within thirty days. (*Id.* at 27-28). This was confirmed in Case Management Order No. 1, dated February 8, 2006.

On February 17, 2006, Delaware submitted its issues of fact and law, which appeared to broaden the matters for which Delaware would seek discovery regarding the BP/Crown Landing Project and other pending projects. Specifically, Delaware's issues of fact and law included the following:

## ISSUES OF FACT

1. What projects, other than BP's Crown Landing project, are under consideration or pending for approval in New Jersey within the twelve-mile circle and implicate Article VII or VIII of the 1905 Compact?

2. What is the relationship of BP's commercial interests in obtaining regulatory approval of the Crown Landing project to New Jersey's decision to bring this action?

....

6. Have the other projects previously approved by New Jersey within the twelve-mile circle required the dredging of Delaware's submerged land? If so, has the dredging been on a scale commensurate with BP's Crown Landing project?

....

8. What is the nature and scope of BP's Crown Landing liquefied natural gas unloading facility?

9. Has BP obtained all necessary New Jersey government permits for the Crown Landing project?

....

## ISSUES OF LAW

1. Whether, in light of the facts to be discovered, the Supreme Court has jurisdiction over this action.

....

Because Delaware's identification of issues of fact and law expanded upon Delaware's previous statements concerning its need for discovery on the "scope and status" of the BP/Crown Landing Project, on February 23, 2006, New Jersey requested that the matters covered by its preliminary motion include Delaware's Issues of Fact No. 1, 2, 6, 8, and 9 and Issues of Law No. 1, and that the date for filing the motion be extended to March 20, 2006. Delaware did not object, and the Special Master granted New Jersey's request, as reflected in Case Management Order No. 2, dated February 24, 2006.

## LEGAL ARGUMENT

### I. THE SUPREME COURT'S EXERCISE OF ITS ORIGINAL JURISDICTION RESOLVED WHETHER NEW JERSEY HAS ARTICULATED A JUSTICIABLE CASE OR CONTROVERSY AND IS THE REAL PARTY IN INTEREST.

When the Supreme Court exercises its original jurisdiction to resolve a dispute between two states, its determination resolves a number of underlying issues. Because the Court exercises original jurisdiction only sparingly, it considers, first, whether the state's complaint presents a claim of sufficient "seriousness and dignity" to warrant maintenance of an original action, and second, whether there is an alternative forum in which the issues can be fully resolved. See *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). In addition, a state seeking to bring an original action must show that it asserts "an interest of her own and not merely that of her citizens or corporations." *Arkansas v. Texas*, 346 U.S. 368, 370 (1953) (citing *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938)).

Although the Supreme Court has been reluctant to "extrapolate wholesale law of the case principles into the situation of our original jurisdiction, where jurisdiction to accommodate changed circumstances is often retained," *Arizona v. California*, 460 U.S. 605, 619 (1983), the Court has recognized that "prior rulings in such cases 'should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated.'" *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992) (quoting *Arizona v. California*, 460 U.S. at 618-19). In *Wyoming v. Oklahoma*, the Court noted that it retains the power to reconsider its earlier decision at any time, and would do so if it were convinced "that we were *clearly wrong* in accepting jurisdiction of this case." 502 U.S. at 446 (emphasis added). Nevertheless, in that case, the Court rejected a challenge by Oklahoma to Wyoming's standing to maintain an original action, because that issue had already been decided when the Supreme

Court granted Wyoming leave to file its complaint, and again on a motion to dismiss by Oklahoma.

Here, Delaware's claim that BP, not New Jersey, is the real party in interest was raised by Delaware (*see* DE Opposition at 30-32) and resolved by the Supreme Court's decision to grant New Jersey leave to file its bill of complaint. No circumstances have changed in the months since Delaware made these arguments to the Court. Indeed, it can be presumed that Delaware's attempt to show that BP's interests influenced New Jersey's decision to file this action would rely nearly entirely on proofs related to the period before the Court granted New Jersey's motion. Therefore, the findings required for the Court's ruling asserting original jurisdiction constitute the law of the case and should not be disturbed.

In short, because Delaware's issue of fact No. 2 proposes the introduction of expanded proofs on an issue that already has been decided, the issue is barred by the application of the law of the case, and discovery on this issue should not be permitted.

## **II. DELAWARE'S ISSUE OF FACT NO. 2. IS NOT RELEVANT.**

Even if Delaware were able to overcome the preclusive effect of the Court's initial ruling, Delaware's issue of fact No. 2 should be stricken because it is not relevant to this case. As the Court's initial order decided, New Jersey's claims are sufficient to establish that there is a controversy between it and Delaware that is of sufficient "seriousness and dignity" to support the exercise of original jurisdiction, *see Mississippi v. Louisiana*, 506 U.S. at 77, and to establish that New Jersey is the real party in interest. Quite simply, Delaware's assertion that other concerns also may have influenced New Jersey's decision to seek relief is irrelevant and improperly seeks to probe the deliberations and mental processes of New Jersey decision makers leading to the

State's filing of an original action authorized by the Governor and Attorney General of New Jersey.

**A. The Nature of the Controversy Between New Jersey and Delaware Shows that New Jersey Is the Real Party in Interest.**

The nature of relief sought by New Jersey makes it clear that New Jersey is the real party in interest in this proceeding. Specifically, New Jersey's Petition asks this Court for relief curtailing Delaware's interference with New Jersey's ability to "continue to exercise riparian jurisdiction of every kind and nature," on its side of the river. (New Jersey's Petition, Prayer for Relief). This claim is clearly that of New Jersey, and can be asserted and resolved only by New Jersey in an action under the Supreme Court's original jurisdiction. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28-29 (1951).

The Supreme Court has rarely declined to exercise original jurisdiction over cases involving the construction of an interstate compact. *Texas v. New Mexico*, 462 U.S. 554, 567-68 (1983) ("If there is a Compact, it is the law of the United States, and our first and last order of business is interpreting the compact.") (citations omitted). An interstate compact not only has the force of federal law, but it also constitutes a contract between the parties. *Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991). New Jersey's contractual rights under the Compact of 1905 can be enforced only by an original action in the Supreme Court; no other forum is available. *West Virginia ex rel. Dyer*, 341 U.S. at 28 ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered between states . . . can be unilaterally nullified, or given final meaning by an organ of one of the contracting states.").

Further, New Jersey's interest in this dispute is not hypothetical or conjectural, nor is its injury speculative or remote. *See Florida v. Mellon*, 273 U.S. 12, 18 (1927). Rather, Delaware's violation of the Compact has manifested itself in Delaware's attempt to assert jurisdiction over



actual projects emanating from New Jersey's shore. It does not follow, however, that New Jersey's suit can be characterized as an action to redress the rights of the private entities involved in such projects. This Court has rejected that argument in other original actions, where private parties had additional or separate interests that may have been advanced as an incident of a state's original action. *See, e.g., Kansas v. Colorado*, 533 U.S. 1, 8-9 (2001) (finding that the State of Kansas, not Kansas farmers, was the real party in interest when Kansas sought damages based on crop losses attributable to Colorado's breach of the Arkansas River Compact); *Colorado v. New Mexico*, 459 U.S. 176, 182 & n.9 (1982) (rejecting New Mexico's contention that Colorado was "improperly suing directly and solely for the benefit of a private individual" when it sought to protect diversions of the Vermejo River).

Here, New Jersey has shown a real injury to its sovereign interests because Delaware's actions have violated New Jersey's contractual rights under the Compact. In addition, New Jersey's Petition has identified a likely adverse impact on the prosperity and welfare of its citizens if Delaware asserts jurisdiction to regulate riparian structures emanating from New Jersey's shore. (NJ Petition ¶ 38.) The impact of one State's actions on the prosperity of another state "affects the general welfare of the State" and thus "rises . . . above a mere question of local private right and involves a matter of state interest." *Kansas v. Colorado*, 206 U.S. 46, 95 (1907) (citing *Georgia v. Tennessee Copper*, 206 U.S. 230 (1907)). Thus, it is clear that New Jersey is the real party in interest.

**B. The Factors Leading a State to File an Original Action Are Not Relevant to the Court's Exercise of its Original Jurisdiction.**

Delaware appears to argue that, if it can show that New Jersey's decision to litigate was driven by an underlying concern with facilitating the BP project, it will disprove New Jersey's justiciable interest in this controversy. This argument ignores New Jersey's sovereign interest in

the enforcement of *its* rights under the 1905 Compact – an interest that the Court recognized when it exercised its original jurisdiction in this dispute. And it ignores the Court’s general unwillingness to inquire into the deliberations leading to a state’s decision to file suit because of the important considerations involved in that decision.

The Court generally does not probe into the mental processes of the state’s decision makers leading to the filing of an original action. Rather, the Court examines a state’s claims objectively to determine whether they meet the test for asserting original jurisdiction. *Arkansas v. Texas*, 346 U.S. at 371 (“We determine whether in substance the claim is that of the State, whether the State is indeed the real party in interest”) (citing *Oklahoma ex rel. Johnson*, 304 U.S. at 392-96). Thus, the Court’s jurisdictional determinations rest on its review of the actual claims presented.<sup>3</sup>

New Jersey acknowledges that BP has an interest that will be advanced by New Jersey’s successful enforcement of the Compact. Delaware law outright prohibits BP’s proposal; on the other hand, if New Jersey prevails in this action, BP will have the opportunity to have its application reviewed under New Jersey law, which does not outright prohibit the proposal. *Compare, e.g.*, Del Code Ann. tit. 7 §§ 7002(f), 7003 (prohibiting “bulk transfer facilities” in Delaware’s coastal zone, except for those in the Port of Wilmington), *with* N.J. Adm. Code 7:7E-7.4(s) (identifying standards relevant to siting LNG facilities in New Jersey’s coastal zone).

Despite some commonality between these interests, however, New Jersey clearly has its own interest in protecting its sovereignty and preserving its right to review and, if appropriate, to

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<sup>3</sup> This is consistent with the common view that the reasons for the institution of an action is not relevant to the subject matter involved. *See Digital Equip. Corp. v. System Indus., Inc.*, 108 F.R.D. 742, 743 (D. Mass. 1986) (citing *Foremost Promotions, Inc. v. Pabst Brewing Co.*, 15 F.R.D. 128, 130 (N.D. Ill. 1953) (finding an inquiry into the motive behind the initiation of a lawsuit to be irrelevant because “(i)t is difficult to see how an inquiry into the circumstances surrounding the instigation of the action could affect the substance of the claim”).

approve a facility under its own regulations, as guaranteed by the Compact. New Jersey's dispute with Delaware will remain an active controversy even if BP obtains all the approvals necessary for its proposed facility, if Delaware continues to assert, as it did in its May 2005 letter to New Jersey precipitating the filing of this action, (NJ Motion to Reopen, App. 21a; NJ Petition ¶ 42; DE Answer ¶ 42), that it has jurisdiction over riparian improvements on New Jersey's side of the Delaware River.<sup>4</sup> Moreover, even if New Jersey prevails in this action, the result will not be the automatic approval of BP's application. *See, e.g.*, N.J. Adm. Code 7:7E-7.4(s). New Jersey simply seeks to enforce its right under the 1905 Compact to review BP's and similar applications free from interference by Delaware. (Motion to Reopen at 1-2.) Thus, New Jersey's claims on their face clearly demonstrate that it seeks adjudication of its own interests, not those of BP or any other entity.

Moreover, Delaware's assertion that it should be able to delve into the mental processes of New Jersey decision makers threatens to intrude upon privileges that this Court has recognized should be protected. For example, the Court has recognized the existence of an attorney work product privilege, and has given special deference to materials that reflect the mental processes or opinions of counsel. *Upjohn Co. v. United States*, 449 U.S. 383, 399-400 (1981). Further, the Court has recognized a deliberative process privilege that permits the government to withhold documents that reflect advisory opinions, recommendations, and

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<sup>4</sup> New Jersey claims an injury by Delaware's assertion of jurisdiction, even where Delaware agrees to grant a permit, as in the case of Fenwick Commons. (NJ Motion to Reopen at 21-22; NJ Petition ¶ 34.)

deliberations comprising part of the process by which the government makes decisions and formulates policies. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).<sup>5</sup>

The thought processes of a state's decision makers are not a relevant inquiry to determine a state's right to maintain an original action. Further, examining the numerous factors relevant to a state's decision to bring an original action would be a completely unnecessary distraction and impermissibly delve into the state's deliberative processes as well as communications or decisions protected by the attorney-client and work-product privileges.

### **III. DISCOVERY CONCERNING THE BP/CROWN LANDING PROJECT OR OTHER PENDING PROJECTS WILL NOT YIELD EVIDENCE RELEVANT TO INTERPRETING ARTICLE VII OF THE 1905 COMPACT.**

Delaware also has identified four issues of fact relating to the "scope and status" of the BP/Crown Landing Project and other pending projects within the Twelve-Mile Circle. (Issues of Fact No. 1, 6, 8, 9) and has stated that it intends to pursue discovery concerning these matters.<sup>6</sup> These issues, however, are irrelevant to the fundamental legal issue in this case: the States'

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<sup>5</sup> The Court's determination to limit inquiry into a prosecutor's use of prosecutorial discretion also is instructive on the question of why an inquiry into the decision to file an original action is not appropriate. Prosecutors are granted "broad discretion" as to whom to prosecute, largely because of the Court's "recognition that the decision to prosecute is particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607 (1985). A decision to prosecute entails the evaluation of "(s)uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan(,)" which "are not readily susceptible to the kind of analysis the courts are competent to undertake." *Id.* In addition, judicial examination of the basis for prosecution is costly, and "delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the government's enforcement policy." *Id.* Therefore, inquiry into the exercise of prosecutorial discretion is limited to the question of whether the decision was made for constitutionally impermissible reasons. *Id.* at 608 (citing *United States v. Batchelder*, 442 U.S. 114, 125 (1979)).

<sup>6</sup> In fact, on March 7 and 8, 2006, Delaware served subpoenas on BP/Crown Landing, seeking various documents regarding the Crown Landing Project.

respective rights under Article VII of the 1905 Compact. Because the “scope and status” of any proposed projects in this area will not assist the Court in its interpretation of the meaning of Article VII, discovery on such matters is unnecessary and should not be permitted.

The fundamental issue in this case is the scope of each States’ jurisdiction under Article VII, not the scope of the BP/Crown Landing Project or other projects that have not received a final determination from New Jersey regulators. The Court’s ruling in this case will determine the scope of each State’s riparian jurisdiction in this area. It will determine whether, as New Jersey argues, New Jersey has exclusive riparian jurisdiction over improvements extending from the New Jersey shoreline into the Delaware River within the Twelve-Mile Circle. It will determine whether, as Delaware argues, the rights granted by Article VII are limited by the scope of projects within the contemplation of the States in 1905. The Court’s ruling will then guide the States’ review of any pending and future projects in this area, and particular projects can then be assessed to determine whether they fall within the exercise of the States’ riparian jurisdiction under the Compact.

A compact is “a contract . . . . It remains a legal document that must be construed and applied in accordance with its terms.” *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (internal quotations and citations omitted). In addition, “congressional consent ‘transforms an interstate compact . . . into a law of the United States’ . . . .” *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)). “Once a compact between States has been approved [by Congress], ‘it settles the line or original right; it is the law of the case binding on the states and its citizens, as fully as if it had never been contested.’” *New Jersey v. New York*, 523 U.S. at 810 (quoting *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 727 (1838)).

“Just as if a court were addressing a federal statute, then, the ‘first and last order of business’ of a court addressing an approved interstate compact ‘is interpreting the compact.’” *New Jersey v. New York*, 523 U.S. at 811 (quoting *Texas v. New Mexico*, 462 U.S. at 567-68); *Virginia v. Maryland*, 540 U.S. 56, 66 (2003). “Accordingly, where the terms of the compact are unambiguous, this Court must give effect to the express mandate of the signatory States.” *Oklahoma v. New Mexico*, 501 U.S. at 245 (Rehnquist, C.J., concurring in part and dissenting in part). Where the Court determines that the terms of a compact are ambiguous, the Court may then consider extrinsic evidence to assist its interpretation of the compact. *Id.* at 236.

In this case, New Jersey argues that the language of Article VII is clear and unambiguous and that interpretation of the 1905 Compact presents a clear issue of law that should be decided its favor. New Jersey recognizes that Delaware disputes this argument and asserts that Article VII is ambiguous. New Jersey also recognizes that, were the Court to conclude that Article VII is ambiguous, it could look to extrinsic evidence such as the legislative history of the Compact, the contemporaneous understanding of the parties to the Compact, and the States’ course of performance under the Compact. *See., e.g., Oklahoma v. New Mexico*, 501 U.S. at 236 (“Thus, resort to extrinsic evidence of the compact negotiations in this case is entirely appropriate.”); *Local 28, Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 466 (1986) (“The agencies’ contemporaneous reading of the statute lends strong support to our interpretation.”); *New Jersey v. New York*, 523 U.S. at 830-31 (Scalia, J., dissenting) (“It is hornbook contracts law that the practical construction of an ambiguous agreement revealed by later conduct of the parties is good indication of its meaning.”); *see also* Report of the Special Master, *New Jersey v. New York*, No. 120, Orig., 1997 WL 291594 at \*15 (filed Mar. 31, 1997) (considering “extrinsic evidence . . . includ[ing] the original record in the 1829-30 *New Jersey v. New York* case; ... precompact

negotiations; pre-Compact and post-Compact related jurisprudence from this Court and the Courts of both States; expert testimony; and written reports”).

Here, information concerning proposed projects simply is not the kind of extrinsic evidence that would be considered in order to clarify any ambiguity in the 1905 Compact, so such information is not relevant to interpreting the language of Article VII and determining the rights of the States under the 1905 Compact. In fact, as Delaware explained in its motion for appointment of a special master, Delaware does not seek information about the “scope and status” of the BP/Crown Landing Project to assist with the interpretation of Article VII. Rather, Delaware seeks such information to show that this Project was beyond the contemplation of the States at the time of the 1905 Compact. (DE Special Master Motion at 9.)<sup>7</sup> Certainly, Delaware is free to argue that the Compact is limited by the contemporaneous understanding of the parties, but it does not need discovery concerning projects under consideration a century after the Compact was drafted to do so.

Further, as a practical matter, even if Delaware were to show a need for information concerning the “scope and status” of the BP/Crown Landing Project, Delaware does not need formal discovery on these issues. Rather, Delaware’s concerns over the “scope and status” of the BP/Crown Landing Project can easily be addressed through public documents that BP/Crown Landing has submitted to New Jersey, Delaware, and the Federal government. As demonstrated by its detailed discussion of the Project in its initial filing with the Court, (*see, e.g.*, DE Opposition at 9-11, 17-21, 139a-143a), Delaware clearly has availed itself of the voluminous public record to obtain information about the “scope and status” of the BP/Crown Landing Project, at least in part because New Jersey made its Crown Landing files available to Delaware

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<sup>7</sup> As discussed above, Delaware now also seeks this information to challenge the Court’s exercise of its original jurisdiction over this dispute. *See* §§ 1 and 2, *supra*.

during the discovery that occurred before the referral of this case to the Special Master. In light of the availability of such information, Delaware cannot claim that it now needs costly and time-consuming discovery on these issues.

### CONCLUSION

For the reasons stated above, New Jersey respectfully requests that the Special Master grant New Jersey's motion to strike Delaware's Issues of Fact No. 1, 2, 6, 8, 9 and to enjoin discovery related to those issues.

Respectfully submitted,

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**In The  
Supreme Court of the United States**

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STATE OF NEW JERSEY,

*Plaintiff,*

v.

STATE OF DELAWARE,

*Defendant.*

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

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 20<sup>th</sup> day of March 2006, counsel for the State of New Jersey caused true and correct copies of the Motion of State of New Jersey to Strike Delaware's Issues of Fact No. 1, 2, 6, 8, and 9 and to Preclude Discovery on These Issues, and Brief in Support of Motion to be served upon counsel for the State of Delaware in the manner indicated below:

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