No. 134, Original

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

On Bill of Complaint

ANSWER OF STATE OF DELAWARE AND MOTION FOR APPOINTMENT OF SPECIAL MASTER

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December 28, 2005

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ANSWER OF STATE OF DELAWARE

The State of Delaware, by its Attorney General and special counsel, and pursuant to this Court's order dated November 28, 2005, hereby treats the Petition for a Supplemental Decree filed by the State of New Jersey on July 28, 2005, in No. 11, Original, as a Bill of Complaint in No. 134, Original ("Complaint"), and for its Answer admits, denies, and alleges as follows:

1. The allegations of paragraph 1 of the Complaint are admitted only inasmuch as that paragraph accurately quotes a portion of the text of the 1935 Decree issued by this Court in No. 11, Original, *New Jersey v. Delaware*, 295 U.S. 694, 698 (1935). To the extent New Jersey intends by setting forth that quotation to allege that the reopening of No. 11, Original is proper, Delaware denies that allegation. This Court denied New Jersey's motion to reopen No. 11, Original, and for a supplemental decree by

Order dated November 28, 2005. *See New Jersey v. Delaware*, 126 S. Ct. 713 (2005).

2. The allegations of paragraph 2 of the Complaint are denied, as Delaware maintains its position that New Jersey cannot demonstrate any concrete injury caused by Delaware sufficient to invoke this Court's original jurisdiction because New Jersey itself has yet to approve B.P. p.l.c.'s ("BP") proposed Crown Landing project under New Jersey's own Coastal Zone Management Rules. Likewise, the Federal Energy Regulatory Commission ("FERC") and other federal agencies have not yet completed their review and could therefore deny permission to construct the proposed project. Wholly apart from that absence of the requisite concrete injury, this Court also lacks jurisdiction because BP, not the State of New Jersey, is the real party in interest. *See generally* Brief of the State of Delaware in Opposition to the State of New Jersey's Motion To Reopen and for a Supplemental Decree at 25-35 (Oct. 27, 2005) ("DE Opp."). Delaware preserves its previously asserted objections to jurisdiction. In addition, Delaware reserves its right to assert other appropriate objections to jurisdiction based on the further evidence to be developed or discovered in this case.

3. Delaware is without knowledge or information sufficient to form a belief as to whether New Jersey's Complaint was filed with the authority of the appropriate New Jersey public officials.

4. Delaware admits only that New Jersey seeks the relief set forth in paragraph 4 of the Complaint; Delaware expressly denies that New Jersey is entitled to such relief as set forth below in this Answer. *See generally* DE Opp.

5. The allegations of the first sentence of paragraph 5 of the Complaint are admitted insofar as the quotation accurately states what this Court wrote in *New Jersey v. Delaware*, 291 U.S. 361, 376 (1934). The second sentence of paragraph 5 of the Complaint is denied. Delaware admits the third sentence of paragraph 5 of the

Complaint. *See id.* at 364 ("Delaware makes the division at the geographical center."). The remaining allegations of paragraph 5 of the Complaint are admitted, except it is denied that Delaware traced its title to the lands within the twelve-mile circle solely to the deed of feoffment and lease on August 24, 1682, from the Duke of York to William Penn. *See id.* at 366 ("On March 22, 1682/3, letters patent under the Great Seal of England were issued to the Duke of York for the identical lands and waters described in the deed of feoffment from York to William Penn. . . . By force of this grant there passed to the Duke of York a title to the land within the circle which inured by estoppel to the grantee under the feoffment.").

6. The allegations of paragraph 6 of the Complaint are denied. This Court's discussion of Delaware's chain of title in *New Jersey v. Delaware*, 291 U.S. 361 (1934), speaks for itself, as does the Court's conclusion that "Delaware's chain of title . . . from the feoffment of 1682 to the early days of statehood . . . has been found to be unbroken." *Id.* at 374.

7. The allegations of paragraph 7 of the Complaint are admitted. New Jersey filed its Bill of Complaint on March 13, 1877, and obtained a preliminary injunction on March 26, 1877, on an incomplete record. Subsequently, after examining all of the facts, the Court unanimously rejected New Jersey's claim to jurisdiction to the middle of the Delaware River and confirmed Delaware's sovereignty over the twelve-mile circle up to the low-water mark on the New Jersey shore. *New Jersey v. Delaware*, 291 U.S. at 384.

8. The allegations of paragraph 8 of the Complaint are admitted, except that Delaware denies New Jersey's alleged characterizations that the Delaware legislature "failed to approve" a compact in 1903 and that, in 1905, the commissioners "quickly agreed" to the same provisions as in 1903.

9. The allegations of paragraph 9 of the Complaint are admitted, insofar as paragraph 9 accurately sets forth Article VII of the Compact of 1905 between New Jersey and Delaware ("1905 Compact" or "Compact") and New Jersey rests its present arguments on that Article. Delaware has offered a preliminary analysis opposing New Jersey's interpretation, *see* DE Opp. 35-75, and reserves the right to submit further analysis.

10. The allegations of paragraph 10 of the Complaint are admitted.

11. The allegations of the first and third sentences of paragraph 11 of the Complaint are admitted, as the 1905 Compact "did not settle the boundary line" between Delaware and New Jersey and Article VI had indeed "left open" disputes concerning oyster beds. Article VII likewise left open the scope of riparian jurisdiction that could lawfully be exercised by each State through, among other things, the use of the phrase "on its own side of the river." In 1934, this Court established the boundary line at the low-water mark on the New Jersey shore, and thus the dividing line between each State's "own side of the river." The allegations of the second and fourth sentences of paragraph 11 of the Complaint are denied. The dispute referred to therein occurred in 1927, and the Court granted leave to file a bill of complaint in 1929. The allegations of the fifth, sixth, and seventh sentences of paragraph 11 of the Complaint are admitted.

12. The allegations of paragraph 12 of the Complaint are admitted.

13. The allegations of paragraph 13 of the Complaint are admitted.

14. Delaware admits that paragraph 14 of the Complaint accurately sets forth selected portions of paragraphs 5, 6, and 7 of the 1935 Decree.

15. The allegations of paragraph 15 of the Complaint are denied, except it is admitted that since the 1800s New Jersey has adopted certain statutes purporting to regulate riparian rights and riparian lands.

16. The allegations of paragraph 16 of the Complaint are admitted only insofar as New Jersey purported to issue the five grants referenced in paragraph 16 between 1854 and 1871. New Jersey purported to issue those grants after the decision in *In re Pea Patch Island*, 30 F. Cas. 1123 (Arb. Ct. 1848), which confirmed Delaware's sovereignty over the twelve-mile circle in an analysis that this Court later praised as a "careful and able statement of the conflicting claims of right." *New Jersey v. Delaware*, 291 U.S. at 373, 377. This Court held that "there can be no legitimate inference that Delaware made over to New Jersey the title to the stream up to the middle of the channel or even the soil under the piers. The privilege or license was accorded to the owners individually and even as to them was bounded by the lines of their possession." *Id.* at 375-76.

17. The allegations of paragraph 17 of the Complaint are denied. The special master appointed by this Court in 1929 noted in his report that the grants referred to in paragraph 17 were "few" and "were all issued, and the improvements erected after the institution of the suit by [New Jersey] against [Delaware] in 1877." *New Jersey v. Delaware*, 55 S. Ct. 934, 954-55 (1935).

18. Delaware presently is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 18 of the Complaint. The allegations of the second sentence of paragraph 18 of the Complaint are denied. New Jersey had no power to "authorize" the construction of structures on Delaware's subaqueous soil. Delaware is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning purported "riparian grants" in the third sentence of paragraph 18 of the Complaint and therefore denies same; moreover, New Jersey had no power to issue riparian grants of Delaware's sovereign lands.

19. The allegations of paragraph 19 of the Complaint are denied, except it is admitted that paragraph 19

accurately sets forth selected portions of the record in the case referred to therein, and that Mr. Southerland, who was one of several counsel representing Delaware in that case, served as the attorney general of Delaware in the 1920s and as the first Chief Justice of Delaware's separately constituted supreme court from 1951 to 1963. New Jersey's reliance on the quoted statements is misplaced for multiple reasons that Delaware has previously set forth, in part, in its Opposition and will elaborate upon further after appropriate discovery. *See* DE Opp. 68-72.

20. The allegations of the first sentence of paragraph 20 of the Complaint are denied, except it is admitted that on December 2, 1957, a private lawyer retained by the State Highway Department, S. Samuel Arsht, Esquire, sent a letter to the State Highway Department concurring with an interpretation of the Compact put forward by DuPont's counsel, without any indication that either counsel was aware of the 1954 Formal Opinion of the New Jersey Attorney General directly contrary to the opinion of DuPont's counsel. The remaining allegations of paragraph 20 of the Complaint are denied, except it is admitted that paragraph 20 accurately sets forth portions of a letter dated December 13, 1957 from an official at the State Highway Department to an official at the U.S. Army Corps of Engineers. The State Highway Department did not adopt Mr. Arsht's concurrence with DuPont's counsel's mistaken interpretation of the 1905 Compact. *See also* DE Opp. 67-68. Delaware has exercised its sovereign right to regulate structures located on its subaqueous soil on many occasions. *See id.* at 61-66.

21. The allegations of paragraph 21 of the Complaint are denied. Delaware has numerous permitting requirements applicable to waterway construction activities including, without limitation, permits relating to coastal zone status, coastal zone consistency, subaqueous lands, water allocation, water discharge, historic preservation, beaches, wetlands, and air quality.

Most but not all of these permitting programs are administered by the Delaware Department of Natural Resources and Environmental Control ("DNREC").

22. The allegations of the first sentence of paragraph 22 of the Complaint are admitted. The remaining allegations of paragraph 22 of the Complaint are admitted to the extent that New Jersey has accurately set forth selected portions of the Delaware Coastal Zone Act ("DCZA").

23. The allegations of the first sentence of paragraph 23 of the Complaint are admitted. The allegations of the second sentence of paragraph 23 of the Complaint are denied. In 1972, New Jersey was made aware of, and voiced no objection to, Delaware's rejection under the DCZA of a proposal by the El Paso Eastern Company to construct a liquefied natural gas processing terminal in Delaware waters off the New Jersey shore. *See* DE Opp. 63 & n.35. Indeed, New Jersey has now functionally conceded that this allegation is incorrect. *See* NJ Reply 6 n.1. Additional investigation and discovery may yield evidence on whether any other applications for a DCZA permit relating to "an improvement appurtenant to the New Jersey shore" have been or should have been made.

24. The allegations of the first sentence of paragraph 24 of the Complaint are admitted. The remaining allegations of paragraph 24 of the Complaint are admitted insofar as paragraph 24 accurately sets forth selected portions of the Subaqueous Lands Act. Delaware began regulating the use of its subaqueous soil within the twelve-mile circle well before the adoption of the Subaqueous Lands Act in 1986; further, New Jersey applied for and obtained a license from Delaware under the Subaqueous Lands Act in 1996, and expressed no objection to Delaware's application of the Subaqueous Lands Act, or its predecessor statutes, until 2005. Delaware has consistently exercised its sovereign right to regulate riparian structures located on its subaqueous soil on many occasions. *See* DE Opp. 61-66.

25. The allegations of the first sentence of paragraph 25 of the Complaint are denied. The remaining allegations of paragraph 25 of the Complaint are admitted. Since 1961, Delaware has issued at least 11 subaqueous land leases and/or permits for the use of Delaware's subaqueous lands within the twelve-mile circle for projects entering Delaware territory from the New Jersey shore. *See* DE Opp. 61-62; DE App. 66a-68a (Maloney Aff. ¶¶ 3-14).

26. The allegations of the first sentence of paragraph 26 of the Complaint are admitted. The allegations of the second sentence of paragraph 26 of the Complaint are denied. BP's proposed structure would extend approximately 2,000 feet into Delaware's sovereign territory. In addition, while New Jersey here claims that BP's proposed facility would require 800,000 cubic yards of Delaware's subaqueous soil to be dredged from the riverbed, *see, e.g.*, NJ App. 135a (Segal Aff. ¶ 4), recent filings by BP with FERC have increased that already enormous dredging estimate by more than 50%, to 1.24 million cubic yards. *See* Berth Design Revision at 1-2, Docket No. CP04-411-000 (FERC filed Dec. 1, 2005).

27. The allegations of paragraph 27 of the Complaint are denied, except it is admitted that paragraph 27 accurately sets forth a portion of a letter dated April 18, 2005, from the New Jersey Board of Public Utilities to FERC. The New Jersey Board's letter also states that "all environmental and safety concerns" should be "adequately addressed."

28. The allegations of paragraph 28 of the Complaint are admitted.

29. The allegations of the first sentence of paragraph 29 of the Complaint are admitted. The remaining allegations of paragraph 29 of the Complaint are denied, except it is admitted that on February 3, 2005, the Secretary of Delaware's DNREC issued a decision concluding that under the DCZA the Crown Landing project was a prohibited "offshore bulk product transfer

facility" and a prohibited "heavy industry," and it is further admitted that paragraph 29 of the Complaint accurately sets forth a selected portion of the Secretary's decision.

30. The allegations of the first and third sentences of paragraph 30 of the Complaint are admitted. The allegations of the second sentence of paragraph 30 of the Complaint are denied. Delaware's Coastal Zone Industrial Review Board ("CZIRB") announced its decision after a lengthy public hearing on March 30, 2005, and issued a detailed written decision and order dated April 14, 2005. *See* DE App. 51a-61a. In its appeal to the CZIRB, BP chose not to argue that Delaware lacked jurisdiction over the project based on the 1905 Compact. In addition, BP chose not to appeal the CZIRB's decision to the Delaware Superior Court, thus forfeiting its right to seek review of that decision by the Delaware Superior Court, the Supreme Court of Delaware, and this Court on writ of certiorari. *See* DE Opp. 32-35.

31. The allegations of paragraph 31 of the Complaint are denied. The 1905 Compact provides that any riparian jurisdiction possessed by New Jersey is limited to jurisdiction exercised within New Jersey's territory, which this Court unanimously held in 1934 extends only to the low-water mark on the New Jersey shore inside the twelve-mile circle. *See* DE Opp. 35-75. Moreover, the 1905 Compact makes clear that New Jersey has no "exclusive" jurisdiction over Delaware's sovereign lands. *See id.* at 56-58. Delaware is not precluded by the 1905 Compact from exercising other forms of jurisdiction within its sovereign territory, such as jurisdiction over how its coastal zone is used. *See, e.g., id.* at 53-56.

32. The allegations of the first sentence of paragraph 32 of the Complaint are admitted. The allegations of the second sentence of paragraph 32 of the Complaint are denied, except it is admitted that paragraph 32 of the Complaint accurately sets forth a portion of a letter dated May 6, 2005. Fenwick Commons agreed that "Delaware is

the owner of ungranted subaqueous lands lying beneath the waters of Delaware Bay." The remaining allegations of paragraph 32 of the Complaint are admitted.

33. The allegations of the second sentence of paragraph 33 of the Complaint are admitted. Delaware is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 33 of the Complaint, and therefore denies same.

34. The allegations of paragraph 34 of the Complaint are denied. *See also supra* ¶ 31.

35. The allegations of the first sentence of paragraph 35 of the Complaint are admitted. The allegations of the second sentence of paragraph 35 of the Complaint are denied to the extent they may be read to assert that six municipalities and two counties of New Jersey possess land within the State of Delaware.

36. The allegations of paragraph 36 of the Complaint are denied. *See also supra* ¶ 31.

37. The allegations of paragraph 37 of the Complaint are denied. *See also supra* ¶ 31.

38. The allegations of paragraph 38 of the Complaint are denied. *See also supra* ¶ 31.

39. The allegations of paragraph 39 of the Complaint are denied. *See also supra* ¶ 31.

40. The allegations of the first sentence of paragraph 40 of the Complaint are admitted; the remaining allegations of paragraph 40 of the Complaint are denied. In 1980, the New Jersey Department of Environmental Protection ("NJDEP") acknowledged in a filing to the United States government that "any New Jersey project extending beyond mean low water must obtain coastal permits from both states." *See* DE Opp. 64. More recently, in 2005, the NJDEP advised BP that its proposed Crown Landing project is "subject to Delaware Coastal Zone Management Regulations" to the extent that it involves "activities taking place from the mean low

water line . . . outshore" from New Jersey. *See id.* at 64-65.

41. The allegations of paragraph 41 of the Complaint are denied, except it is admitted that paragraph 41 accurately sets forth a selected portion of a letter from Paul T. Fader, Chief Counsel to the Acting Governor of New Jersey, Richard J. Codey, dated April 11, 2005. *See also supra* ¶ 31. In any case, Delaware's exercise of its sovereign right to regulate goes beyond mere "riparian jurisdiction" and is therefore not precluded even under New Jersey's erroneous reading of the scope of New Jersey's "riparian jurisdiction" under the 1905 Compact.

42. The allegations of paragraph 42 of the Complaint are admitted. *See also supra* ¶ 31.

43. The allegations of paragraph 43 of the Complaint are denied, except it is admitted that on May 2, 2005, the New Jersey State Assembly adopted a resolution, which speaks for itself, and that paragraph 43 of the Complaint accurately sets forth a selected portion thereof.

44. The allegations of paragraph 44 of the Complaint are denied, except it is admitted that on June 27, 2005, 31 New Jersey legislators introduced a bill that speaks for itself.

45. The allegations of paragraph 45 of the Complaint are denied, except it is admitted that on June 29, 2005, two Delaware legislators introduced a bill that speaks for itself.

AFFIRMATIVE DEFENSES

First Affirmative Defense

New Jersey's claims are barred because this Court either lacks or should decline to exercise jurisdiction.

Second Affirmative Defense

New Jersey's claims are barred by New Jersey's and/or BP's failure to exhaust all state and federal administrative or judicial remedies.

Third Affirmative Defense

New Jersey's allegations fail to state a claim upon which relief may be granted.

Fourth Affirmative Defense

New Jersey's claims are barred by estoppel.

Fifth Affirmative Defense

New Jersey's claims are barred by waiver.

Sixth Affirmative Defense

New Jersey's claims are barred by consent.

Seventh Affirmative Defense

New Jersey's claims are barred by laches.

Eighth Affirmative Defense

New Jersey's claims are barred by the doctrines of severability and unenforceability.

Prayer For Relief

The State of Delaware prays that judgment be entered:

A. Declaring that Delaware has the right, both as sovereign over all territory within the twelve-mile circle and under the 1905 Compact, to enforce its laws, including its coastal zone, environmental protection, and natural resources statutes; that Delaware, in particular, has the right as sovereign in that territory in the enforcement of its laws as they apply to proposals to construct bulk product transfer facilities and/or heavy industry, or otherwise to use or to disturb the subaqueous soil within Delaware's coastal zone;

B. Enjoining New Jersey, its privies, assigns, lessees, and other persons claiming under it, from interfering with the rights of Delaware of, in, or over the Delaware River within the twelve-mile circle, including without limitation the subaqueous soil thereof; and

C. Granting such further relief as this Court may deem just and proper.

Respectfully submitted,

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MOTION FOR APPOINTMENT OF SPECIAL MASTER

Defendant, the State of Delaware, by its Attorney General and special counsel, respectfully moves for the appointment of a Special Master in this action and to refer this matter to him or her with authority to take evidence and to report the same to the Court along with findings of fact, conclusions of law, and recommendations for decree, all to be subject to approval or other disposition by the Court.

Background

In 1929, New Jersey filed a second original jurisdiction action in this Court against Delaware to resolve a long-standing boundary dispute between the two States. After appointment of a special master and the taking of evidence, this Court resolved that controversy in 1934 by adopting the recommendation of the special master and holding in relevant part that the boundary within a

twelve-mile circle about the town of New Castle, Delaware, was at the low-water mark on the eastern (or New Jersey) shore of the Delaware River. *See New Jersey v. Delaware*, 291 U.S. 361 (1934) (Cardozo, J.). The Court thus confirmed Delaware's long-standing claim (dating back to a 1682 grant from the Duke of York to William Penn) to title and thus sovereignty over the Delaware River, including its subaqueous soil, within the twelve-mile circle all the way to the low-water mark on the New Jersey shore; and the Court squarely rejected New Jersey's competing claim of title to the center of the navigable channel within the twelve-mile circle. *See id.* at 364-78. The Court's decree stated that it 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" (herein, the "1905 Compact"), which had addressed disputes between the States other than the boundary dispute. *New Jersey v. Delaware*, 295 U.S. 694, 699 (1935) (No. 11, Orig.).

Relying on that portion of the decree, on July 28, 2005, New Jersey petitioned this Court to reopen No. 11, Original and to issue a supplemental decree. In the alternative, New Jersey asked that its petition be treated as a new bill of complaint. New Jersey's current claim is that Article VII of the 1905 Compact gives New Jersey exclusive "riparian jurisdiction" to approve or deny the proposed erection and/or use of structures extending from the New Jersey shore beyond the low-water mark and thus into Delaware's sovereign territory, and that Delaware has no power to regulate those uses made of its subaqueous soil and the waters above it. The instant dispute arose because Delaware denied a permit sought by a subsidiary of B.P. p.l.c. ("BP") to build a massive liquefied natural gas ("LNG") processing terminal on lands within Delaware's border and subject to Delaware's coastal zone regulations.

Rather than file a traditional bill of complaint, New Jersey initiated this case by filing what was functionally a

motion for summary judgment consisting of 52 pages of legal briefing and a 270-page appendix – half of which consisted of eight newly created affidavits and attachments thereto. *See* Petition for a Supplemental Decree (July 28, 2005) ("NJ Pet."); Brief in Support of Motion To Reopen and for a Supplemental Decree (July 28, 2005) ("NJ Br."). New Jersey argued that the plain language of the 1905 Compact should resolve the case in its favor, *see* NJ Br. 22-27, and that the evidence it had submitted with its brief resolved any material questions of fact in its favor, *see id.* at 27-33. New Jersey then claimed, based on the preceding arguments, that it is unnecessary to appoint a special master. *See id.* at 33-34.

Delaware opposed New Jersey's voluminous filing, arguing that (1) the Court lacks (or should decline to exercise) jurisdiction and (2) New Jersey's claims fail on their merits both because the plain language of the 1905 Compact resolves the dispute in Delaware's favor and, in any case, because the evidence developed at this very early stage of the case showed that New Jersey's claims have no merit. *See* Brief of the State of Delaware in Opposition to the State of New Jersey's Motion To Reopen and for a Supplemental Decree (Oct. 27, 2005) ("DE Opp."). New Jersey filed a reply brief and supplemental appendix, which included still further evidentiary submissions. *See* Reply Brief and Supplemental Appendix in Support of Motion To Reopen and for a Supplemental Decree (Nov. 8, 2005) ("NJ Reply").

After considering those pleadings, on November 28, 2005 this Court denied New Jersey's motion to reopen No. 11, Original but granted New Jersey's alternative request to treat its Petition for a Supplemental Decree as a bill of complaint. *See New Jersey v. Delaware*, 126 S. Ct. 713 (2005). The Court therefore docketed a new case – No. 134, Original – and gave Delaware 30 days within which to file its answer.[1] Delaware files this Motion for

[1] The full text of the Court's November 28, 2005 order is as follows: "The motion to reopen and for supplemental decree is denied. The

Appointment of a Special Master concurrently with its Answer to Bill of Complaint.

Discussion

"The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas*, 339 U.S. 707, 715 (1950). The question whether Delaware continues to have regulatory authority over substantial portions of its own sovereign territory or is powerless to prevent New Jersey from unilaterally placing a massive LNG bulk transfer facility on Delaware soil is certainly one of "high public importance." The dispute now launched by New Jersey arises out of the 1905 Compact, which the States entered into after New Jersey first filed litigation in this Court against Delaware more than a century ago to resolve certain rights pertaining to the boundary between the two States.

As this new suit now comes to this Court, a complete set of the previous litigation records in the previously filed actions by New Jersey is still being compiled and the historical record of riparian uses and exercises of state jurisdiction over such projects is still being researched. Moreover, the history and purposes behind the States' use of certain language in the 1905 Compact is still being investigated. Because the dispute at the heart of New Jersey's complaint requires scrutiny of such litigation records, the development of historical facts (that include different state agency archival materials), and a proper understanding of the legal concepts the parties chose to employ in the 1905 Compact, a special master would be especially helpful in directing the parties' discovery

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alternative motion for leave to file a bill of complaint is granted. The defendant is allowed 30 days within which to file an answer. This proceeding shall be docketed as Case No. 134, Original." 126 S. Ct. at 713.

efforts, refining the issues for this Court's consideration, and offering a recommended disposition of the case.

This Court routinely appoints a special master in cases involving disputes between two States about the meaning of an interstate compact or their respective rights to use the waters of an interstate waterway. *See, e.g., Kansas v. Colorado*, 543 U.S. 86 (2004); *Virginia v. Maryland*, 540 U.S. 56 (2003); *New Jersey v. New York*, 523 U.S. 767 (1998); *Oklahoma v. New Mexico*, 501 U.S. 221 (1991); *Texas v. New Mexico*, 482 U.S. 124 (1987); *see also Nebraska v. Wyoming*, 515 U.S. 1 (1995) (appointing a special master in a case brought by Nebraska to enforce a 1945 decree by this Court); Robert L. Stern, *et al.*, *Supreme Court Practice* § 10.12, at 576 (8th ed. 2002) ("*Supreme Court Practice*").

Indeed, in the only other instance of which we are aware in which a complainant filed a motion for summary judgment before its motion to file a bill of complaint was granted, the Court appointed a special master after denying summary judgment and granting leave to file the complaint. *See Illinois v. Michigan*, 359 U.S. 963 (1959) ("The motion to advance and for summary judgment is denied. The case is set for argument on the motion for leave to file the complaint."); *Wisconsin v. Illinois*, 360 U.S. 712, 714 (1959) (granting leave to file bill of complaint and appointing special master); *Supreme Court Practice* § 10.12, at 575 n.37 (discussing these cases and explaining that "[w]e know of no other motion for summary judgment prior to filing a complaint in an original case"). This Court's well-settled policy of respecting the sovereign rights of a State by "allowing full development of the facts" on matters of "high public importance" thus strongly counsels in favor of appointing a special master. *United States v. Texas*, 339 U.S. at 715. A special master would be best positioned to consider in the first instance, for example, the extensive historical evidence that each State could be expected to put forward as to the following subjects.

Drafting History of the 1905 Compact. The informal discovery propounded by both parties in the short amount of time since this case was filed revealed virtually no documents pertaining to the drafting of the 1905 Compact. It cannot be presumed, however, based on those limited investigations, that no such documents still exist given the historical importance of the 1905 Compact. For example, Delaware plans to search archives, museums, the papers of key participants, and other historical sources that it has not yet had time to investigate. Delaware will also further search its own state files, and will request that New Jersey do the same. Such documents, if they can be found, may be critical to resolving any issues of disputed fact over the proper interpretation of the 1905 Compact.[2]

New Jersey v. Delaware, No. 1, Original, filed 1877. The relevant history of the present dispute dates back even farther than the 1905 Compact. As New Jersey itself explained, the execution of the 1905 Compact terminated the need for litigation concerning fishing

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[2] In its reply brief, New Jersey asserted that the special master in No. 11, Original already compiled all of the evidence of the drafters' intent at the time they signed the Compact, citing portions of only two of the 854 exhibits from that case. *See* NJ Reply 28 (citing Record, No. 11, Orig., Pl. Ex. 161, at 25-45; *id.*, Ex. 162, at 13-20). The cited exhibits consist of state legislative documents authorizing the appointment of commissioners to negotiate what became the 1905 Compact, ratifying the final product, and authorizing commissioners to draft the uniform fishing laws called for in Article IV of the executed 1905 Compact; and a 1907 report by those commissioners on uniform fishing laws. They thus shed little, if any, light on the actual drafting process, or on how the drafters interpreted the language of Article VII. Moreover, No. 11, Original concerned a dispute over the boundary, and not interpretation of Article VII of the 1905 Compact, so the primary focus of the evidentiary record compiled in that case concerned the chain of Delaware's title dating back to 1682. Accordingly, there is no reason to think the parties would have focused on the drafting history of the 1905 Compact to compile anything approaching a complete record on that issue. Delaware believes that the parties should be able to uncover more relevant evidence on the drafting history of the 1905 Compact through further investigation directed to that specific issue.

rights in the Delaware River, which New Jersey had commenced by filing suit against Delaware in this Court in 1877 following a fishing dispute that had arisen in 1871. *See* NJ Pet. ¶¶ 7-8; NJ Br. 5-6. The positions taken by the States in No. 1, Original may therefore provide an important context for interpreting the 1905 Compact. Indeed, Delaware only recently learned that New Jersey in that case appeared to be claiming only concurrent jurisdiction within the twelve-mile circle – a claim that is inconsistent with its current, far-reaching claim that the 1905 Compact settling that dispute gave New Jersey exclusive jurisdiction.

A special master would be well-positioned to weigh the parties' competing factual claims based on the drafting context provided by No. 1, Original and to recommend findings of fact for this Court's consideration. In any case, Delaware has been able to perform only a limited review of the record in that case currently available to it and is still attempting to obtain the entire record. Moreover, it is Delaware's understanding from this Court's library that substantial portions of the record in that case are missing. Delaware is currently pursuing other avenues of obtaining copies of that record but has not yet been successful in finding it.

Legal Context of the 1905 Compact. Another critical element of this case is the state of the law of waters and of riparian rights as the drafters would have understood them in the years leading up to 1905. While Delaware was able to investigate that subject to some degree in its brief in opposition to New Jersey's Motion To Reopen and for a Supplemental Decree, this case would benefit from additional research and investigation. In addition, the Court might benefit from the opinions of expert witnesses on water law, and a special master would be best situated to manage the development of those expert opinions.

Parties' Course of Conduct from 1905 to the Present. The parties have adduced some evidence of their respective courses of conduct in purporting to regulate

structures and activities carried out on Delaware's subaqueous soil. Formal discovery is necessary, however, to ensure that all relevant evidence is found and analyzed – tasks well-suited to the fact-finding function of a special master. Although the parties have exchanged some documents pursuant to informal discovery and briefed the course of conduct issue to an extent in their prior submissions, Delaware believes there is more to discover. In addition to independent investigations and deeper searches of state files, it will almost certainly be necessary for Delaware to undertake third-party discovery to obtain a fuller record than is available solely from state archival materials. New Jersey's initial filing also contained multiple assertions of its exercise of riparian jurisdiction based on New Jersey laws dating back to 1851. *See* NJ Br. 8-10. Delaware would seek to take discovery and to investigate further the accuracy and completeness of those assertions.[3]

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[3] Although New Jersey has claimed that the record in No. 11, Original is complete on that score through 1933, *see* NJ Reply 28-29, that should not preclude further investigation into events from those years. No. 11, Original focused on the boundary dispute, not on how the parties performed under the 1905 Compact. Thus, while the parties did adduce some evidence of riparian acts, it was for the purpose of adjudicating New Jersey's claim of prescription (which this Court rejected) and not for interpreting the "riparian jurisdiction" language in Article VII of the 1905 Compact. *See New Jersey v. Delaware*, 291 U.S. at 375-77. Accordingly, there could well be additional evidence from those years uniquely relevant to the current dispute but omitted from the record of the boundary dispute. New Jersey also contends that evidence of course of performance for the years after 1933 is not necessary because the evidence submitted by New Jersey in its current filings "demonstrates that there is nothing of consequence in Delaware's favor that could materially change the conclusion" New Jersey seeks to have this Court draw. NJ Reply 29. The evidentiary record, however, plainly cannot be limited to what New Jersey submitted as part of its own advocacy. Rather, Delaware deserves its day in court and to have this case decided on a full evidentiary record. Given the significance of this Court's resolution of this dispute for the States' conduct well into the future, Delaware's position is that this case should be decided based on all of the relevant historical facts.

Status and Scope of BP's Proposed Project. Delaware will also seek discovery on the extent of BP's proposed project, which appears to present a moving target. For example, while New Jersey's affiant in this case has reported that BP's proposed facility would require 800,000 cubic yards of Delaware's subaqueous soil to be dredged from the riverbed, *see, e.g.*, NJ App. 135a (Segal Aff. ¶ 4), more recent filings by BP with the Federal Energy Regulatory Commission ("FERC") have increased that already enormous dredging estimate *by more than 50%*, to 1.24 million cubic yards. *See* Berth Design Revision at 1-2, Docket No. CP04-411-000 (FERC filed Dec. 1, 2005). As this example illustrates, discovery is necessary to reveal the true nature and scope of BP's LNG facility and the activities proposed to be conducted within Delaware. Such discovery is important to the legal claims of New Jersey because the BP project dwarfs anything that might have been contemplated by the parties at the time the 1905 Compact was being drafted and ratified.

It would be particularly unfair to Delaware to treat this long-standing dispute between the two States as suitable for resolution without further factual and legal development. Each of the prior original actions brought by New Jersey has involved extensive work between the two parties so that the Court could achieve a just resolution of the issues. Given the long span of time in which boundary-related disputes have arisen between the two States, New Jersey simply cannot justify its request to bypass this Court's normal process for resolving a controversy of this type. The only entity that would benefit from such speedy treatment is BP, and this Court has never allowed the short-term commercial interests of a corporation to dictate the manner in which it resolves a historic dispute between two States.

Conclusion

For the foregoing reasons, the Court should grant Delaware's motion for appointment of a special master.

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