No. 134, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

BRIEF IN OPPOSITION TO DELAWARE'S MOTION FOR APPOINTMENT OF SPECIAL MASTER

PETER C. HARVEY
Attorney General

RACHEL J. HOROWITZ*
Deputy Attorney General

Of Counsel
GERARD BURKE
Assistant Attorney General
JOHN R. RENELLA
Deputy Attorney General

On the Brief
WILLIAM E. ANDERSEN
AMY C. DONLON
DEAN JABLONSKI
EILEEN P. KELLY
Deputy Attorneys General

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

* *Counsel of Record*

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

STATUTES, REGULATIONS AND RULES

LEGISLATIVE MATERIALS

ADMINISTRATIVE MATERIALS

Federal Energy Regulatory Commission:

SUMMARY OF ARGUMENT

The Court's object in original cases is to have the parties, "as promptly as possible, reach and argue the merits of the controversy presented." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). Although the Court frequently appoints a special master, it has also chosen not to do so in cases where the Court was fully capable of resolving the dispute after briefing and argument. This is such a case.

New Jersey is entitled to judgment in its favor because Article VII of the Compact unambiguously confers exclusive State riparian jurisdiction on New Jersey; because Delaware is judicially estopped from claiming otherwise due to its litigation position in *New Jersey v. Delaware*, 291 U.S. 361 (1934) (No. 11, Orig.); and because this Court's decision in *Virginia v. Maryland*, 540 U.S. 56 (2003), provides clear guidance to resolve the issues presented. New Jersey has already responded fully and voluntarily to Delaware's discovery, and Delaware cannot identify any material issue of fact that is disputed, or specify how any further discovery is likely to reveal any such disputed material fact. Consequently, the Court should decide this case without appointing a special master.

I. THE COURT DOES NOT REQUIRE A SPECIAL MASTER IN CASES THAT CAN BE DECIDED BY THE COURT ON THE EXISTING RECORD AFTER ARGUMENT.

In its Motion to Reopen and for a Supplemental Decree, New Jersey asked that this case be decided on its merits, without the appointment of a special master. The Court decided to treat this matter as a new action, but left

open the question of how this action was to proceed beyond the filing of an Answer by Delaware. Delaware now moves for the appointment of a special master. Delaware, however, advances no factual issues calling for further discovery or the introduction of extrinsic evidence. Therefore, Delaware's motion should be denied.

This Court's "object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented." *Ohio v. Kentucky*, 410 U.S. at 644. To this end, the Court will, where feasible, "dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear." *Id.*

While it is true that the Court frequently appoints a special master in original actions, it has proceeded directly to final decision where warranted. For example, in *United States v. Texas*, 339 U.S. 707 (1950) (No. 13, Orig.), the United States invoked this Court's original jurisdiction to establish its exclusive ownership of the marginal sea in the Gulf of Mexico, which lies below the low-water mark on the Texas coast. Although the Court had decided similar cases in favor of the United States, *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950), Texas argued that the unique sovereignty enjoyed by the Republic of Texas prior to admission to the Union warranted a different result. 339 U.S. at 712-14.

Texas urged the appointment of a special master "to take evidence and report to the Court." *Id.* at 712. The Court denied Texas's request, reasoning that it could decide the case on the basis of the "equal footing" doctrine, which

had been applied to resolve questions of ownership of the marginal sea in *California* and *Louisiana*. *Id.* at 716-20.

Similarly, the Court resolved *New Hampshire v. Maine*, 532 U.S. 742 (2001) (No. 130, Orig.), without appointing a special master. In response to a motion by Maine to dismiss its complaint, New Hampshire argued that the determination as to the correct historical border between the States "cannot properly be made on the record submitted by Maine . . . ." *See* Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss, *New Hampshire v. Maine*, No. 130, Orig., 2000 WL 33323606 *1 & n. 1 (U.S. Oct. 10, 2000). New Hampshire further requested that, if the Court determined that the issue of res judicata could not be decided without reference to disputed evidence, the motion "be submitted to a master for hearing with leave granted to Maine to renew its motion after hearing." *Id.* Nevertheless, the Court ruled on the merits of Maine's motion, holding that New Hampshire was judicially estopped from claiming that its boundary in the Piscataqua River ran along Maine's shoreline because New Hampshire had taken a contrary litigating position in the 1970s in Original, No. 64. *New Hampshire v. Maine*, 532 U.S. at 755.

The Court should follow the same procedure here because this case can be decided based on the unambiguous language of Article VII of the Compact of 1905, as interpreted in light of the clear guidance provided by the Court's recent decision in *Virginia v. Maryland*, 540 U.S. 56.

II. NEW JERSEY IS ENTITLED TO JUDGMENT, AND A SPECIAL MASTER IS NOT REQUIRED, BECAUSE NO MATERIAL FACTS ARE IN DISPUTE AND NO FURTHER DISCOVERY IS NEEDED.

Delaware characterizes New Jersey's opening motion in this action, together with its accompanying affidavits, as "functionally a motion for summary judgment . . . ." (Del. Mot. at 2-3). Indeed, New Jersey's request for relief, like a case for summary judgment, presents no disputes of material fact and can be resolved as a matter of law. Summary judgment motions are proper and not uncommon in original action cases. *See, e.g., United States v. Alaska*, 503 U.S. 569, 575 (1992); *see also Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993) (No. 108, Orig.) ("although not strictly applicable, Rule 56(c) of the Federal Rules of Civil Procedure and our precedents construing that Rule serve as useful guides."); *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 278 (1982) (No. 89, Orig.) ("No essential facts being in dispute, a special master was not appointed and the case was briefed and argued.")

Summary judgment is permissible "at any time after the expiration of 20 days from the commencement of the action." Fed. R. Civ. P. 56(a). A motion for summary judgment will not be defeated by mere speculation on the part of the opposing party that that it might, after discovery, establish facts entitling it to relief. *E.g., Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 1389 (Fed. Cir. 1989). A party opposing summary judgment is required to demonstrate by affidavit that summary judgment is inappropriate, either because material facts are disputed, or

because the party is presently unable to "present by affidavit *facts essential* to justify [that party's] opposition." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 n.6 (1986) (quoting Fed. R. Civ. P. 56(f) (emphasis added)). Such an opposition must demonstrate "a plausible basis for the movant's belief that previously undisclosed or undocumented facts exist . . . and that, if obtained, there is some credible prospect that the new evidence will create a trialworthy issue." *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26, 44 (1st Cir. 1998).[1]

Although Delaware urges the need for a special master, it has failed to point to any issues of disputed fact or ambiguities in the language of the Compact of 1905 that require resort to extrinsic evidence. To the contrary, the materials that Delaware seeks to discover with the assistance of a special master are neither necessary nor useful to the task of interpreting the Compact's clear and unambiguous terms. It is therefore appropriate to proceed to a determination of this issue without the appointment of a special master.

[1] *See also, e.g., Keebler*, 866 F.2d at 1389 ("If all one had to do to obtain a grant of a Rule 56(f) motion were to allege possession by movant of 'certain information' and 'other evidence,' every summary judgment decision would have to be delayed while the non-movant goes fishing in the movant's files.").

A. Because the 1905 Compact is Unambiguous, Extrinsic Evidence Is Unnecessary for a Determination on the Merits.

When Congress ratified the Compact of 1905, 34 Stat. 858 (1907), that compact was "'transform[ed] . . . 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)). "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. 554, 567-68 (1983); *Virginia v. Maryland*, 540 U.S. at 66.

Where a Compact is unambiguous, its legislative history and evidence of the parties' subsequent course of performance are irrelevant. *See Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991); *see also New Jersey v. New York*, 523 U.S. at 784 n.6. New Jersey has previously briefed its position that the 1905 Compact unambiguously granted New Jersey exclusive riparian jurisdiction along its own shoreline (N.J. Br. 24-27; N.J. Rep. Br. 11-19), and that the legislative history and course of performance evidence, although helpful to New Jersey's position, is immaterial (N.J. Rep. 19-28.)

B. Delaware Has Engaged in Ample Fact Finding Already and Has Failed to Specify How Any Further Discovery Will Make a Difference.

New Jersey voluntarily provided extensive discovery in response to twenty-three separate document requests propounded by Delaware. (*See* Ex. A, Letter from Rachel

Horowitz, New Jersey Deputy Attorney General, to Max Walton, Special Counsel for Delaware, dated Oct. 19, 2005, at App. 1a-7a). The topics were wide-ranging, including the 1905 Compact (No. 21), wharfing and use of subaqueous lands within the Twelve-Mile Circle (Nos. 17-18), files for specific projects (Nos. 1-12), and communications between New Jersey and Delaware concerning activities within the Twelve-Mile Circle (No. 12). On October 21, 2005, New Jersey forwarded its Record and Transcript in *New Jersey v. Delaware I* (No. 1, Orig.), in response to a verbal request on behalf of Delaware made during New Jersey's production of documents on October 5-6, 2005. (*See* Ex. B, Letter from Rachel Horowitz, New Jersey Deputy Attorney General, to Matthew Boyer, Esq., Special Counsel for Delaware, dated October 21, 2005, App. at 8a-9a.)

In its October 27, 2005 brief, Delaware complained not that New Jersey had withheld anything from Delaware, but that Delaware had not yet had an opportunity to review the "significant amount of documents" that New Jersey provided. (Del. Br. 76 n.42.) Delaware has now had that opportunity, but is unable to specify how any further discovery will generate any particular material issue of fact precluding judgment for New Jersey.

Delaware offers several examples of work in progress to justify the need for further delay, discovery, and the appointment of a special master. None of its arguments is persuasive. First, Delaware says it is "still" compiling the "previous litigation records in the previously filed actions by New Jersey . . . ." (Del. Mot. 4). However, notwithstanding this claim, Delaware's Lodging, filed on October 28, 2005, copied liberally from the record in both Original, No. 1 and Original, No. 11. The Delaware State Archives also

maintains copies of the transcript and exhibits in Original, No. 11,[2] as do both the New Jersey State Library[3] and the National Archives.[4] Delaware has had ample time to "compile" the previous litigation record since New Jersey filed its opening brief here more than five months ago.

Second, Delaware claims it wants more time to scour other archival files and library sources to uncover additional history relating to the 1905 Compact. (Del. Mot. 6.) Delaware says that "[s]uch documents, *if* they can be found, may be critical to resolving *any* issues of disputed fact over the proper interpretation of the 1905 Compact." (*Id.*) (emphasis added).

This request lacks merit because Delaware has failed to point to "any issues of disputed fact" or any ambiguity in the language of the Compact that requires resort to extrinsic documents. In addition, the history of the 1905 Compact is already well known to the States, and Delaware has not pointed to any specific material gaps in that knowledge that require further historical research to understand the plain language of the agreement. The respective New Jersey and Delaware legislative enactments relating to the Compact are a matter of public record. The principal documents were

---

[2] *See* Delaware Public Archives Record Group 0750, Subgroup 000, Series 001 (New Jersey Versus Delaware Boundary Suit Exhibits).

[3] New Jersey-Delaware Boundary Case, New Jersey State Library, Call No. 974.90 B765, 1934 (19 vols.).

[4] United States National Archives & Records Admin., Record Group 267, Boxes 155-165 (*New Jersey v. Delaware,* No. 11, Orig.).

included in Exhibits 161 and 162 in Original, No. 11. Exhibit 161 specifically included the report of the New Jersey commissioners. (*See* N.J. Supp. App. 27a.) The Delaware Commissioners' report also exists. *See* Del. Sen. Journal 898 (1903). The legislative history relating to Congress' ratification of the Compact is also a matter of record. *See* H.R. Doc. No. 59-43 (1905); S. Doc. No. 59-260 (1906); H.R. Rep. No. 59-6440 (1907); Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907).

Delaware fails to explain what other legislative history it expects to find, what Delaware thinks that will show, or how it could alter the plain language of the Compact. Even assuming for the sake of argument that the Compact were ambiguous, and assuming that Delaware could unearth previously undiscovered correspondence from the Compact's drafters, "[i]t is beyond cavil that statements allegedly made by, or views allegedly held by, 'those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body,' are of little use in ascertaining the meaning of compact provisions." *Oklahoma v. New Mexico*, 501 U.S. at 236 (quoting *Arizona v. California*, 292 U.S. 341, 360 (1934)).

Third, Delaware argues that further delay is required because it might wish to proffer "the opinions of expert witnesses on water law." (Del. Mot. 7.) That argument too should be rejected. Neither this Court nor lower federal courts will defer to the legal opinions offered by a party's "expert" on the proper interpretation of a statute or the contours of American law. *E.g., Edwards v. Aguillard*, 482 U.S. 578, 595-96 (1987); *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997) (collecting cases); *Crow Tribe*

of Indians v. Racicot, 87 F.3d 1039, 1045 (9th Cir. 1996) ("Expert testimony is not proper for issues of law."); *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988) ("There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge . . . . To allow anyone other than the judge to state the law would violate the basic concept.") (internal quotation marks, citation omitted; alteration in original).

Fourth, Delaware says it wishes to take discovery concerning New Jersey's riparian grants in the Twelve-Mile Circle. (Del. Mot. 8.) However, Special Master Rawls compiled the evidence of New Jersey grants from 1854 through 1929, including witness testimony about most of them, as part of the record in Original, No. 11. (N.J. App. 30a-47a.) The first five riparian grants, from 1854 through 1871, were embodied in acts of the New Jersey legislature. (N.J. App. 31a-33a.) The next 37 -- dating from 1883 through 2001 -- consist of instruments that were recorded in the New Jersey Bureau of Tidelands Management. (*Id.*, 34a-50a.)

New Jersey already produced its files to Delaware last September (*see* Ex. A (Nos. 17-18) at App. 5a), and Delaware has failed to explain how any further discovery concerning these grants could generate a disputed issue of material fact relevant to determining whether Article VII of the 1905 Compact gave New Jersey exclusive State riparian jurisdiction on the New Jersey side of the River. Further discovery would be a waste of time, particularly since Delaware concedes that it did not grant any rights on the New Jersey side of the River at any time prior to 1962. (Del. App. 66a ¶ 3; Del. Ans. ¶ 25.)

Finally, Delaware claims that further delay is needed because it wants discovery about the "true nature and scope" of BP's Crown Landing project. (Del. Mot. 9.) This case, however, is not about whether the BP/Crown Landing Project is in the public interest or should be constructed. That determination will be made by FERC, other responsible federal agencies, and New Jersey, if it prevails. In addition, Delaware's concerns can continue to be considered through the federal permitting process.[5] The question presented here is simply whether the Compact of 1905 conferred upon New Jersey exclusive State riparian jurisdiction over improvements on the New Jersey side of the Delaware River. The Court is fully capable of resolving that question on the existing record after argument.

Moreover, Delaware already is fully informed about the size, nature and scope of the Crown Landing project, from many sources. New Jersey answered Delaware's document requests about the project. (Ex. A (Nos. 1, 15) at 1a, 4a.) Delaware is currently a party intervenor in the federal regulatory review of the project being conducted by the Federal Energy Regulatory Commission ("FERC") under § 3(a) of the Natural Gas Act,[6] has access to FERC's

[5] If New Jersey prevails here, the federal permitting process will continue to provide Delaware with a satisfactory, impartial forum in which to raise any concerns it may have about the construction of particular improvements appurtenant to the New Jersey shoreline. *Accord, City of Milwaukee v. Illinois*, 451 U.S. 304, 326 (1981) ("The statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit-granting process").

[6] *See* Motion to Intervene For Party Status of Delaware Department of Natural Resources & Environmental Control Re Crown

electronic library,[7] and continues to be an active participant in the federal regulatory review.[8] Delaware also conducted its own regulatory review of the project when it refused to issue its coastal zone act permit for the pier. (Del. Br. 14-15.) Thus, Delaware's claim that it needs to take more discovery about the project is meritless.

Delaware lastly accuses New Jersey of seeking a speedy resolution of this case in order to facilitate the construction of the Crown Landing project. (Del. Mot. 9.)[9] New Jersey, however, simply seeks to avoid the delay and needless expense that would result from unnecessarily prolonging a matter than can be resolved without further discovery. *See Ohio v. Kentucky*, 410 U.S. at 644.

Landing, FERC Docket CP04-411-000 (filed Oct. 14, 2004). *See also* 18 C.F.R. § 385.214(a)(2) (2005) (intervention of right by state agencies).

[7] The docket and contents of all public records may be viewed at http://elibrary.ferc.gov/idmws/docket_search_consol.asp, by entering "CP04-411" in the "Docket Number" field.

[8] *E.g.*, Letter of John Hughes, Secretary, Delaware Department of Natural Resources and Environmental Control, to Magalie R. Salas, Federal Energy Regulatory Commission, at 2, dated June 7, 2005, FERC Docket CP04-411-000 (filed June 28, 2005) ("It is our expectation that FERC will take very seriously not only our jurisdiction over this project but our denial of the Coastal Zone Permit required under Delaware law, and will therefore withhold approval of the project.").

[9] Although the project is supported by the New Jersey Board of Public Utilities as a means to increase the "vital" supply of natural gas to New Jersey (N.J. Br. 13), Delaware's refusal to allow sediment sampling in the riverbed has prevented the New Jersey Department of Environmental Protection from completing its own regulatory review of the project (N.J. Rep. Br. 8).

C. This Court's Decision in *Virginia v. Maryland* Effectively Resolved the Issues Raised Here.

A special master is also unnecessary in this case because, as New Jersey has previously explained, the Court's decision in *Virginia v. Maryland,* 540 U.S. 56, provides controlling legal guidance. (*See* N.J. Rep. Br. 14-19.) Article VII of the 1905 Compact sets forth its jurisdictional grants even more clearly than did its counterpart in the Virginia-Maryland Compact of 1785. The 1785 Compact granted the "citizens" of both States "full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements," *id.* at 62, and said nothing expressly about Virginia's riparian jurisdiction. Nonetheless, this Court held that the 1785 Compact, "which governs the rights of the Commonwealth of Virginia," conferred *exclusive* riparian jurisdiction on Virginia over projects extending across the Potomac River boundary into Maryland. *Id.* at 79 (declaring Virginia's right to construct improvements and withdraw water "free of regulation by Maryland"). The 1905 Compact, by contrast, *explicitly* granted New Jersey, "on its own side of the river," the right "to continue to exercise riparian jurisdiction of every kind and nature . . . ." (N.J. App. 5a.)

Virginia v. Maryland also definitively addressed the affirmative defenses of estoppel, waiver, consent and laches that Delaware has raised in its answer. (Del. Ans. 12.) Maryland raised the same affirmative defenses, all of which

are variants of the doctrine of "prescription and acquiescence."[10] This doctrine requires the party invoking it to prove "a long and continuous . . . assertion of sovereignty" and the other State's "acquiescence in her prescriptive acts." 540 U.S. at 76 (quoting *New Jersey v. New York*, 523 U.S. at 807). In *Virginia v. Maryland,* the Court observed that the period of time for Maryland's prescriptive acts was arguably too short as a matter of law, but ruled that Virginia, in any case, had asserted her compact rights in the mid-1970s, which alone was sufficient to defeat Maryland's claim. *Id.* at 76-79.

Judgment in favor of New Jersey is proper because Delaware's defenses fail as a matter of law and can be decided on the basis of undisputed material facts. First, this Court's decisions in cases like *Virginia v. Maryland* provide an ample basis upon which to conclude that Delaware's claims of prescription and acquiescence are premised on a period of time that is legally too short. Although the Court has not established a minimum time period, the period must be "substantial." *Id.* at 76; *New Jersey v. New York*, 523 U.S. at 786. Most cases applying the doctrine have involved

---

[10] Maryland argued that Virginia had acquiesced in hundreds of permits and authorizations issued by Maryland to Virginia municipalities and citizens from 1957 through 2000, without any objection from Virginia; that Virginia had never had its own permitting system; and that Virginia officials had even participated in Maryland's development in 1987 of a tidal wetlands licensing requirement for Virginia riparian owners. Report of the Special Master at 82-92, *Virginia v. Maryland,* No. 129, Orig. (Dec. 9, 2002); *see also Virginia v. Maryland*, 540 U.S. at 76.

periods approaching or exceeding 100 years.[11] In *New Jersey v. New York*, the Court observed that a period of 60 years was "enough to open the door to litigation . . . ." 523 U.S. at 790. In *Virginia v. Maryland*, in which the period was 43 years (1957-2000), the Court said that "only once before have we deemed such a short period of time sufficient to prove prescription in a case involving our original jurisdiction. *See Nebraska v. Wyoming*, 507 U.S. 584, 594-595 (1993) (41 years)." 540 U.S. at 77. The Court cautioned, however, that because an alternative basis supported the decision in *Nebraska v. Wyoming*, "it is far from clear that such a short prescriptive period is sufficient as a matter of law." *Id.*[12]

In this case, Delaware concedes that it did not issue any grant or lease for any improvement on the New Jersey

---

[11] *See Georgia v. South Carolina*, 497 U.S. 376, 391-93 (1990) (160 years); *California v. Nevada*, 447 U.S. 125, 126-32 (1980) (80 years); *Ohio v. Kentucky*, 410 U.S. at 645-52 (151 years); *Arkansas v. Tennessee*, 310 U.S. 563, 566, 569-72 (1940) (114 years); *Vermont v. New Hampshire*, 289 U.S. 593, 615-20 (1933) (121 years); *Maryland v. West Virginia*, 217 U.S. 1, 41-44 (1910) (103 years); *Louisiana v. Mississippi*, 202 U.S. 1, 53-58 (1906) (90 years); *Virginia v. Tennessee*, 148 U.S. 503, 505, 524 (1893) (85 years); *Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591, 638 (1846) (125 years).

[12] New Jersey reserves the right to argue that the doctrine of prescription and acquiescence is unavailable to divest a State of a federally approved compact right. *See, e.g., New Jersey v. New York*, 523 U.S. at 811 ("'unless the compact to which Congress has consented is somehow unconstitutional,' no court may order relief inconsistent with its express terms, no matter what the equities of the circumstances might otherwise invite.") (*quoting Texas v. New Mexico*, 462 U.S. 554, 564 (1983)).

side of the River until 1962. (Del. Ans. ¶ 25; Del. App. 66a.) Moreover, Delaware's activities in 1962 and 1963 are irrelevant, because they related to grants for pipelines that crossed from one side of the River to the other, (Del. App. 66a-67a), and, as such, required permission of both states. (N.J. Rep. Br. 13 n.6). These approvals by nature are not prescriptive acts.

The first grant by Delaware for a riparian improvement on the New Jersey side did not occur until 1971, when the DuPont Company accepted a subaqueous land lease from Delaware, under protest, to construct a dock. (Del. App. 67a; N.J. Rep. Br. 24.) Since this action was the first by Delaware involving riparian jurisdiction along the New Jersey shoreline, any period of alleged prescriptive activity commenced in 1971, and hence amounts only to 34 years (1971-2005). Further, even if the claimed period of prescription is based on the 1962 actions involving pipelines, it still would be only 43 years (1962-2005), the same period identified as likely inadequate as a matter of law in *Virginia v. Maryland.*

Moreover, Delaware identifies only eleven instances since adoption of the 1905 Compact in which it claims, beginning in 1962, to have exercised jurisdiction on New Jersey's side of the river. This stands in sharp contrast to New Jersey's history of exercising jurisdiction over riparian lands, including those in the Twelve Mile Circle, commencing in the 1800's. (N.J. Br. 8-10). Since the adoption of the 1905 Compact, New Jersey has exercised its jurisdiction to approve tidelands conveyances on at least thirty-three occasions. (*Id.* at 9.)

The fact that Delaware did not even begin to issue grants or leases on the New Jersey side of the River until 1962 undercuts its claim that it has somehow always enjoyed jurisdiction over New Jersey's riparian activities. *E.g., City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478, 1492 (2005) ("When a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations.") (footnote omitted). Similarly, Delaware's failure to assert prescriptive activities legally adequate to support its claims is demonstrated by the fact that, since 1935, Delaware law has prevented the City of Wilmington, Delaware, from taxing any riparian properties on the New Jersey side of the River, pending a "final determination" of the question of Delaware's authority under the Compact of 1905, whether by agreement between the two States or "a final Court adjudication." (N.J. Rep. Br. 25; N.J. Supp. App. 14a, 21a.) Delaware's law thus recognizes that New Jersey continued to dispute its authority. *E.g., Arkansas v. Tennessee*, 246 U.S. 158, 172 (1918) ("These acts, far from treating the boundary as a line settled and acquiesced in, treat it as a matter requiring to be definitely settled, with the cooperation of representatives of the sister State if practicable, otherwise by appropriate litigation.").

Because these issues can be resolved by this Court as a matter of law based on undisputed facts, it is unnecessary to appoint a special master.

III. THE CASE SHOULD BE ARGUED THIS TERM.

Delaware has not identified any disputed issues of material fact that bear on whether the Compact of 1905 gives

New Jersey exclusive State riparian jurisdiction on its own side of the Delaware River. Thus, the facts raised by Delaware and the affirmative defenses asserted in her answer do not necessitate the appointment of a special master. Instead, this matter should proceed to argument and decision this term, based on the clear and unambiguous language of the Compact of 1905.

PETER C. HARVEY
Attorney General

RACHEL J. HOROWITZ*
Deputy Attorney General

Of Counsel
GERARD BURKE
Assistant Attorney General
JOHN R. RENELLA
Deputy Attorney General

On the Brief
WILLIAM E. ANDERSEN
AMY C. DONLON
DEAN JABLONSKI
EILEEN P. KELLY
Deputy Attorneys General

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

* *Counsel of Record*

January 4, 2006

EXHIBIT A -- LETTER FROM RACHEL HOROWITZ, NEW JERSEY DEPUTY ATTORNEY GENERAL, TO MAX WALTON, SPECIAL COUNSEL FOR DELAWARE, DATED OCT. 19, 2005

RICHARD J. CODEY
Acting Governor

PETER C. HARVEY
Attorney General

STATE OF NEW JERSEY
Office of the Attorney General
Department of Law and Public Safety
Division of Law
P.O. Box 112
Trenton, NJ 08625-0112

October 19, 2005

By Overnight Mail

Max Walton, Esq.
Connolly Bove Lodge & Hutz LLP
The Nemours Building
1007 North Orange St.
P.O. Box 2207
Wilmington, Delaware 19899

Re: State of New Jersey v. State of Delaware

Dear Mr. Walton:

In response to Delaware's letter of August 25, 2005, requesting documents with regard to this matter, I am writing to confirm that the documents referenced in the letter of

August 25 were produced as set forth below. In addition, I am enclosing with this letter copies of documents that were not previously produced, along with privilege logs. As you are aware, after the August 25 document request was made, Delaware's time to respond to New Jersey's motion was extended to October 27, 2005; consequently, the timeframe requested for document production in Delaware's letter of August 25 was extended by mutual consent.

The documents referenced in the letter of August 25 were produced as follows:

1. Files for the British Petroleum and/or Crown Landing LLC LNG project as well as New Jersey's proposal to construct any part of the project: Produced for inspection and copying on October 5 and 6, 2005; Remaining documents not produced on those dates are enclosed with this letter.

2. Any other proposals to build a LNG facility on lands in New Jersey extending into the Delaware River, including El Paso Eastern Company's proposal between 1969 and 1974: No files located.

3. The Sun Oil Company of Pennsylvania or the Sun Oil Company regarding Delaware's coastal zone or for activities within the 12 mile circle: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

4. New Jersey's application to Delaware for permission to construct facilities in the Delaware River at

Fort Mott State Park: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

5. Sunolin Chemical Company's request to construct pipelines in Logan Township, New Jersey to cross the Delaware River: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

6. Colonial Pipeline Company's request to construct pipelines in Logan Township, New Jersey to cross the Delaware River: produced for inspection and copying on September 14, 2005 and September 23, 2005.

7. Columbia Gas Transmission Corporation's request to construct pipelines in New Jersey to cross the Delaware River: No files located.

8. E.I. DuPont de Nemours &. Co.'s requests to perform work on, above, or in the Delaware River within the 12 mile circle: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

9. Keystone Cogeneration Systems, Inc.'s request for approval of a coal unloading pier and facility in Logan Township, New Jersey: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

10. Sunoco, Inc.'s request, to maintain pipelines to cross the Delaware River: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

11. Fenwick Common, LLC's request, for permission to construct the Penns Grove Riverfront and Pier,

in Perms Grove, New Jersey: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

12. Any request to Delaware by representatives of New Jersey for permission to conduct any activities in the Delaware River within the 12 mile circle: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

13. Documents reflecting any discussions by representatives of New Jersey with representatives of Delaware regarding New Jersey's development of its coastal zone management plan dated August 1980, and any updates: Produced for inspection and copying on October 5 and 6, 2005; one remaining document enclosed with this letter.

14. Documents relating to any submission by New Jersey to any Federal agency regarding New Jersey's or Delaware's jurisdiction to regulate activities within the 12 mile circle, including submissions to the National Oceanic and Atmospheric Administration: Produced for inspection and copying on October 5 and 6, 2005.

15. Documents submitted to the Federal Energy Regulatory Commission (FERC) for any proposed project within the 12 mile circle, including any submissions related to the proposed British Petroleum/Crown Landing, LLC's LNG facility: Produced for inspection and copying on October 5 and 6, 2005; remaining documents enclosed with this letter.

16. Documents regarding Delaware's Coastal Zone Act: Produced for inspection and copying on October 5 and 6, 2005.

17. Documents relating to any use of subaqueous lands within the 12 mile circle: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

18. Documents relating to wharfing within the 12 mile circle: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

19. Documents relating to any communication with the Army Corps of Engineers for any use of subaqueous lands within the 12 mile circle: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

20. Documents relating to any communications with the Delaware River Basin Commission regarding New Jersey's or Delaware's jurisdiction and/or authority to regulate any activities within the 12 mile circle: Produced for inspection and copying on September 23, 2005, and October 5 and 6, 2005.

21. Documents relating to the negotiation or adoption of the 1905 Compact between New Jersey and Delaware: Produced for inspection and copying on September 23, 2005.

22. Documents relating to any proposed agreement between British Petroleum and/or Crown Landing, LLC and New Jersey relating to the proposed LNG facility within the 12 mile circle; Produced for inspection and copying on

October 5 and 6, 2005; remaining documents enclosed with this letter (bates stamped NJ0001-NJ0389).

23. All opinions (formal and informal) relating to New Jersey's or Delaware's authority to regulate activities (including riparian or subaqueous activities) within the 12 mile Circle: Produced for inspection and copying on September 23, 2005.

This letter and enclosures conclude New Jersey's response to Delaware's letter of August 25, 2005.

Sincerely yours,

PETER C. HARVEY
ATTORNEY GENERAL OF
NEW JERSEY

By: s/ Rachel Horowitz
Rachel Horowitz
Deputy Attorney General

c: Ryan Newell, Esq.

Enc.: Plaintiff's Privilege Log
NJEDA list of documents produced, with privilege log

Remaining documents responsive to no.s 1 and 22 above: NJEDA documents, bates stamped NJ0001-NJ0389
USCG Navigation and Vessel Inspection Circular No. 05-05, bates stamped NJ0390-NJ0436

Crown Landing LLC, Draft Environmental Resource Report, July 2004, Volume IV, Binders IVA and IVB; and Volume III, Binder IIIA
Critical Wildlife Habitat Plan, reissued 4-18-05
Vegetation Management Plan, reissued 4-18-05
Waterfront Development Area - Environmental Sensitivity, reissued 4-18-05
Surveyed Wetlands, Sunoco Site, revised Nov. 14, 2003

Remaining document responsive to no. 13 above:
Memo to State Coastal Program Managers from Clement Lewsey, NOAA, dated July 2, 1993, with attached Joint Statement of Purpose

EXHIBIT B – LETTER FROM RACHEL HOROWITZ, NEW JERSEY DEPUTY ATTORNEY GENERAL, TO MATTHEW BOYER, SPECIAL COUNSEL FOR DELAWARE, DATED OCTOBER 21, 2005

RICHARD J. CODEY
Acting Governor

PETER C. HARVEY
Attorney General

STATE OF NEW JERSEY
Office of the Attorney General
Department of Law and Public Safety
Division of Law
P.O. Box 112
Trenton, NJ 08625-0112

October 21, 2005

By Overnight Mail for
Saturday Delivery

Matthew Boyer, Esquire
Connolly Bove Lodge & Hutz LLP
The Nemours Building
1007 North Orange St.
P.O. Box 2207
Wilmington, Delaware 19801

Re: State of New Jersey v. State of Delaware

Dear Mr. Boyer:

During the course of our investigation, New Jersey located the Record and Transcript of New Jersey v. Delaware I and is enclosing a CD containing the three (3) volumes and Record of same. This will now satisfy the subsequent verbal request made by Mr. Newell for the Record of Transcript during the document production of Oct. 5-6, 2005, and per Ryan's instructions of October 21, 2005, mode of delivery.

Also enclosed are pictures of the boxes that were reviewed by Mr. Newell during the October 5-6, 2005 document production.

Sincerely yours,

PETER C. HARVEY
ATTORNEY GENERAL OF
NEW JERSEY

By: s/ Rachel Horowitz
Rachel Horowitz
Deputy Attorney General

c: Ryan Newell, Esq.
Enclosures: CD contents:
New Jersey v. Delaware Vol I, II, III, and Record.
Photographs