Supreme Court, U.S.
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No. 134, Original

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

BRIEF OF BP AMERICA INC. AND CROWN LANDING LLC, AS *AMICUS CURIAE*, IN SUPPORT OF THE STATE OF NEW JERSEY

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TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Cited Authorities

Page

STATE CASES

INTERSTATE COMPACTS

Cited Authorities

FEDERAL STATUTES

Cited Authorities

STATE STATUTES

Cited Authorities

Cited Authorities

Page

INTEREST OF THE *AMICUS CURIAE* [1]

This case will determine whether the Compact of 1905 allows Delaware to block Crown Landing LLC, an affiliate of BP America Inc. (collectively "Crown Landing"), from constructing a pier on the New Jersey side of the Delaware River within the Twelve-Mile Circle (the "Circle"). The pier is needed to offload liquefied natural gas ("LNG") to an import terminal Crown Landing seeks to build and operate in Gloucester County, New Jersey. In June 2006, the Federal Energy Regulatory Commission ("FERC") approved the entire project, subject to the conditions set forth in the order. 115 FERC ¶ 61,348 (June 20, 2006), *reh'g denied and clarification granted*, 117 FERC ¶ 61,209 (Nov. 17, 2006). Delaware, however, has sought steadfastly to block the project by withholding permits needed to build the pier.

The LNG terminal will be capable of delivering a baseload of 1.2 billion cubic feet of natural gas per day to the Mid-Atlantic region. *See also id.* at p. 62,387, P 36 (noting "important role that LNG will play in meeting future demand for natural gas in the United States"). In addition, according to a study by the School of Planning and Public Policy at Rutgers University, commissioned by Crown Landing, construction activities are expected to create more than 1,300 new jobs, add $277 million to New Jersey's gross state product, and generate $13 million in state and local tax revenues, while operation of the facility is projected to generate more than $88 million in additional state and local tax revenues over a thirty-year period.[2]

The pier in dispute would be fifty feet wide and 2,000 feet long, extending 1,455 feet past the low water mark that

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[1] This brief is filed with the written consent of both parties. Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to its preparation or submission.

[2] Dr. Joseph J. Seneca, et al., *Economic Impacts of BP's Proposed Crown Landing LNG Terminal* 65 (April 2007), http://www.policy.rutgers.edu/news/reports/BPCrownLanding.pdf.

constitutes the boundary line between New Jersey and Delaware within the Circle. The River is approximately one mile wide at this location. The unloading pier will accommodate one berth, receiving 100 to 150 ships annually. 115 FERC at p. 62,382, P 3. A plan showing the proposed terminal, the pier, and the state line, is posted on the website of the Delaware Department of Natural Resources and Environmental Control ("DNREC").[3] As the drawing reflects, the pier allows access to deep water near the Marcus Hook anchorage.

The project will require dredging 1.24 million cubic yards of subaqueous soil to make room for the berth and the pier. FERC, *Final Environmental Impact Statement: Crown Landing LNG and Logan Lateral Projects*, Docket No. CP04-411-000 (April 2006) ("FEIS") at ES-2. Though a large amount, it is well within the dredge volumes that "would have been familiar to or ascertainable by individuals interested in riparian uses or structures at the time the Compact [of 1905] was signed or ratified." (NJ App. 1227a (expert report of J. Richard Weggel, Ph.D., P.E.); *see id.* 1234a (discussing 1896 dredging to remove more than 35 million cubic yards from the Delaware River, and 1907 dredging at Cape May, New Jersey, removing 19.7 million cubic yards).)

FERC concluded that the project, built and operated in accordance with the approved conditions, is "environmentally acceptable." 115 FERC at p. 62,395, P 89. It considered various alternative locations, including several outside of the Circle. FERC found those alternatives environmentally and economically inferior. *E.g.*, FEIS at ES-9 & 3-36 to 3-59. FERC also determined that, "[w]hile the risks associated with the transportation of any hazardous cargo can never be entirely eliminated, we are confident that they can be reduced to minimal levels and that the public will be well protected from harm." 115 FERC at p. 62,392, P 72. It required that Crown Landing

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[3] *See* Riparian License Plan, Crown Landing, LLC, http://www.dnrec.state.de.us/DNREC2000/admin/bp/ (follow "Riparian Map" hyperlink).

submit an Emergency Response Plan that provides for "funding all project-specific security/emergency management costs that would be imposed on state and local agencies." *Id.* at p. 62,400, P 32.

Despite FERC's approval, Delaware has blocked the project by withholding permits needed for the pier. The 1971 Delaware Coastal Zone Act, 58 Del. Laws ch. 175 (1971) (codified at Del. Code Ann. tit. 7, §§ 7001-7013 (2007)) ("DCZA"), announced Delaware's policy "to prohibit entirely the construction of new heavy industry in its coastal areas." *Id.* § 7001. New "bulk product transfer facilities" after 1971 are barred, except in the Port of Wilmington. *Id.* §§ 7002(f), 7003. Other industrial development requires a DCZA permit. *Id.* § 7004. On February 3, 2005, the Secretary of DNREC ruled that Crown Landing's pier was an "offshore bulk product transfer facility" as well as a "heavy industry use" that was categorically prohibited by the DCZA. (DE App. 3811.) He 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." (*Id.*)

Although § 3 of the Natural Gas Act, 15 U.S.C. §§ 717-717z (2000 & Supp. V 2006) ("NGA"), grants FERC "exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal," *id.* § 717b(e)(1), it preserves whatever authority the states may have under, *inter alia*, the federal Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451-1466 (2000 & Supp. V 2006)) ("the federal CZMA"), 15 U.S.C. § 717b(d)(1). The federal CZMA, in turn, requires a federal permit applicant to provide a certificate that the proposed activity complies with "the enforceable policies of the state's approved [coastal zone management] program and that such activity will be conducted in a manner consistent with the program." 16 U.S.C. § 1456(c)(3)(A). Significantly, however, the federal CZMA itself has a savings provision that preserves the rights and jurisdiction

of the states under any pre-existing interstate compact. *Id.* § 1456(e) ("Nothing in this chapter shall be construed – (1) to displace, supersede, limit, or modify any interstate compact . . . .").[4]

FERC's order approving the Crown Landing project took notice of the pending jurisdictional dispute between New Jersey and Delaware. *E.g.,* 115 FERC at p. 62,391, P 61. The FEIS stated: "[w]e recognize that the Supreme Court decision could affect our recommendations regarding Coastal Zone Management Act determinations." FEIS at ES-5 to ES-6. Because "[a]t the present time, this issue is not resolved" (*id.* at 4-101), FERC's order currently requires that Crown Landing obtain CZMA consistency determinations from *both* Delaware and New Jersey before construction may begin, 115 FERC at p. 62,398, P 19-20.

In addition to denying a DCZA permit, Delaware has refused to permit Crown Landing to take sediment samples on Delaware's side of the line. (DE App. 3789.) The samples are required not only by FERC as a condition prior to construction, 115 FERC at p. 62,397, P 11, but by New Jersey as a condition of issuing a waterfront development permit (NJ App. 1296a-98a).

As the Special Master observed, "if Delaware is correct in its assertion that it has regulatory jurisdiction over projects extending from the New Jersey shore outshore of the low water mark, BP and Crown Landing, LLC will be precluded from constructing the proposed LNG facility." (Report at 21.) Accordingly, Crown Landing has a strong interest in the outcome of this dispute and can offer its own experience with Delaware's permitting system.

SUMMARY OF ARGUMENT

The Special Master mistakenly concluded that the 1905 Compact allowed Delaware to exercise "overlapping" authority

[4] The Clean Water Act has a similar savings provision. *See* 33 U.S.C. § 1370 (2000) ("nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States").

over riparian rights on New Jersey's side of the River within the Circle. His recommendation cannot be reconciled with *Virginia v. Maryland,* 540 U.S. 56 (2003), and violates the plain language of the 1905 Compact, which protected New Jersey's "riparian jurisdiction of every kind and nature" on its "own side" of the River.

The Special Master mistakenly concluded that the term "riparian jurisdiction" rendered Article VII ambiguous, justifying the use of post-1971 evidence (ignoring the first 66 years) to conclude that Delaware enjoys concurrent jurisdiction over New Jersey's riparian rights. "Riparian jurisdiction" obviously means jurisdiction over "riparian rights," a concept the Master said "was well established by 1905." (Report at 47.) Article VII was not ambiguous about whether such riparian jurisdiction was exclusive — it was New Jersey's alone, "on its own side" of the River. Although the drafters did not use the word "exclusive" in Article VII, they did not use the word "concurrent" either, even though both terms were used elsewhere in the Compact. Other Compact provisions show that the drafters carefully limited when the authorities of one State could regulate the citizens of the other State. As in *Virginia*, "[i]f any inference at all is to be drawn from Article Seventh's silence on the subject of regulatory authority . . . it is that each State was left to regulate the activities of her own citizens." 540 U.S. at 67. In this case, Article VII is hardly "silent," but rather gives "riparian jurisdiction of every kind and nature" to New Jersey on its own side of the River. The Special Master's contrary interpretation of Article VII is "inconsistent with its express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

The Special Master erred in using the unmistakability doctrine to conclude that Article VII reserved Delaware's authority to regulate New Jersey's riparian rights. As in *Virginia*, this doctrine does not apply where two States enter into a compact to resolve their respective riparian jurisdiction, in perpetuity, while leaving unresolved the question of boundary.

The Special Master's recommendation would allow Delaware to veto New Jersey's river access within the Circle. Delaware currently excludes riparian uses after 1971 associated with heavy industry, except in the Port of Wilmington, a *per se* "exclusion prohibited by the Compact." *Virginia*, 540 U.S. at 87 (Kennedy, J., dissenting). In addition, Delaware law gives it unappealable authority to regulate the use of its subaqueous soil. Delaware can use these laws to strangle all existing and future development on the New Jersey side of the River.

The Special Master erred in relying on post-1971 evidence to allow this result. He overlooked compelling evidence of the parties' earlier construction. This included the States' contemporaneous construction of the Compact at the time of its ratification, Delaware's statements in *New Jersey v. Delaware*, 291 U.S. 361 (1934) ("*New Jersey v. Delaware II*"), the 1954 opinion of the New Jersey Attorney General, decisions by New Jersey's courts from 1919 through 1992, and the 1958 concession by the Delaware State Highway Department that the Compact denied it authority over projects on the New Jersey side. Moreover, as *Virginia* teaches, the Special Master should have treated the parties' conduct after 1971 under the doctrine of prescription and acquiescence, not practical construction. The evidence of New Jersey's acquiescence here pales by comparison to Virginia's louder, longer, and more frequent concessions acceding to Maryland's claimed authority. The Court, nonetheless, ruled that the 1785 Compact protected Virginia's exclusive riparian jurisdiction on its own side of the Potomac River. The 1905 Compact is clearer than its 1785 counterpart, compelling the analogous result here.

ARGUMENT

This case bears a striking resemblance to *Virginia v. Maryland*, 540 U.S. 56 (2003). Both involve a river separating two States that, for centuries, disputed the location of their common boundary. Both involve a compact that settled their respective riparian jurisdiction while leaving the boundary question "open to long continued disputes." *Id.* at 62 (citation omitted). Both involve a later adjudication fixing the boundary

at the low water mark on one side of the river. And both involve whether the parties' historically recent conduct serves to give the boundary-winning State the power to regulate the losing State's river access.

"Article Seventh" of the 1785 Compact between Virginia and Maryland made no mention of riparian jurisdiction in the Potomac River. It simply granted the citizens of each State "full property in the shores . . . adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements . . . ." *Id.* at 66. The Black-Jenkins Award of 1877 set the boundary at the low water mark on the Virginia side, but recognized Virginia's "right to such use of the river beyond . . . low-water mark as may be necessary to the full enjoyment of her riparian ownership . . . agreeably to the compact of [1785]." *Id.* at 62-63. In 1957, Maryland began issuing permits to Virginia users, without protest from Virginia. *Id.* at 63, 76. Maryland's exclusive permitting activities continued uncontested for another 43 years, except for a brief time in the 1970s when Virginia claimed that the 1785 Compact protected her riparian rights. *Id.* at 77-78.

The Court concluded that the States' conduct during the half-century preceding the lawsuit did not deprive Virginia of her authority under the Compact. *Id.* at 76-79. Despite that the Compact did not mention riparian sovereignty, the Court found that it gave Virginia exclusive riparian jurisdiction, "free of regulation by Maryland." *Id.* at 79. This enabled a Virginia utility, without Maryland's consent, to excavate and construct a water intake pipe (with a capacity of 312 million gallons per day),[5] 725 feet beyond the boundary line. *Id.* at 79-80.

This case is easier. Unlike its 1785 counterpart, Article VII of the 1905 Compact confirmed that New Jersey may "continue to exercise riparian jurisdiction of every kind and nature," on

[5] Lodging Accompanying Reply by the Commonwealth of Virginia to the State of Maryland's Exceptions to the Report of the Special Master at L-331 ¶ 7(a), *Virginia v. Maryland,* No. 129, Orig. (Mar. 31, 2003).

its "own side of the River" under the "laws of" New Jersey. (SM App. B-5.) The 1934 decision setting the boundary in the Circle was expressly "subject to the Compact of 1905." *New Jersey v. Delaware II*, 291 U.S. at 385. Moreover, as shown below, *infra* pp. 24-27, the evidence of New Jersey's "acquiescence" in Delaware's claimed authority — involving conduct only since 1971 — pales in comparison to Maryland's much weightier evidence, extending over a much longer period, which this Court rejected as legally insufficient to deprive a State of its riparian sovereignty.

I. THE SPECIAL MASTER ERRED IN CONCLUDING THAT THE COMPACT ALLOWS DELAWARE TO REGULATE NEW JERSEY'S RIPARIAN RIGHTS.

The Special Master correctly determined that Article VII protects New Jersey's "riparian jurisdiction" over structures extending below the low water mark on the New Jersey side of the River. (Report at 84-86; Proposed Decree ¶ 1(a) (SM App. A-1).) He erred, however, in concluding that New Jersey's riparian jurisdiction "is not exclusive" (Report at 86), but "overlapping" (*id.* at 84), with Delaware's. That interpretation conflicts with the plain language and would gut New Jersey's riparian rights in the Circle.

A. New Jersey's Riparian Jurisdiction Is Exclusive Under the Plain Meaning of Article VII.

"[W]hen a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). The same is true with a compact, which is both a contract and a federal statute. "'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." *New Jersey v. New York,* 523 U.S. 767, 811 (1998) (quoting *Texas v. New Mexico*, 462 U.S. 554, 564 (1983)).

Article VII of the 1905 Compact is plain and unambiguous: "Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." (SM App. B-5.) The Special Master erred in concluding that the phrase "riparian jurisdiction" is "inherently ambiguous." (Report at 54.) As he stated only seven pages earlier, "[t]he concept of riparian rights was well established by 1905." (Report at 47.) In New Jersey, the concept included the "absolute right to wharf out and otherwise reclaim the land down to even below low water, provided [it] did not thereby impede the paramount right of navigation." *Gough v. Bell,* 23 N.J.L. 624, 658, 1852 WL 3448, at *23 (1852). The phrase "riparian jurisdiction" means, quite simply, a state's jurisdiction over the exercise of such riparian rights. The Special Master himself did not need to resort to extrinsic evidence to determine what "riparian jurisdiction" means. He used the same phrase in his proposed decree, which recommends giving New Jersey "*riparian jurisdiction* over rights for the construction, maintenance and use of wharves and other riparian improvements appurtenant to the eastern shore of the Delaware River . . . extending outshore of the low water mark . . . ." (SM App. A-1 (emphasis added).)

Rather than using extrinsic evidence to inform the meaning of the term "riparian jurisdiction," the Special Master examined whether New Jersey's riparian jurisdiction was "overlapping" (Report at 84) with Delaware's. But on that question, no ambiguity exists. No language in Article VII remotely suggests that Delaware could regulate riparian rights on the New Jersey side of the River. To the contrary, that interpretation violates its plain language, which confirms New Jersey "riparian jurisdiction of every kind and nature," on "its own side" of the River, "under the laws of" New Jersey. (SM App. B-5.) Referring to the "plain language" of the Compact in *Virginia,* the Court likewise observed that "[n]otably absent" was any authority by Maryland to regulate the riparian rights granted to Virginia citizens. 540 U.S. at 66.

The Special Master decided to read the word "overlapping" or "concurrent" into Article VII because it did not contain the word "exclusive." He reasoned that "the drafters were aware of the concept of 'exclusive jurisdiction' and included it in other portions of the Compact when defining the States' respective rights." (Report at 62.) But the reverse argument carries equal, if not greater, force. The States used the concept of "concurrent" jurisdiction *three times* in Article IV of the Compact, which provides for "concurrent legislation" to enact uniform fishing laws. (SM App. B-4 to B-5.) If they had intended the riparian jurisdiction mentioned in Article VII to be "concurrent," they certainly would have said so.

This compact is clearer than the one in *Virginia*, about which this Court said:

> If any inference at all is to be drawn from Article Seventh's silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens.

Virginia, 540 U.S. at 67. Unlike its 1785 counterpart, Article VII was not "silent" about riparian jurisdiction, but granted it solely to New Jersey on its "own side" of the River.

Moreover, just like the 1785 Compact, the 1905 Compact "carefully delineated the instances in which the citizens of one State would be subjected to the regulatory authority of the other." *Id.* at 67. The Compact was intended to settle for all time a dispute that began with Delaware's arrest of New Jersey fishermen. (Report at 2-8.) Articles I and II authorized each State to serve criminal process anywhere on the River from shore to shore, but only for offenses committed on the respective "soil" of each State, on each State's respective "half" of the River, or on a "vessel being under [its] exclusive jurisdiction." (SM App. B-2 to B-3.) Each State was specifically precluded from serving process "on board a vessel aground upon or fastened to the shore of" the other State, or "fastened to a wharf adjoining thereto." (*Id.*) Article III protected "a common right of fishery throughout" the River, "except so far as either State may have heretofore

granted valid and subsisting private rights of fishery." (*Id.* B-3.) And while Article IV provided for "concurrent legislation" with respect to the enactment of uniform fishing laws (*id.* B-4 to B-5), once uniform laws were adopted, each State would then have "exclusive jurisdiction within said river to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for" (*id.* B-5). In light of how carefully the drafters ensured that one State would not interfere with the activities of the other State's citizens, it is inconceivable that they silently intended in Article VII for Delaware to enjoy "overlapping" jurisdiction to regulate New Jersey's riparian rights.

The Special Master failed to see this parallel, and his attempt to distinguish *Virginia* is unpersuasive. He said: "The language of Article VII in the Compact of 1905 between New Jersey and Delaware contains no *comparably clear language* providing that the preservation of riparian jurisdiction for New Jersey was intended either to encompass all regulatory oversight (as opposed to merely riparian oversight) or to be exclusive of jurisdiction by Delaware." (Report at 65 n.118 (emphasis added).) But neither the 1785 Compact nor the Black-Jenkins Award contained *any language* about riparian jurisdiction over improvements. Nonetheless, the Court found that the Compact granted Virginia exclusive jurisdiction over riparian structures extending across the boundary line, "free of regulation by Maryland." 540 U.S. at 79 (Decree, ¶ 2).

The Court's reasoning in *Virginia* applies with *even greater* force in this case. For unlike its Virginia counterpart, the 1905 Compact *expressly* addressed the question of riparian sovereignty. It made clear that New Jersey enjoyed "riparian jurisdiction of every kind and nature" on its "own side" of the River. "[N]o court may order relief inconsistent with [these] express terms. Yet that is precisely what the Special Master has recommended." *Texas*, 462 U.S. at 564.

B. The Special Master Erred in Applying the Unmistakability Doctrine Because Delaware's Jurisdiction Was Vigorously Disputed in 1905.

The Special Master began with a flawed premise: "Because Delaware owns the land and water up to the low water mark, the starting presumption is that Delaware, as the sovereign State, has jurisdiction over its own land." (Report at 34; *see also, e.g., id.* at 35 ("presumption in favor of Delaware's authority"), 42 ("strong presumption").)

The "unmistakability doctrine" invoked by the Special Master is a rule of construction that "sovereign power . . . will remain intact unless surrendered in unmistakable terms." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). "[T]he doctrine has little if any independent legal force beyond what would be dictated by normal principles of contract interpretation. It is simply a rule of presumed (or implied-in-fact) intent." *United States v. Winstar Corp.*, 518 U.S. 839, 920 (1996) (Scalia, J., concurring). The doctrine makes sense, for example, in the context of a private citizen contracting with the government; the citizen would not reasonably assume that the government intends to relinquish its future sovereign powers "unless the opposite clearly appears." *Id.* at 920-21.

But where two States, as co-equal sovereigns, enter into a compact that settles their riparian jurisdiction (Art. VII), "binding in perpetuity" (Art. IX), but leaves the boundary open to continuing dispute (Art. VIII), neither side would reasonably assume that the other retained any residual riparian authority. This, in fact, is the core holding of *Virginia*. The Court expressly rejected Maryland's reliance on the unmistakability doctrine because its key historical premise — well-settled sovereignty at the time of the Compact — was entirely absent:

> Maryland is doubtless correct that if her sovereignty over the River was well settled as of 1785, we would apply a strong presumption against reading the Compact as stripping her authority to regulate activities on the River. *See, e.g., Massachusetts v. New York*,

> 271 U.S. 65, 89 (1926) . . . . *But we reject Maryland's historical premise.*
>
> . . . Our own cases recognize that the scope of Maryland's *sovereignty over the River was in dispute both before and after the 1785 Compact* . . . .
>
> . . .
>
> Accordingly, we read the 1785 Compact *in light of the ongoing dispute over sovereignty*. Article Seventh simply guaranteed that the citizens of each State would retain the right to build wharves and improvements *regardless of which State ultimately was determined to be sovereign over the River* . . . .

540 U.S. at 67-69 (emphasis added).

Just like the 1785 Compact, the 1905 Compact was negotiated when sovereignty over the River was hotly contested. *E.g., New Jersey v. Delaware II*, 291 U.S. at 376 ("almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them"). Because both States in 1905 claimed exclusive sovereignty over the eastern half of the River, they would not have shared the Special Master's "starting presumption" that riparian jurisdiction was only Delaware's to surrender.

C. Granting Delaware Concurrent Jurisdiction Would Eviscerate New Jersey's River Access in the Circle.

Though not mentioned in his Report, the Special Master recognized at oral argument that granting Delaware "dual or concurrent jurisdiction" would give it "effectively a veto" over New Jersey projects. (Oral Arg. Tr. at 73 (Feb. 22, 2007).) Delaware's veto can be exercised in a variety of ways. In the case of Crown Landing, Delaware law categorically prohibits riparian structures built after 1971 associated with "heavy industry" and "bulk product transfer facilities" located anywhere in Delaware waters, except in the Port of Wilmington. Del. Code Ann. tit. 7, §§ 7002(f), 7003. This amounts to a *per se* "exclusion prohibited by the Compact." *Virginia*, 540 U.S. at 87 (Kennedy, J., dissenting).

Delaware can also exercise such veto power, directly, through its Subaqueous Lands Act ("DSLA"), Del. Code Ann. tit. 7, §§ 7201-7217 (2007), enacted in 1986. 65 Del. Laws ch. 508 (1986). Section 7205(a) requires a permit to "remove or extract materials from" or to "construct . . . any structure or facility upon submerged lands . . . ." The DSLA establishes no legal standard requiring Delaware to issue a permit, and "[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. As Crown Landing's experience shows, Delaware can invoke the DSLA to forbid taking even a thimble of sediment from the riverbed, despite that New Jersey regulators require sediment sampling as a condition of issuing their own permits. (NJ App. 1296a-1298a.) Even though the Special Master posits that New Jersey "may authorize . . . the Crown Landing project" (Report at 31), allowing Delaware to block access beyond the low water mark preempts any such authority.

Delaware can similarly use the DSLA to prohibit the dredging that is needed both to maintain a pier and to allow access to the navigable channel. New Jersey historically has regulated such activities within the Circle. *See* N.J. Stat. Ann. § 12:3-21 (1979) (NJ App. 1204a (1928 permit); *id.* 1184a at ¶ 296 (1977 permit); *id.* 824a (1982 permit); *id.* 827a (1988 permit); *id.* 870a (1998 permit)). The Special Master's recommendation, if followed, would allow Delaware to block any *new* development on New Jersey's side of the Circle and to strangle any *existing* development that requires maintenance dredging.

Upholding New Jersey's exclusive State riparian jurisdiction does not foreclose Delaware from raising any legitimate concerns it may have with respect to a particular project on the New Jersey side. For instance, DNREC intervened as a party and participated fully in the FERC proceeding concerning the Crown Landing project. *E.g.*, FEIS at ES-10, 3-34, 4-25. *Cf. 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."). By contrast, giving veto power to Delaware makes that State the ultimate arbiter of whether development can take place along the New Jersey shoreline and denies New Jersey any recourse to protect itself.

II. THE SPECIAL MASTER ERRED IN RELYING ON THE PARTIES' CONDUCT SINCE 1971.

Assuming that the States' practical construction is relevant to inform the meaning of an ambiguous term in Article VII, the Special Master committed two major errors in evaluating that evidence. First, he overlooked the massive evidence *prior* to 1971 showing that both States construed the Compact as granting New Jersey exclusive riparian jurisdiction on its side of the River. Second, he failed to follow the Court's approach in *Virginia*, where the Court considered the parties' conduct in the several decades preceding the lawsuit under the doctrine of "prescription and acquiescence," not "practical construction."

A. The Special Master Overlooked the Evidence Showing the Parties' Recognition that New Jersey's Riparian Jurisdiction Is Exclusive.

The Special Master overlooked at least five major categories of earlier "practical construction" evidence showing the States' mutual recognition that New Jersey's riparian jurisdiction under Article VII is exclusive.

1. New Jersey Understood Article VII to "Thoroughly Safeguard" Its Riparian Rights and Jurisdiction.

The New Jersey Commissioners who negotiated the Compact assured the New Jersey Legislature in 1903 that "every interest of the State of New Jersey has been protected, *all its riparian*, fishery and other rights *and jurisdiction thoroughly safeguarded* and every question of practical difficulty between the two States settled for all time." (Minutes of the New Jersey General Assembly, pp. 549-50 (Mar. 16, 1903) (NJ App. 103a) (emphasis added).) There is no evidence that anyone in

New Jersey thought any question would be left open about whether Delaware could regulate riparian rights or lands on the eastern side of the River.

Delaware did nothing to suggest otherwise. When the Delaware Legislature initially refused to ratify the Compact in 1903, Delaware's Commissioners explained that "the people of the State [were] unalterably opposed to the surrender directly or indirectly of the title and jurisdiction which the State of Delaware claims to and over the soil and waters of the Delaware River within the twelve mile circle." (Letter of 3/28/1903 from Delaware Commissioners to New Jersey Commissioners (NJ 105a-06a).) Two more years of litigation in *New Jersey v. Delaware I* caused Delaware to change its mind (*e.g.*, NJ App. 108a), but it approved the Compact only over staunch domestic opposition. George Bates, Delaware's counsel in the boundary litigation and a draftsman of the Compact, admonished the Delaware Legislature that the Compact "would operate as a practical surrender of the rights claimed by Delaware since she became a State and by the colony prior to that time from the year 1682." (NJ App. 1098a (*Every Evening* (Mar. 15, 1905)).) He warned: "it seems to me puerile to assert or contend that the adoption of this compact will not affect the question of jurisdiction. If this compact is adopted, it will be considered, as it is intended, to close the controversy." (NJ App. 1099a.)

2. Delaware's Concessions in *New Jersey v. Delaware II* that the Compact Ceded "All" Riparian Jurisdiction to New Jersey on Its Side of the River.

During the proceedings in *New Jersey v. Delaware II,* Delaware never asserted that it had jurisdiction over New Jersey's riparian rights. To the contrary, Delaware conceded to Special Master William L. Rawls: "Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey and *a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights.*" (NJ App. 123a (emphasis added).) During oral argument before

Mr. Rawls, Delaware said this was a cession of "all" riparian jurisdiction:

> We say moreover that the Compact of 1905 expressly acknowledged *the rights* of the citizens of New Jersey, at least, by implication to wharf out, and in my view the Compact of 1905 *ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them, and it was a very sensible thing to do.*

(NJ App. 126a-1 (emphasis added).)

In its brief filed here in December 1933, Delaware continued to assure the Court, unconditionally, that "Delaware has never questioned the right of citizens of New Jersey to wharf out to navigable water nor can such a right be questioned now because it is clearly protected by the Compact of 1905 between the States." (NJ App. 139a; *id.* 141a ("right had never been questioned").) Delaware took pains to emphasize that any fears by New Jersey that Delaware could interfere with its shoreline development were misplaced because the Compact provided complete protection:

> Much is said by the Plaintiff . . . of the great value of these wharf rights on the New Jersey side. The implication in the brief is that if the boundary line between the States is determined to be low-water mark on the New Jersey shore the interests of the riparian owners will be either destroyed or seriously prejudiced. This, of course, is simply not the fact. The Compact of 1905 above referred to recognized the rights of riparian owners in the river to wharf out, and the Master so found.

(NJ App. 140a.) The Court agreed, making the boundary award "subject to the Compact of 1905," *New Jersey v. Delaware II,* 291 U.S. at 385, and issuing its decree "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," 295 U.S. 694, 699 (1935).

Delaware cannot square these historic promises with its current position that it enjoys veto power over New Jersey's riparian "rights."[6] Delaware's concessions are at least as informative as a similar statement reflecting Maryland's construction of the 1785 Compact. Maryland asserted in 1874, during the boundary arbitration, that the state line should be drawn "around all wharves and other improvements now extending or which may hereafter be extended by authority of Virginia from the Virginia shore . . . ." 540 U.S. at 72 n.7 (quotation omitted). Delaware's statements at the time of its own boundary determination are similarly respectful of New Jersey's exclusive riparian jurisdiction to regulate the construction, maintenance and use of its own riparian improvements.[7]

3. The 1954 Opinion of its Attorney General that New Jersey Has "Complete and Exclusive" Jurisdiction to Grant Riparian Lands Below Low Water Mark.

The Special Master failed to give any weight to the 1954 "formal opinion" of the Attorney General of New Jersey, who

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[6] The Special Master deemphasized these promises, quoting instead a separate statement in Delaware's brief that "*Even if* the Compact of 1905 be construed as ceding to the State of New Jersey the right to determine to whom riparian rights (i.e., wharf rights appurtenant to riparian lands) shall be granted, it would still not affect the boundary between the States in any conceivable way." (Report at 90, *quoting* NJ App. 142a (emphasis added).) The Special Master read this language as silently reserving concurrent jurisdiction "also to regulate such improvements" (*id.* at 90), but the text nowhere suggests this. The Master's inference directly contradicts the many times Delaware recognized New Jersey's unconditional rights of wharfage.

[7] The Special Master also erred in implying that the Court in *Virginia* relied on Maryland's 1874 statement to inform the meaning of an otherwise ambiguous agreement. (Report at 64-65 n.118.) To the contrary, the Court repeatedly cited the "plain language" of the Compact and the boundary award, 540 U.S. at 66, 69, stating, for instance, that "the Award's plain language permits no inference of Maryland's regulatory authority," *id.* at 75.

concluded that "the State of New Jersey has by virtue of Article VII the *complete and exclusive* right to make grants and leases of riparian lands below low water mark on its side of the river." 1954 N.J. Op. Att'y Gen. 6, 7 (Feb. 2, 1954) (NJ App. 302a, 303a) (emphasis added). In 1956, New Jersey sent a copy of this opinion to the Chief Deputy Attorney General for Delaware, answering the latter's request for information about whether "New Jersey has the sole right to grant these riparian rights" (NJ App. 305a, 306a). There is no record that Delaware ever disputed New Jersey's position.

The Special Master committed two significant mistakes with respect to this opinion. (Report at 41-42 & n.92.) First, he ignored its importance as a statement of *New Jersey's* practical construction of the Compact that went unrebutted by Delaware. The Master does not even list this opinion in his chronology summarizing the "Actions by Delaware and New Jersey Reflecting an Assertion of Jurisdiction or Authority Over the Eastern Shore of the Delaware River." (SM App. I-23 to I-24.)

Second, the Special Master misinterpreted the opinion as concluding that New Jersey law did not permit riparian owners "to dredge lands beyond the low water mark." (Report at 42, n.92.) Dredging for *riparian purposes* within the Circle is authorized by N.J. Stat. Ann. § 12:3-21 (1979). That statute codified section 1 of an 1891 law, 1891 N.J. Laws ch. 123, § 1, p.213 (NJ App. 250a). The Attorney General, by contrast, was speaking about § 12:3-22, which codified section 2 of the 1891 law, 1891 N.J. Laws ch. 123, § 2, p.214 (NJ App. 251a). That provision authorizes a New Jersey agency (currently the Board of Commerce and Navigation) to issue "licenses to dredge or remove any deposits of sand or other material 'from *lands of the state*' under tide waters." (*Id.; see also* NJ App. 304a, *quoting* § 12:3-22) (emphasis added).) Because the riverbed below the low water mark within the Circle was not the "lands of the state," the agency could not issue licenses or charge fees for extracting it. (*Id.*) By contrast, § 12:3-21 initially states that no person

may remove material from the "lands of the State lying under tidal waters without a license [under] § 12:3-22," but it contains the proviso that:

> [N]othing in this section . . . shall prevent the owner of any grant . . . from the State . . . from digging, dredging, removing, and taking sand and other material within the lines of, or in front of, such grant or lease, for the purpose of improving lands granted or leased to them . . . nor . . . from digging or dredging a channel or channels to the main channels, and removing and taking the material therefrom.

N.J. Stat. Ann. § 12:3-21. Because the Special Master overlooked the distinction between § 12:3-21 and § 12:3-22, he mistakenly concluded that New Jersey law did not authorize riparian owners to use dredging to maintain their riparian rights and channel access on New Jersey's side of the Circle. New Jersey has consistently allowed that practice. *See supra* p. 14.

4. State Court Decisions Consistently Recognized New Jersey's Jurisdiction on the Eastern Half of the River Within the Circle.

The Special Master also overlooked New Jersey's state court decisions recognizing that the Compact protected its jurisdiction on the eastern half of the River in the Circle. *New Jersey v. Cooper*, 107 A. 149 (N.J. 1919); *New Jersey v. Federanko*, 139 A.2d 30 (N.J. 1958); *Ampro Fisheries, Inc. v. Yaskin*, 606 A.2d 1099 (N.J. 1992); *Main Assocs. Inc. v. B&R Enters., Inc.*, 181 A.2d 541 (N.J. Super. Ct. Ch. Div. 1962).

In 1919, *Cooper* held that the Compact protected New Jersey's criminal jurisdiction over illegal liquor sales that took place on a vessel sailing on the eastern half of the River within the Circle. 107 A. at 149. *Federanko* reaffirmed that holding in 1954, upholding a conviction for gambling that took place on a New Jersey pier on Delaware's side of the boundary line. 139 A.2d at 32. The New Jersey high court noted that *Delaware itself* had filed an *amicus curiae* brief in which it "adopted the view of our Attorney-General with respect to [the Compact's]

continued existence and undiminished effectiveness." 139 A.2d at 33. The timing is significant. *Federanko* was argued and decided in 1958 — only two years *after* New Jersey sent its 1954 opinion to the Chief Deputy Attorney General for Delaware, maintaining New Jersey's "complete and exclusive" jurisdiction to grant riparian lands within the Circle.

In 1962, the New Jersey trial court in *Main* held that Article VII of the Compact entitled New Jersey to impose real property taxes on the riparian grants it had issued, even though such grants extended beyond the boundary line into Delaware. 181 A.2d at 544. The court concluded that the provisions of Article VII "*unequivocally* provide New Jersey with the *absolute right* not only to exercise riparian jurisdiction over land on its side of the river, but authority to make riparian grants of these lands as well." 181 A.2d at 544 (emphasis added).

New Jersey never questioned that Article VII protected its authority to tax riparian improvements extending across the boundary line. The riparian grant in *Main* had been taxed by New Jersey since 1915. (NJ App. 1202a.) By contrast, Delaware has consistently doubted its own legal authority, enacting legislation in 1935 barring the City of Wilmington from taxing riparian properties on the New Jersey side of the River "until the final determination of the effect of" the Compact on Delaware's taxing authority. 40 Del. Laws ch. 179 (1935) (NJ App. 314a, 318a). That prohibition remains part of the *current* charter for the City of Wilmington. Wilmington City Code, §§ 1-1 & 1-100 (adopted June 17, 1993) (NJ App. 341a, 344a-345a).

Finally, as recently as 1992, the New Jersey Supreme Court made the following broad statements about New Jersey's rights under the Compact:

> [T]he decree . . . in 1935 has no disabling effect on New Jersey's regulation of the eastern-shore waters of the Delaware. Absent any restraints created by the Compact, *New Jersey exercises its sovereign powers fully in those waters.*

Ampro Fisheries, 606 A.2d at 1103-04 (emphasis added, citation omitted).

5. The 1958 Concessions by the Delaware State Highway Department that the Compact Denied Delaware Riparian Jurisdiction Over New Jersey Structures.

The Special Master also overlooked a critical episode in the parties' practical construction that began in the 1950s, when Delaware conceded that the 1905 Compact denied it jurisdiction over riparian structures on the New Jersey side. In 1957, the Delaware State Highway Department requested the United States Army Corps of Engineers to obtain Delaware's consent before permitting E.I. du Pont de Nemours & Company ("DuPont") to build an outfall extending below the low water mark. DuPont protested. It held riparian grants from New Jersey, and Delaware had never before required permission for such projects. (NJ App. 636a-37a.) Relying on the 1905 Compact and *New Jersey v. Delaware II*, DuPont maintained that New Jersey was "the proper authority with which we should deal." (*Id.* 637a.)

The Delaware State Highway Department sought advice from its counsel, S. Samuel Arsht. (*Id.* 638a.) Arsht issued a legal opinion concurring with DuPont that New Jersey *alone* had jurisdiction over projects on the New Jersey side of the River. (*Id.* 639a-40a.) Arsht further advised the Department to notify the Corps of Engineers "that the State of Delaware has no jurisdiction over grants that may be made in and to the lands lying under the Delaware River on the New Jersey side thereof and within the twelve-mile circle, and that the prior approval of the State of Delaware in such matters is not required." (*Id.* 640a.) The Department followed that advice. It adopted a resolution in December 1957, "taking cognizance" of Arsht's opinion and directing the "Chief Engineer to notify the Corps of Engineers, U.S. Army, that while *the Department has no jurisdiction over the area mentioned*, the Department wishes to be notified of all permits requested and granted." (*Id.* 1299a (emphasis added).)

The Department notified the Corps of Engineers accordingly. (*Id.* 641a.) While conceding it had no authority to control projects on the New Jersey side of the River, the Department maintained that "[i]f any work is contemplated or requested on the *Delaware* side, then, of course, no permits should be issued without approval of the Delaware State Highway Department." (*Id.* (emphasis added).)

In 1971, after DNREC asserted that its approval was required for another DuPont project on the New Jersey shoreline (DE App. 3395, 3397), DuPont objected, again, based on the 1905 Compact (NJ App. 642a, 1300a). Saying it was more concerned with building its project than resolving the jurisdictional dispute, DuPont submitted a permit application to Delaware under protest. (*Id.* 649a.) DuPont also entered into a riparian lease with Delaware, but all lease payments were reserved until "title to the subaqueous lands in question is resolved in favor of Lessor at some future date under a final judgment of a federal court of competent authority." (*Id.* 650a, 653a.) DuPont successfully resisted Delaware's demand for payment in 1981, again, by asserting its rights under the 1905 Compact. (*Id.* 671a, 1303a.) DuPont continues to withhold the lease payments to the present day. (*Id.* 1160a-61a.)

The Special Master overlooked the 1958 resolution by the Delaware State Highway Department adopting its counsel's opinion that the 1905 Compact denied Delaware jurisdiction over New Jersey structures. (He also did not mention any of DuPont's letters from 1957 through 1981 objecting to Delaware's jurisdiction.) The Special Master clearly erred in failing to identify this episode as an important example of Delaware's practical construction conceding New Jersey's exclusive riparian jurisdiction under the Compact.

B. The Special Master Failed to Follow *Virginia v. Maryland*, Which Evaluated Evidence of the Parties' *Recent* Conduct Under the Doctrine of "Prescription and Acquiescence," Not "Practical Construction."

Virginia demonstrates that conduct occurring for the first time many years after an interstate compact is ratified is poor evidence of its original intent. Maryland emphasized Virginia's conduct since 1957 to show that the 1785 Compact did not give Virginia riparian jurisdiction on its side of the River. The Court analyzed this claim under the doctrine of prescription and acquiescence, not practical construction. 540 U.S. at 76-78.

Significantly, the recent conduct evidence found inadequate in *Virginia* was far more extensive than what Delaware has marshaled here. A side-by-side comparison of the key facts dramatically shows this:

Table: Comparison of Key Facts

Virginia v. Maryland No. 129, Orig.	***New Jersey v. Delaware*** No. 134, Orig.
Virginia had "never operated a permitting system for water withdrawal or waterway construction" 540 U.S. at 77 n.10, although the Court found this omission to have no legal consequence, *id.*	New Jersey issued 41 separate grants for riparian rights and lands in the Circle since 1854. (NJ App. 372a (8 grants from 1854-1905; 33 from 1905-2006); *id.* 386a-631a (copies of grants).) New Jersey also established pierhead and bulkhead lines in 1877 and 1916 (*id.* 372a, 374a, 376a), extending "below low water mark at distances varying from 378 to 3,550 feet" (*id.* 135a, 376a).

Since 1957, Maryland issued 29 permits for Virginia users to withdraw water from the Potomac River, and "numerous waterway construction permits to Virginia entities." 540 U.S. at 63. Maryland emphasized that it had issued "between 250 and 350 authorizations" to Virginia riparian owners.[8]	"Since 1969, *only three* additional riparian structures have been built within the disputed territory. And Delaware has regulated all three of those projects." (Report at 74 (emphasis added).)
"No evidence shows that any Virginia applicant ever submitted a waterway construction permit application under protest or with a claim that Virginia, not Maryland, had jurisdiction." Report of the Special Master 90, *Virginia v. Maryland*, No. 129, Orig. (Dec. 9, 2002) ("No. 129 Report").	Numerous private entities have protested Delaware's claimed riparian jurisdiction on the New Jersey side of the River during the period in question: • DuPont, in 1957, 1971, and 1981, *see supra* pp. 22-23; • Sun Petroleum Products Company, in 1979 (NJ App. 932a-33a); • Crown Landing, in 2004;[9] and • Fenwick Commons LLP, in May 2005 (NJ App. 885a).

[8] Exceptions of the State of Maryland to the Report of the Special Master 13, *Virginia v. Maryland*, No. 129, Orig. (Feb. 27, 2003) (hereinafter "Md. Exc.").

[9] Memorandum from D. Swayze, Counsel for BP America Inc. and Crown Landing LLC, to J. Hughes, Secretary, DNREC, at 1 n.3 (Dec. 7, 2004), http://www.dnrec. state.de.us/DNREC2000/ admin/bp/ (follow "Memo to Secretary Hughes" hyperlink).

Virginia state agencies "acknowledged on *hundreds of occasions* . . . that Maryland has jurisdiction over construction activities taking place beyond low-water mark on the Potomac." (Md. Exc. at 40 (emphasis added).) For decades, Virginia agencies routinely told applicants that Virginia had no jurisdiction on its own side of the River but that Maryland did. (*Id.* at 40-42.)	The New Jersey Department of Environmental Protection ("DEP") issued reports in 1979 and 1980 stating that Delaware exercises jurisdiction over projects on the New Jersey side of the River. (Report at 78-81.) None of these documents mentioned the Compact.
Virginia officials knowingly acquiesced in Maryland's enactment of a 1987 regulation governing Virginia piers in the tidal portion of the Potomac River. (No. 129 Report at 92; Md. Exc. at 41.)	In the 1990s, the States discussed plans to cooperate in overseeing development along the River but they never reached agreement. (Report at 82.)[10] Their 1994 draft said the parties "do not intend this memorandum of agreement to expand, limit, or bind their existing statutory powers in any way." (NJ App. 1076a.)

[10] The New Jersey employee who worked on the draft said that DEP did not sign it for fear Delaware would interfere with New Jersey's permits, although he also believed at the time that Delaware had its own permitting authority (DE App. 803-04 (Whitney Dep. at 128-32).) The employee testified he was unaware of the Compact when he worked on this issue. (DE App. 780 (Whitney Dep. at 35).)

One Virginia official in 1984 told an applicant that the 1785 Compact itself granted Maryland jurisdiction over Virginia's riparian improvements. (Md. Exc. at 41.) Even after Virginia filed suit in 2000, some Virginia officials "continued to acknowledge Maryland's jurisdiction over the construction of riparian improvements on the Virginia shoreline of the Potomac." (*Id.* at 13.) Virginia also "continued to refer its citizens to Maryland when they seek permission to engage in construction activity in the tidal portion of the Potomac River." (*Id.* at 41.)	In February 2005, a New Jersey state employee who "was not aware of the Compact" (DE App. 736 (Risilia Dep. at 117:2)), initially advised FERC that the portion of the Crown Landing project outshore of the low water mark was subject to Delaware regulation (DE App. 4641). DEP corrected this mistake (DE App. 560 (Dietrick Dep. at 82:2-12)), issuing letters in May 2005 to clarify that the Compact gave New Jersey authority over the entire project (NJ App. 1525a, 1527a). In August 2006, while this litigation was pending, the New Jersey State Park Service applied to Delaware for a renewal of its 1996 subaqueous lands lease for Fort Mott State Park. (DE App. 4326-27.)
"Maryland claims, and Virginia does not dispute, that it [Maryland] has taxed structures erected on such improvements (i.e., restaurants, etc.); issued licenses for activities occurring thereon (i.e., liquor, gambling, etc.) . . . ." 540 U.S. at 76.	New Jersey historically has taxed riparian grants extending beyond the boundary line, based on the 1905 Compact, while Delaware has barred the City of Wilmington from taxing such property until its authority to do so under the Compact is clarified. *See supra* p. 21.

As the comparison reflects, New Jersey's acquiescence here is inconsequential compared to the evidence that was rejected as inadequate in *Virginia*. Such legally ineffective evidence does not become case-dispositive by calling it the parties' "practical construction." Although New Jersey state employees who were unaware of the Compact may have engaged in a handful of actions acquiescing in Delaware's historically recent assertion of jurisdiction, "officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." *United States v. California*, 332 U.S. 19, 40 (1947). No one could reasonably infer from the scant, post-1971 evidence that New Jersey harbored an "intention to relinquish," *New Jersey v. New York*, 523 U.S. at 786 (quotation omitted), its 1905 Compact rights.[11]

The Special Master erred by not evaluating the recent-conduct evidence under the proper legal standard. Following the approach in *Virginia*, the Court should reject Delaware's claim that the parties' conduct since 1971 limits or qualifies the language of Article VII preserving New Jersey's "riparian jurisdiction of every kind and nature" on its "own side" of the River.

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[11] The comparison to *Virginia* also highlights a second fatal weakness in Delaware's case. The period of prescription here is, at most, 34 years (1971-2005), much shorter than the 43-year period in *Virginia*, and even shorter than the 41-year span the Court said was the *shortest* period previously found "sufficient to prove prescription in a case involving our original jurisdiction." 540 U.S. at 77 (discussing *Nebraska v. Wyoming*, 507 U.S. 584, 594-595 (1993)). Moreover, like the Virginia officials who reasserted their State's compact rights in the 1970s, thereby interrupting any prescriptive period, *id.* at 77-78, the New Jersey Supreme Court reiterated in 1992 that the 1905 Compact was alive and well and that the 1934 boundary decision "has no disabling effect on New Jersey's regulation of the eastern-shore waters of the Delaware." *Ampro Fisheries*, 606 A.2d at 1103-04.

CONCLUSION

Delaware cannot be permitted to block New Jersey's access to the Delaware River in the Twelve-Mile Circle. The Court should sustain the exceptions filed by New Jersey and enter the decree proposed by New Jersey. (SM App. G.)

Respectfully submitted,

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