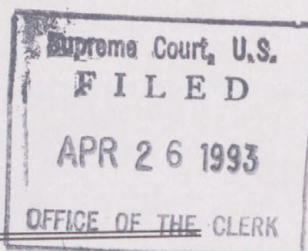


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No. ____ Original



In The
Supreme Court of the United States
October Term, 1992

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT,
COMPLAINT AND BRIEF IN SUPPORT OF
MOTION FOR LEAVE TO FILE COMPLAINT

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No. ____ Original

In The
Supreme Court of the United States
October Term, 1992

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

Comes now the State of New Jersey, by and through the Attorney General of the State of New Jersey, Robert J. Del Tufo, and respectfully asks leave of the Court to file its Complaint against the State of New York, submitted herewith.

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April 23, 1993
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992
NO. ____ ORIGINAL

COMPLAINT

STATE OF NEW JERSEY,)	
)	
)	Plaintiff,
)	
v.)	
)	
STATE OF NEW YORK,)	
)	
)	Defendant.
)	

Comes now the State of New Jersey, by and through its Attorney General, and brings this suit against the Defendant, the State of New York, and for its cause of action states:

A. Jurisdiction and the Pressing Need for the Court to Address This Controversy.

1. The original and exclusive jurisdiction of this Court is invoked pursuant to Art. III, Sec. 2, Clause 2 of the Constitution of the United States, and 28 U.S.C. §1251(a). *Mississippi v. Louisiana*, 506 U.S. ___, 113 S.Ct. 549, 121 L.Ed. 2d 466 (1992).

2. The original and exclusive jurisdiction of this Court is invoked in order to resolve this State boundary dispute between the State of New Jersey and the State of New York regarding Ellis Island in the Hudson River between New York and New Jersey. In 1834, when the

boundary between New Jersey and New York was fixed, Ellis Island was approximately three acres in size. Underwater land surrounding the island was artificially filled after 1834, and Ellis Island presently consists of approximately 27.5 acres of land. New Jersey claims that all portions of Ellis Island that were created by the artificial filling after 1834 are within the territory of and are subject to the governmental jurisdiction of New Jersey. New York claims that the whole of Ellis Island is within its territory and subject to its jurisdiction.

3. There is a pressing need for the prompt and final settlement of this controversy. Because under 28 U.S.C. §1251(a) this Court has original and exclusive jurisdiction over controversies between two States, this is the only court with jurisdiction to resolve the dispute between New Jersey and New York concerning their common border. Resolution of the controversy is essential because in 1992 the Court of Appeals for the Second Circuit issued its opinion in *Collins v. Promark Products, Inc.*, 956 F.2d 383 (2d Cir. 1992), holding in the context of a workers compensation action that the law of New York would be applied to resolve a contribution claim for damages sustained on the filled portions of Ellis Island. Although the Court of Appeals for the Second Circuit does not have jurisdiction to resolve the dispute between New Jersey and New York concerning its common border, the decision of that court in *Collins v. Promark Products, Inc.*, *supra*, reflects a determination that the whole of Ellis Island, including the lands artificially filled after 1834, is within the territory of New York and subject to its governmental jurisdiction. This decision was erroneous and is being improperly relied upon by the State of New York

to expand its governmental authority over the filled portions of the island. For example, on or about November 10, 1992, the Landmarks Preservation Commission of the City of New York held hearings on the question of whether the whole of Ellis Island should be declared a city landmark. In taking that action, the Commission is relying upon extending the *Collins* decision to all matters involving state jurisdiction over the entire island.

4. The need for immediate resolution by the Court of the boundary dispute concerning Ellis Island is further exemplified by the current development proposals for the island. The National Park Service plans to act under the National Historic Preservation Act, 16 U.S.C. §470(f), and present for public comment in the near future plans by the Center Development Corporation of New York for the renovation of three existing buildings on the filled area of the island. The buildings will be designed to house graduate students and professors for certain colleges and universities within the City of New York in New York State. The renovations are to be financed by the proceeds of bonds issued by the Dormitory Authority of the State of New York. The Center intends to use the money generated by the dormitories to build an international scholastic center at other renovated buildings on the island. The Authority is limited by statute to projects in New York State under the Dormitory Authority Act, N.Y. Public Authorities Law §1675 *et seq.* (McKinney 1981), and having a part in this development would be a violation of this law. The proposal constitutes an unwarranted extension of the decision in *Collins*, which in any event was erroneous, and is contrary to New Jersey sovereignty over the filled portion of the island.

B. The Historical and Legal Origins of New Jersey's Sovereignty Over Ellis Island.

5. Following a long-standing dispute between the States of New Jersey and New York concerning their common water boundary, Commissioners representing both States on September 16, 1833 entered into a Compact to define the jurisdictional and territorial limits of each State, *inter alia*, in New York Harbor ("The Compact"). The Compact was ratified by the State of New Jersey on February 26, 1834, N.J.Stat.Ann. 52:28-1, by the State of New York on February 5, 1834, N.Y. State Law §7, and by the United States on June 28, 1834, c. 126, 4 Stat. 708.

6. Article I of the Compact, as codified in both States' statutes, established the boundary line between the states at a point in the middle of the Hudson River and New York Bay, with New York to the east and New Jersey to the west of that line:

Article I. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned. [4 Stat. 709.]

7. Ellis Island in the Bay of New York is situated well to the west of the middle line of the Hudson River, and would therefore be, pursuant to Article I, within the territory and under the jurisdiction of the State of New

Jersey. However, Article II of the Compact provides an exception to Article I, and states that Ellis Island will nevertheless continue under the then "present" jurisdiction of the State of New York:

Article II. The state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state. [4 Stat. 709.]

8. Before the approval of the Compact, New York State had ceded jurisdiction of Ellis Island to the United States Government, subject only to New York State's ability to serve any process, civil or criminal, on the island, at that time called Oyster Island. Laws of New York of 1800 c. 6, p. 454, passed February 15, 1800. New York conveyed its title to the island to the United States on June 28, 1834. At that time, Ellis Island was approximately three acres in size. The submerged tidal lands west of the middle of the Hudson River, including the lands under water immediately adjacent to Ellis Island were lands of the State of New Jersey, its property under common law, and subject to its sovereign jurisdiction pursuant to Article I of the Compact, subject only to the jurisdiction of the State of New York over those waters for police purposes to protect and advance the interests of the New York port.

9. After the Civil War, the United States War Department determined that the military installation then in operation was no longer required at Ellis Island. In 1890, it transferred the island to the Treasury Department for its use as an immigration station. Between 1890 and 1934 the United States Government undertook several

landfill projects by which the size of Ellis Island enlarged ninefold from its original, natural size of approximately three acres as it existed at the time of the 1834 Compact, to approximately 27.5 acres, to accommodate the new use.

10. The submerged lands around the original approximately three-acre island were recognized as the lands within the territory and sovereignty of the State of New Jersey by the United States Government when in 1904 it purchased the title to these tidal submerged lands from the State of New Jersey. A State tidelands "grant" or deed was delivered to the United States Government pursuant to N.J.Stat.Ann. 12:3-1 *et seq.*, on November 30, 1904. The "grant" or deed recites that the conveyed submerged tidal lands of the Hudson River are "in the Bay of New York in the County of Hudson, and State of New Jersey." These were the lands that were filled and developed between 1890 and 1934 by the United States Government for the immigration facility on Ellis Island. The 1904 application for a tidelands "grant" or deed by the United States Government from the State of New Jersey was reported by the *New York Times*, July 19, 1904. The *Times* stated, "The chief interest in the application lies in the fact that it is a recognition of the claim that New Jersey and not New York owns the submerged lands in the vicinity of Ellis Island." The original natural island has sometimes been referred to as "Island No. 1", while the filled lands on Ellis Island have sometimes been referred to as "Island No. 2" and "Island No. 3" by the employees on the island and by the United States Government.

11. The State of New Jersey at no time has ceded its territorial sovereignty and jurisdiction over the approximate 24.5 acres of filled lands surrounding the original,

natural three-acre Ellis Island to the United States or to the State of New York. Under the rules of law governing state boundaries along navigable waters as articulated by this Court, the artificial filling of a submerged bed and channel, *i.e.*, an artificial avulsion, does not change the location of a state's boundary.

12. The State of New Jersey and the State of New York presently have a dispute concerning which state has jurisdiction over the approximate 24.5 acres of filled land of Ellis Island for the purposes of taxation, zoning, environmental protection, elections, education, residency, insurance, building codes, historic preservation, labor and public welfare laws, civil and criminal law, and for all other purposes related to the jurisdiction of any state.

C. Repeated Assertions of New Jersey's Sovereignty Over Ellis Island

13. The State of New Jersey and its citizens have publicly asserted the sovereignty claim of the State of New Jersey to the filled portion of Ellis Island many times over the years after 1904, including, but not limited to, the following:

(a) The City of Jersey City, in the County of Hudson, in the State of New Jersey has, during the entire period, carried Ellis Island on its tax rolls as assessed property within its boundaries, although with a tax exempt status, as owned by the United States Government.

(b) On or about August 3, 1934, the Bricklayers, Masons, and Plasterers International Union Local 10 in Jersey City asserted that New Jersey had jurisdiction over the filled

portion of Ellis Island in conjunction with the construction of several buildings on the island. The claim was made in a letter to United States Representative Mary T. Norton. Congresswoman Norton thereupon wrote to the Administrator of the Public Works Administration, Harold L. Ickes, to object to the barring of workers from New Jersey unions from working on a public works project on Ellis Island. The United States Government decided that employment on Ellis Island would be divided between workers from New Jersey and those from New York. Congresswoman Norton, in her letter to Administrator Ickes, was reported as saying that inasmuch as Ellis Island is located partly on New Jersey land, and is, in fact, closer to New Jersey than New York, it is only just that unemployed New Jersey men should be allowed to work on the project.

(c) In mid-July 1955, the New Jersey Commissioner of Conservation and Economic Development, Dr. Joseph E. McLean, wrote to Walter F. Downey, Regional Director of the United States General Services Administration, and asserted that Ellis Island lay within the geographical limits of the State of New Jersey. The letter was reported in the *New York Times*, July 21, 1955.

(d) On July 30, 1955, H.R. 3120, a bill authorizing the appointment of a New York City National Shrines Advisory Board, was considered by the U.S. House of Representatives. During the debate on that bill, Representative Thomas J. Tumulty of New Jersey stated, "I am not going to prolong the discussion, but Jersey City claims that Ellis Island is within the confines of Jersey City." *Congressional Record*, July 30, 1955, at 12387. His objection to the bill

blocked its passage in the House at that time. A companion bill, S.732, was considered on August 1, 1955. Representative George Klein of New York responded to Congressman Tumulty's objection, and stated that New Jersey residents would be allowed to serve on the proposed Board. *Congressional Record*, August 1, 1955, at 12703. Congressman Tumulty withdrew his reservation of objection, and the bill thereupon passed. The bill was approved August 11, 1955. Pub.L. No. 341 c. 779, 69 Stat. 632.

(e) On January 4, 1956, 25 New Jersey State and County officials inspected Ellis Island as part of their efforts to reassert New Jersey's claims to the island. Leading the contingent were the New Jersey State Commissioner of Conservation and Economic Development, Joseph B. McLean, City of Jersey City Mayor Bernard J. Berry, New Jersey State Senator James F. Murray, Jr. and New Jersey State Senator Richard Stout. The New Jersey group was taken to the island aboard the Coast Guard cutter *Tuckahoe*. They received a two-hour inspection tour from the federal employees on the island. The inspection by New Jersey officials was reported in the *New York Times*, January 5, 1956. Representative Irwin D. Davidson of New York commented on this inspection tour and New Jersey's claim of jurisdiction over Ellis Island. He did so in an Extension of Remarks reprinted in the *Congressional Record*, March 7, 1956 at 4244. In October 1962, City of Jersey City Mayor Thomas Gangami also made a trip to Ellis Island in order to claim it for New Jersey.

(f) On January 2, 1958, New Jersey State Senator James F. Murray, Jr. telegraphed United States Senators Alexander Smith and Clifford P. Case and United States Congressional Representatives Alfred D. Simiensi and Vincent J. Dellay to assert that the City of Jersey City had legal jurisdiction over Ellis Island. The action was reported in the *New York Times*, January 3, 1958.

(g) The Council of State Governments attempted to arrange a meeting between representatives of New Jersey and New York over the jurisdiction of either State on Ellis Island. The date set was August 8, 1960. New York State Senator Elisha T. Barrett, Chairman of the New York Commission on Interstate Cooperation, advised New Jersey that New York would not participate. He asserted that New York would have jurisdiction over Ellis Island if the United States Government disposed of the island. New Jersey State Commissioner of Conservation and Economic Development Salvatore A. Bontempo replied that Ellis Island was clearly in New Jersey, and stated that New York was confusing ownership with jurisdiction. The proposed meeting and the exchange between New Jersey and New York state officials was reported in *The Newark News*, July 22, 1960.

(h) On December 6, 1962, the City of Jersey City, through its Corporation Counsel, Meyer Pesin, asserted the interests of the City in the filled portion of Ellis Island during three days of hearings on the disposal of Ellis Island before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations of the United States Senate. During his testimony he stated that, "Jersey City may well claim preemptive governmental jurisdiction over Ellis Island . . . [.] To put it

simply, in other words, the city of Jersey City may look upon Ellis Island as within the proper boundaries of the city and subject to its jurisdiction." (Transcript, p. 123). Much of the discussion by those who testified concerned "the question of jurisdiction over the island between the States of New York and New Jersey." United States Senator Edmund S. Muskie, Chairman, so framed the issue on the first day. (Transcript p. 20). A Mr. Eugene J. Morris, who testified on behalf of the development of a senior citizen center on the island, stated that either a bi-state compact or an appeal to the United States Supreme Court would resolve the matter, which he stated, "is at the moment totally unresolved." (Transcript p. 25). United States Senator Kenneth B. Keating of New York recognized the existence of the dispute and submitted a memorandum from the Library of Congress on the issue. (Transcript p. 64). The Honorable Robert F. Wagner, Mayor of New York City and Congressman Leonard Farbstein also spoke in favor of the position of the State of New York.

(i) On September 5, 1963, the City of Jersey City enacted a zoning ordinance applicable to Ellis Island which would control any development on the island if it were sold to private interests, as was proposed by some who testified before the Subcommittee on Intergovernmental Relations in the hearings on the disposal of Ellis Island. The ordinance was reprinted in *Discussion on the Disposal of Ellis Island before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, United States Senate 88 Congress 1st Session, September 4, 1963* at pages 21 to 25. (Committee Print 1963).

(j) The sovereignty and jurisdiction of the State of New York and the State of New Jersey over Ellis Island was the subject of a complaint entitled *Frank J. Guarini et als. v. The State of New York and the State of New Jersey* filed in the Superior Court of New Jersey, Chancery Division, Hudson County on November 9, 1984 and removed to the United States District Court for the District of New Jersey. There, the State of New Jersey first filed an Answer dated January 9, 1985. The State of New Jersey admitted the Plaintiffs' factual allegations in the Third Count, paragraph 2 of the Complaint which were as follows:

2. The landfill and accretions to Ellis Island, consisting of approximately 24.5 acres, fall within the territorial jurisdiction and the sovereignty of the defendant State of New Jersey under the terms of the compact of 1834.

The position of the State of New Jersey during that litigation was consistent with the Plaintiffs' allegation in paragraph 2 of the Complaint. The federal district court remanded the action to the state court. The litigation was dismissed upon the ground that only the United States Supreme Court has jurisdiction to decide the boundary issues between states. *Guarini v. State of New York*, 215 N.J. Super. 426, 521 A.2d 1362 (Chan. Div. 1986), *aff'd*, 215 N.J. Super. 293, 521 A.2d 1294 (App. Div. 1986), *certif. den.* 107 N.J. 77, 526 A.2d 157 (1987) *cert. den.*, 484 U.S. 817, 108 S.Ct. 71, 98 L.Ed.2d 34 (1987). The State of New York was a party to the litigation.

(k) On June 23, 1986, Thomas H. Kean, Governor of the State of New Jersey, and Mario M. Cuomo, Governor of the State of New York, signed a Memorandum of Understanding agreeing to divide the state and local taxes

collected on Ellis Island and Liberty Island equally and devote this revenue to relief for homeless persons of both States. The taxes involved include sales, income, and corporate taxes. Both Governors agreed to use their best efforts to have their legislatures approve the proposal. The agreement was incorporated into law by the State of New Jersey in 1987, N.J.Stat.Ann. 32:32-1 *et seq.* This agreement has not been incorporated into law by the State of New York. This agreement was, in any event, only a partial attempted resolution of this dispute.

(1) The State of New Jersey appeared as an *amicus curiae* asserting its jurisdictional and territorial rights over the filled portion of Ellis Island in the United States Court of Appeals for the Second Circuit in *Collins v. Promark Products, Inc., supra*. The State of New York appeared as an *amicus curiae* in support of its jurisdictional and territorial claims over the same filled land. The Court held that the law of the State of New York regarding workers compensation would apply to the litigation involving an accident which occurred on the filled portion of Ellis Island.

14. The State of New York has improperly claimed all of Ellis Island as part of its jurisdiction by including it as a noncontiguous part of the County of Manhattan in the State of New York for the purposes of United States Congressional districts, New York State Senate districts, New York State Assembly districts, and for other purposes.

15. The State of New Jersey has attempted on several occasions to negotiate an overall resolution of this

dispute with the State of New York. The 1986 Memorandum of Understanding and the approval of that agreement by the New Jersey Legislature are illustrative of those attempts. Such efforts have not been successful, and it appears highly unlikely that any comprehensive agreement as to this jurisdictional dispute can be reached.

16. New Jersey Attorney General Robert J. Del Tufo wrote to New York Attorney General Robert Abrams on January 8, 1993 reiterating New Jersey's jurisdictional and sovereignty claims over Ellis Island. The letter further indicated that the failure of the New York Legislature to adopt concurrent legislation as intended in the 1986 Memorandum of Understanding could result in the within action in this Court. Attorney General Abrams responded by letter dated February 8, 1993. He stated that New York Governor Mario M. Cuomo submitted bills essentially identical to New Jersey's implementing legislation to the New York Legislature on three separate occasions, in 1986, 1987 and 1988. "However, despite the Governor's active efforts, the Legislature declined to pass the bill in each of three successive years. Thus, Governor Cuomo has used his best efforts to secure enactment of the Liberty Trust Fund legislation." No proposals have been submitted to the Legislature by the Governor since 1988. At the same time, the staff of the State of New Jersey Historic Preservation Office has been advised that the National Park Service plans to present for public comment a proposal by the Center Development Corporation for the renovation of three existing buildings on the filled portions of Ellis Island. Center Development anticipates that financing of these renovations will be undertaken with the proceeds of bonds issued by the

Dormitory Authority of the State of New York. In addition, New York City is seeking to have the entire island declared a New York City landmark. Because of the New York Legislature's failure to enact legislation to implement the Memorandum of Understanding, and because of other actions taken by the State of New York to advance New York's control of Ellis Island, the 1986 Memorandum of Understanding is a nullity, without any force and effect.

WHEREFORE, the State of New Jersey prays:

- (1) That process be issued against the State of New York and that the State of New York be required to answer this Complaint; and
- (2) That a decree be entered declaring the true and correct boundary line between the State of New Jersey and the State of New York on Ellis Island; and
- (3) That the boundary line be declared to be the former mean high water line of the original natural island, approximately 3 acres in size, so that the original island is thereby declared to be within the territory and jurisdiction of the State of New York, and so that the balance of the island, approximately 24.5 acres in size, and the surrounding waters, are thereby declared to be within the territory and jurisdiction of the State of New Jersey; and
- (4) That this Court issue a permanent injunction prohibiting the State of New York from enforcing its laws or asserting its jurisdiction within the filled portions of Ellis Island; and

(5) For such other and further relief as this Court may deem to be proper.

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April 23, 1993

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No. ____ Original

In The
Supreme Court of the United States
October Term, 1992

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

BRIEF IN SUPPORT OF MOTION
FOR LEAVE TO FILE COMPLAINT

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QUESTION PRESENTED

Whether the Court should permit the State of New Jersey to invoke its original jurisdiction and file a complaint against the State of New York to resolve the long-standing dispute between the states concerning their mutual border on Ellis Island in the Hudson River and Upper New York Bay, where New Jersey's sovereignty over the filled portions of Ellis Island is consistent with the Compact made between the states and ratified by Congress in 1834, and where the Court's resolution will facilitate plans for commercial development and settle attendant controversies over taxation, zoning, and the state civil and criminal laws and regulations applicable on the Island?

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No. ____ Original

In The
Supreme Court of the United States
October Term, 1992

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**BRIEF IN SUPPORT OF MOTION
FOR LEAVE TO FILE COMPLAINT**

JURISDICTION

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States and under Title 28, United States Code, Section 1251(a).

**CONSTITUTIONAL PROVISION AND
STATUTES INVOLVED**

United States Constitution, Art. III, §2, cl. 2

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction.

28 U.S.C. 1251(a), Original Jurisdiction

The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

4 Stat. 708, the 1834 Compact between New Jersey and New York (see Appendix).

STATEMENT OF FACTS

This is a suit under the Court's original and exclusive jurisdiction seeking to resolve a long-standing dispute between the State of New Jersey and the State of New York as to the location of their common boundary on Ellis Island, in the Hudson River and in Upper New York Bay.

Ellis Island is best known as the gateway through which millions of immigrants entered the United States of America beginning at the turn of the century. Between 1892 and 1954, 17,000,000 immigrants were admitted to the United States through Ellis Island. *Collins v. Promark Products, Inc., supra*, 956 F.2d at 385 n.1. Although there were a number of cities on all three American coasts through which immigrants passed, so busy was Ellis Island at that time that it has been estimated that the ancestors of 40% of all Americans came through Ellis Island. *Id.*, at 384.

The island is now part of the Statue of Liberty National Monument, and has been partially restored. The Second Circuit Court of Appeals referred to the island as "a shrine to the nation's immigrant history and ethnic diversity." *Id.*, at 384. The restoration of the Great Hall on Ellis Island, through which all of these immigrants

passed, represents "the largest historic renovation project in the history of the United States." *Id.*, at 385 n.1.

The genesis of the present controversy is the Compact of 1834, a boundary agreement between New Jersey and New York covering their border on the Hudson River, in New York Harbor, and in Raritan Bay. That Compact was itself a resolution of a dispute between the two states which was by then nearly two centuries old. In advancing their boundary positions both sides argued from the royal grants which first created the two colonies.

A. Colonial Antecedents Leading to the Dispute Over the Common Boundary Between the States

It is therefore accurate to say that New Jersey's boundary dispute with New York along the Hudson River and the Bay of New York began with the founding documents of English rule in this part of North America. On March 12, 1664, King Charles II (1630-1685) made a grant of a portion of the lands the Dutch had called New Netherlands to his brother James, Duke of York (1633-1701). James, Duke of York, would rule as James II between 1685 and 1688. The grant from Charles II to the Duke of York arguably included the entire Hudson River. The lands it involved were conveyed . . .

. . . together also with the said river called Hudson's river. . . . [as quoted in a letter from Ezra L'Hommedieu *et als.*, Commissioners of New York to the Commissioners of New Jersey dated September 28, 1807, reprinted in *Report of the Commissioners on the Controversy with the*

*State of New York Respecting the Eastern Boundary
of the State of New Jersey p.5 (Trenton 1807).]*

James, Duke of York conveyed part of the lands he received from Charles II to John, Lord Berkeley, and Sir George Carteret (c.1610-1680) on June 23 and June 24 in 1664. This grant arguably did not include the Hudson River and did include Staten Island. It conveyed

. . . all that tract of Land . . . westward of Long-
Island and Manhattan's Island, and bounded on
the east part by the main sea, and part by Hud-
son's river. . . . [*Id.*, p.6]

According to New York, in its discussions with the New Jersey Commissioners, these two documents were consistent as to the title to the Hudson River. The entire river was conveyed to the Duke of York, so the contention went. When he conveyed out a portion of his new lands to Berkeley and Carteret in 1664, this portion was only bounded on the east by the River, but did not include it. Thus, the Hudson River assertedly remained as part of the colony of New York, and remained part of New York when it became a state. Indeed, this position extended in the early 1800's not only to a claim of sovereignty by New York to the river as it then existed, but also to the original mean low water line on the New Jersey side. Even by then there had been some filling in of the Hudson River, and of the tidemarsh of what later became downtown Jersey City. By virtue of the colonial grants, New York claimed jurisdiction to the filled-in lands on the New Jersey side of the Hudson River, and to the roads and wharfs that were built there.

New Jersey responded that it was a co-equal colony and a sovereign state for which access to and jurisdiction

over half of the Hudson River was economically vital. The middle line of the river was the only proper boundary under the law of nations and the reasonable interpretation of the documents in context, according to New Jersey. Thus, New Jersey's argument with respect to the Hudson River was not based upon a strict interpretation of prior grant instruments.

New York reliance upon the strict interpretation of those same documents in support of its claim of dominion over Staten Island was far less persuasive. The Duke of York's grant to Berkeley and Carteret, upon which New York so heavily relied as to its claim to all of the Hudson River, identified the lands granted as being "west of Manhattan's Island and bounded on the east part by the main sea and in part by Hudson's River." [*Id.*, p.6]. To those in New Jersey, that description included Staten Island as part of New Jersey, because Staten Island is west of Manhattan and is bounded on the east by the main sea, which New Jersey read as what is now Upper New York Bay, the Narrows and Lower New York Bay. In support of its argument for jurisdiction over Staten Island, New York was forced to argue that the Hudson River did not end at Bedloe's Island, but then continued west and south through the much narrower Kill Van Kull and the Arthur Kill to Raritan Bay, thus including Staten Island in New York. The "main sea" did not begin, in this view, until well beyond Sandy Hook. Beyond the terms of the documents, New Yorkers argued Staten Island was theirs as a result of uninterrupted and unchallenged possession from earliest colonization. Thus, New Jersey had as reasonable a claim to Staten Island as New York had to

the Hudson River. Accordingly, it was appropriate to convene negotiators from both states.

B. Negotiations Between the States Concluding in the Compact of 1834

In 1806 and in 1826 commissioners appointed by both states attempted to resolve the ambiguities left by the royal grants. New York applied pressure on New Jersey during this period by arresting and jailing a ship's captain for docking in Perth Amboy, New Jersey in violation of New York law. New Jersey thereupon jailed the Sheriff of Staten Island, New York who made the Perth Amboy arrest for serving process within New Jersey. New Jersey enacted a law setting the boundary between the two states as the middle of the Hudson River. Laws of New Jersey of 1807, c. 3, p. 18. New York then enacted a law during the negotiations setting its boundary along the west shore of the Hudson River at the low water mark, thus claiming jurisdiction over the entire river. New Jersey responded by filing suit in this Court to set the boundary between the States. Thereupon, for a third time, commissioners from both states met in 1833.

This time the negotiations were successful. Commissioners representing both states entered into a Compact on September 16, 1833, to define the jurisdictional and territorial limits of each state, *inter alia*, in New York Harbor. Essentially New York received Staten Island and the other islands in the Hudson River, including Ellis Island, and New Jersey received half of the Hudson River as it existed in 1834. The Compact was ratified by the State of New Jersey on February 26, 1834, N.J.Stat.Ann.

52:28-1, by the State of New York on February 5, 1834, N.Y. State Law §7, and by the United States on June 28, 1834, c. 126, 4 Stat. 708. See generally, as to the history and background to the Compact of 1834, Parker, James, "A Brief History of the Boundary Dispute Between New York and New Jersey" *Proceedings of the New Jersey Historical Society*, VIII, 1856-1859, pages 106-109. Mr. Parker was the only person who was a Commissioner at all three periods of negotiations between the two states.

Article I of the Compact established the boundary line between the states at a point in the middle of the Hudson River and New York Bay, with New York to the east and New Jersey to the west of that line:

Article I. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned. [4 Stat. 709.]

Ellis Island in the Bay of New York is well to the west of the middle line of the Hudson River, and would therefore be, pursuant to Article I, within the territory and under the jurisdiction of the State of New Jersey. Article II of the Compact is in the nature of an exception to Article I, and provides that Ellis Island would nevertheless continue under the then present jurisdiction of the State of New York:

Article II. The state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state. [4 Stat. 709.]

Before the approval of the Compact, New York State had ceded jurisdiction of Ellis Island to the United States Government, subject only to New York State's ability to serve any process, civil or criminal, on the island, at that time called Oyster Island. Laws of New York of 1800, c. 6, p. 454, passed February 15, 1800. New York conveyed its title to the island to the United States on June 28, 1834, the same date as the Compact's approval in Congress. At that time, Ellis Island was approximately three acres in size. The submerged tidal lands west of the middle of the Hudson River, including the lands under water immediately adjacent to Ellis Island, were lands of the State of New Jersey, its property under common law, and subject to its sovereign jurisdiction pursuant to Article I, subject only to the jurisdiction of the State of New York over those waters for police purposes to protect and advance the interests of the New York port.

C. The Filling of Submerged Lands Around Ellis Island

After the Civil War, the United States War Department determined that the military installation then in operation there was no longer required at Ellis Island. In 1890, it transferred the island to the Treasury Department for its use as an immigration station. Between 1890 and 1934, the United States Government undertook several

landfill projects by which the size of Ellis Island was increased from the original, natural approximately three acres to approximately 27.5 acres to accommodate the new use.

The lands around the original three-acre island were recognized as the lands within the territory and sovereignty of the State of New Jersey by the United States Government when in 1904 it purchased the title to these tidal submerged lands from the State of New Jersey. A New Jersey State tidelands "grant" (or deed) was delivered to the United States Government pursuant to N.J.Stat.Ann. 12:3-1 *et seq.*, on November 30, 1904. The grant recites that the conveyed submerged tidal lands of the Hudson River were "... in the Bay of New York in the County of Hudson, and State of New Jersey." These were the lands that were filled and developed between 1890 and 1934, by the United States Government for the immigration facility on Ellis Island. The original natural island has sometimes been referred to as Island No. 1, by the employees on the island and by the United States Government, while the filled lands have sometimes been referred to as Islands No. 2 and 3 on Ellis Island.

D. The Current Dispute Over the Filled Portion of Ellis Island

As pleaded in the accompanying proposed Complaint, the State of New Jersey at no time has ceded its territorial sovereignty and jurisdiction over the 24.5 acres, approximately, of filled lands surrounding the original, natural 3-acre Ellis Island to the United States or to the State of New York.

The State of New Jersey and the State of New York presently have a dispute concerning which state properly has jurisdiction over the 24.5 acres, approximately, of filled land of Ellis Island, for the purposes of taxation, zoning, environmental protection, elections, education, residency, insurance, building codes, historic preservation, labor and public welfare laws, the imposition of civil and criminal law, and for all other purposes related to the jurisdiction of any state.

The State of New York has improperly claimed all of Ellis Island as part of its jurisdiction by including it as a noncontiguous part of the County of Manhattan in the State of New York for the purposes of United States Congressional districts, New York State Senate districts, New York State Assembly districts, and for other purposes.

E. New Jersey's Continued Assertions of Sovereignty Over the Filled Portion of Ellis Island

The State of New Jersey and its citizens have publicly asserted the sovereignty claim of the State of New Jersey to the filled portion of Ellis Island many times over the years after 1904, as evidenced by the following facts.

First, the City of Jersey City, Hudson County, New Jersey, has, during the entire period, from 1890 to the present, carried Ellis Island on its tax rolls as assessed property within its boundaries, although with a tax exempt status based on its ownership by the United States Government. Second, in 1934, New Jersey Congresswoman Mary T. Norton wrote to the Administrator of the federal Public Works Administration, Harold L.

Ickes, to object to the barring of workers from New Jersey unions from working on a public works project on Ellis Island. Congresswoman Norton based her objection on Ellis Island's partial location on New Jersey land and on the Island's closer proximity to the New Jersey mainland than to the New York mainland. In response to Norton's objection, the United States Government decided that employment on Ellis Island would be divided between workers from New Jersey and those from New York.

Next, in mid-July 1955, the New Jersey Commissioner of Conservation and Economic Development, Dr. Joseph E. McLean, wrote to Walter F. Downey, Regional Director of the United States General Services Administration, and asserted that Ellis Island lay within the geographical limits of the State of New Jersey. In addition, during that same year, United States Representative Thomas J. Tumulty objected to a federal bill authorizing the appointment of a New York City National Shrines Advisory Board on the basis of Jersey City's claims to Ellis Island. *Congressional Record*, July 30, 1955, at 12387. This objection to the bill blocked its passage until United States Representative George Klein of New York responded to the objection by stating that New Jersey residents would be allowed to serve on the proposed Board. *Congressional Record*, August 1, 1955, at 12703.

During the following year, on January 4, 1956, 25 New Jersey State and County officials inspected Ellis Island as part of their ongoing efforts to reassert New Jersey's claims to the island. The contingent was led by Joseph B. McLean, New Jersey State Commissioner of Conservation and Economic Development, and by City of Jersey City Mayor Bernard J. Berry, New Jersey State

Senator James F. Murray, Jr. and New Jersey State Senator Richard Stout. The New Jersey group was taken to the island aboard the Coast Guard cutter *Tuckahoe* and received a two-hour inspection tour from the federal employees on the island; the inspection by New Jersey officials was reported in the *New York Times* on January 5, 1956. Representative Irwin D. Davidson of New York commented on this inspection tour and New Jersey's claim of jurisdiction over Ellis Island. He did so in an Extension of Remarks reprinted in the *Congressional Record*, March 7, 1956 at 4244. In October, 1962, City of Jersey City Mayor Thomas Gangami also made a trip to Ellis Island in order to claim it for New Jersey.

On January 2, 1958, New Jersey State Senator James F. Murray, Jr. telegrammed United States Senators Alexander Smith and Clifford P. Case and United States Congressional Representatives Alfred D. Simiensi and Vincent J. Dellay to assert that the City of Jersey City had legal jurisdiction over Ellis Island. The action was reported in the *New York Times* on January 3, 1958.

The Council of State Governments subsequently attempted to arrange a meeting between representatives of New Jersey and New York over the jurisdiction of either State on Ellis Island and the date of August 8, 1960 was set for the meeting. However, New York State Senator Elisha T. Barrett, Chairman of the New York Commission on Interstate Cooperation, then advised New Jersey that New York would not participate and he asserted that New York would have jurisdiction over Ellis Island if the United States Government disposed of the island. New Jersey State Commissioner of Conservation and Economic

Development, Salvatore A. Bontempo replied to this assertion by stating that Ellis Island was clearly in New Jersey and that New York had confused ownership with jurisdiction. The proposed meeting and the exchange between New York and New Jersey State officials was reported in *The Newark News* on July 22, 1960.

Two years later, on December 6, 1962, the City of Jersey City, through its Corporation Counsel, Meyer Pesin, asserted the interests of the City in the filled portion of Ellis Island during three days of hearings on the disposal of Ellis Island before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations of the United States Senate. During his testimony, Pesin stated that "Jersey City may well claim preemptive governmental jurisdiction over Ellis Island . . . [.] To put it simply, in other words, the city of Jersey City may look upon Ellis Island as within the proper boundaries of the city and subject to its jurisdiction." (Transcript, p. 123). In addition, much of the other hearing testimony also concerned the question of jurisdiction over the island between the States of New York and New Jersey, and United States Senator Edmund S. Muskie, Chairman, explicitly recognized this issue on the first hearing day. (Transcript p. 20). This testimony included a statement by Mr. Eugene J. Morris, who asserted that either a bi-state compact or an appeal to the United States Supreme Court would resolve the matter, which " . . . is at the moment totally unresolved." (Transcript p. 25). The testimony also included a statement by United States Senator Kenneth B. Keating of New York, who submitted a memorandum from the Library of Congress on the issue (Transcript p. 64), as well as statements by Robert F.

Wagner, Mayor of New York City, and by New York Congressman, Leonard Farbstein. On September 5, 1963, the City of Jersey City responded to the hearing by enacting a zoning ordinance applicable to Ellis Island which would control any development on the island if it were sold to private interests.

The sovereignty and jurisdiction of the State of New York and the State of New Jersey over Ellis Island was ultimately the subject of a complaint entitled *Frank J. Guarini v. The State of New York and the State of New Jersey*, which was filed in the Superior Court of New Jersey, Chancery Division, Hudson County on November 9, 1984 and was then removed to the United States District Court for the District of New Jersey. The State of New Jersey filed an Answer to that Complaint on January 9, 1985, and admitted the Plaintiffs' factual allegations in the Third Count, paragraph 2 of the Complaint. Those allegations were:

2. The landfill and accretions to Ellis Island, consisting of approximately 24.5 acres, fall within the territorial jurisdiction and the sovereignty of the defendant State of New Jersey under the terms of the compact of 1834.

The Federal District Court remanded the *Guarini* action to the state court, which subsequently dismissed the case on the ground that only the United States Supreme Court has jurisdiction to decide the boundary issues between states. *Guarini v. State of New York*, 215 N.J. Super. 426, 521 A.2d 1362 (Chan. Div. 1986), *aff'd*, 215 N.J. Super. 293, 521 A.2d 1294 (App. Div. 1986), *certif. den.*, 107 N.J. 77, 526 A.2d 157 (1987) *cert. den.*, 484 U.S. 817, 108

S.Ct. 71, 98 L.Ed.2d 34 (1987). The State of New York was a party to the litigation.

On June 23, 1986, Thomas H. Kean, Governor of the State of New Jersey, and Mario M. Cuomo, Governor of the State of New York, signed a Memorandum of Understanding agreeing to divide the state and local taxes collected on Ellis Island and Liberty Island equally and to devote this revenue to relief for homeless persons of both states. The taxes involved include sales, income, and corporate taxes. Both Governors agreed to use their best efforts to have their legislatures approve the proposal, and the agreement was incorporated into law by the State of New Jersey in 1987, N.J.Stat.Ann. 32:32-1 *et seq.* However, the agreement has not yet been incorporated into law by the State of New York.

Most recently, in 1992, the State of New Jersey appeared as an *amicus curiae* in *Collins v. Promark Products, Inc., supra*, to assert its jurisdictional and territorial rights over the filled portion of Ellis Island before the United States Court of Appeals for the Second Circuit. The State of New York also appeared as an *amicus curiae* in that litigation to support its jurisdictional and territorial claims over the same filled land.¹ The *Collins* Court held that the law of the State of New York regarding workers compensation would apply to the litigation involving an accident which occurred on the filled portion of Ellis Island.

¹ Neither state was a party to the *Collins* litigation, and neither state was involved in the litigation before the trial court. Neither state was allowed to enlarge the record before the appellate court.

F. New York's Imminent Plan for the Development of the Filled Portion of Ellis Island in the Face of This Dispute Warrants This Court's Intervention

The existence of a dispute between the State of New Jersey and the State of New York as to the proper jurisdiction over the filled portion of Ellis Island has a severe impact on the potential development of these lands, which have been unoccupied and essentially not maintained since 1954. This area is a prime site for commercial development, and uncertainty as to jurisdiction over this area inhibits its full development. For example, Center Development Corporation of New York proposed in 1992 to renovate the 120,000-square-foot baggage and dormitory building on Ellis Island into a 135-room hotel. Most recently, it proposed a student dormitory be constructed on the island. The company has also proposed to renovate 27 other buildings on Ellis Island into a conference center. This last proposal was selected in 1983 by the Interior Department as the best way to preserve the historic structures on the island at no cost to taxpayers.

The State of New Jersey has attempted to negotiate an overall resolution of this dispute with the State of New York. The 1986 Memorandum of Understanding and the approval of that agreement by the New Jersey Legislature are illustrative of those attempts. Officials of the State of New Jersey have requested that the Governor of the State of New York use his best offices to have the proposed partial resolution of this dispute submitted to the Legislature of the State of New York, and there approved. Such efforts have not been successful, and it appears highly

unlikely that any agreement as to this jurisdictional dispute can be reached.

The original jurisdiction of this Court is invoked because there is a pressing need for a prompt and final settlement of the controversy, and because the question in issue, the jurisdiction over the filled lands of Ellis Island, between the State of New Jersey and the State of New York, can be resolved by this Court alone. As an illustration of this pressing need to settle this matter, the State of New Jersey points to the recent actions of the New York City Landmarks Preservation Commission. On November 10, 1992, the Commission held hearings in the process of having the entire island declared a city landmark. In taking this action, the Commission is endeavoring to extend the decision of the Court of Appeals in *Collins v. Promark Products, Inc.*, *supra*, to all matters involving state jurisdiction over the entire island.

The need for the immediate resolution by the Court of the boundary dispute concerning Ellis Island is further exemplified by the current development proposals for the island. The National Park Service plans to act under the National Historic Preservation Act, 16 U.S.C. §470(f), and present for public comment in the near future plans by the Center Development Corporation of New York for the renovation of three existing buildings on the filled area of the island. The buildings will be designed to house graduate students and professors for certain colleges and universities within the City of New York in New York State. The renovations are to be financed by the proceeds of bonds issued by the Dormitory Authority of the State

of New York. The Center intends to use the money generated by the dormitories to build an international scholastic center at other renovated buildings on the island. The Authority is limited by statute to projects in New York State under the Dormitory Authority Act, N.Y. Public Authorities Law §1675 *et seq.* (McKinney 1981), and having a part in this development would be a violation of this law. The proposal constitutes an unwarranted extension of the decision in *Collins*, which in any event was erroneous, and is contrary to New Jersey sovereignty over the filled portion of the island.

New Jersey Attorney General Robert J. Del Tufo wrote to New York Attorney General Robert Abrams on January 8, 1993 reiterating New Jersey's jurisdictional and sovereignty claims over Ellis Island. The letter further indicated that the failure of the New York Legislature to adopt concurrent legislation as intended in the 1986 Memorandum of Understanding could result in the within action in this Court. Attorney General Abrams responded by letter dated February 8, 1993. He stated that New York Governor Mario M. Cuomo submitted bills essentially identical to New Jersey's implementing legislation to the New York Legislature on three separate occasions, in 1986, 1987 and 1988. "However, despite the Governor's active efforts, the Legislature declined to pass the bill in each of three successive years. Thus, Governor Cuomo has used his best efforts to secure enactment of the Liberty Trust Fund legislation." No proposals have been submitted to the Legislature by the Governor since 1988. At the same time, the staff of the State of New Jersey Historic Preservation Office has been advised that the National Park Service plans to present for public

comment a proposal by the Center Development Corporation for the renovation of three existing buildings on the filled portions of Ellis Island. Center Development anticipates that financing of these renovations will be undertaken with the proceeds of bonds issued by the Dormitory Authority of the State of New York. In addition, New York City is seeking to have the entire island declared a New York City landmark. These actions, coupled with the New York Legislature's inaction for nearly seven years, force New Jersey to conclude that the 1986 Memorandum of Understanding is a nullity, and of no force and effect and cannot now form the basis of a partial resolution of the matter in controversy.

SUMMARY OF ARGUMENT

This is a suit under this Court's original and exclusive jurisdiction seeking to resolve a serious and long-standing dispute between New York and New Jersey concerning the location of their common boundary on Ellis Island, in the Hudson River and Upper New York Bay. It seeks to enjoin New York from exercising its jurisdiction over a 24.5-acre portion of the island which was created by artificial filling after 1834. New Jersey asserts that pursuant to an 1834 Compact fixing the boundary between New Jersey and New York and to this Court's decisions regarding state boundary law, all portions of Ellis Island that were created by artificial filling after 1834 are within New Jersey's territory and are subject to its jurisdiction. New York claims that the whole of Ellis Island, including the artificially filled areas, is within its territory and subject to its jurisdiction.

This Court has original and exclusive jurisdiction over controversies between states under 28 U.S.C. §1251(a), and is thus the only Court available to resolve this dispute. *Mississippi v. Louisiana*, 506 U.S. ___, 113 S.Ct. 549, 121 L.Ed.2d 466 (1992). Moreover, there is a pressing need for this Court to finally resolve this long-standing controversy. New Jersey has been attempting for many decades to resolve the issues concerning Ellis Island without success. These attempts have involved state and federal officials, including United States Senators, United States Congressional Representatives, local officials, and the Governors of both states. These long-standing but futile efforts by the highest officials of both states demonstrate "the seriousness and dignity of the claim." *Id.*, 506 U.S. at ___, 113 S.Ct. at 552, 121 L.Ed.2d at 471.

In addition, in 1992 the Court of Appeals for the Second Circuit held, in a workers compensation and products liability matter, that the law of New York would be applied to resolve a claim for contribution for damages sustained on the filled portion of Ellis Island, rather than the law of New Jersey. *Collins v. Promark Products, Inc.*, *supra*. The *Collins* decision reflects an erroneous determination that the whole of Ellis Island is within the jurisdiction of New York. It is now being relied upon by New York to expand its governmental authority over the filled portion of Ellis Island. Only a resolution by this Court can halt this activity, which threatens New Jersey's sovereign right to review and regulate construction within its borders, to impose sales, corporate, and income taxes on any development within its jurisdiction, and to

otherwise appropriately and fully exercise its authority within its lawful boundaries.

New Jersey's jurisdiction over the lands in dispute is established by the precedents of this Court and by an 1834 Compact between New York and New Jersey. That Compact, 4 Stat. 708, fixed the boundary between the states by allocating a three-acre land area then known as Ellis Island to New York and by allocating the lands under the waters of the river and bay surrounding that island to New Jersey. Between 1890 and 1934, the United States filled the New Jersey waters surrounding Ellis Island, and thereby increased the island's size by approximately 24.5 acres.

This Court has repeatedly held that the artificial filling of waters along a state's river boundary does not operate to change the location of its boundary with the adjacent state. *Georgia v. South Carolina*, 497 U.S. 376, 110 S.Ct. 2903, 111 L.Ed.2d 309 (1990). This rule is "settled beyond the possibility of dispute." *Arkansas v. Tennessee*, 246 U.S. 158, 173, 38 S.Ct. 301, 304, 62 L.Ed. 638, 647 (1918), and clearly establishes New Jersey's jurisdiction over the 24.5-acre portion of Ellis Island created by artificial filling after 1834.

New Jersey's sovereignty claim is also fully consistent with the actions of the United States, which in 1904 purchased the lands it intended to fill from New Jersey. This purchase rightfully reflected that New Jersey owns the lands under its tidal waters. *Phillips Petroleum Co. v. State of Mississippi*, 484 U.S. 469, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988). Moreover, the sale of its land by New Jersey

did not and could not in any way convey away its sovereignty. *Central Railroad Co. v. Mayor, etc., of Jersey City*, 209 U.S. 473, 28 S.Ct. 592, 52 L.Ed. 896 (1908). Thus the conveyed lands remained within the territorial boundaries of New Jersey, as set by the Compact of 1834.

Despite New Jersey's jurisdiction over the artificially filled portion of Ellis Island, New York has alleged that New Jersey has accepted New York's assertion of sovereignty over all of Ellis Island and has thereby relinquished its jurisdiction. These assertions are unfounded because, from the time artificial filling commenced in 1890, the State of New Jersey and its citizens have continuously disputed the State of New York's claim of jurisdiction.

Although, "long acceptance of the status quo counts for a great deal in matters of territorial dispute between states," *Collins v. Promark Products, Inc., supra*, 956 F.2d at 388, no such acceptance occurred in this case. Rather, New Jersey officials repeatedly objected to New York's assertion of jurisdiction over the filled area of Ellis Island, and New York and New Jersey have in fact been engaged in an ongoing dispute concerning the boundary between them on the island. Cf. *New Jersey v. Delaware*, 291 U.S. 361, 376-377, 54 S.Ct. 407, 412, 78 L.Ed. 847, 855 (1934). In such circumstances, New York's defense against New Jersey's claim of sovereignty over the filled portion of Ellis Island must fail.

The *Collins* Court did not have before it either the record of New Jersey's ongoing objections to New York's improper exercise of sovereignty or the legislative history

of the Compact of 1834.² That history shows that after the Compact was enacted, a Boundary Commission in 1888-1890, composed of representatives from both states, drew the line between the states. That Boundary Commission recognized that a great amount of filling had taken place in the Hudson River and in New York Bay between 1834 and 1880, but interpreted the Compact of 1834 as fixing the boundary line with reference to the shoreline *as it originally existed in 1834*. The Commission therefore spent considerable time and effort to find a map from 1834, eventually locating a United States Coast and Geodetic Survey map prepared "a few years after the treaty of 1834." The Commission determined to use that map for the purpose of drawing the boundary line. After doing so, the Commission drew the common boundary between New York and New Jersey by reference to the shoreline of 1834. By filing this suit, New Jersey is simply asking this Court to enforce that boundary line between the original island and the filled land now comprising Ellis Island.

LEGAL ARGUMENT

I.

THE BOUNDARY DISPUTE BETWEEN NEW JERSEY AND NEW YORK PRESENTS A JUSTICIABLE CASE OR CONTROVERSY REQUIRING THE EXERCISE OF THE COURT'S ORIGINAL JURISDICTION.

The language of Article III, Section 2, Clause 2 of the Constitution of the United States gives original

² New Jersey did not participate before the trial court in *Collins*. Neither New York nor New Jersey was allowed to enlarge the record before the appellate court.

jurisdiction to this Court "In all cases . . . in which a State shall be a Party . . . " In order to determine if a particular dispute constitutes a justiciable "case" within the meaning of the Constitution, the Court has found that the complaining State must suffer an apparent wrong as a result of the second State's action which furnishes grounds for judicial redress or that it asserts a judicially enforceable right under accepted principles of common law or equity. *Massachusetts v. Missouri*, 308 U.S. 1, 15, 60 S.Ct. 39, 84 L.Ed. 3 (1939).

Plaintiff, the State of New Jersey, submits that a boundary dispute such as that involved in this case is, without doubt, a constitutionally justiciable "case" between states, requiring the exercise of the Court's original jurisdiction. Indeed, there has been no serious doubt on this score since the Court first addressed this question in *Rhode Island v. Massachusetts*, 37 U.S. 657, 9 L.Ed. 1233 (1838). The Court considered the derivation of the judicial power under the Constitution in conjunction with a discussion of those attributes of sovereignty retained and surrendered by the states under the Constitution. *Id.*, 37 U.S. at 720-731, 9 L.Ed. at 1258-1263. The Court noted that the power to resolve a boundary dispute in the manner normally available to sovereigns had been surrendered by the states and concluded that an original action before this Court was the only constitutional means available for legally resolving such a dispute between States. *Id.*, 37 U.S. at 726, 9 L.Ed. at 1261.

Most recently, in *Mississippi v. Louisiana*, 506 U.S. ___, 113 S.Ct. 549, 121 L.Ed.2d 466 (1992), this Court reaffirmed this principle. In that matter, in an action originally commenced by private plaintiffs against other

private defendants in a federal district court, the State of Louisiana filed a third-party complaint against Mississippi seeking to determine the boundary between the two states in the vicinity of the land disputed by the private parties. The Court held that 28 U.S.C. §1251(a) conferred upon this Court original and exclusive jurisdiction of all controversies between two states, and deprived the District Court of jurisdiction over the third-party complaint. The Court stated that its original jurisdiction would be exercised only "sparingly" because it "is of so delicate and grave a character." In determining whether a case is "appropriate" for its original jurisdiction, the Court wrote that it would examine two factors: first, "the nature of the interest of the complaining State . . . focusing on the seriousness and dignity of the claim," and, second, "the availability of an alternative forum in which the issue tendered can be resolved." *Id.*, 506 U.S. at ___, 113 S.Ct. 549, 552-553, 121 L.Ed.2d at 471-472.

Judged against these standards, the Court should permit the filing of the complaint in this matter. As to "the seriousness and dignity of the claim," the State of New Jersey points to the attempts that it has been making for decades to resolve the issues concerning Ellis Island. State and federal officials on both sides have been involved, including United States Senators, United States Congressional Representatives and local officials. The Governors of both states reached an agreement concerning application of the revenues derived from Ellis (and Liberty) islands in 1986, but the New York Legislature did not ratify the agreement. These efforts, over many years, demonstrate the seriousness of the interest of the complaining state. *Id.*

As to the availability of an alternative forum, the Court's decision in *Mississippi v. Louisiana*, *supra*, makes clear that there is no alternative forum. An attempt was made to litigate this dispute in the State courts of New Jersey, and that attempt was rebuffed, on precisely that ground. *Guarini v. State of New York*, *supra*. Neither is there a superceding issue which may be determined by a lower court. (See, e.g., *Arizona v. New Mexico*, 425 U.S. 794, 96 S.Ct. 1845, 48 L.Ed.2d 376 (1976).) This matter is a border dispute between states, the very type of action requiring the exercise of this Court's original jurisdiction. In the case at bar, the State of New Jersey, relying on the Compact of 1834, asserts that its boundary with the defendant, the State of New York, on Ellis Island is the original natural mean high water line as it existed in 1834. The defendant, the State of New York, claims jurisdictional sovereignty over the entire island, natural and filled, despite the Compact of 1834. There is clearly a controversy between the two states which calls for a resolution by this Court.

There is, moreover, a pressing need for the prompt and final settlement of this controversy. Resolution of the dispute is essential because, as stated previously, in 1992 the Court of Appeals for the Second Circuit issued its opinion in *Collins v. Promark Products, Inc.*, *supra*, holding in the context of a worker's compensation action that the law of New York would be applied to resolve a contribution claim for damages sustained on the filled portions of Ellis Island. Although the Court of Appeals for the Second Circuit does not have jurisdiction to resolve the dispute between New York and New Jersey concerning its common border, the decision of that court in *Collins v.*

Promark Products, Inc., supra, reflects a determination that the whole of Ellis Island, including the lands artificially filled after 1834, is within the territory of New York and subject to its governmental jurisdiction. This decision was patently erroneous and is being improperly relied upon by the State of New York to expand its governmental authority over the filled portions of the island. For example, on or about November 10, 1992, the Landmarks Preservation Committee of the City of New York held hearings on the question of whether the whole of Ellis Island should be declared a city landmark. In taking that action, the Commission is endeavoring to extend the *Collins* decision to all matters involving state jurisdiction over the entire island.

The need for immediate resolution by the Court of the boundary dispute concerning Ellis Island is further exemplified by the current development proposals for the island. New Jersey officials have been advised that the National Park Service plans to act under the National Historic Preservation Act, 16 U.S.C. §470(f), and present for public comment in the near future plans by the Center Development Corporation of New York for the renovation of three existing buildings on the filled area of the island. The buildings will be designed to house graduate students and professors for certain colleges and universities within the City of New York in New York State. Center Development anticipates that financing of these renovations will be undertaken with the proceeds of bonds issued by the Dormitory Authority of the State of New York. Center Development intends to use the money generated by the dormitories to build an international scholastic center at other renovated buildings on the

island. The Authority is limited by statute to projects in New York State under the Dormitory Authority Act, N.Y. Public Authorities Law §1675 *et seq.* (McKinney 1981), and having a part in this development would be a violation of this law. The proposal constitutes an unwarranted extension of the decision in *Collins*, which in any event was erroneous, and is contrary to New Jersey sovereignty over the filled portion of the island.

The Court has original and exclusive jurisdiction over state boundary disputes. This matter involves the New Jersey-New York boundary on Ellis Island, an issue that has concerned the highest officials of both states for many decades. The seriousness of the dispute is evident. No other forum exists to resolve the controversy. Moreover, pending development proposals make urgent the need for this Court to grant New Jersey's motion.

II.

THE MIDDLE LINE OF THE HUDSON RIVER AND NEW YORK BAY WAS AGREED TO BE THE BOUNDARY BETWEEN NEW JERSEY AND NEW YORK IN THE COMPACT OF 1834. EXCEPT AS OTHERWISE PROVIDED IN THE COMPACT, NEW JERSEY HAS SOVEREIGN AUTHORITY AND ITS LAWS APPLY TO ALL LANDS ON NEW JERSEY'S SIDE OF THE BOUNDARY. THIS INCLUDES FORMERLY TIDE FLOWED LAND ARTIFICIALLY FILLED TO ENLARGE ELLIS ISLAND LONG AFTER THE COMPACT WAS RATIFIED.

Ellis Island and the present and formerly flowed tidelands surrounding it lie on New Jersey's side of the boundary between New Jersey and New York as resolved

in the Compact of 1834. The original natural Ellis Island in 1834 was much smaller than the Ellis Island of today, comprising only a part of the northern end of the island as it exists now. A map showing the original island and the artificial filling which took place between 1890 and 1936 is reproduced in the Appendix to the Court's decision in *Collins v. Promark Products, Inc.*, *supra*, 956 F.2d at 390. It is undisputed that a major portion of Ellis Island became secure and fast upland not by the slow and imperceptible process of the addition of soil gradually to the island, a process known as accretion, but rather by the sudden and perceptible artificial filling of the adjacent tidal portions of the Bay, a process called avulsion, which occurred here between 1892 and 1934. *Collins v. Promark Products, Inc.*, *supra*, 956 F.2d at 385. That artificial fill did not deprive New Jersey of its sovereignty over areas which the Compact of 1834 determined were part of New Jersey.

A. The Compact of 1834 Set the Boundary Between New York and New Jersey Subject to Certain Exceptions.

In 1834 a bi-state agreement was reached between New York and New Jersey concerning their common boundary in the Hudson River and New York Bay. Commissioners were empowered and appointed by both states in 1833 to determine the boundary, and they reached an agreement in the same year, on September 16, 1833. Their agreement was ratified by New Jersey on February 26, 1834, L. 1834, p. 188, N.J.Stat.Ann. 52:28-1 *et seq.* (1986), by New York on February 5, 1834, Laws of New York of 1834, c. 8, p. 8, N.Y. State Law §7 (McKinney

1984), and by the United States on June 28, 1834, c. 126, 4 Stat. 708. The agreement is referred to generally as the Compact of 1834.

Upon the three ratifications the Compact became a binding agreement between the two states. *Poole v. Fleeger's Lessee*, 36 U.S. 185, 9 L.Ed. 680 (1837). The boundary line set by the Compact was surveyed and described by metes and bounds, monumented and recorded by both States. See N.Y. State Law §7 (McKinney 1984). It remains in effect today, unchanged.

The principal accomplishment of the Compact was to locate the boundary line between New York and New Jersey as the middle line of the Hudson River and New York Bay:

Article I. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan bay to the main sea; except as hereinafter otherwise particularly mentioned. [4 Stat. 709].

This provision placed Ellis Island within New Jersey, since it is well to the west or on New Jersey's side of the middle line of the Bay. Article II, however, carved out an exception to Article I, stating that "The state of New York shall retain its *present* jurisdiction of and over Bedlow's and Ellis' islands . . ." (emphasis supplied). 4 Stat. 709. Furthermore, Article III states that New York shall have

exclusive jurisdiction of and over all of the waters of the Hudson River and New York Bay, with the following exception:

The State of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey. [Article III(1); 4 Stat. 710.]

As explained herein, under the settled judicial construction accorded the Compact and the settled law of riparian rights, New Jersey has sovereignty over and its laws apply to the tidelands west of the boundary, sovereignty which is retained notwithstanding the artificial filling of the underwater lands.

B. The Settled Judicial Construction of the Compact Applies New Jersey's Laws West of the Boundary Line.

The first three provisions of the Compact quoted previously were construed in a number of early cases. In *People of the State of New York v. Central Railroad Co.*, 42 N.Y. 283 (1870), *app. dismiss.*, 79 U.S. 455 (1872), the New York Court of Appeals rebuffed an attempt by the Attorney General of New York to cause the removal of railroad piers extending from the New Jersey shore one mile into the harbor. The Court held that the State of New York had in Article I "clear[ly] and explicit[ly]" released its right and claims to New Jersey to the lands under water west of the middle line of the Hudson River. *Id.* at 292. The middle line of the Hudson River became, upon ratification of the Compact, the boundary for the sovereignty

and jurisdiction of each state. *Id.* at 293. The New York Court limited the jurisdiction of New York as stated in Article III to the *waters* of the River (emphasis in original, *Id.* at 297), and indicated that New York's jurisdiction was limited to those police powers necessary to regulate commerce and navigation, and health:

By this exception, it was designed that vessels afloat upon said bay and river should not escape or evade the quarantine laws, and the laws relating to passengers of New York, by coming to anchor on or near the New Jersey shore, or by becoming attached to the wharves or docks on said shore or adjacent thereto, but in all other particulars they were left subject to the laws of New Jersey. [*Id.* at 300]

The same result was reached in *State v. Babcock*, 30 N.J.L. 29 (Sup. Ct. 1862). The New Jersey Court there held that New York had jurisdiction to seek the removal of obstructions to navigation in the Hudson River and for criminal violations in that regard below the low water line on the New Jersey side. *Id.* at 31-32. Justice Lucius Q.C. Elmer, who wrote for the Court, was one of the New Jersey Commissioners who negotiated the terms of the Compact of 1834. He stated that the intent of the Commissioners was to grant New York police and quarantine powers over the entire river, while New Jersey was accorded sovereignty and exclusive jurisdiction to the middle of the river. *Id.* at 33-34.

A Second Circuit Judge sitting in the Southern District of New York was early called upon to consider the same issues in *Atlantic Dredging Co. v. Bergen Neck Ry. Co.*, 44 F. 208 (S.D.N.Y. 1890). A railroad sought to trestle a

navigation channel off the mainland of Bayonne, New Jersey. The district court held that the lands under the waters there were those of New Jersey, and that it did not have jurisdiction, citing *People of the State of New York v. Central Railroad Co.*, 42 N.Y. 283 (1870), *app. dismissed*, 79 U.S. 455 (1872).

Finally, this Court considered the Compact in *Central Railroad Co. v. Mayor, etc., of Jersey City*, 209 U.S. 473, 28 S.Ct. 592, 52 L.Ed. 896 (1908) (Holmes, J.). The Court noted that the courts of both New York and New Jersey had agreed in interpreting the Compact. The Court held that New Jersey had the right to tax the land under water from the low water line to the middle line of the river under the Compact, *Id.* 209 U.S. at 478-479, 28 S.Ct. at 593, 52 L.Ed. at 899, adopting the view that the middle line of the Hudson River is the boundary of sovereignty and general jurisdiction, despite any apparent inconsistent language in Article III.

As previously stated, Article III provides that "New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson river . . . and of and over the lands covered by the said waters . . . " to the low water line off New Jersey. Article III, N.J.Stat.Ann. 52:28-4 (1986). Speaking for the Court, Mr. Justice Holmes considered this provision and pointed out that the dominant purpose of the Compact was the establishment of the boundary line as the middle of the river and bay. *Id.*, 209 U.S. at 479, 28 S.Ct. at 593, 52 L.Ed. at 898. This was accomplished in Article I, *supra*. The Court refused to read Article III as granting to New York sovereignty over

the New Jersey side of the river and bay. Such an interpretation would strip Article I of its meaning, and was plainly wrong. *Central Railroad Co.*, *supra*, 209 U.S. at 479, 28 S.Ct. at 593, 52 L.Ed. at 899. Further, the Court refused to limit New Jersey's authority to merely one of ownership to the lands under the waters west of the middle of the Bay, despite the Compact's use of the phrase "exclusive right of property" to refer to New Jersey's claim to the west of the Bay. Article III(1). To do so would make New Jersey a mere landlord to the west of the middle of the Bay. Mr. Justice Holmes pointed out that this would be "inconsistent with titles already accrued" and that it "would lose significance the moment New Jersey sold the land." *Central Railroad*, *supra*, 209 U.S. at 478-479, 28 S.Ct. at 593, 52 L.Ed. at 898. To read the Compact otherwise would call into question why New Jersey would ratify such an agreement at all: it would be essentially a one-sided agreement in favor of the State of New York.

In more recent times, the Courts of both New York and New Jersey have decided that torts committed west of the middle line of the Hudson River give rise to the application of New Jersey law. In *Kowalskie v. Merchants & Miners Transportation Co.*, 76 N.Y.S. 2d 699 (Sup. Ct. 1947), the court applied New Jersey's shorter statute of limitations to injuries occurring to seamen in the waters of the river west of the middle line. Similarly, in *In re Gutkowski's Estate*, 135 N.J.Eq. 93, 33 A.2d 361 (Prerog. Ct. 1943), the court applied New Jersey's distribution statute because that was the situs of the injury. The minor's death occurred in a ferry boat collision on the New Jersey side of the Hudson River. And finally, in *Clarke v. Ackerman*, 243 A.D. 446, 278 N.Y.S. 75 (1935), New York's

Appellate Division applied New Jersey law to an accident which occurred 800 feet west of the center of the George Washington Bridge, which crosses the Hudson River between New Jersey and New York.

As a result of the Compact and its consistent interpretation by the courts of New York, New Jersey, the lower federal courts, and this Court, the lands under water to the west of the midline of the Hudson River and Upper New York Bay are lands within the territory of New Jersey, and are subject to its sovereign jurisdiction in all matters. The only exception is that New York accepted the responsibility of police and quarantine powers over the whole Harbor. The lands under water around Ellis Island in 1834 were lands of the State of New Jersey, and remained under the sovereignty of New Jersey even after fee title was sold in 1904.

C. Artificial Filling of a Portion of Tidal New Jersey Land to Expand Ellis Island Long After the Ratification of the Compact Did Not Deprive New Jersey of Its Sovereignty Over These Lands.

By reason of the Compact, the tidal lands around Ellis Island at that time (1834) were confirmed as being within the jurisdiction, sovereignty, and ownership of the State of New Jersey. Article III(1), N.J.Stat.Ann. 52:28-4 (1986). It is those lands that were filled in the years following the Compact to make Ellis Island the size it is today.

However, such artificial avulsive action does not operate to change the boundaries of New Jersey and New York set by the 1834 Compact. The land involved is still

that of New Jersey. This is because avulsive change of water boundaries between two states does not change their boundaries.

The decisions standing for this proposition are legion. In the United States Supreme Court, they stretch from *New Orleans v. United States*, 35 U.S. 662, 717, 9 L.Ed. 573, 594 (1836), to *Georgia v. South Carolina*, 497 U.S. 376, 110 S.Ct. 2903, 111 L.Ed.2d 309 (1990). In *Georgia v. South Carolina*, this Court reviewed the effects of the work of an Army Corps of Engineers' navigation project on the boundary between Georgia and South Carolina. It held that the changes in the flow of water which made new upland caused by hydraulic fill done by the Corps did not change the states' boundary. The Court reaffirmed those principles of law as follows:

General rules concerning the formation of riparian land are well developed and are simply expressed and well accepted. When the bed is changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream. But if the stream leaves its old bed and forms a new one by the process known as avulsion, the result works no change of boundary. *Arkansas v. Tennessee*, 246 U.S. 158, 173, 38 S.Ct. 301, 304, 62 L.Ed. 638 (1918). [*Georgia v. South Carolina, supra*, 497 U.S. at 403, 110 S.Ct. at 2919, 111 L.Ed.2d at 335 (1990).]

Arkansas v. Tennessee, supra, cited by the Court in *Georgia v. South Carolina, supra*, involved a natural sudden and violent new channelization of the Mississippi River between the two states, i.e., an avulsive change in the watercourse. The Court stated the rule as settled that

avulsion by natural or artificial means works no change in state boundaries:

It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel. *New Orleans v. United States*, 35 U.S. 662, 717, 9 L.Ed. 573 (1836); *Jefferis v. East Omaha Land Company*, 134 U.S. 178, 189, 10 S.Ct. 518, 33 L.Ed. 872 (1890); *Nebraska v. Iowa*, 143 U.S. 359, 361, 367, 370, 12 S.Ct. 396, 36 L.Ed. 186 (1892); *Missouri v. Nebraska*, 196 U.S. 23, 34-36, 25 S.Ct. 155, 49 L.Ed. 372 (1904). [*Arkansas v. Tennessee*, *supra*, 246 U.S. at 173, 38 S.Ct. at 304, 62 L.Ed. at 647 (1918).]

The land involved in this matter was unquestionably filled by the United States Government between 1890 and 1934. The original island, the Ellis Island of the Compact of 1834, was called Island No. 1, and is the approximate location of the Great Hall.

The sequence of filling that occurred thereafter is shown in the map attached as an Appendix to *Collins v. Promark Products, Inc.*, 956 F.2d at 390. The filled lands

were known as Island No. 2 and Island No. 3 until the dock basin between the two islands was itself filled. These were artificial changes *at* the water boundary between New York and New Jersey. Under the settled law of this Court, this filling worked no change *in* the boundary between the two states: the filled land, once under water and subject to the sovereign jurisdiction of New Jersey, was still land of the State of New Jersey, even after it became filled upland.

D. The State of New Jersey Has Not Lost Sovereignty And Jurisdiction Over the Filled Portions of Ellis Island Under the Theory of the Long Acceptance of the *Status Quo* By New Jersey.

In *Collins v. Promark Products, Inc.*, *supra*, the Second Circuit Court of Appeals considered a worker's compensation action arising from an injury which occurred on the artificially filled portion of Ellis Island. The Court held that New York law applied to the filled lands, and stated *in dicta* that,

[L]ong acceptance of the status quo counts for a great deal in matters of territorial disputes between states. *See, e.g., Georgia v. South Carolina*, 497 U.S. 376, 110 S.Ct. 2903, 2914, 111 L.Ed.2d 309 (1990); *Arkansas v. Tennessee*, 310 U.S. 563, 569-71, 60 S.Ct. 1026, 1030-31, 84 L.Ed. 1362 (1940); *Michigan v. Wisconsin*, 270 U.S. 295, 306-08, 46 S.Ct. 290, 293-94, 70 L.Ed. 595 (1926); *Indiana v. Kentucky*, 136 U.S. 479, 511-12, 10 S.Ct. 1051, 1054-55, 34 L.Ed. 329 (1890). [*Collins, supra*, 956 F.2d at 388.]

The *Collins* court did not have before it the record of New Jersey's objections over the years to New York's assertion of jurisdiction over the filled portions of Ellis Island. While New York claims sovereignty over the island for over one hundred and fifty years, *Collins, supra*, 956 F.2d at 387, it must be remembered that the land at issue in this matter was all under the waters of New York Bay until after the 1890's, and until then the land under water was unquestionably New Jersey's land. The filling occurred between 1890 and 1934, so that Ellis Island increased from approximately 3 acres to approximately 27.5 acres only after 1890, and indeed did not reach its current size until nearly 1934. *Collins, supra*, 956 F.2d at 385.

Even in the 1890's, *i.e.*, from the very start of the filling, New Jersey asserted its claim of sovereignty and jurisdiction over the lands filled and to be filled. As a result, the United States Government recognized New Jersey's title to the lands to be filled around Ellis Island and the surrounding waters in 1904. In that year, the Government purchased New Jersey's proprietary interest in this land for fair market value and received from the State of New Jersey a State tidelands deed for Ellis Island pursuant to N.J.Stat.Ann. 12:3-1 *et seq.* (1979).³ The

³ A tidelands grant conveys property rights. It does not affect sovereignty or cede jurisdiction from one political jurisdiction to another. Thus, while New Jersey no longer owns, in a proprietary sense, the land it sold to the Government, New Jersey continues to exercise sovereignty over that part of the state unaffected by the grant of ownership, in the same manner that it does over the many other parcels of New Jersey tidelands, and other lands, that it has conveyed. *Central Railroad Co.*

Attorney General of the United States wrote to the Board of Riparian Commissioners of the State of New Jersey as follows on July 15, 1904:

Heretofore, it would seem, the General Government has proceeded upon the theory that the ownership of the lands under water around Ellis Island was in the State of New York. In 1800 New York ceded its jurisdiction over Ellis Island to the United States; in 1808 it condemned the island and sold it to the United States; and in 1880 it granted to the United States its title and jurisdiction to and over the lands under water around Ellis Island within certain limits.

While there is no question as to the ownership and jurisdiction of New York of and over Ellis Island proper and its power to convey the same to the United States, it would seem from the boundary agreement between New York and New Jersey of September 16, 1833 that the ownership of the lands under water west of the Hudson River and the Bay of New York is in the State of New Jersey. [The letter is quoted in Pike, Henry H., *Ellis Island - Its Legal Status* at 60-61. (General Services Admin., Office of General Counsel Opinion 143, February 11, 1963).

The State of New Jersey and its citizens have publicly asserted the sovereignty claim of the State of New Jersey to the filled portion of Ellis Island many times over the years after 1904, as indicated in the proposed Complaint (paragraph 13) and in the Statement of Facts.

v. Mayor, etc., of Jersey City, supra, 209 U.S. at 478-479, 28 S.Ct. at 593, 52 L.Ed. at 898.

the Second Circuit Court of Appeals. All of these contacts and events were covered by the *New York Times* and other newspapers.

Thus, the matter of the correct and true state boundary on Ellis Island has been in conflict from almost the time the first submerged river bottom land was made upland. The cases in which this defense has been allowed have involved far more substantial periods of time, such as the 163 years in *Georgia v. South Carolina, supra*, the 113 years in *Arkansas v. Tennessee, supra*, and the 50 to 75 years in *Michigan v. Wisconsin, supra*. During all those times, the other state made *no* objection. Here, at best, the period is far shorter, and the State of New Jersey made, over the years, numerous objections to New York's claims. None of this record was before the Court in *Collins v. Promark Products, Inc., supra*. And because of this record, the State of New Jersey's claims should be evaluated on their merits and not dismissed on the defense of prescription and acquiescence.

E. The Legislative History Concerning the Compact of 1834 Supports the Conclusion That the Tidal Lands Filled Around the Original Ellis Island Were Intended To Remain Under the Sovereignty of the State of New Jersey.

The Court in *Collins v. Promark Products, Inc., supra*, 956 F.2d at 386-387 commented on whether the drafters of the Compact of 1834 intended filling to affect jurisdiction and sovereignty of the filled lands. The lands under water around the original Ellis Island in 1890 were clearly

New Jersey's under Article I of the Compact as interpreted by the early cases considering the Compact, including those before this Court. *State v. Babcock, supra*; *People v. Central Railroad, supra*; *Central Railroad v. Jersey City, supra*. Under the law developed by this Court, filling of tidal lands does not affect jurisdiction and sovereignty.

The *Collins* Court did not have before it any legislative history of the Compact of 1834, but nevertheless reasoned:

The language of the Compact concerns power over the *entity* known as Ellis Island and in no way implicates the size of the entity. It was the stated intention of the Commissioners that whatever matters were subject to the jurisdiction of New York at the time the Compact was entered into would continue thereafter to be subject to the jurisdiction of New York. Surely, the Commissioners must have contemplated that the territory of the Island might over the years decrease or increase as the result of natural or artificial forces. This is evidenced by the fact that language of size forms no part of the structure of the Compact as it specifically relates to Ellis Island. [*Collins v. Promark Products, Inc., supra*, 956 F.2d at 386-387. Emphasis in original]

The Compact of 1834 was followed by a Boundary Commission in 1888-1890, which was charged with actually drawing the line described by the Compact. Between 1830 and 1890 there was extensive development in the United States in general and in New York Harbor in particular, development which was accompanied by large scale filling of the shoreline, *i.e.*, the Hudson River and New York Bay. The Compact of 1834 set the midline of the

Hudson River and New York Bay as the boundary in Article I, but filling of the shoreline from 1834 to 1890 had changed the apparent midline of the Hudson River in 1890. The commissioners in 1890 interpreted the Compact to fix the midline *as it originally existed in 1834*, notwithstanding any subsequent filling. They therefore drew the boundary line between New Jersey and New York in the Hudson River and New York Bay by reference to the original, natural shoreline in 1834, not the filled-in shoreline of 1890. For this purpose, the Commissioners used a United States Coast and Geodetic Survey map dated "a few years after the treaty of 1834." *Report and Proceedings of the New Jersey Boundary Commission*, January 18, 1890 p.4-5. The boundary maps accompanying this report show both lines just for this purpose, *i.e.*, the shoreline of 1834 and the shoreline of 1890.

No reference is made in the Report to the filling around Ellis Island because it had not yet occurred. However, the interpretation of the Compact given in 1890 by the Commissioners of both New Jersey and New York indicates that, contrary to the view expressed by the *Collins* Court, the Commissioners of New Jersey and New York determined the boundary between the states by reference to the natural shorelines, and both states in 1890 felt that artificial filling could not and should not change sovereignty and jurisdiction. This is consistent with this Court's view of the effect of artificial filling on territorial boundaries. In the face of this history involving the agreement of both states in 1890, the fact that "language of size forms no part of the structure of the Compact as it specifically relates to Ellis Island," *Collins v. Promark Products, Inc.*, *supra*, 956 F.2d at 386-387, is not

persuasive. Both New Jersey and New York found filling relevant and important in 1890, and so drew their common boundary by reference to the shoreline of 1834. That is all that New Jersey asks here from this Court.

F. The New York Legislature Has Failed to Approve the Memorandum of Understanding in Nearly Seven Years and New York Has Recently Acted in Derogation of the Memorandum. Accordingly, the 1986 Memorandum of Understanding is a Nullity and of No Force and Effect.

The Memorandum of Understanding signed by New Jersey Governor Thomas H. Kean and New York Governor Mario M. Cuomo on June 23, 1986 represented, an attempt by the Governors to avoid disputes over sovereignty to Ellis Island, as well as Liberty Island, the site of the Statue of Liberty. The agreement only addressed the issue of revenues derived from these two islands. The Memorandum proposed to allocate certain revenues collected by both states on Ellis Island and Liberty Island equally for the relief of the homeless of both states. No resolution was proposed in the Memorandum for the related issues of zoning, environmental protection, elections, education, residency, insurance, building codes, historic preservation, labor and welfare laws, civil and criminal law, or for any other issue related to the jurisdiction of any state. It was a tentative, partial solution promptly embraced by the State of New Jersey.

In the Memorandum, Governors Kean and Cuomo agreed to use their best efforts to secure the enactment of legislation in their respective states to implement the

agreement. Within nine months of the Governors' agreement, New Jersey enacted legislation, N.J.Stat.Ann. 32:32-1 *et seq.* providing for the establishment of the Statue of Liberty Trust Fund. New Jersey law provided that it would become effective upon the enactment by New York of concurrent legislation. N.J. Laws of 1987, c. 57, §12.

New York never acted. New Jersey has been informed by New York Attorney General Robert Abrams that bills essentially identical to New Jersey's law were submitted to the New York Legislature three times: in 1986, 1987 and 1988. "These proposals were submitted as Governor's Program Bills, which represents legislation of the highest priority to the Governor. However, according to Attorney General Abrams' letter to New Jersey Attorney General Del Tufo, dated February 8, 1993, "despite the Governor's active efforts, the Legislature declined to pass the bill in each of three successive years." Since 1988, Governor Cuomo has not submitted the proposal to his Legislature. No action by the Legislature was recommended by him in 1989, 1990, 1991, 1992 or to date in 1993.

It is readily apparent that the State of New York no longer has any interest in taking steps to implement the 1986 Memorandum of Understanding. Instead, New York has taken steps to assert its full jurisdiction and authority over all of the filled portions of Ellis Island in an erroneous reliance upon the Court's decision in *Collins v. Promark Products, Inc.*, *supra*. The New York City Landmarks Preservation Commission held hearings recently concerning whether all of Ellis Island should be declared a New York City landmark. At the same time, the staff of

the State of New Jersey Historic Preservation Office has been advised that the National Park Service plans to present for public comment a proposal by the Center Development Corporation for the renovation of three existing buildings on the filled portions of Ellis Island. Center Development anticipates that financing of these renovations will be undertaken with the proceeds of bonds issued by the Dormitory Authority of the State of New York.

Although no time was stated in the Memorandum of Understanding for its implementation by both states, even if an offer does not limit the time for its acceptance, it must be accepted within a reasonable time. This rule of law is "well settled." *Minneapolis and St. Louis Ry. Co. v. Columbus Rolling Mill Co.*, 119 U.S. 149, 151, 7 S.Ct. 168, 170, 30 L.Ed. 376, 377 (1886); Restatement (Second) of Contracts 2d §41(1) (1981). The reasonableness of the delay will be judged by the circumstances. *Minneapolis and St. Louis Ry. Co. v. Columbus Rolling Mill Co.*, *supra*, Restatement (Second) of Contracts §41(2) (1981). The circumstances make clear that New York has failed to proceed in a reasonable time period. New Jersey's Legislature acted to implement the Memorandum of Understanding within nine months of the Governors' agreement. New York has failed to enact corresponding legislation; New York's Governor submitted the proposal to his legislature for three years thereafter: 1986, 1987 and 1988. The New York Governor thereafter abandoned any further efforts to implement the Memorandum in 1989, 1990, 1991, and 1992, or to date in 1993. These actions manifest a refusal by inaction to accept New Jersey's offer to resolve certain aspects of this controversy. These

actions can also be interpreted as manifesting New York's outright intention to reject New Jersey's offer.

New Jersey considers that the seven years that have passed is an unreasonable time to wait for New York's acceptance of resolution of the revenue issues. Accordingly, New Jersey no longer considers itself bound by the Memorandum. Unaccepted offers to enter into a contract bind neither party. *Blossom v. Milwaukee & Chicago Railroad Co.*, 70 U.S. 196, 205, 18 L.Ed. 43, 46 (1866). *Tilley v. City of Chicago*, 103 U.S. 155, 26 L.Ed. 374 (1881). The State of New Jersey will not recognize any late acceptance by New York of the Memorandum now as binding on it. The State of New Jersey considers that its offer has been rejected by New York by the lapse of time and by New York's actions in derogation of the compromise. An acceptance now by New York would not be binding on New Jersey. *Moffett, Hodgkins & Clarke Company v. City of Rochester*, 178 U.S. 373, 20 S.Ct. 957, 44 L.Ed. 1108 (1900); Restatement (Second) of Contracts 2d §42 (1981). The Memorandum of Understanding is a nullity as a direct consequence of the failure of New York to approve the compromise and of its recent actions to further extend its jurisdiction over the entire island. The partial proposed compromise is a dead letter, and void.



CONCLUSION

This Court has original and exclusive jurisdiction of this boundary dispute between the State of New Jersey and the State of New York. The dispute should be resolved by finding the boundary between the states to

be the original natural mean high water line on Ellis Island as it existed at the time of the Compact of 1834, so that the State of New York shall have exclusive sovereign authority over the original natural island, approximately three acres in size, and the State of New Jersey shall have exclusive sovereign authority over the approximate 24.5 acres of land artificially filled between 1890 and 1934.

Respectfully submitted,

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April 23, 1993

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APPENDIX

The Compact of 1834, 4 Stat. 708

CHAP. CXXVI. – An Act giving the consent of Congress to an agreement or compact entered into between the state of New York and the state of New Jersey, respecting the territorial limits and jurisdiction of said states.

WHEREAS commissioners duly appointed on the part of the state of New York, and commissioners duly appointed on the part of the state of New Jersey, for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two states, have executed certain articles, which are contained in the words following, viz:

Agreement made and entered into by and between Benjamin F. Butler, Peter Augustus Jay and Henry Seymour, commissioners duly appointed on the part and behalf of the state of New York, in pursuance of an act of the legislature of the said state, entitled "An act concerning the territorial limits and jurisdiction of the state of New York and the state of New Jersey, passed January 18th, 1833, of the one part; and Theodore Frelinghuysen, James Parker, and Lucius Q. C. Elmer, commissioners duly appointed on the part and behalf of the state of New Jersey, in pursuance of an act of the legislature of the said state, entitled "An act for the settlement of the territorial limits and jurisdiction between the states of New Jersey and New York," passed February 6th, 1833, of the other part.

ARTICLE FIRST. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned.

ARTICLE SECOND. The state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state.

ARTICLE THIRD. The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson river lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel Creek; and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the state of New Jersey, that is to say:

1. The state of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey.

2. The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said

state; and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York, which now exist or which may hereafter be passed.

3. The state of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of the said waters, PROVIDED, That the navigation be not obstructed or hindered.

ARTICLE FOURTH. The state of New York shall have exclusive jurisdiction of and over the waters of the Kill Van Kull between Staten Island and New Jersey to the westernmost end of Shooter's Island in respect to such quarantine laws, and laws relating to passengers, as now exist or may hereafter be passed under the authority of that state, and for executing the same; and the said state shall also have exclusive jurisdiction, for the like purposes of and over the waters of the sound from the westernmost end of Schooter's Island to Woodbridge creek, as to all vessels bound to any port in the said state of New York.

ARTICLE FIFTH. The state of New Jersey shall have and enjoy exclusive jurisdiction of and over all the waters of the sound between Staten Island and New Jersey lying south of Woodbridge Creek, and of and over all the waters of Raritan bay lying westward of a line drawn from the lighthouse at Prince's bay to the mouth of Mat-tavan Creek; subject to the following rights of property and of jurisdiction of the state of New York, that is to say:

1. The state of New York shall have the exclusive right of property in and to the land under water lying between the middle of the said waters and Staten Island.

2. The state of New York shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of Staten Island, and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the state of New Jersey, which now exist or which may hereafter be passed.

3. The state of New York shall have the exclusive right of regulating the fisheries between the shore of Staten Island and the middle of the said waters: PROVIDED, That the navigation of the said waters be not obstructed or hindered.

ARTICLE SIXTH. Criminal process, issued under the authority of the state of New Jersey, against any person accused of an offence committed within that state; or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid; or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the third article; and also civil process issued under the authority of the state of New Jersey against any person domiciled in that state, or against property taken out of that state to evade the laws thereof; may be served upon any of the said waters within the exclusive jurisdiction of the state of New York, unless such person or property shall be on board a vessel aground upon, or fastened to, the shore of

the state of New York, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New York.

ARTICLE SEVENTH. Criminal process issued under the authority of the state of New York against any person accused of an offence committed within that state, or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid, or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the fifth article; and also civil process issued under the authority of the state of New York against any person domiciled in that state, or against property taken out of that state, to evade the laws thereof, may be served upon any of the said waters within the exclusive jurisdiction of the state of New Jersey, unless such person or property shall be on board a vessel aground upon or fastened to the shore of the state of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New Jersey.

ARTICLE EIGHTH. This agreement shall become binding on the two states when confirmed by the legislatures thereof, respectively, and when approved by the Congress of the United States.

Done in four parts (two of which are retained by the commissioners of New York, to be delivered to the governor of that state, and the other two of which are retained by the commissioners of New Jersey, to be delivered to the governor of that state,) at the city of New York this

sixteenth day of September, in the year of our Lord one thousand eight hundred and thirty-three and of the independence of the United States the fifty-eighth.

B. F. Butler,
Peter Augustus Jay,
Henry Seymour,
Theo. Frelinghuysen,
James Parker,
Lucius Q. C. Elmer.

And whereas the said agreement has been confirmed by the legislatures of the said states of New York and New Jersey, respectively, – therefore,

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA, IN CONGRESS ASSEMBLED, That the consent of the Congress of the United States is hereby given to the said agreement, and to each and every part and article thereof, PROVIDED, That nothing therein contained shall be construed to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

APPROVED, June 28, 1834.

MEMORANDUM OF UNDERSTANDING
IN REGARD TO ESTABLISHING A BI-STATE
PUBLIC CORPORATION TO BE KNOWN AS THE
STATUE OF LIBERTY TRUST FUND

ARTICLE I

Liberty and Ellis Islands are national treasures symbolizing our nation as a land of hope for people yearning for freedom, justice, equality of opportunity and a better life.

The Statue of Liberty was the first sight of thousands of immigrants to the United States. The view of the Statue standing in the harbor symbolized the start of a new life with greater opportunities and challenges in this country. Ellis Island was the soil on which these immigrants first stepped in their new world.

There is now pending a lawsuit that seeks to determine the respective sovereignty and jurisdiction of the States of New Jersey and New York over Liberty and Ellis Islands. In view of the special subject matter involved, it is fitting that such conflicts be avoided by dedicating the economic benefits of sovereignty and jurisdiction over the Islands to a regional purpose related to the symbolic meaning of the Statue of Liberty and Ellis Island. However, since these Islands have long been under effective federal title, they can truly be said to belong to all of the people of the United States.

Today, the homeless population of the States of New York and New Jersey is a reminder that there are still many in this region for whom hopes of a better life remain unfulfilled. It is appropriate, in this centennial year of the Statue of Liberty, that Ellis and Liberty

Islands, the nation's monuments to the vast numbers of people who came from other countries seeking a better life, be rededicated to the assistance of our homeless population.

Homelessness is a regional problem that demands regional solutions. Because of the ease of access to interstate transportation and the very nature of their transient existence, the homeless now travel back and forth across state borders quickly and easily. It is therefore appropriate that the States of New Jersey and New York work cooperatively to develop and promote programs to assist homeless men, women and children in both states in obtaining decent and affordable shelter.

ARTICLE II

The Governors of the States of New York and New Jersey hereby agree to use their best efforts to secure enactment of identical legislation in their respective states which shall establish a bi-state public corporation to be known as the "Statue of Liberty Trust Fund" (hereinafter "the Fund").

The Fund shall be managed by an eleven member board of directors, five to be appointed by the Governor of the State of New York and five to be appointed by the Governor of the State of New Jersey, and one director, who shall be designated the chairperson of the board, to be appointed by the Governors jointly. All board members shall serve without compensation, but shall be entitled to reimbursement of their actual and necessary expenses incurred in the performance of their duties. The term of office of each member shall be five years and each

member shall hold office until his successor shall have been appointed.

No action of the board of directors of the Fund shall be binding unless taken at a meeting at which at least three of the members from each state are present and vote in favor thereof. The board of directors of the Fund shall annually submit a plan for the expenditure of the resources of the Fund which shall only become effective upon the approval of both Governors.

ARTICLE III

The purpose of the Fund shall be to provide aid to homeless persons within the States of New Jersey and New York. The Fund shall accomplish this objective primarily by entering into contracts with or making grants to local social services districts or to other public or private entities in each state which aid homeless persons, pursuant to such criteria as each state shall provide. For the purposes of this agreement, "homeless persons" shall mean undomiciled persons who are unable to secure adequate, permanent and stable housing in the States of New York and New Jersey without special assistance. The Fund shall coordinate with social service organizations of both states to ensure that resources are provided to the most cost-effective programs for the homeless and are used to address the most pressing needs in this regard. Resources of the Fund shall be provided to appropriate agencies and other organizations from each state on an equal basis.

ARTICLE IV

The Governors of New York and New Jersey agree that it is appropriate that the States of New York and New Jersey each appropriate annually to the Fund upon its establishment, through the states' respective budgets, the amounts described in this article to effectuate the intent of this agreement.

Such annual appropriation by each state shall be in an amount equal to the amount, as determined in the manner hereafter described, set forth in the certificate of its tax administrator as the total of a) all state and local tax revenues collected by that state and its localities, after deducting administrative costs, from the taxes hereafter set forth during the prior calendar year which are attributable directly to Ellis and Liberty Islands and b) the amount collected by that state and its localities, and one-half of the amount collected by joint agencies thereof, from the fees hereafter described during the same period. Such state and local taxes which shall be taken into account for the purpose of such annual appropriation are the following taxes presently or hereafter imposed by the respective states and their localities: franchise, or business privilege or like taxes on the doing of business; taxes imposed on the earnings or income of business entities (including corporations) or individuals; and sales and compensating use taxes. The fees which shall be taken into account for the purpose of such appropriation are those fees now or hereafter collected by either state or its localities, and one-half of the amount collected by joint agencies thereof, for the provision of public access to or from Ellis or Liberty Islands. The tax administrator of each state shall, for the purpose of fixing the required

amount of the annual appropriation to the Fund, certify to the legislature of his state and the Fund a) his estimate of the amount, less costs of administration, of the state and local revenues collected during the prior calendar year from the aforesated taxes which are attributable directly to the Islands, and b) the appropriate amount of such fees collected during such period, and the appropriation to be made by each state shall be equal to the total set forth in such certification of its tax administrator. The two states shall prescribe uniform procedures and methods to be employed by the tax administrators in making the estimation of such state and local tax revenues required to be included in such certification and such other uniform procedures as may be necessary to effectuate the terms of this agreement.

For the purpose of determining revenue attribution of the above enumerated state and local taxes to Ellis or Liberty Islands the following shall apply:

1. Traditional revenue attribution. For the purposes of determining revenue attribution, if any, of any particular such state or local tax to Ellis or Liberty Island, the same method or concept with respect to allocation or attribution which is used for the purpose of determining allocation to the state or locality with respect to that particular tax as administered by the state (or locality) imposing such tax shall be applied in making the determination with respect to the Islands. In the case of sales and compensating use taxes, if the tax is occasioned by an event occurring on the Islands, the tax revenues derived therefrom shall be allocable to the Islands.

2. Other Revenue Attribution. In addition to the foregoing attribution of such state and local taxes by the method set forth in paragraph 1 above, to the extent not already included under such paragraph, the revenues collected from the following such taxes, to the extent presently or hereafter imposed by the states and their localities, shall, for the purposes of this article, be attributable directly to the Islands:

- a) State and local sales and compensating use taxes imposed with respect to (1) the provision of water, sewerage, gas, electricity, telephone or like utilities or utility services where such utilities or utility services are used or consumed on Ellis or Liberty Islands, irrespective of the facts that the delivery of such utilities or utility service occurs off the Islands, (2) the building of or the provision of access to or from Ellis or Liberty Islands, (3) the provision of sightseeing tours to, of or around Ellis and/or Liberty Islands or transportation to or from the Islands, irrespective of the fact that such tour or transportation was purchased off the Islands, (4) sales of food and beverage and other tangible personal property by providers of such sightseeing tours to their patrons or by the providers of such transportation to their passengers, (5) fuel and all other tangible personal property purchased by providers of such tours or transportation and used directly in connection with the provision of such tours or transportation. Where such sightseeing tour or transportation includes other sites or destinations, such taxes shall be apportioned;

- b) State and local sales tax imposed by either state or its localities with respect to the purchase of tangible personal property, services or other items which are used or consumed on Ellis or Liberty Islands by persons residing thereon or in connection with a trade or business conducted thereon if with respect to such use or consumption there is due and owing state and local compensating use tax;
- c) State and local franchise, or business privilege or like taxes on the doing of business or taxes imposed on the earnings or income of business entities (including corporations), in the case of business activities conducted in either state which consists of (1) providing water, sewerage, gas, electricity, telephone or like utilities or utility services where such utilities or such utility services are used or consumed on Ellis or Liberty Islands, (2) the building of or the provision of access to or from Ellis or Liberty Islands, (3) conducting tours to, of or around Ellis and/or Liberty Islands or providing transportation to or from the Islands. The portion of such state and local taxes derived from such business activities shall be attributable directly to Ellis and Liberty Islands;
- d) (1) Personal income taxes imposed by the states and their localities on other than persons residing on Ellis and Liberty Islands (i) personal income taxes imposed by the State of New York and its localities with respect to residents of the State of New York and its localities and (ii) personal income taxes imposed by the State of New Jersey and its

localities with respect to residents of the State of New Jersey and its localities, in the case of income or wages from employment or earnings from self-employment of such residents derived from employment or self-employment (A) on Ellis or Liberty Islands, and (B) with respect to the building of or the provision of access to or from such Islands or the conducting of tours to, of or around Ellis and/or Liberty Islands or the provision of transportation to or from such Islands, the portion of such state and local taxes derived from such income or wages or earnings shall be attributable directly to Ellis and Liberty Islands and (2) nonresident personal income and earnings taxes imposed by either state and its localities with respect to persons residing on Ellis and Liberty Islands, in the case of such persons paying such taxes to either state and its localities, the taxes so paid by such persons shall be attributable directly to Ellis and Liberty Islands.

/s/ Mario M. Cuomo
Mario M. Cuomo
 Governor
 State of New York

Date: June 23, 1986

/s/ Thomas H. Kean
Thomas H. Kean
 Governor
 State of New Jersey

Date: June 23, 1986
