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By E-Mail and First-Class Mail

Ralph I. Lancaster, Jr., Esq.
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Portland, ME 04101

Re: *New Jersey v. Delaware*, No. 134, Original

Dear Mr. Lancaster:

The State of Delaware respectfully submits this letter-brief in opposition to New Jersey's motion to strike the entire expert report of Professor Joseph Sax as well as 24 words from the 52-page expert report of Professor Carol E. Hoffecker. For the reasons set forth below, New Jersey's objections to those reports have no merit and its motion should be denied.

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INTRODUCTION

The Sax and Hoffecker reports are admissible in this original action as "fact" and "consultive" expert reports within Case Management Plan ("CMP") §§ 6.6.2.a and 6.6.2.b. Professor Sax has been a widely-recognized authority on water rights for more than forty years and is currently the James H. House & Hiram H. Hurd Professor Emeritus at the University of California at Berkeley's Boalt Hall School of Law. Professor Hoffecker, Ph.D., is the Richards Professor and Alison Professor Emerita of History at the University of Delaware. New Jersey neither challenges their credentials to serve as experts nor contests the relevance of their reports or the fact that their reports shed considerable light on how the issues in this case should be resolved. The basis on which New Jersey does object – that Delaware's experts have somehow encroached on the province of the Special Master – is wrong as a matter of fact, is inconsistent with the CMP, and is unsupported by the pertinent case law.

A key issue in this case will be to interpret the meaning of the words in the 1905 Compact, and in particular the words chosen by the drafters in Article VII, which provides in full: "Each State may, on its own side of the river, continue to exercise *riparian jurisdiction* of every kind and nature, and to make grants, leases, and conveyances of *riparian lands and rights* under the laws of the respective States." (Emphases added.) Evidence of the drafters' intent is highly relevant and a proper subject for an expert report, as New Jersey acknowledges. *See* NJ Mot. at 5, 8 (stating that "prior drafts of the Compact or statements by the drafters" would be an appropriate basis for an expert report). The challenged reports provide a history and analysis of just such evidence of the drafters' intent, for they establish the historical and legal context in

which the drafters found themselves when they negotiated the 1905 Compact. That background is critical to understanding and interpreting the precise words the drafters selected.

New Jersey seeks to strike all of Professor Sax's report and 24 words of Professor Hoffecker's report on the ground that they constitute impermissible "legal argument" that is "inadmissible as evidence under Fed. R. Evid. 702 and 704." NJ Mot. at 2. New Jersey cites no case – and we have found none – upholding a Special Master's decision to strike an expert report in an original action in this Court. New Jersey's motion is flawed at several levels. First, its argument overlooks the CMP, which expressly permits the parties to submit "consultive" reports by experts "retained by the parties *to testify as to matters and issues in this case.*" CMP § 6.6.2.b (emphasis added). New Jersey's failure to offer "consultive" expert testimony of its own should not be rewarded by striking Delaware experts permitted under the plain terms of the CMP. Second, New Jersey incorrectly assumes that the Federal Rules of Evidence govern this original action, rather than serving merely as a guide to this Court in deciding the case. Third, even under the Federal Rules of Evidence, Professors Sax and Hoffecker may offer the testimony that New Jersey challenges. Numerous courts have permitted experts to testify as to the factual and legal context underlying contracts, the common understanding of legal terms that are disputed in an agreement, and the factual underpinnings of a legal dispute. Indeed, courts routinely permit expert testimony on arcane and difficult issues of law, on the meaning of words used in legal documents, and on the application of facts to legal concepts. Finally, the principal justifications for excluding expert testimony in the cases New Jersey cites – that it would somehow supersede the province of the Court or that it would confuse the jury – are not present here.

Because there is no basis in fact or law for Delaware's expert reports to be stricken and because Delaware would suffer significant prejudice from such a ruling, New Jersey's motion should be denied.

BACKGROUND

Delaware has consistently taken the position that an expert on riparian law would materially assist the Court in the resolution of this case. In its first filing in this case, Delaware argued that a Special Master would assist this Court because Delaware would "submit historical evidence about each State's riparian rights within the twelve-mile circle under common law and applicable state statutes – as well as historical exercise of those rights – prior to the 1905 Compact." Brief of the State of Delaware in Opposition to the State of New Jersey's Motion to Reopen and for a Supplemental Decree at 76 (No. 11 Orig., filed Oct. 27, 2005). Subsequently, in a section on the "Legal Context of the 1905 Compact," Delaware explained that a benefit of appointing a Special Master in this case would be that "the Court might benefit from the opinions of expert witnesses on water law," because a "critical element of this case is the state of the law of waters and of riparian rights as the drafters would have understood them in the years leading up to 1905." Answer of State of Delaware and Motion for Appointment of Special Master at 7 (No. 134 Orig., filed Dec. 28, 2005) ("Del. Mot. for Appm't of Special Master"). Delaware further explained to the Court that "Delaware anticipates that a water law expert would offer testimony that would inform the Court on the historical development of water law as it existed when the 1905 Compact was negotiated. Such testimony is more akin to a historical expert on legal developments." Reply in Support of Motion for Appointment of Special Master at 8 (No. 134, Orig., filed Jan. 17, 2006). New Jersey opposed the appointment of a Special Master on this

point, arguing that "[n]either this Court nor lower federal courts will defer to the legal opinions offered by a party's 'expert' on the proper interpretation of a statute or the contours of American law." Brief in Opposition to Delaware's Motion For Appointment of Special Master at 9 (No. 134 Orig., filed Jan. 4, 2006). That objection – like New Jersey's motion to strike here – misses the point. Delaware is not asking this Court to "defer" to Professor Sax's learned opinion. It is, however, asking the Court to consider the relevant background principles pursuant to which the 1905 Compact was adopted in determining the meaning of Article VII – subjects that Professor Sax is extremely well-qualified to address.

In accord with those representations, Delaware retained Professor Sax to submit an expert report "to provide an historical analysis of riparian rights and laws as they existed at the time the 1905 Compact was executed by Delaware and New Jersey, as well as an opinion as to the interpretation to be given to the language in Article VII of the 1905 Compact at issue in this case, insofar as [he] can do so based on [his] knowledge of the law of riparian rights in the 19th and early 20th centuries." Expert Report of Professor Joseph L. Sax ¶ 8 (Nov. 7, 2006) ("Sax Rep."). In doing so, he addresses "the historical context for the drafting of Article VII" and "describes the history and understanding of riparian rights and laws in the United States, including New Jersey and Delaware, up to the execution of the 1905 Compact." *Id.* ¶ 9.[1]

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[1] Professor Sax was qualified by the court as an expert on riparian matters for the State of Mississippi in *Bayview Land, Ltd. v. Mississippi*, No. C2402-98-389 (Miss. Chancery 2002). The trial court admitted into evidence his expert report entitled, "Report on the Historic and Functional Background and Understanding of Riparian and Littoral Rights, and of the Public Trust Doctrine as Related to Those Rights." Bayview Land objected – on virtually the same ground as New Jersey here – that "it is in essence, though, Your Honor a legal brief. It has legal conclusions that are the province of this Court with regard to the implication of this with regard to Mississippi law." Tr. 8/27/02 at 21 (excerpt attached here as Ex. A).

Consistent with that mandate, Professor Sax discusses the development of riparian rights and the historical treatment of riparian landowners at the time of the Compact. In particular, he explains the manner in which New Jersey had permitted riparian landowners to construct structures for access to the navigable portion of the river. *See id.* ¶¶ 18-25. Professor Sax considers the fact that "[r]iparian landowners who desired to wharf out routinely sought prior authority for their wharf from the state," *id.* ¶ 19, and the fact that in 1905 "there were, according to New Jersey's Castagna Affidavit, only a handful of structures extending from New Jersey into Delaware," *id.* ¶ 21. He also takes into account the fact that "New Jersey may have been uncertain as to which state's law governed the right to wharf out" because "its prior grants, leases, and conveyances applied to land that might turn out to be in Delaware." *Id.* ¶ 20.

Because the drafters selected the term "riparian jurisdiction," "identification of the extent and limits of the riparian realm . . . becomes relevant" and "it is useful to note the historic situation of the law affecting wharfing out." *Id.* ¶ 17. In considering the evidence of the historic and legal context in which the 1905 Compact was drafted, Professor Sax determines that it is highly relevant in discerning the drafters' intent that the realm of riparian rights and laws to which the language in Article VII refers was a subset of property law that was always subject to and did not encompass "the application of the general police power" to regulate activities conducted on riparian property. *Id.* ¶ 14. Professor Sax also finds as relevant contextual evidence the analyses of riparian rights by New Jersey's Attorney General in an 1867 report, *see id.* ¶ 27 n.43, and riparian rights arguments accepted by Justice Holmes that had been made by one of New Jersey's commissioners appointed to negotiate the 1905 Compact, Robert McCarter,

who was also New Jersey's Attorney General and lead counsel in *New Jersey v. Delaware I*, *see id.* ¶ 27 & nn.37 & 39.

Professor Sax also examined each of the riparian grants, leases, and conveyances issued by New Jersey between 1854 and 1920, and concluded from that factual evidence that New Jersey's "actions in exercising riparian jurisdiction do not include examination or regulation of the particular activities intended to be engaged in" and are thus consistent with Delaware's exercise of jurisdiction over those activities under its police powers. *Id.* ¶ 24. He likewise examined the factual evidence in New Jersey's Responses to Delaware's Requests for Admissions and concluded that they "indicate a similar distinction. For example, New Jersey responded that 'the grants do not expressly specify the precise business that can be carried on at any point in time,' or 'the precise cargo that can be unloaded at any specific point in time.'" *Id.* ¶ 25 (footnote omitted; quoting New Jersey's Responses to Delaware's First Requests for Admissions, Nos. 5 & 9 (filed Sept. 8, 2006)). Thus, Professor Sax concluded, "[t]o the best of my knowledge, the separation of authorities described in New Jersey's Responses to Requests for Admissions reflects the usual and traditional separation of the exercise of riparian rights from the exercise of state police power." *Id.*

Based on his expert knowledge and analysis of those historical facts and the contemporaneous understanding of "riparian" rights, Professor Sax concludes that the phrase "riparian jurisdiction" was not "a legal term of art." *Id.* ¶ 11. Instead, it was "devised for use in Article VII of the 1905 Compact," *id.*, and, in particular, "as a limitation on the term 'jurisdiction,'" *id.*, to "administration of the property aspects of riparian landownership on the New Jersey shore," *id.* ¶ 30. In view of all this contextual evidence, Professor Sax concludes:

> [I]nsofar as the 1905 Compact may be construed as a transfer of any permanent authority by Delaware to New Jersey over waters within its boundaries, that authority would have been limited to administration of the property aspects of riparian landownership on the New Jersey shore, and not to the far more extensive and significant administration of public rights and the general police power over the Delaware River and its environs as affected by activities related to the use of wharves constructed, or to be constructed, from the New Jersey shore into the river.

Id.[2]

Delaware's second expert, Professor Hoffecker, is a preeminent scholar of the state's political history. In her report, she describes, in considerable detail, the events leading to the 1905 Compact. According to Professor Hoffecker's analysis, the Compact "grew out of an interstate conflict concerning the regulation of fishing rights in the Delaware River." Expert Report of Carol E. Hoffecker, Ph.D., at 2 (Nov. 9, 2006) ("Hoffecker Rep."). By 1934, however, the number of fish in the Delaware River had declined to the point where, according to her report, "the states were no longer concerned with the fishing issues that had led them to enter into the Compact of 1905." *Id.* at 3. Although Professor Hoffecker discusses the history of the Compact in some detail, at no time does she attempt to provide a legal analysis of the Compact or otherwise offer a legal opinion on any matter.

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[2] Professor Sax's report focuses on the historical and legal background of the Article VII language "to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States," and does not address other arguments by Delaware for rejecting New Jersey's assertion of sovereignty over activities within the twelve-mile circle.

DISCUSSION

I. The Reports Are Admissible As "Consultive" Expert Reports Under The Case Management Plan

The CMP clearly distinguishes between "fact" experts and "consultive" experts. The CMP permits the states to offer "consultive" experts who "have been retained by the parties to testify as to matters and issues in this case." CMP § 6.6.2.b. Although by its plain terms a consultive expert can opine on the ultimate "issues in this case," the contrast between a "consultive" expert authorized to render such opinions and a "fact" expert as permitted under the CMP is quite clear. A "fact" expert is one who has "personal knowledge of information and/or events and whose training and experience provide them the expertise to testify as experts." *Id.* § 6.6.2.a. Underlying New Jersey's motion to strike, therefore, is the erroneous assumption that the only experts permitted in this action are "fact" experts. *See* NJ Mot. at 2 ("Legal argument and opinion concerning the meaning of the Compact, without any supporting facts, will not assist the Special Master in determining the intent of the drafters of the Compact and is, thus, inadmissible as evidence under Fed. R. Evid. 702 and 704."). In fact, Professor Sax is permitted to serve as a "consultive" expert "to testify as to matters and issues in this case." CMP § 6.6.2.b. And, to the extent that the 24 objected-to words in Professor Hoffecker's report are to the same effect, she too is permitted to be treated as a "consultive" expert even though her 52-page report is concededly that of a "fact" expert in all other respects.[3]

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[3] New Jersey's complaint (at 2) that the Sax Report should be treated against Delaware's page limit for its brief should be rejected. New Jersey had every opportunity to submit its own consultive expert but chose not to – even after Delaware announced its intention nearly a year ago to present testimony from "expert witnesses on water law." Del. Mot. for Appm't of Special Master at 7. After having gone to the expense and effort of identifying and retaining Professor Sax, Delaware should not be prejudiced by New Jersey's failure to offer a consultive expert to

Delaware would suffer great prejudice by a different construction of the CMP. It has relied on the plain language in the CMP to invest significant resources in identifying Professor Sax, the preeminent water-law expert in the United States, and in retaining him to give expert testimony in this action. His testimony is a significant component of Delaware's defense to New Jersey's suit. New Jersey has suggested no prejudice – other than the effectiveness of Professor Sax's report – from allowing the report to be admitted into evidence to assist the Court in construing unique legal terminology in the 1905 Compact. Given that New Jersey has not cited a single original action in this Court in which an expert's report has been stricken from the evidence before the Justices have an opportunity to review the record, it would be highly prejudicial to Delaware for such an unprecedented ruling to be made here.

II. The Guidance Provided By The Federal Rules Of Evidence In Original Actions Has Been Construed By This Court To Permit Evidence Of The Type Contained In The Sax And Hoffecker Reports

Contrary to the assumption underlying New Jersey's motion, the appropriate standard is not a strict adherence to the admissibility of "evidence under Fed. R. Evid. 702 and 704." NJ Mot. at 2. First, the Federal Rules of Evidence plainly do not apply of their own force in this original action in the Supreme Court. *See* Fed. R. Evid. 1101(a) (limiting application to cases before district courts, courts of appeals, bankruptcy courts, and magistrate judges). Second, this Court's Rules provide that the Federal Rules of Evidence serve only as a "guide" and not a set of mandatory strictures. *See* S. Ct. R. 17.2 ("The form of pleadings and motions prescribed by the

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rebut Professor Sax's report. New Jersey also could have taken Professor Sax's deposition but chose not to depose either of Delaware's expert witnesses. Moreover, regardless of the subject of an expert report, it is always the case that reliance on it will reduce the pages necessary to treat those issues, and reducing Delaware's page limits is no more justifiable than reducing New Jersey's page limits based on its own two expert reports.

Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides."). Nor does the CMP in this action put the parties on notice that the Federal Rules of Evidence will be strictly applied. *See* CMP §§ 5, 6 (explaining that the Federal Rules of Civil Procedure shall apply, with significant exceptions, to fact and expert discovery, with no mention of the Federal Rules of Evidence).

This Court has looked to the Federal Rules of Evidence as guidance in original actions, and in so doing has permitted expert testimony on the ultimate legal issue before it. In *Colorado v. New Mexico*, 467 U.S. 310 (1984), for example, this Court held that "[Colorado's] experts concluded that reasonable conservation measures would offset the diversion" of water. *Id.* at 336 n.5. "This expert opinion testimony was *plainly admissible* on this ultimate question, Fed. Rules Evid. 702, 704, and together with other evidence in the record, fully supports the Master's conclusion on this question." *Id.* (emphasis added). Under the standard applied in that case, the expert reports of Professors Sax and Hoffecker are plainly admissible.

III. Even Under The Federal Rules Of Evidence As Applied In The Lower Courts, The Reports Are Admissible

Federal Rule of Evidence 702 permits the admission of expert testimony that "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. "This condition goes primarily to relevance." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993). Both the Sax and Hoffecker reports are admissible in full because they will help the Court to understand background historical and legal principles with which the drafters would have been familiar in drafting the 1905 Compact.[4] Indeed, New Jersey does not challenge

[4] Delaware respectfully submits that it would be error to exclude any portion of the expert reports without first reviewing them. Under the Federal Rules of Evidence pertaining to expert

the *relevance* of these reports at all; rather, its challenge essentially is that the reports are too effective in offering expert opinion on how this Court should resolve the issues. But that objection is unsupported even in the case law applying Rule 702.

A. Professor Sax's Expert Testimony Regarding the Historical Legal Context and Understanding Against Which the 1905 Compact Was Drafted Is Admissible

In view of the arcane and specialized nature of riparian rights and laws, and the fact that the relevant context is more than a century old, Professor Sax's testimony as an expert in the history and development of riparian rights and laws will be helpful to the Court in determining the historical and legal context in which this dispute must be assessed.

1. Expert testimony on the underlying factual and legal context of the dispute is admissible under the Federal Rules

Professors Wright and Gold have written that courts are "more open to the admission of expert legal opinions where the subject is the application of some complex regulatory or legal standard to a specific factual background. In such a context, the opinions often involve questions of law and fact that overlap to the extent they are virtually indistinguishable." 29 Charles A.

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testimony, a trial judge "fulfills its role as gatekeeper by *screening the proposed evidence* and evaluating it in light of the specific circumstances of the case to ensure that it is reliable and sufficiently relevant to assist . . . in resolving the factual disputes." *Miller v. Baker Implement Co.*, 439 F.3d 407, 412 (8th Cir. 2006) (emphasis added); *see also Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025 (10th Cir. 2002) ("After *hearing Dr. Beyer's testimony* . . . , the district court found [it] . . . should be excluded in its entirety.") (emphasis added). Indeed, a trial judge "has no discretion to avoid performing th[is] gatekeeper function." *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003). A trial judge would err by "focus[ing] exclusively upon the proffered expert's opinion, rather than considering the [facts] underlying the opinion" because that judge "may not fail to consider the underlying testimony and focus exclusively on whatever opinion the expert may offer." *United States v. Rahm*, 993 F.2d 1405, 1412 (9th Cir. 1993). As this Court has emphasized, "[B]ecause the ultimate responsibility for deciding what are correct findings of fact remains with us in any event, we have examined for ourselves the pertinent exhibits and transcripts." *United States v. Maine*, 475 U.S. 89, 98 (1986) (internal quotation marks and footnote omitted).

Wright & Victor J. Gold, *Federal Practice and Procedure* § 6264, at 217-22 & n.36 (1997). *See New Mexico v. General Elec. Co.*, 335 F. Supp. 2d 1266, 1305-06 (D.N.M. 2004) (finding law professor's expert testimony about the legal administrative history of the Rio Grande River and the Middle Rio Grande Basin, and the effect of the Rio Grande compact, admissible as "background or context for the determination of the pertinent factual issues"); *see also Idaho v. United States*, 533 U.S. 262, 266 (2001) (relying on expert witness historian's account of late nineteenth century reliance by Coeur d'Alene Tribe on submerged lands under lake in the interpretation of presidential executive orders and congressional statutes).

Professor Sax's report canvasses the history and law of riparian rights in the late nineteenth century, as well as New Jersey's activities in issuing grants, leases, and conveyances of submerged lands, and provides a context in which the commissioners who drafted the 1905 Compact did their work. At least six of the commissioners involved in drafting the 1905 Compact (three on each side) were themselves attorneys and would have possessed at least some understanding of the law regarding riparian rights.[5] Furthermore, the commissioners plainly recognized that they were drafting a legal document and therefore would certainly have looked to relevant law about the meaning of "riparian" in drafting the Compact language.

Testimony about the legal context as those commissioners would have understood it at the time, therefore, will "assist the trier of fact to understand the evidence or to determine a fact

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[5] The following attorneys served as commissioners for the drafting of what became the 1905 Compact: Robert McCarter (New Jersey's Attorney General in 1905 and lead counsel in *New Jersey v. Delaware I*), Thomas McCarter (New Jersey's Attorney General in 1903), Chauncy Parker (New Jersey), Herbert Ward (Delaware's Attorney General), George Bates (Delaware's lead counsel in *New Jersey v. Delaware I*), and Robert Richards (Delaware's Attorney General from 1905-1909), and Herbert Ward (Delaware's Attorney General from 1901-1905).

in issue." Fed. R. Evid. 702. The commissioners necessarily would have used the words "riparian jurisdiction" in light of the then-governing riparian principles. That the materials considered by the drafters would have come from the arcane area of riparian rights and laws is simply the nature of the 1905 Compact. And, because that is such a specialized and technical area, it is a proper subject for an expert in the history and laws of riparian rights. Given his extensive expertise in this esoteric area of legal history, Professor Sax's report will provide material assistance to the Court in understanding the legal and historical context in which the 1905 Compact was ratified.

2. Expert testimony on the drafters' intent of the 1905 Compact is admissible

"A compact is a contract. . . . It is a fundamental tenet of contract law that parties to a contract are deemed to have contracted with reference to principles of law existing at the time the contract was made." *Kansas v. Colorado*, 533 U.S. 1, 20 (2001) (O'Connor, J., concurring and dissenting in part). Professor Sax bases his expert opinion on historical facts about the state of the law, such as then-prevailing legal principles, then-effective statutes, and the state of case law at the time pertaining to the historical and legal development of riparian rights. Professor Sax also analyzes a report by New Jersey's Attorney General in 1867 and arguments made in the 1900s by one of its commissioners (and accepted by Justice Holmes for the Court) on the substance of riparian rights and state police powers.

New Jersey concedes that expert testimony establishing the "intention of the drafters of the Compact" is relevant and therefore admissible. NJ Mot. at 2; *see id.* at 5. Indeed, New Jersey acknowledges (at 5) that Professor Sax's report would be admissible if he based his conclusion about the intent of the drafters in using the term "riparian jurisdiction" on "prior

drafts of the Compact or statements by the drafters." New Jersey thus acknowledges that the historical context in which the drafters found themselves is highly relevant and a proper subject for an expert report. There can be no serious dispute that all of these are *facts* or that this Court will need to make factual findings about that historical context to reach legal conclusions about the meaning of the 1905 Compact in general and Article VII in particular. Nothing in Rule 702 purports to exclude otherwise admissible testimony merely because it is based, in part, on legal sources.

3. Testimony on difficult and arcane legal topics is admissible

Courts *routinely* consider expert testimony on legal topics, so long as the testimony is useful to the court. For instance, in patent litigation, "technical experts are generally allowed to comment on the scope of a patent's coverage and give their conclusions on the issue of infringement." *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 101 n.13 (1st Cir. 1997); *see also United States v. Clardy*, 612 F.2d 1139, 1153 (9th Cir. 1980) (affirming decision to admit testimony from Internal Revenue Service Agent regarding the validity of a taxpayer deduction). In *First National State Bank v. Reliance Electric Co.*, 668 F.2d 725 (3d Cir. 1981) (per curiam), the Third Circuit affirmed a district court's decision to admit expert testimony from "an outstanding scholar and a foremost expert on the Uniform Commercial Code" who testified as to "trade usage" in order to assist a jury in interpreting an allegedly ambiguous agreement. *See id.* at 731. The logic of *First National* applies with equal force here: Professor Sax's testimony is plainly relevant to any determination of the meaning of the phrase "riparian jurisdiction" at the time of the 1905 Compact and therefore plainly probative of the 1905 Compact drafters' intent.

Nor does New Jersey's reliance on Rule 704 have any persuasive force. Rule 704 is a rule of inclusion, pursuant to which otherwise admissible evidence may not be kept out merely "because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704(a).[6] Thus, contrary to New Jersey's claims, nothing in the Federal Rules imposes a "per se bar on any expert testimony which happens to touch on the law." *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1246 (10th Cir. 2000) (affirming trial court's admission of expert testimony regarding the meaning of the phrase "hedonic damages" under New Mexico law).

4. Reliance on the statements in the Special Master's Report in Virginia v. Maryland *is misplaced*

New Jersey erroneously invokes the Special Master's report in *Virginia v. Maryland* – the primary authority on which New Jersey relies to support its claim that the two expert reports should be stricken. Importantly, the Special Master in that case did *not* rule those reports to be inadmissible or order them stricken from the record; rather, after review he gave them the weight he thought they deserved. That is fundamentally different from the relief New Jersey seeks in its motion. By offering views about the Maryland experts' reports, the Special Master in *Virginia v. Maryland* did not prejudice Maryland before the Court – Maryland was free to take exception to the Special Master's views about the expert reports, and the Justices were free to read those reports and decide what weight to give them. Thus, nothing in the Special Master's treatment of the expert reports in *Virginia v. Maryland* provides a basis on which to strike Professor Sax's report from the record created in this action.

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[6] A separate section of Rule 704 – not relevant here – excludes certain testimony relating to the mental state of criminal defendants. *See* Fed. R. Evid. 704(b).

Moreover, the treatment of the expert reports in *Virginia v. Maryland* is readily distinguishable from the posture of this case on the merits. The relevant question there was whether the phrase "Patowmack River" in a compact between the two states encompassed the entire Potomac River, as Virginia claimed, or, as Maryland argued, merely the tidal portions of it. The Special Master concluded that the term referred to the entire river, finding that Maryland had submitted no evidence in support of its claim that "Patowmack River" was understood in 1785 to refer solely to the tidal portion of the river. In a footnote, the Special Master further noted that he "could not accept the . . . legal conclusions about what the [term 'Patowmack River' in the] Compact means" as found in two of Maryland's expert reports. NJ Mot., Exh. C at 16 n.20. Those experts, however, did not offer factual evidence that would support the conclusion "that 'Potowmack River' in 1785 meant only the tidal Potomac." *Id.* at 15-16 & n.20. Instead, one of those experts offered only "legal and interpretive conclusions [that] require[d] speculative leaps of faith unsupported by the language of the Compact." *Id.* at 16 n.20. The other offered only evidence of the "post-Compact 'belief' on the part of 'contemporaneous observers.'" *Id.* By contrast, Professor Sax's report sets forth the historical facts about the legal context and understanding of riparian law, as well as New Jersey's actions in regulating riparian lands, "up to the execution of the 1905 Compact." Sax Rep. ¶ 9. Those facts in turn form the basis for his conclusions about the intent of the drafters in choosing the language of Article VII.[7]

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[7] New Jersey's reliance (at 9) on *Edwards v. Aguillard*, 482 U.S. 578, 595-96 (1987), is likewise misplaced. There, the Court agreed with the lower court's exclusion of expert opinions as to a state legislature's motives in enacting a statute. Here, Delaware seeks only to establish the state of water law in 1905 in aid of the Court's contextual interpretation of the words of the 1905 Compact. *See also Nieves-Villanueva*, 133 F.3d at 100-01 (barring testimony on legal issues "routinely before the federal courts [and] . . . not complex," while noting that "there may be particular areas of law . . . where expert testimony on legal matters is admissible"); *Crow*

5. The justifications typically given for excluding expert testimony are absent here

Courts have traditionally offered two reasons for excluding expert testimony regarding legal issues. First, they focus on the need to avoid the risk "that the jury may think that the 'expert' in the particular branch of the law knows more than the judge – surely an impermissible inference in our system of law." *Nieves-Villanueva*, 133 F.3d at 99 (citations and internal quotation marks omitted). Second, they express concern about the possibility "that jurors will be confused by . . . differing [legal] opinions." *Specht*, 853 F.2d at 809. Neither risk is present here. In this proceeding, the possibility of jury confusion is nonexistent. Thus, to the extent that there are legal conclusions contained in any of the parties' expert reports, the Court is free to grant them whatever weight they merit. "A court sitting as trier of fact frequently will allow the testimony to be heard, then will disregard that evidence which is inadmissible or unpersuasive." *Berry v. School Dist.*, 195 F. Supp. 2d 971, 977 n.3 (W.D. Mich. 2002). But Professor Sax's learned exposition of the materials that the drafters necessarily would have considered in crafting the phrase "riparian jurisdiction" will certainly be helpful to the Court.

B. Professor Hoffecker's Expert Testimony Regarding the History of the 1905 Compact Is Admissible

New Jersey's very limited objections to Professor Hoffecker's expert report also lack merit. New Jersey objects to Professor Hoffecker's report on the ground that she purportedly "frequently strays into areas reserved for the Special Master." NJ Mot. at 11. In support of this claim, New Jersey identifies only 24 words from six isolated quotations from Professor

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Tribe of Indians v. Racicot, 87 F.3d 1039, 1045 (9th Cir. 1996) (excluding expert testimony on meaning of "lottery games" in a 1993 gaming compact); *Specht v. Jensen*, 853 F.2d 805, 808 (10th Cir. 1988) (excluding legal conclusions as to whether there had been a "search" of plaintiffs' residence).

Hoffecker's 52-page report, none presented in context. *See id.* (Issues (A)-(F)). A fair review of the relevant sections shows that the language to which New Jersey objects is plainly not objectionable.

To take just one example, New Jersey argues that the emphasized language in this passage should be stricken:

> In all the news reports about the drafting and adoption of the compact, there is no record of any debate about the provisions of Articles VI and VII concerning regulation of the oyster and other shellfish industry or riparian rights. Issues concerning the oyster industry appeared to be settled, and *riparian issues presented no problems* since at that time Delaware did not regulate or tax structures built into the Delaware River on either side of the river.

Hoffecker Rep. at 40. New Jersey objects to the assertion in the above paragraph that "riparian issues presented no problems" because it supposedly discusses "the meaning and relative importance of the individual Articles of the Compact." NJ Mot. at 11. The above paragraph does nothing of the sort. Rather, it simply offers an expert historical explanation as to why contemporaneous news reports of the 1905 Compact failed to discuss the issue of riparian rights. Tellingly, New Jersey has no objections to Professor Hoffecker's expertise in Delaware history that enables her to reach such conclusions from the facts on which she relies.

New Jersey's other objections are equally strained. For instance, New Jersey objects to the emphasized language in Professor Hoffecker's statement that "the [Delaware] Assembly . . . [found] time on March 23, 1905, to appoint commissioners to confer with their counterparts in New Jersey regarding the two *transcendent issues* in the compact: drafting uniform fishing laws and delineating the boundary between the Delaware River and the Delaware Bay," Hoffecker Rep. at 42, on the ground that it is inappropriate for her to "select which 'issues' in the Compact were 'transcendent.'" NJ Mot. at 11. But this is plainly Professor Hoffecker's expert

assessment, as an historian, of which issues were most important to the drafters based on the historical context of the live disputes they were trying to resolve. Professor Hoffecker's historical analysis does not become a legal conclusion simply because she links the historical context to the 1905 Compact itself.

New Jersey similarly twists Professor Hoffecker's discussion of Justice Cardozo's use of the phrase "subject to the Compact of 1905" in the 1934 opinion upholding the Special Master's decree. *See New Jersey v. Delaware*, 291 U.S. 361, 385 (1934). Professor Hoffecker's purpose in quoting from this Court's opinion is to put those words in historical context, not to offer her opinion as to their precise legal meaning. *See* Hoffecker Rep. at 50 ("What might the words 'subject to the Compact of 1905' have meant, taken in historical context? The compact had been created to address conflict over the rights of commercial fishermen of New Jersey and Delaware, particularly within the twelve-mile circle."). Thus, the handful of isolated quotations that New Jersey has taken from Professor Hoffecker's report offers no justification for striking any portion of her report.

New Jersey also repeatedly mischaracterizes Professor Hoffecker's report by alleging that she concludes that the 1905 Compact "addressed only" fishing rights and by quoting her incorrectly (twice) as stating that the Compact "resolved nothing else." N.J. Mot. 6, 11. The passage in the Hoffecker Report (at 51) in which the allegedly improper words appear in fact states the following historical conclusion:

> Viewed in historical context, the Compact of 1905 addressed the most pressing and divisive issue of the time, which was fishing rights in the Delaware River. The compact did not attempt to resolve other issues, it merely deferred them with language that permitted the *status quo* to continue.

C. Equitable Factors Support Denying New Jersey's Motion

Considerations of fair play weigh entirely in favor of denying New Jersey's motion to strike and of permitting Delaware's expert reports to be included in the record in their entirety and considered in resolving the merits of this case. In every filing by Delaware in this Court prior to the appointment of the Special Master, Delaware expressed the position that experts in the field of water rights law would materially assist this Court and that it intended to retain such an expert to testify. *See* pp. 5-6, *supra*. Knowing at that time that Delaware intended to offer an expert on the law of water rights, New Jersey sought to persuade this Court that the appointment of a Special Master was unnecessary, but it elected not to object to Delaware's stated intention at any point in the process until the eve of dispositive motion briefing. It permitted the CMP to go forward without any objection to the provision for "consultive experts"; it chose not to retain an expert of its own (instead relying on a state employee to offer his own opinions about the state of riparian law at the time of the 1905 Compact's drafting); and it determined not to depose Professor Sax or to challenge his credentials as an expert. New Jersey may well have concluded that it did not need an outside authoritative expert on water law because with its Complaint it had submitted an affidavit by New Jersey state employee Richard Castagna, as to which BP's lawyers had substantial input. *See, e.g.*, Opposition of State of Delaware to Motion of State of New Jersey to Strike Delaware's Issues of Fact Nos. 1, 2, 6, 8, and 9 and to Preclude Discovery on These Issues, 5-6, 11-12 (filed May 5, 2006). Contrary to the position taken in New Jersey's instant motion, the Castagna affidavit contains extensive citations to and legal analysis of numerous New Jersey statutes, grants, and other legal documents, and asserts that those actions by New Jersey constitute exercises of "riparian jurisdiction" under the 1905 Compact. *See*

Motion to Reopen and for a Supplemental Decree, Appendix 5 (Castagna Aff.) (No. 11 Orig., filed July 28, 2005). New Jersey's effort to deny Delaware an opportunity to submit contrary evidence from a more authoritative, independent, and neutral source should be rejected.

CONCLUSION

Delaware respectfully requests that New Jersey's motion to strike the expert report of Professor Joseph Sax and portions of the expert report of Professor Carol E. Hoffecker be denied.

Respectfully submitted,

David C. Frederick

David C. Frederick

cc: Rachel J. Horowitz, Esq.
Barbara Conklin, Esq.
Collins J. Seitz, Jr., Esq.

PAGE 1 SHEET 1

IN THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

IMPERIAL PALACE OF MISSISSIPPI, INC.	PLAINTIFF/COUNTER-DEFENDANT	
VERSUS	CAUSE NO. C2402-01-251	
TAL FLURRY, ET AL	DEFENDANTS/COUNTER-PLAINTIFFS/ COUNTER-DEFENDANTS	
CONSOLIDATED WITH		
BAYVIEW LAND, LTD, AND IMPERIAL PALACE OF MISSISSIPPI, INC.	PLAINTIFFS/COUNTER-DEFENDANTS/ COUNTER-PLAINTIFSS	
VERSUS	CAUSE NO. C2402-98-389	
ERIC CLARK, ET AL	DEFENDANTS/COUNTER-PLAINTIFFS COUNTER-DEFENDANTS	
CONSOLIDATED WITH		
TREASURE BAY CORP.	PLAINTIFF/COUNTER-DEFENDANT	
VERSUS	CAUSE NO. C2402-01-522	
TAL FLURRY, ET AL	DEFENDANTS/COUNTER-PLAINTIFFS/ COUNTER-DEFENDANTS	

TRANSCRIPT OF TESTIMONY

****

TRANSCRIPT OF TESTIMONY IN THE ABOVE STYLED AND NUMBERED CAUSE BEFORE HONORABLE DONALD PATTERSON, SPECIAL CHANCELLOR FOR THE EIGHTH CHANCERY COURT DISTRICT OF MISSISSIPPI, ON THE 27TH DAY OF AUGUST, 2002.

****

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S121	C.V. of Joseph Sax		9
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THE COURT: Are you ready to proceed?
MR. ROBERTSON: Yes, Your Honor.
THE COURT: Who do you have next?
MR. ROBERTSON: Joseph Sax.
THE COURT: Raise your right hand, please.
(WITNESS WAS SWORN BY THE COURT)
THE COURT: Proceed, Mr. Robertson.

JOSEPH SAX,

having been called to testify, and after having been duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION BY MR. ROBERTSON:

Q. State your full name, please, sir.
A. Joseph Sax.
Q. Where do you live, Professor Sax?
A. I live in San Francisco, California.
Q. And what is your occupation or profession?
A. I'm a professor of law emeritus at the University of California, Berkeley.
Q. Would you describe for the Court, please, your professional education.
A. I'm a graduate of Harvard College and the University of Chicago Law School. I graduated in 1959.
Q. And would you describe for the Court, please, your general professional background and experience since you graduated from law school.

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A. Yes. When I left law school, I went to work for the Attorney General of the United States at the U.S. Department of Justice as an assistant.

I then worked for a small law firm for several years in Washington, D.C.

And my first teaching job was at the University of Colorado in Boulder where I taught what was called the package of natural resources courses. I taught oil and gas law, water law, and mining law.

In 1960 -- that was in 1962. In 1966 I moved to the University of Michigan where I was professor. I taught there for 20 years. And in 19 --

Q. In what fields?

A. Also in the field of natural resources law. My specialty is water law. I also taught environmental law and public land law. I taught public trust law. And I taught property rights, constitutional property rights under the Fifth Amendment, so-called takings clause of the Constitution.

In 1986 I moved to the University of California at Berkeley where I taught essentially the same courses.

And in 1994, in the spring of 1994, I went to the U.S. Department of the Interior as Deputy Assistant Secretary of the Interior and as counselor to the

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Secretary of the Interior. I was there for two and a half years.

Q. What general issues and responsibilities did you have in that position?

A. I worked primarily on the water issues involving the Bureau of Reclamation, and also on issues relating to the so-called takings or property rights legislation. There was active legislation in the Congress, and I represented the Department of the Interior, testified on a number of occasions. I also did some work water -- issues relating to water and the Endangered Species Act. But water was my primary responsibility.

I returned at the end of 1996 to Berkeley. I had taken a leave of absence to go work for the Administration. And I returned in 1996 continuing to teach water law, public trust law, takings, and public land law.

And then as of January 1st of this calendar year, I took emeritus status and I have --

Q. Does that mean that you work less or more?

A. It means I do pretty much the same things that I did previously; writing, consulting, but I'm just not teaching classes on any regular basis.

Q. And you don't have to go to faculty

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meetings?

A. I don't have to go to faculty meetings. I don't have to serve on committees. And I can sleep later if I want to.

Q. Is that sort of like being a special chancellor who has senior status?

Professor Sax, have you had any visiting professorships along the way?

A. Yes. I visited at a number of universities. At the University of Utah, at Stanford University, and at the University of Paris, the so-called Sorbonne.

Q. Would you --

A. I've also --

Q. Excuse me.

A. I think that's -- I may be forgetting something, but I think that's all.

Q. Would you describe in a general way your research and publication interests in your professional career as an academician?

A. Yes. Well, as I said, my primary field has been water law. I taught water law almost without exception for during the 40 years I was on the faculty. I published my first sort of textbook case book in 1965, and then another one in 1967.

I did part of the multi-volume treatise

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Waters and Water Rights that came out at about the same time in '67. And then more recently collaborating with several others, I've done a book on water law, a teaching book on water law, which was published by the West Publishing Company, which is now in its third edition. I've also written many, many articles. I don't know, 140 articles or so, over the years dealing with public trust issues, with constitutional property right issues, water law issues, environmental issues of various kinds. And also I've done a fair amount of writing in connection with some of the consulting work that I am doing.

I consult primarily for government agencies: The Bureau of Reclamation; the Los Angeles Department of Water and Power; the State of California; for a county in Nevada, Douglas County, which has had a lot of water issues.

Q. Professor Sax, the State has asked you in this case to undertake a study regarding the historical and functional background and understanding of the public trust doctrine and it's interaction with riparian or littoral rights.

Would you describe generally, and you've already alluded to some of this, your education, experience, and expertise that would qualify you to

undertake the assignment that we have asked you to take.

A. Well, I -- I think I have already alluded to some of these things. But I would mention the fact that I've taught in the field of public trust and water law for nearly 40 years. I've prepared materials, published materials for students in the area of public trust and in water law.

I've -- for the purposes of my general research as well as those particular things, I've over the years read very widely in the history of water rights and public trust rights. I've made it a practice to try to keep abreast of the court decisions and important legislative developments in these areas.

So I feel that I have a pretty extensive background which underlies the report that I prepared at your request.

MR. ROBERTSON: Your Honor, I have Exhibit 121, which is a summary resume or CV for Professor Sax that I would like to offer into evidence.

(EXHIBIT S121 MARKED IN EVIDENCE)

MR. ROBERTSON: If Your Honor please, the State would tender Professor Sax as an expert in the historic and functional background and understanding of riparian and littoral rights and

of the public trust doctrine as related to such rights.

THE COURT: Voir dire?

MR. BLESSEY: Just one question, Your Honor.

VOIR DIRE EXAMINATION BY MR. BLESSEY:

Q. Professor Sax, when were you tasked by the State to prepare your report and testimony, approximately?

A. Approximately -- let's see. I believe -- I believe about the beginning of this year.

Q. 2002?

A. Yes, sir.

MR. BLESSEY: Your Honor -- that's the only question we have, Your Honor.

We object to his testimony as an expert for the reason that he was not tasked to report to the Secretary of State prior to December 15th, 1994.

THE COURT: Overruled.

DIRECT EXAMINATION BY MR. ROBERTSON: (Continuing)

Q. Professor Sax, at the outset, I would like to ask you a couple of questions about terminology. And, for the record, the term that we will use frequently, littoral rights, is l-i-t-t-o-r-a-l. As an old river rat, I didn't know that term for many years.

I wish you would initially explain to the

Court again in a definitional sense what we are talking about when we use the term "littoral rights."

A. Littoral rights are those rights which may be property rights or may be merely licenses or privileges, depending on state law, which are associated with the ownership of land bounded by the high -- the mean high water mark on the ocean or bays, the seas or lakes.

Q. And would you also define the perhaps more familiar and more common term "riparian rights"?

A. Yes. Riparian rights are those rights or privileges that are associated with the ownership of land at the high water mark of rivers. And rivers are defined as those bodies of water that have a bed and banks, a channel and a flow as contrasted for example with lakes. Although there are some ambiguity sometimes as to whether something is a river or a lake.

Q. Is there any essential distinction other than the application to the seas on the one hand for littoral rights and rivers for riparian rights, is there any distinction between the two terms?

A. I think essentially the answer is no. The terms are frequently indeed usually used interchangeably both by courts and legislators, legislatures and writers. As a practical matter, there

may be some -- there may be some differences; for example, in some places where littoral rights involve the sea or the seashore, you will have public trust tidelands that bound the upland owner. On many rivers which are not tidal, t-i-d-a-l, and are not navigable, the underlying lands are owned privately by the upland owners. So there may be some differences in the extent of rights that they have but for the most part and in common parlance people almost always use the term "riparian rights" when they mean littoral rights.

Q. And have you found that to be the case in judicial opinions and legal literature as well as common parlance?

A. Yes.

Q. Professor Sax, I would like to ask you to describe in a general way your understanding of the history and background of the whole notion of littoral rights. Where did it come from? What was its origin in a factual and functional sense?

A. The background of littoral rights is connected with the historic importance of navigation by water. As everyone knows, until the modern era, time of highways, airplanes and railroads, water was the primary means of transportation, both for commercial and other purposes. And, of course, in order to use

the water for navigation, it's necessary to have access to the water or to have access to the navigable part of the water, that is the deep enough water for ships. So, the question was whether -- the question was how to provide access to shore landowners particularly since the waters of navigable rivers and lakes and bays has always had a public component.

Q. Would you describe that public component, please, sir.

A. Well -- yes. Just briefly, going back to Roman times in antiquity of 2000 years ago, it was the law, the Roman law that the sea and seashore cannot be privately owned but belong to everybody and that, of course, is for navigation. That was the origin of navigation idea. That idea has been picked up both in English law and in, of course, in American law so that -- this is one of the most traditional legal ideas that waters that are navigable are to be available to the public. They are not privatized or even privatizable.

So you always have this what in olden times was an interesting legal question for the judges, which was if the waters are public in some sense and you have private property owners who own the adjacent land, how do you permit them to make use of the waters and to

facilitate public use of the waters unless you let them, in effect, trespass onto this public area.

So, the solution that the law wisely found to this was to create what we nowadays call riparian rights or littoral rights, which were as simply stated as possible, rights of access. That is if you are a littoral owner and you want to have access to the navigable waters, you may build a facility; a pier, a wharf, a dock in order to obtain access to the navigable waters. And that's a permissible trespass or what the law traditionally called a purpresture.

Q. Spell that, please.

A. P-u-r -- I feel like I'm in elementary school. P-u-r-p-r-e-s-t-u-r-e.

Q. The difference is that no one here will know if you misspell it.

A. Well, it's not only hard to spell, it's hard to pronounce. But in any event, the familiar historic example of this is if you -- if you block a public highway, that's a purpresture and the authorities have a right to remove that.

What the judges said about these riparian or littoral structures was they are really purprestures. That is they may -- they are in the public right of way but they are permissible purprestures and as long as

they are promoting these public uses such as navigation and in modern times we have extended that beyond just navigation, but as long as they are promoting these uses, they are permissible purprestures. But they may always -- if it turns out that they are no longer in the public interest, they may always be removed.

I could give you an example if that would be helpful.

Q. Please do. Please do.

A. From a very sort of a famous old California case, when they first started doing offshore oil drilling in California they had to put these facilities out into the water. Well, of course that was in the public navigational area. And state authorities said, well, you can't do that. You can't block the public navigation in the Pacific Ocean. And the solution that the court found in this famous case, which was called Boone against Kingsbury, was that this was a purpresture. It was permissible because it was in the public interest to have oil drilling, and at the same time there was no evidence that public navigation, recreation, fisheries or other so-called public trust uses were being impaired.

But the Court said in its opinion, however, the State must always retain the authority to remove

this if at some time in the future it is determined to be in violation or blocking public rights.

So, that's -- that's how the private right or privilege of littoral building and the public right of use of the seas and rivers has been made congruent in the law.

Q. Well, Professor Sax, let me ask you to focus for just a moment on the public right that you have been describing, and I believe we place that under the label "the public trust" or sometimes the "Public Tidelands Trust." Would you give your understanding of the history and the function of the Public Tidelands Trust idea in the United States.

A. In the United States. Yes. Well, it goes back to -- most people date it back I think properly to a case -- a New Jersey case of 1821 called Arnold against Mundy. That was a case involving oystering. And the question -- the question was whether this was -- this right of oyster harvesting that had been given was a private property right. And what the Court effectively said in that case in some quite eloquent language was that this use, which was a perfectly legitimate use, was on the tidelands. The tidelands belong to the State. And I may, if you permit, say a word about that in a moment. And that these -- that

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while uses consistent with the public interest in the tideland -- private uses consistent with the public interest in the tidelands may be allowed, those uses have to be water-related; that is, they have to be needful of the water such as navigation or the harvesting of oysters, but that they -- that the public rights may never be granted away in any way that is inconsistent with the protection of these public uses or what is called the public trust. That was the earliest case.

Then in 1892 in what most people consider the most famous case, the U.S. Supreme Court decided a case called the Illinois Central Railroad case. And in that case, which is similarly illustrative, the State legislature had granted away the strip of the waterfront in Chicago at -- in Lake Michigan. If you know the Chicago waterfront there is a park there for about a mile where you will see the museums and so forth, and they had simply granted this to the railroad which was going to fill it in and put railroad tracks there.

There was some indication that there was a whiff of corruption in the legislature when they made this grant. But, in any event, some years later the legislature repented of its alleged sins and retracted

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the grant. And Illinois Central Railroad sued the State claiming that this was a grant of property. They had a property right, and it couldn't be taken away at least without just compensation. And the Supreme Court of the United States in what has become the most famous public trust opinion said, no, this grant was void because you can't use the state, hold these -- now these are not tidelands because, of course, Lake Michigan is a fresh water lake, but these are the submerged lands beneath navigable waters which have, in American law, the same status as tidelands. You can't just grant these away to a private company for some private use. You are a trustee and they are held in trust and you don't have the power to grant them away.

Q. And so the State then took these lands and gave them to Marshall Field for the Field Museum?

A. No, these lands were -- they were taken back and they are -- you can go to Chicago today and still see them and they are water -- they are lands covered by water. You will see that there is a yacht harbor there, a small yacht harbor, and that is a permissible public trust use because it's a water necessitous use. Of course, if you are going to have a marina or a yacht harbor, where else can you put it? I mean you can't put it up on the land.

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Q. Historically what did all of this have to say and what was the resulting idea regarding the legal title to the tidelands?

A. Well, the law -- the law is that when a state is admitted to the union, at the moment of admission to the union, all the -- all of the tidelands are transferred to the state in trust ownership. And in most of the United States, I don't know the history of this state, but in most of the United States outside the original 13 colonies, the land passed to the United States and people got their titles from the United States or what we call patents.

Those patents -- for example, if you got a patent of land on the shore here, your -- your title only goes down to the mean high water mark. That is, because everything waterward of the mean high water mark is held, if for example it was a territory, is held until statehood at which time that submerged land passes to the state. So that as a practical matter, all of the tidelands pass to the state at the moment of statehood. Everything waterward of the mean high water mark and owners of private lands, whatever their deeds might say, only get down to the high water mark. And the reason for this, the explanation for this is that America adopted -- the 13 colonies adopted this public

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trust idea that the waters -- navigable waters and under the decisions of the court, and tidal waters are public, should be held for public use, and that the state should act as a trustee to assure that. And it is a -- it is a matter of federal constitutional law under what is called the Equal Footing Doctrine that each new state when it enters the union is to have the same arrangement as each previous state. So that when this state entered the union in whatever, 1817, was it, I can't remember exactly, but it was to be on an equal footing with all of the other states. The tidelands went to the State of Mississippi. The uplands to whoever, the United States or there may have been a previous sovereign who granted the lands. The same when California came into the Union. My state in 1850, exactly the same thing happened. So that's the case in each state.

Some states have made some grants of various kinds of tidelands, but originally they were the full owners. Those grants are usually subject public to public trust.

Q. Professor Sax, one housekeeping matter that I forgot a moment ago. Have you undertaken at our request a study of the historic and functional background and understanding of riparian and littoral

rights and of the Public Trust Doctrine as related to those rights?

A. I have, yes.

Q. And have you prepared a report reflecting your study?

A. Yes, I have.

Q. And have you prepared this report in accordance with accepted professional standards in your field?

A. Yes.

MR. ROBERTSON: I'd like to offer Professor Sax's report into evidence, please.

MR. BLESSEY: Your Honor, we have read the report and certainly we have great respect for Professor Sax's scholarship, it is in essence, though, Your Honor a legal brief. It has legal conclusions that are the province of this Court with regard to the implication of this with regard to Mississippi law.

And while we certainly do not object to an examination about the history and the background and function and so forth that counsel has been going into, to introduce this treatise into the record as a fact really is invading the province of this Court, Your Honor.

To that extent, we object to it. It's basically a legal brief on this subject. It cites cases. It draws legal conclusions. And we think the Court ultimately must determine that insofar as Mississippi law is concerned.

THE COURT: I reject or question legal briefs all the time, so I don't quite understand your objection.

MR. BLESSEY: He is offering the legal brief as evidence, Your Honor.

THE COURT: Overruled. S120 is admitted.

(EXHIBIT S120 MARKED IN EVIDENCE)

MR. ROBERTSON: When Your Honor says you reject legal briefs --

THE COURT: I accept and reject and I -- perhaps my language was not totally appropriate, but I think everybody understands what I mean. I extract what I agree with and reject what I don't agree with and then the Supreme Court tells me wherein I erred.

BY MR. ROBERTSON:

Q. Professor Sax, you have given an overview of the history of the idea of the public trust and the related idea of littoral rights. Would you bring that forward to the current time and provide us with your

general understanding of the current and prevailing custom and usage with respect to these two related doctrines, the public trust and littoral rights?

A. Yes. Let me begin with the public trust. As I mentioned a few minutes ago in response to your question, the origin of the trust and the idea of trusteeship was drawn from navigation and the historic importance of navigation. Because this is essentially a common law doctrine, and in that sense one that evolves with changing times, in many states, in a number of states, courts have explained that the scope of the public trust should evolve with evolving public needs and uses, for example, as recreational uses of the waters as well as just navigation and fishing, which were the traditional uses. The courts have recognized the protection and promotion of public recreation on the water as a public trust use.

More recently, beginning about in the early 1970s, states -- several states have said when the question arose that the protection of environmental resources, such as at the water's edge some of these tideland areas that are not navigable in any traditional sense are biologically important or important for biodiversity purposes, and that the public trust incorporates an obligation and

responsibility to protect environmental values. So the trust has evolved in that sense.

And in term of littoral rights, they have evolved, too. That is, in the sense that access to the waters for recreational water-based or water-dependent recreational uses are permitted as well as traditional commercial navigation uses. But in one sense there has been no change of the fundamental idea. And that fundamental principle is that both the trust and the littoral rights are determined by what is sometimes called water relatedness, or water dependence, or water orientation, water necessitousness. However, it is described, it must be to promote access to the use of water or use of water for some purpose that is water related. Maybe I could give you an example.

Q. Would you please.

A. Would that be helpful?

Q. Please.

A. For example there are cases and I mentioned at least one or several of them in my report. For example, where a littoral owner wanted to fill in some of the submerged land and build an apartment house, and in that case I believe the submerged lands actually belonged to the littoral owner; that is, they weren't tidelands of the kind we have been discussing, but it