

SUPREME COURT OF THE UNITED STATES

NO. 134, ORIGINAL

STATE OF NEW JERSEY, )  
 )  
 Plaintiff )  
 )  
 V. )  
 )  
 STATE OF DELAWARE, )  
 )  
 Defendant )

ORIGINAL

TELEPHONE CONFERENCE before SPECIAL MASTER  
 RALPH I. LANCASTER, JR., ESQ., held at the law offices  
 of Pierce Atwood at One Monument Square, Portland, Maine,  
 on December 8, 2006, commencing at 10:05 a.m., before  
 Claudette G. Mason, RMR, CRR, a Notary Public in and for  
 the State of Maine.

APPEARANCES:

For the State of New Jersey: RACHEL J. HOROWITZ, ESQ.  
 BARBARA CONKLIN, ESQ.  
 WILLIAM E. ANDERSEN, ESQ.  
 DEAN JABLONSKI, ESQ.  
 EILEEN P. KELLY, ESQ.

For the State of Delaware: DAVID C. FREDERICK, ESQ.  
 SCOTT H. ANGSTREICH, ESQ.  
 SCOTT K. ATTAWAY, ESQ.  
 COLLINS J. SEITZ, JR., ESQ.  
 MATTHEW F. BOYER, ESQ.  
 MAX B. WALTON, ESQ.  
 RYAN P. NEWELL, ESQ.

Also Present: MARK E. PORADA, ESQ.



1 record, is to follow up on the e-mail we received  
2 from you and some questions that we had.

3 SPECIAL MASTER: Well, anything -- I think  
4 anything we do should be on the record.

5 Let's do this. Let's start with -- well, let  
6 me pose this question to you. If you think that  
7 the issue you want to raise is in any way  
8 disqualifying, then perhaps we should address it  
9 before we get to the substance of any motion or  
10 anything else. If not, we can postpone it until  
11 the end of the discussion.

12 MR. SEITZ: It's more right now,  
13 Mr. Lancaster, to take you up on your invitation  
14 or e-mail to ask some additional questions.

15 We had forwarded your note on to our client  
16 and had a discussion with them. And they -- and  
17 meaning absolutely no disrespect or any kind of  
18 questioning the integrity of the Special Master  
19 and your assistant, they did have some follow-up  
20 questions. And I think you invited them in your  
21 note, and we just wanted to take you up on that.

22 SPECIAL MASTER: Sure. Well, let's go  
23 forward with the agenda and then take that up at  
24 the end, if that's all right with you.

25 MR. SEITZ: That would be fine. That's fine.

1           SPECIAL MASTER: The agenda, as I see it, is,  
2 first, New Jersey's motion to strike and then  
3 Philadelphia housekeeping arrangements and now an  
4 attempt to answer whatever questions you may have  
5 regarding the Passamaquoddy matter.

6           Is there anything else, New Jersey?

7           MS. HOROWITZ: No, nothing else from our end.

8           SPECIAL MASTER: Anything else, Delaware?

9           MR. FREDERICK: No, sir.

10          SPECIAL MASTER: Okay. Let's turn to the  
11 motion first then. Technically -- and I'll  
12 address this to Ms. Conklin since she, as I  
13 understand it, is going to speak to the motion.  
14 Technically, since these reports which are the  
15 subject of the motion have not been offered, there  
16 is nothing in evidence which can be stricken. I  
17 intend to treat the matter as a motion in limine,  
18 and I assume that there is no problem with either  
19 counsel in that respect. I agree with New  
20 Jersey -- and I assume Delaware agrees -- that  
21 it's beneficial for both parties to know how these  
22 reports will be treated, if they are offered.

23          Then let me state my understanding. My  
24 understanding is that New Jersey's motion is a  
25 request that I rule either that if the reports are

1 offered, the entire Sax report and those portions  
2 of the Hoeffcker report set forth on page 11 of  
3 New Jersey's initial brief, be declared  
4 inadmissible or, alternatively, that if I admit  
5 them, I disregard the legal citations, the legal  
6 argument and the legal conclusions in both  
7 reports.

8 Do I correctly understand that to be the  
9 thrust of New Jersey's motion, Ms. Conklin?

10 MS. CONKLIN: You do, Mr. Lancaster.

11 SPECIAL MASTER: All right. Thank you. Why  
12 don't you proceed.

13 MS. CONKLIN: Thank you, Mr. Lancaster. Can  
14 you hear me?

15 SPECIAL MASTER: Oh, yes.

16 MS. CONKLIN: Okay. Thank you very much.

17 The -- this is obviously New Jersey's motion  
18 made November 27 of '06 to strike those reports.  
19 And I'm going to try and be as brief as possible.  
20 I know you have read the papers.

21 The first thing I would like to make very,  
22 very clear is that we understand very clearly that  
23 your -- that Rule 702 under the federal rules is a  
24 permissive rule. It indicates that the Court may  
25 decide if a person with specialized knowledge will

1 assist the tryer of fact to understand the  
2 evidence or determine a fact in issue. We are not  
3 suggesting that this Court does not have the  
4 authority or the discretion to rule something  
5 helpful to it. However, it is our position in  
6 this case that you already have 18 lawyers on this  
7 case. The 19th lawyer is not going to assist this  
8 Court any further in understanding the "state of  
9 water law in 1905", which is what this report  
10 is -- the Sax report is plainly going to be  
11 admitted for.

12 And I am quoting from page 18 of Delaware's  
13 opposition brief at footnote 7. In that footnote  
14 there is an announced intention, quote, Delaware  
15 seeks only to establish the state of water law in  
16 1905 in aid of the Court's contextual  
17 interpretation of the words of the 1905 Compact.

18 Again, we have 18 lawyers here who are more  
19 than capable of giving the law and interpreting  
20 the law in this matter; and a 19th, however  
21 august, is I would respectfully suggest  
22 unnecessary for this tribunal to understand the  
23 law of riparian waters.

24 Delaware argues that the Sax report relates  
25 to certain documents that the New Jersey

1 commissioners may have had in mind when they were  
2 drafting the 1905 Compact; and it is very, very --  
3 we really must emphasize at this point there is  
4 nothing in the Sax report that relates to drafts  
5 of the Compact, correspondence between the  
6 drafters, newspaper quotations from the Compact  
7 drafters, any factual evidence whatsoever that  
8 indicates -- there is nothing tethering the legal  
9 argument to any fact in this case or a drafter's  
10 understanding or use of a word.

11 It is important to understand that the Sax  
12 affidavit states at paragraph 7, I believe -- no,  
13 paragraph 5 that, in fact, all data and  
14 information considered by Professor Sax in forming  
15 his opinions are cited in his report. And if you  
16 look at the report, there are no facts that  
17 professor Sax is interpreting. He is merely --  
18 not merely, he is interpreting the law of riparian  
19 waters. And that is plainly an issue that is not  
20 appropriate for testimony but for briefing by the  
21 18 lawyers you already have in this case.

22 If I may, there is one reference in the Sax  
23 report to, I'm sorry, Robert McCarter who is, in  
24 fact, one of the drafters of the Compact, a  
25 commissioner. In fact, however, the reference is

1           only to a case in which Mr. McCarter was a  
2           plaintiff that dates from 1908 after the Compact  
3           was drafted. And Professor Sax does not try to  
4           elucidate what Mr. McCarter might have had in mind  
5           about riparian law. In fact, Professor Sax  
6           discusses the case and doesn't even explain the  
7           position that Mr. McCarter may have taken in this  
8           litigation and somehow made a conclusion or  
9           connection between that case and what was  
10          negotiated in the three or four years prior to the  
11          case.

12                 And, again, our simple point here is that  
13           there are no facts that tether Professor Sax's  
14           analysis of the law to any fact in this case that  
15           would assist this Court in understanding the  
16           intention of the drafters of this Compact in using  
17           the words that they did.

18                 And I'm going to try and wrap this up  
19           relatively quickly here. Delaware suggests that  
20           there is no prejudice to New Jersey by virtue of  
21           allowing this information into the evidentiary  
22           record. And in support of that argument they  
23           suggest, well, there is no jury here. We don't  
24           need to worry about prejudice. And as a result,  
25           the Court should feel free to disregard the case



1 law that is surrounding Rule 702. And obviously  
2 it is quite apparent that compliance with the  
3 court rules doesn't depend upon the integrity of  
4 the jurist involved; and there is no sliding scale  
5 here that suggests that when you have a bench  
6 trial or a Special Master, that the court rules  
7 can simply be disregarded willy-nilly on this  
8 point.

9 Again, you have the latitude, Special Master.  
10 We're not suggesting that. But what we are  
11 arguing for strenuously here is a level playing  
12 field where lawyers do not come in and testify  
13 about the law merely because they have a wonderful  
14 reputation for teaching that law. It is simply a  
15 fact -- we ran into this situation once awhile  
16 back. And, again, it's anecdotal. I offer it for  
17 what it's worth to you. I was involved in a tax  
18 court case where there was a challenge to a New  
19 Jersey fee. And the challenge was is this  
20 regulatory fee a fee or tax? And our adversaries  
21 came in with an affidavit from Walter Hellerstein,  
22 who is the guru of the Commerce Clause. And  
23 Mr. Hellerstein submitted an affidavit opining  
24 about whether our fee interfered with interstate  
25 commerce and, therefore, making it a tax. And we

1 moved before the tax court of New Jersey to strike  
2 the affidavit; and the tax court looked at Rule  
3 702 and New Jersey -- and said, yes, this is  
4 plainly legal testimony. I'm striking it.

5 But what happened is is that every argument  
6 in that affidavit appeared in our adversary's  
7 brief. And we didn't object. We didn't object,  
8 but we wanted that level playing field so the  
9 Court understood that these are legal arguments by  
10 lawyers. This is not something where one legal  
11 argument should be given more weight than any  
12 other legal argument merely because of the person  
13 who makes that argument.

14 The -- and I'm going to, again, try and bring  
15 this home fairly quickly. Delaware tried, I  
16 suspect, to dismiss our argument concerning  
17 Professor Hoffecker's report by saying, goodness,  
18 it's only 24 words. Why should we bother?

19 And, again, it's -- I am unaware of a  
20 de minimis requirement for the enforcement of  
21 the federal rules here. The fact is it is more  
22 than 24 words. New Jersey's motion describes the  
23 conclusions and the broad statements in Professor  
24 Hoffecker's report which plainly indicate  
25 conclusions as to the meaning and effect of

1 portions of the Compact. And in all fairness,  
2 those words are as much of a violation of the  
3 federal rules as Professor Sax's entire report is.

4 This does put me in mind, however, though in  
5 terms of the merely 24 words argument that  
6 Hemingway once wrote a short story in six words.  
7 And he said it was the best story he ever wrote.  
8 It's certainly not something he got a Pulitzer  
9 Prize for; but the simple point here is that  
10 trying to dismiss our objections based on the  
11 number of words involved obviously should be --  
12 should be disregarded by this Court.

13 Again, we don't consider this motion a  
14 formality. We consider this a very serious matter  
15 simply because we know what Delaware intends to do  
16 with these affidavits. And, again, we have a  
17 60-page legal limit here on briefs; and we believe  
18 that we would be profoundly disadvantaged if  
19 Delaware is given the opportunity to have an  
20 auxiliary legal brief here.

21 And we hope and understand that you realize  
22 why we are filing this motion. It was not  
23 intended as an academic exercise. We believe that  
24 the motion has to be granted to preserve a level  
25 playing field here.

1 Thank you.

2 SPECIAL MASTER: Thank you very much,  
3 Ms. Conklin.

4 Delaware?

5 MR. FREDERICK: Thank you, Special Master  
6 Lancaster. May it please the Court, for a year  
7 and a half Delaware has advised New Jersey in  
8 every filing before the Justices that we intended  
9 to retain, refer to or opine on the facts and the  
10 history of water laws that existed in the late  
11 19th Century to provide a context for  
12 understanding the words that lawyers writing at  
13 that time chose to put in the 1905 Compact. So  
14 New Jersey can't claim any kind of prejudice or  
15 surprise. We said this in our very first filing  
16 in October of 2005 and in both of our submissions  
17 regarding Delaware's motion for the appointment of  
18 the Special Master.

19 And in the Case Management Plan section  
20 6.6.2.b the plan distinguishes between a fact  
21 expert and a consultive expert who may be  
22 retained, quote, to testify as to matters and  
23 issues in this case. Now, that language is very  
24 important because there is a distinction that's  
25 drawn in the Case Management Plan by its plain

1 language between an expert who can opine on the  
2 facts and an expert who can opine on the matters  
3 and issues in the case. And ultimately, New  
4 Jersey has no response to the plain language of  
5 the Case Management Plan that permits Professor  
6 Sax to serve as a consultive expert and to the  
7 extent that the 24 words New Jersey challenges in  
8 Professor Hoffecker's report would be treated as  
9 consultive to allow those to be admitted into  
10 evidence.

11 Now, when they got the expert reports, they  
12 chose not to challenge the credentials of either  
13 Professor Sax or Professor Hoffecker. They didn't  
14 ask to depose either of those experts. They  
15 didn't take the opportunity provided under the  
16 Case Management Plan to provide their own  
17 historical expert or their own consultive expert  
18 to talk about riparian rights and issues.  
19 Instead, what they have done is they relied on the  
20 affidavit by Mr. Castagna who liberally cites  
21 citations from New Jersey statutes, regulations  
22 and cases in his affidavit in an attempt to  
23 explain why the custom and practice of New Jersey  
24 leading up to the 1905 Compact was consistent with  
25 what New Jersey discovered in 2005 was what they

1 wanted to argue in this case as the meaning of the  
2 phrase "riparian jurisdiction".

3 So our position is quite simple. If you  
4 start with the Case Management Plan, the plain  
5 language permits the retention and use of expert  
6 testimony by Professor Sax and Professor  
7 Hoffecker. New Jersey starts with the premise  
8 that Rule 702 of the Federal Rules of Evidence  
9 applied. But they never rebut the fact that in  
10 this Original proceeding No. 1, Federal Rules of  
11 Evidence do not apply of their own force; and, No.  
12 2, the Supreme Court's rules provide that the  
13 Federal Rules of Evidence are merely guides and  
14 not strictures.

15 Now, that's very important because in -- in  
16 no case that we have been able to find or that New  
17 Jersey has cited has the Supreme Court upheld a  
18 Special Master striking evidence of an expert from  
19 the record and not permitting the Justices to have  
20 the opportunity to review that evidence upon their  
21 ultimate review of the Special Master's  
22 recommendations and report.

23 And so combined with what the Case Management  
24 Plan permits, the absence of any authority from  
25 the Supreme Court to uphold New Jersey's argument

1           that this must be stricken, we don't think there  
2           is any legal authority at all for New Jersey's  
3           motion to strike or as you, I think, properly put  
4           it, Special Master Lancaster, to treat this as a  
5           motion in limine that would be preclusive of our  
6           opportunity to introduce this -- this evidence  
7           into evidence.

8           Now, with respect even to Rule 702, New  
9           Jersey now concedes that that is a permissive  
10          rule; and the purpose behind the rule is to avoid  
11          having experts come in and confuse the jury into  
12          thinking that they are bound to enter a certain  
13          judgment as a result of the legal opinion offered  
14          by an expert. Of course, in this proceeding there  
15          is no possibility that a jury would be confused;  
16          and so the purpose behind excluding legal  
17          testimony in certain context under Rule 702 is  
18          completely absent here.

19          And New Jersey, in their reply brief, they  
20          don't really come to grips with the fact that in  
21          many different examples in the patent area and the  
22          question of what constitutes damages under the  
23          Internal Revenue Code where representatives of the  
24          Government opine on the legality of deductions,  
25          and that is all considered permissible evidence

1 even though it involves substantive legal  
2 opinions. And under case law in the Courts of  
3 Appeals, that's considered perfectly admissible  
4 under Rule 702. So as a matter of law, taking the  
5 legal standard in play, we don't think there is  
6 any authority to justify precluding either of the  
7 expert reports that have been submitted in this  
8 case.

9 Now, with respect to the specifics of  
10 Professor Sax, we take considerable issue with New  
11 Jersey's characterization and mischaracterization  
12 of Professor Sax's report. In fact, he does deal  
13 quite extensively with a range of facts; and they  
14 underlie the opinion that he submits in his report  
15 on how the phrase "riparian jurisdiction" would  
16 have been intended by the drafters of the Compact.  
17 For instance, he looks extensively at the New  
18 Jersey Attorney General's opinion of 1867 on  
19 riparian rights. He concerns -- he considers the  
20 arguments that were made by Robert McCarter, New  
21 Jersey's Attorney General, who was the lead  
22 counsel in New Jersey versus Delaware, 1 and one  
23 of the commissioners who argued and litigated  
24 extensively in the New Jersey courts for many  
25 years on these questions and, therefore, would



1 have understood what riparian meant in the context  
2 of the times.

3 Professor Sax also looked extensively at the  
4 riparian grants that have been made by New Jersey  
5 and were relied upon in the Castagna affidavit,  
6 and he came to the conclusion that the custom and  
7 practice of New Jersey had consistently been to  
8 treat riparian rights solely as property rights  
9 that were held by the riparian landowner adjacent  
10 to a waterway, and that those riparian grants were  
11 not intended to interfere with the police power of  
12 the state.

13 He uses a very simple example to illustrate  
14 this. Under riparian law, a riparian landowner  
15 may draw water out of the river to irrigate a  
16 field; but that doesn't create a legal right to  
17 grow marijuana on the field. And there's a  
18 distinction that is important and absolutely  
19 critical to the ultimate resolution of this case  
20 between the rights that a riparian landowner has  
21 to use property in a certain way and the State's  
22 authority to regulate or restrict those uses if  
23 they encroach upon the State's police powers that  
24 are importantly at issue in this case.

25 Now, he -- Professor Sax further looked at

1 the facts that New Jersey responded to Delaware's  
2 request for admissions with respect to the fact of  
3 how riparian grants had been treated concerning  
4 police powers and affecting the right of the State  
5 to regulate uses on the wharf; and he came to the  
6 conclusion that as a matter of fact, New Jersey  
7 had exercised riparian jurisdiction in certain  
8 ways leading up to the 1905 Compact and that, as a  
9 matter of fact, those regulations -- that  
10 regulation of riparian uses was perfectly  
11 consistent with the common understanding of the  
12 word riparian as it was understood by treatise  
13 writers and by cases.

14 Now, importantly, the Compact was drafted by  
15 lawyers. There were three commissioners on each  
16 side that we can establish were lawyers, one of  
17 whom had -- one of whom on each side had litigated  
18 against each other in the No. 1, Original case;  
19 and those lawyers understood it had -- and had an  
20 understanding of what constituted riparian in that  
21 time period.

22 And New Jersey complains that there is no  
23 level playing field here, but it's only of their  
24 own creation. They could perfectly well have gone  
25 out to get an expert who would have testified as

1 to what they now understand riparian to mean.

2 And I want to draw up just a quick footnote  
3 here, Special Master Lancaster, because New  
4 Jersey's understanding was the same as what  
5 Professor Sax argues right up until BP persuaded  
6 New Jersey to take a different position in the  
7 year 2005. And the evidence is overwhelming.

8 MS. CONKLIN: Excuse me. Excuse me. I have  
9 to interject here, your Honor. I'm sorry, but  
10 quite frankly, this is going way beyond the  
11 admissibility or not of these documents, going  
12 into substantive argument about the case; and I  
13 would really, really very much appreciate that  
14 they're not extended discussion about his  
15 conclusions because they are legal argument.

16 SPECIAL MASTER: I appreciate the comment.

17 MS. CONKLIN: Thank you.

18 SPECIAL MASTER: Go ahead, Mr. Frederick.

19 MR. FREDERICK: Well, New Jersey looked at  
20 the request for admission response -- sorry,  
21 Professor Sax looked at the request for admission  
22 and the responses by New Jersey which go to this  
23 very question; and it's simply not so to say that  
24 these substantive matters that do go to the heart  
25 of the arguments raised by the case are not

1 factual matters that Professor Sax, as a  
2 consultive expert, is entitled to offer an expert  
3 opinion about.

4 Now, ultimately New Jersey is simply unhappy  
5 that Delaware has retained two experts who are  
6 very highly credentialed and enormously respected  
7 in their fields and have come to expert  
8 conclusions that are contrary to New Jersey's  
9 position as New Jersey is litigating it at this  
10 particular time in history in this case. And we  
11 respect the fact that they are unhappy and --  
12 about those conclusions; but that doesn't make  
13 them inadmissible as evidence, and it doesn't mean  
14 that they are not factual in their basic  
15 orientation.

16 Now, with respect to Professor Hoffecker's --  
17 with respect to Professor Hoffecker's report, I  
18 just would like to make a couple of points. No.  
19 1, they repeatedly mischaracterized the words that  
20 she actually used. We called New Jersey on it in  
21 our brief by using the example of how she is  
22 quoted erroneously as saying the Compact, quote,  
23 addressed only fishing rights. But then they  
24 misquote her report again in their reply brief  
25 when she says -- when she -- by saying that it was

1           only, quote, about fishing. In fact, her report  
2           states that the Compact deferred other issues by  
3           using language that permitted the status quo to  
4           continue. And she bases that opinion on a very  
5           extensive detailing of the historical record and  
6           the debates that went on in both states over what  
7           was at issue in the Compact, what the different --  
8           what the two states sought to resolve, and how  
9           they attempted in the Compact to go about  
10          resolving it. Ultimately, they're talking about a  
11          couple of words by an historian in a 52-page  
12          report that otherwise is a complete recitation of  
13          facts.

14                 And I would submit, Special Master Lancaster,  
15          that there is very little difference between what  
16          Professor Hoffecker has done in this case and what  
17          Professor Hart did in Idaho versus United States  
18          in which Professor Hart looked at a long history  
19          of dealings with the Coeur d'Alene Indians between  
20          the United States Government and the Coeur d'Alene  
21          tribe and interpreted Presidential executive  
22          orders, congressional statutes, Department of  
23          Interior regulations and came to the conclusion  
24          that the Coeur d'Alene Indian tribe had been  
25          promised certain rights in submerged lands under

1 Coeur d'Alene Lake. The Court -- the Supreme  
2 Court approvingly cited the expert report that had  
3 been admitted into evidence; and I would submit to  
4 you that there is no practicable difference  
5 between what Professor Hart did, which the Supreme  
6 Court found acceptable in Idaho versus United  
7 States, and what Professor Hoffecker has done in  
8 this case.

9 Ultimately, New Jersey can identify no real  
10 prejudice here. They complain about page limits,  
11 but just a few short weeks ago they argued that  
12 this case could be presented in a mere 30-page  
13 brief. And they had an opportunity to submit  
14 expert reports on these very same topics, but they  
15 affirmatively chose not to. Ultimately, in their  
16 reply brief they back away from the request that  
17 Sax's report be stricken in its entirety; but on  
18 page 7 they say, quote, New Jersey only asks --  
19 asks only that these legal arguments appear in  
20 brief form rather than be stricken from the case  
21 altogether.

22 Well, we certainly do intend to rest some of  
23 our legal arguments on the conclusion that  
24 Professor Sax has drawn; but that's no warrant to  
25 be altering the page limits. New Jersey is going

1 to get a 60-page brief to oppose what we submit.  
2 We will get a 60-page brief to oppose what New  
3 Jersey submits. The expert report should not be  
4 treated as impermissible legal argument any more  
5 than the affidavits that New Jersey has already  
6 submitted in this record would be treated as legal  
7 arguments simply because they are replete with  
8 lots and lots of case citations, statutory cites  
9 and the like.

10 We'll rest on that submission, sir.

11 SPECIAL MASTER: Mr. Frederick, thank you  
12 very much.

13 Were I to deny New Jersey's motion -- and  
14 keep in mind now that I have not read either of  
15 these reports. If I determined upon reading  
16 them -- and I will read them over the weekend --  
17 if I determined that they in effect were  
18 additional legal briefs in part at least, should I  
19 not recognize New Jersey's point that you are  
20 getting more than 60 pages?

21 MR. FREDERICK: Is that directed to me, sir?

22 SPECIAL MASTER: Yes. I'm sorry,  
23 Mr. Frederick, that is directed to you.

24 MR. FREDERICK: No, I don't think you should.  
25 If you look at the case in toto, each side is

1 going to have 130 pages of briefing. And New  
2 Jersey had every opportunity to have the same kind  
3 of expert report that Professor Sax provided. And  
4 I think that if you were to alter the page limits,  
5 you would be in effect prejudicing Delaware for  
6 New Jersey's affirmative decision to utilize its  
7 litigation resources in a particular way that  
8 happened to be different from the judgments that  
9 Delaware made in utilizing their litigation  
10 resources.

11 SPECIAL MASTER: Thank you, Mr. Frederick.

12 Ms. Conklin?

13 MS. CONKLIN: Very, very briefly, your Honor.  
14 It's occurring to me that Delaware is apparently  
15 trying to excuse or justify the submission of the  
16 Sax and Hoffecker affidavit based on material that  
17 was submitted by Mr. Castagna. We -- without  
18 going into any of the argument about this case,  
19 Mr. Castagna is a records custodian and  
20 executive -- a manager at the Bureau of  
21 Tidelands -- at the Bureau of Tidelands; and he  
22 listed all the grants and licenses -- I'm sorry,  
23 grants and leases that New Jersey had issued  
24 within the 12-mile circle. And what he did was  
25 cite to what he believed was his agency's



1 authority to do those things. Mr. Castagna is not  
2 an attorney; but he is, as a fact witness, also  
3 entitled to explain what his agency did and why  
4 they believed they had the authority to do it.

5 Again, he's not an attorney; and to suggest  
6 that Professor Sax's 30-page explanation of the  
7 history of riparian law is in any way a response  
8 to something of that character is simply, I  
9 believe, just insupportable.

10 Let me just say that I see very little  
11 difference between plaintiff's position that the  
12 federal rules do not apply and that they are a  
13 guide versus New Jersey's position that you have  
14 discretion under Rule 702 to do that which you  
15 think is appropriate. I see no distinction  
16 between those positions. Personally -- well, not  
17 personally, speaking on behalf of my client, it  
18 was certainly not our understanding when we filed  
19 this complaint that the federal rules were simply  
20 not applicable. What we did understand was that  
21 the Special Master always has an obligation to  
22 conduct the matter in a fair fashion and that the  
23 federal rules would be a guideline in order to  
24 achieve that fairness.

25 The other -- the other thing, again, is

1 simply that Professor Sax, again, keeps trying to  
2 address what he understood or what the drafters  
3 ought to have understood the law to be. And,  
4 again, there just isn't anything tying their  
5 understanding of the law to what it was they wrote  
6 on that paper.

7 And in conclusion, essentially what I would  
8 like to do, since the Castagna affidavit has now  
9 apparently been placed center stage as a  
10 justification for Professor Sax's response, we  
11 would like to at least fax that over so you could  
12 look at it. On the other hand, if you don't want  
13 to see it, that's fine; and you should just  
14 perhaps look at what has been submitted. We don't  
15 want to expand this any further than necessary.

16 SPECIAL MASTER: Thank you, Ms. Conklin.

17 I have seen and read the Castagna affidavit.  
18 I have not read the two reports yet, as I  
19 indicated. But the Castagna affidavit was  
20 submitted to the Court in its initial stages.

21 MS. CONKLIN: Right. And if I may, one more  
22 just minor point -- it's not so minor. We agreed  
23 to a 60-page limit back before the report was  
24 submitted. The landscape has been substantially  
25 changed by -- by this essentially supplemental

1 legal brief. And, indeed, if we had known that we  
2 were going to have to be responding to what is  
3 essentially a good 30 pages of legal argument, we  
4 might have asked for slightly more than 60 pages.

5 We are not suggesting that we need a  
6 page-for-page compensation. Indeed, that's not  
7 the purpose of our motion. The purpose of our  
8 motion is to make sure that the lawyers do not  
9 testify in this matter. That's it in a nutshell.  
10 But if, indeed, if the Court felt it was  
11 permissible for us to have a few more pages extra,  
12 I surely do not think we would reject it. I think  
13 we can handle it fairly well within the 60 pages;  
14 but, quite frankly, having agreed to a limit, we  
15 don't want to be put in a position when at the  
16 last minute we're five pages over and, you know,  
17 we have a motion here to strike the excess.

18 MR. FREDERICK: Mr. Lancaster, may I --

19 SPECIAL MASTER: Excuse me. Excuse me,  
20 Mr. Frederick.

21 Ms. Conklin, have you finished?

22 MS. CONKLIN: Yes, I have.

23 Thanks.

24 SPECIAL MASTER: All right. Thank you.

25 Yes, Mr. Frederick?

1           Mr. Frederick?

2           MR. FREDERICK: Yes. We would like to  
3 litigate this case on the merits of the dispute in  
4 controversy between the two states. And I think  
5 that it's important to keep in mind that we did  
6 take a very different view of the number of pages  
7 that we felt would be important to present the  
8 case from the view that New Jersey had at the time  
9 you asked us to make those proposals. But if,  
10 upon reviewing the reports, and if, after seeing  
11 the motions -- dispositive motions that are filed  
12 on December 22, New Jersey wants to offer a motion  
13 for a slightly enlarged page limit, you know, our  
14 aim here is to resolve the dispute on the merits  
15 of the dispute and not to be haggling over how  
16 many pages would be used by both sides. And I  
17 would like to take the high road in this matter,  
18 Mr. Lancaster, because at the end of the day,  
19 that's what really matters.

20           SPECIAL MASTER: Right. Thank you for that  
21 very generous offer, Mr. Frederick.

22           Counsel, thank you, both. This argument was  
23 very helpful to me in positioning the -- and  
24 narrowing the issues. I will read the Sax and  
25 Hoffecker reports over the weekend; and I should

1 be able to rule very early next week, perhaps --  
2 well, very early next week is where I'll leave it.  
3 Thank you.

4 Now, I would like to turn to some  
5 housekeeping items. First, on the appendices,  
6 obviously you're free to put as much or as little  
7 of a document in the appendices as you think  
8 relevant. I suggest, however -- and it is only a  
9 suggestion -- that if only two lines of a  
10 multi-page document are relevant and there is no  
11 need to include the rest of the document for  
12 context, that you err on the side of smaller is  
13 better.

14 For example, if you have a 300-page  
15 deposition and there are only a couple of  
16 exchanges to which brief reference will be made, I  
17 can tell you I'm not going to go through the other  
18 298 pages looking for the needle. The opposing  
19 party can always include other portions in a  
20 supplement.

21 Now, just understand this is only a  
22 suggestion. It's not an order, but I'm trying to  
23 obviously keep down the bulk of the documents that  
24 we have to deal with here.

25 Turning to Philadelphia, we have now been

1 assigned a courtroom and chambers through the  
2 courtesy of the Chief Judge of the Third Circuit.  
3 And I will have the pertinent data e-mailed to you  
4 after this conference. But so that you will not  
5 be surprised, let me tell you that the clerk's  
6 office, without knowing the names of anyone in  
7 this process other than me, assigned us to the  
8 Collins J. Seitz Courtroom.

9 So I -- I assume you will be right at home,  
10 Mr. Seitz.

11 MR. SEITZ: I have actually argued in the  
12 courtroom before.

13 SPECIAL MASTER: Yes. That -- it's an  
14 interesting happenstance is the way I approached  
15 it. And I hope you do, too.

16 MR. SEITZ: Yes.

17 SPECIAL MASTER: We are -- we're scheduled  
18 for February 22. To make my life and yours easier  
19 I would like counsel to confer, since we would --  
20 we're going to have competing dispositive motions,  
21 and agree on, if you can, first, the order of  
22 argument, who goes first, who goes second on the  
23 issues, whichever way you want to set it up; and,  
24 second, the length of each segment of each  
25 argument.

1           I told you before I have set aside the entire  
2 day, and I will sit as long as counsel think it  
3 necessary and productive. But, again, as I have  
4 said before, please keep in mind as you two talk  
5 that I will have digested all of the relevant  
6 submitted materials by the 22nd. It will not be  
7 necessary, and I don't think it will be valuable  
8 for any of us to simply regurgitate what is in the  
9 written submissions.

10           Now, obviously if you can't agree, I can set  
11 the schedule. But competent counsel can better  
12 assess these issues, especially after you have  
13 completed your initial briefs.

14           So what I'm asking is that one or both of  
15 you -- one or both of the representatives of the  
16 parties report your agreement on these matters or  
17 your inability to agree no later than the close of  
18 business on February 2. And the reason that I --  
19 I'm asking for that date -- and if you can do it  
20 sooner, that's fine -- that's even better; but the  
21 reason I'm asking for that date is so that we here  
22 in Maine can finalize our travel arrangements. My  
23 experience is that the closer you get to the date,  
24 the more expensive at least the airline fees can  
25 be. And while it's your money, I'm trying to be

1 conservative about that with my Maine Puritanical  
2 background, I guess.

3 Anyway, I want to be able to finalize those  
4 arrangements early in February. So if you would,  
5 mark down February 2. If you can do it sooner, I  
6 would appreciate that.

7 And finally, I suggest that you incorporate  
8 in that report a start time. I would suggest that  
9 we meet in chambers at 9 o'clock and begin oral  
10 arguments shortly thereafter. But if that -- you  
11 find that's too early for any reason, I'll accept  
12 whatever start time suits you.

13 Are there any questions on those housekeeping  
14 arrangements?

15 New Jersey?

16 MS. CONKLIN: No, your Honor.

17 SPECIAL MASTER: Any questions, Delaware?

18 MR. FREDERICK: No.

19 SPECIAL MASTER: Any suggestions at this  
20 point?

21 Please understand I -- I can make these  
22 arrangements very easily and very quickly; but I  
23 prefer to accommodate counsel in these several  
24 regards. And so I'm hopeful that -- these are not  
25 major matters. They ought to be easily agreed



1 upon.

2 Now, turning to New Jersey -- to Delaware,  
3 Mr. Frederick or Mr. Seitz, one of you suggested  
4 that you had some questions for us with regard --

5 MR. SEITZ: Yes. Yes. Mr. Lancaster, in  
6 your e-mail I think you said that it would be  
7 permissible to follow up with you during this call  
8 if any questions arose because of your e-mail.  
9 And --

10 SPECIAL MASTER: Absolutely.

11 MR. SEITZ: And, again, I want to  
12 emphasize -- and I can't emphasize it enough --  
13 that there is no disrespect meant towards you or  
14 your firm or anyone involved in this case by us  
15 asking these questions; but obviously this is a  
16 case of great public importance, and the State of  
17 Delaware recognizes that and just had some  
18 questions that arose as a result of the e-mail.

19 SPECIAL MASTER: Yes. Trust me; I, A, have a  
20 thick skin and, B, you would not be doing your job  
21 if you didn't ask whatever questions occurred to  
22 you and your clients.

23 So please proceed.

24 MR. SEITZ: Thank you, Mr. Lancaster.

25 We have three questions that came up, and

1 maybe they're more in the nature of  
2 clarifications. But the first question is when  
3 did Pierce Atwood commence its representation for  
4 the project in Maine?

5 Maybe I'll just list my questions, and then  
6 you can consider how we should deal with them.

7 The second was -- is whether BP is a  
8 participant in any way in the Maine project. I  
9 know that there are partners in the Maine project;  
10 and we did go and look on the website, but it  
11 wasn't clear who was involved as the partners in  
12 the project.

13 And the third question is whether Pierce  
14 Atwood has any involvement with the FERC  
15 proceedings for the project. I know you sent us a  
16 note saying that you were not representing FERC,  
17 and typically that's done by Government attorneys.  
18 And whoever wrote the website obviously didn't  
19 understand those kind of things, but our clients  
20 did ask that we ask the question whether Pierce  
21 Atwood would be a participant in the FERC  
22 proceedings because, as your Honor probably  
23 recognizes, there is -- that front is also going  
24 on for this project as well.

25 SPECIAL MASTER: Right.

1           MR. SEITZ: So those were the three questions  
2 that we had to follow up on your e-mail.

3           SPECIAL MASTER: Right. I hope -- I hope you  
4 will understand that I can't answer -- neither  
5 Mark nor I can answer -- well, let me ask you.  
6 Mark, do you know the answer to any of these?

7           MR. PORADA: No, I don't.

8           SPECIAL MASTER: Neither Mark nor I can  
9 answer these questions.

10           The website was brought to our attention on  
11 the day I sent you or the day after -- the day  
12 before I sent you the copy of it or the reference  
13 to it. And we had no -- neither Mark nor I had  
14 any personal knowledge about this matter at all.  
15 We're not a huge firm, but we're large enough so  
16 that we're not aware of what's going on every day  
17 in the firm.

18           I will go to the people in our environmental  
19 group who are involved in this and get you the  
20 answers. The questions, as I understand them, is  
21 when did we commence the representation? My -- I  
22 think that representation existed at the time that  
23 I was appointed as Special Master; but I don't  
24 have a date for you.

25           Whether BP is a participant in the Maine

1 project, I have no idea. I don't know who the  
2 partners are. And whether Pierce Atwood has any  
3 involvement in the FERC process, I don't know that  
4 either.

5 So I will get that information as soon as I  
6 can contact the attorney here who is representing  
7 that client, and I will send it to you by e-mail.

8 If, upon receiving those answers, you have or  
9 New Jersey has any further questions, if you will  
10 let me know, we can set up another conference call  
11 very promptly; and I can attempt to respond to  
12 further questions as promptly as possible.

13 Is that satisfactory?

14 MR. SEITZ: Yes, it is. Thank you.

15 MS. CONKLIN: Yes, thank you.

16 SPECIAL MASTER: Okay. Well, is there  
17 anything else, New Jersey?

18 MS. CONKLIN: No, Mr. Lancaster.

19 SPECIAL MASTER: Anything else, Delaware?

20 MR. FREDERICK: No, Mr. Lancaster.

21 SPECIAL MASTER: Well, then I will simply  
22 wish you all a happy holidays; and we'll close the  
23 record.

24 (The conference was concluded at 10:48 a.m.)

25

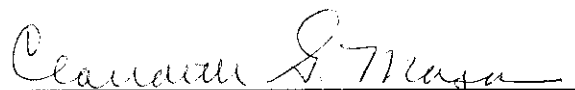
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CERTIFICATE

I, Claudette G. Mason, a Notary Public in and for the State of Maine, hereby certify that the foregoing pages are a correct transcript of my stenographic notes of the above-captioned Proceedings that were reduced to print through Computer-aided Transcription.

I further certify that I am a disinterested person in the event or outcome of the above-named cause of action.

IN WITNESS WHEREOF I subscribe my hand this 14~~th~~ day of December, 2006.



Notary Public

My Commission Expires  
June 9, 2012.