

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
February 6, 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.
 JOHN R. RENELLA, ESQ.
 WILLIAM E. ANDERSEN, ESQ.
 DEAN JABLONSKI, ESQ.
 EILEEN P. KELLY, ESQ.
 JULIE GOLDMAN

For the State of Delaware: DAVID C. FREDERICK, ESQ.
 SCOTT H. ANGSTREICH, ESQ.
 SCOTT K. ATTAWAY, ESQ.
 COLLINS J. SEITZ, JR., ESQ.

Also Present: MARK E. PORADA, ESQ.

1 I assume that being good counsel you have
2 already gone on my website and taken a look at me.
3 If you go on again, you can take a look at Mark.

4 Mark's direct dial number is 791 -- I'm
5 sorry. It's (207) 791-1108 in case you need to
6 reach him. And my assistant is Elizabeth Umland.
7 That's U M L A N D. She's the woman who sent you
8 the e-mails and also the wrong numbers. She is
9 ordinarily very efficient, and I'm sure you will
10 enjoy working with her. Her number is -- her
11 direct dial number is (207) 791-1317.

12 Now, as we proceed, I would ask that you
13 identify yourself when you're speaking so that
14 Claudette will be sure that the transcript
15 accurately reflects who the speaker is.

16 I would like to begin by asking you to enter
17 your appearances and tell me who is present,
18 including those who won't have a speaking role, so
19 that we know who is present in each location. And
20 since New Jersey is the petitioner, we'll start
21 with New Jersey.

22 MS. HOROWITZ: Thank you.

23 This is Rachel Horowitz. And also with me
24 are Barbara Conklin, Deputy Attorney General; John
25 Renella, Deputy Attorney General; Eileen Kelly,

1 Deputy Attorney General; William Andersen, Deputy
2 Attorney General; Dean Jablonski, Deputy Attorney
3 General; and Julie Goldman, legal assistant.

4 SPECIAL MASTER: Thank you.

5 Delaware?

6 MR. FREDERICK: This is David Frederick, and
7 with me are Scott Angstreich and Scott Attaway.

8 MR. SEITZ: This is C. J. Seitz at Connolly
9 Bove in Wilmington, Delaware for Delaware as well.

10 SPECIAL MASTER: Okay. Thank you very much.

11 Now, the items we're going to discuss today
12 will be ultimately memorialized in a Case
13 Management Plan which I will issue by a Case
14 Management Order. The purpose of our meeting
15 today is simply to introduce ourselves one to
16 another, although I'm sure counsel for New Jersey
17 and Delaware have already been -- have become
18 familiar with each other. But I wanted to be sure
19 that we're all starting off on the same page and
20 so, hopefully, we can avoid any misunderstandings
21 as we proceed.

22 First, let me -- let me get some housekeeping
23 items out of the way. And as I said, most of
24 these will be memorialized in the Case Management
25 Plan.

1 First, let's talk about methods of
2 communicating. I'm -- I would prefer that we
3 communicate in the first instance by e-mail. And
4 I would like to have you send me those materials
5 in PDF format so that we can have access here to
6 them in a data base. With all e-mails that you
7 send, I would like hard copies sent by regular
8 first class mail. And the reason for that, as I'm
9 sure you will appreciate, is that when this matter
10 is concluded and I enter my final report, I will
11 have to send hard copies of all of the materials
12 to the court. We keep a docket here, as required
13 by the court; and then ultimately everything is
14 shipped to the court itself.

15 So in the first instance, e-mail PDF form
16 with hard copies sent by regular first class mail
17 unless the materials are unduly bulky, in which
18 case they should be sent in hard copy by overnight
19 delivery; and we'll scan them in here, if
20 necessary.

21 On the document format, as I'm sure you're
22 all aware, the complexities of Supreme Court Rule
23 33 do not apply. So that while you had to go
24 through the agony of printing in the specified
25 format for the court filings, you do not have to

1 do that with me. And I will set forth in the Case
2 Management Plan the outline for the format for the
3 documents that you send to me.

4 The next question is who should be served.
5 Here, I would like to have four copies -- when you
6 send the hard copies, I would like to have four
7 copies for internal working purposes. And in your
8 cases, please, if you would, tell us, as you serve
9 these papers, whom you want served and how many
10 copies you want served on you.

11 Let's, again, start with New Jersey.

12 MS. HOROWITZ: We would like served myself,
13 Rachel Horowitz, and also Barbara Conklin,
14 C O N K L I N, two copies apiece.

15 SPECIAL MASTER: So that's -- I'm sorry. I
16 wasn't -- was that eight in all?

17 Four people, two copies each; is that
18 correct?

19 MS. HOROWITZ: No. That was two people,
20 Rachel Horowitz and Barbara Conklin.

21 SPECIAL MASTER: Okay. I'm sorry,
22 Ms. Horowitz. Okay, two copies to two people.

23 MS. HOROWITZ: And if I could just revise
24 that, if you would send three to me and two to
25 Barbara.

1 SPECIAL MASTER: All right. So three copies
2 to Ms. Horowitz and two, Ms. Conklin, right?

3 MS. HOROWITZ: Yes, thank you.

4 SPECIAL MASTER: All right. And
5 Mr. Frederick?

6 MR. FREDERICK: We would appreciate getting
7 three copies.

8 SPECIAL MASTER: Sent to you?

9 MR. FREDERICK: Yes, please. And two to
10 C. J. Seitz.

11 SPECIAL MASTER: Okay. Three copies to you
12 and two to Mr. Seitz.

13 All right. Is that understood now between
14 the two parties?

15 MS. HOROWITZ: Yes.

16 SPECIAL MASTER: Mr. Frederick?

17 MR. FREDERICK: Yes, sir.

18 SPECIAL MASTER: Okay. The next topic will
19 be the procedural rules. As you know, only one
20 Supreme Court rule deals with the original actions
21 and special masters. That's Rule 17. And under
22 Rule 17(2) the Federal Rules of Civil Procedure
23 suggested as guides to pleadings and motions only.
24 And beyond that, there is no direction at all. I
25 will incorporate in the Case Management Plan the

1 rules that I suggest should be applicable, but I
2 anticipate that it will be Federal Rules of Civil
3 Procedure 26 through 37 and 45, as modified by me.
4 And I don't plan to take the time today to run
5 through each of those and suggest to you how they
6 will be modified. I will do that in the Case
7 Management Plan. For example, 26(a), initial
8 disclosure, is really -- unless something comes up
9 later on here that I don't anticipate, really is
10 inappropriate and inapplicable; and I will need to
11 modify each of the others.

12 They're only guidelines for us, but in the
13 Case Management Plan I will incorporate them as
14 modified. And they will control unless modified
15 by a subsequent Case Management Order.

16 I would like now to turn to your anticipated
17 discovery needs. I have had the opportunity to
18 review the filings that you have already made.
19 And unless I'm mistaken, there has been some
20 extensive discovery on both sides, perhaps in your
21 judgment incomplete. But there has been some -- I
22 shouldn't have used the word extensive because I
23 don't know; but there has been some discovery
24 already. What I would like now to talk about is
25 the type of discovery that you anticipate at this

1 juncture that you think you're going to need,
2 depositions, interrogatories, document requests,
3 the routine standard types of discovery. And then
4 we'll talk about the timing if we have -- we'll
5 talk about the timing.

6 So, first, let's start with New Jersey.

7 Ms. Horowitz?

8 MS. HOROWITZ: Yes. As you indicated, it's
9 our view that there already has been extensive
10 discovery and exchange of information between us
11 and Delaware. So we do not see the need for very
12 much else in the way of discovery. We think that
13 there should be paper discovery only for a limited
14 period, which we would suggest would be three
15 months. And other than that, we think that the
16 documents have already been exchanged between us
17 and Delaware, plus the materials that are
18 contained already in the appendices. We think --
19 really, we don't think there's a whole lot else
20 that's out there that is warranted. We don't see
21 the need for any depositions or interrogatories or
22 anything other than just document exchange. And
23 we don't see the need for re-exchanging documents
24 that have already been exchanged. We did produce
25 for Delaware lots and lots of files which they had

1 the opportunity to inspect and copy in September
2 and October of last year.

3 It's our view that after that document
4 exchange goes on, it would be appropriate to have
5 motions filed -- summary judgment type motions
6 filed at which point if there are additional
7 issues that are identified through those motions,
8 then there could be some more tailored discovery
9 that would follow. But we don't see the need for
10 any open-ended, extensive discovery at this point
11 in light of the information that's already been
12 exchanged.

13 SPECIAL MASTER: Mr. Frederick?

14 MR. FREDERICK: Yes. We take a different
15 view, Mr. Lancaster. And we appreciate that New
16 Jersey has supplied documents to us through an
17 informal process. We have also engaged in efforts
18 to find archival materials, both in Delaware and
19 in New Jersey. And our efforts so far, while they
20 have been as comprehensive as we have had the time
21 thus far to make them, lead us to believe that
22 there are still potentially very important
23 documents that we have not yet had time to
24 discover and that we would like to have the time
25 to find.

1 Let me give you some examples. In the No. 1
2 Original case between New Jersey and Delaware the
3 Supreme Court library informed us that the record
4 in that case was incomplete. New Jersey provided
5 us with what they had. They asked us to provide
6 what we had. We're still attempting to determine
7 whether or not we have a complete record from
8 No. 1 Original. We view that's important because
9 it set the context by which the parties led to the
10 drafting of the 1905 Compact.

11 We also have done some limited exchanges on
12 the Compact itself and the drafting of it. But
13 those documents are quite scanty, if you will, in
14 that there are a lot of repositories of potential
15 documents that we think should be -- to be
16 responsible in discovering this matter should be
17 examined. For instance, papers of the
18 participants have not been exchanged between the
19 parties. We have done some historical research to
20 try to identify the key participants and where
21 their papers might have been reposed. We have had
22 limited success thus far. We determined that New
23 Jersey's archived records are extremely difficult
24 to work with because they are reposed in a number
25 of different repositories. The retrieval systems

1 are antiquated. The index systems are very
2 general and don't allow for specific
3 identification of records. And, frankly, the
4 people have been -- that we have tried to work
5 with there have not been as helpful as we would
6 hope in order to make for the most expeditious
7 retrieval of documents possible.

8 They're also -- we're attempting to work
9 through the National Archives to get the
10 congressional legislative records; but those are
11 also very inefficiently kept. And we have made
12 several efforts to try to get as comprehensive a
13 look at the 1905 Compact as possible, but what we
14 would like to propose is that we be given at least
15 three months to identify what records are possibly
16 out there. I mean, unlike most discovery in civil
17 litigation, this is a situation where arguably
18 some of the most important documents might not be
19 in the direct possession of either party.
20 Governor's papers, for instance, have been sent to
21 various libraries. The papers of key participants
22 have been reposed at various repositories. And
23 they are not in the direct custody and control of
24 the parties.

25 So while we appreciate that New Jersey has

1 made available the documents that it thinks are
2 relevant to the dispute, we're not convinced that
3 that production is a comprehensive one to allow us
4 to understand the full historical context in which
5 this dispute has arisen, in which the 1905 Compact
6 was drafted, and in which the parties purported
7 the Compact.

8 And let me turn now, if I could, to what
9 happened after the 1905 Compact was enacted. We
10 think that there is a significant issue as to
11 whether or not the Compact is, in fact, valid
12 still because of the nature of what the parties
13 were attempting to accomplish in that Compact and
14 how it was interpreted and construed and acted
15 upon since 1905. So we would like to take
16 discovery not only of the New Jersey agencies that
17 would be relevant, but also of third parties whose
18 actions might shed light on what the parties
19 intended in the 1905 Compact.

20 So our counterproposal would be that we be
21 given at least three months simply to identify
22 where various key documents might be reposed and
23 to try to identify in a reasonable time frame what
24 those documents might be and to, you know,
25 identify and retrieve them and then to start what

1 would be a formal discovery process which would
2 involve the normal form of document request and
3 interrogatories, requests for admission and the
4 like.

5 We would envision that there be, you know, at
6 least a nine-month period for there to be a proper
7 discovery. Try to keep in mind -- I would like to
8 note here that this dispute between the parties
9 has been going on literally for centuries over
10 this particular piece of land. And it doesn't
11 seem to us to be appropriate, especially after the
12 Supreme Court twice rejected New Jersey's effort
13 to have a hasty resolution of this dispute, that
14 the parties simply cram down within a very short
15 period of time their efforts to discover the full
16 nature of the dispute and to try to resolve it
17 in -- in an appropriate way.

18 We think it's possible also that we might
19 need to engage in historical experts both for fact
20 research and for legal questions because as, I'm
21 sure, you're experienced with the Virginia and
22 Maryland case revealed, these concepts of riparian
23 law are quite arcane. The States had different
24 interpretations of what they thought was riparian.
25 And we're interpreting phrases in this provision

1 of the Compact that are not terms of art. The
2 phrase "on its own side of the river" is not a
3 term of art. The phrase "riparian jurisdiction"
4 is not a term of art. And so we think it's
5 important to get the full historical context so
6 that we can best ascertain what the parties'
7 respective positions were when they drafted the
8 1905 Compact and whether they intended for it to
9 still be valid if certain key provisions were not
10 operationalized.

11 SPECIAL MASTER: Ms. Horowitz, do you want
12 respond to Mr. Frederick?

13 MS. HOROWITZ: Yes. As you know, we filed
14 our initial motion back in July of 2005. So
15 there's already been six, seven months at least to
16 look to figure out where documents could be
17 located. So the fact of the matter is that if
18 things haven't been located at this point, there
19 is not a whole lot of likelihood that they will
20 all of a sudden appear since people have already
21 been -- had many months to figure out what is out
22 there and to look for them.

23 We don't see any need for experts because
24 with respect to the legal issue, we do think that
25 the riparian jurisdiction is a pretty well

1 understood term. It has a specific legal meaning.
2 We don't see any need for experts on the matter
3 what does that term mean and what does the Compact
4 mean. And I think a lot of the issues raised by
5 Mr. Frederick are not -- probably not relevant.

6 The -- we know what the practice was before
7 1905 and after 1905. That information exchange
8 has already taken place. We have a record already
9 from 1933 and '34 where the parties went into
10 riparian and jurisdiction and grants and leases
11 and so forth, and that was already examined back
12 in 1934. The record from 1934 with that
13 respect -- in that respect is complete. And so
14 the likelihood of finding anything else out there
15 at this point we think is really de minimis. And
16 in any event, a lot of time has already taken
17 place for that information to be gathered.

18 So, again, our view of it is that there
19 should be a limited amount of time for people to
20 look and identify whatever else is out there,
21 exchange those documents, and at that point have
22 motion practice to narrow down and streamline the
23 issues and have more focused discovery, if any is
24 identified, as necessary as that point.

25 MR. FREDERICK: Mr. Lancaster, may I have an

1 opportunity to respond to that, please?

2 SPECIAL MASTER: Sure.

3 MR. FREDERICK: The July filing by New Jersey
4 was, if you will, a complete surprise to Delaware.
5 New Jersey had taken whatever number of months
6 that they wanted to take before filing this
7 action, and Delaware was caught completely unaware
8 of that. So a lot of the work that New Jersey may
9 have done historically was suited for its own
10 litigation purposes and was not designed to
11 necessarily facilitate our side of the case, if
12 you will.

13 And the filing, as you see from their
14 submissions, is that this is a dispute about a
15 term in the Compact, and the context is
16 irrelevant. It's a plain language case. But they
17 twice made that argument to the Justices in their
18 motion to reopen the 1934 decree and in their
19 opposition to the appointment of the special
20 master, and in both cases the Supreme Court didn't
21 accept that argument. If it had, we would be
22 briefing on the merits; and we would argue the
23 case this term as New Jersey strenuously argued to
24 the justices be done.

25 With respect to the course of conduct

1 information, there is -- it is true that some
2 information has exchanged hands with respect to
3 the pre-1905 matter. But Ms. Horowitz can't deny
4 that the documents about the drafting of the 1905
5 Compact remain at this point out of either side's
6 hands. And we don't have a very clear sense of
7 exactly what went into the drafting of the
8 Compact, which New Jersey thinks is critical for
9 resolution of the dispute.

10 The 1933 and '34 papers don't go to the issue
11 that's addressed in this case. That was a title
12 dispute, a boundary dispute. And the issue of
13 what constituted riparian jurisdiction was not
14 before the justices when they decided No. 11
15 Original.

16 Finally, New Jersey has urged speed upon the
17 Supreme Court and upon us. And the only reason
18 that we can think of why they would do that is to
19 facilitate the interests of a commercial party,
20 BP, so that it can finish a liquified natural gas
21 facility at a time when it would be commercially
22 feasible. Yet, when we put that before the
23 Justices to say that's not a proper purpose
24 because jurisdiction can't rest in a dispute
25 between states if one of the states is simply

1 acting as a stalking-horse for a private party,
2 New Jersey came back and said, no, this dispute is
3 not about BP at all. But they have never given a
4 reason why a dispute that has existed for
5 centuries has to be resolved on such an expedited
6 basis.

7 It simply doesn't make sense to us to try to
8 hurry up to resolve a dispute that would end up
9 benefitting only BP and cause potential detriment
10 to the citizens of Delaware.

11 SPECIAL MASTER: Well, counsel, thank you. I
12 don't want to get in -- try to get into an
13 argument or -- argument over the issues themselves
14 today because I am sufficiently uninformed. So
15 that while I'm sure your arguments would be cogent
16 and persuasive, they would fall on deaf ears at
17 this point.

18 Let me address, rather, the discovery
19 questions briefly here. First of all, I can't
20 make any decisions, even preliminary decisions, at
21 this point on relevance. And I know there was
22 some discussion on relevance at this point. And,
23 similarly, I can't make any decisions as to
24 whether experts or expert testimony will be
25 admissible or will be helpful at this point. It's

1 too early for me to make those kinds of decisions.

2 I am -- I was surprised to hear that the
3 court apparently has said that they can't be sure
4 that the record is -- their records are
5 incomplete. The National Archives, I know from
6 personal experience, have every scrap of paper
7 that the world has ever seen. And I would be
8 surprised if there was -- something was lost
9 between the clerk's office and the archives. But
10 you will be able to ferret that out in due course.

11 The -- I don't intend -- someone used the
12 word "cram down" or words "cram down". I don't
13 intend to cram anything down anybody's throat in
14 this process. But by the same token, I don't
15 intend to make a career out of this appointment.
16 And so there's a tension between New Jersey's
17 interest in moving forward rapidly and Delaware's
18 interest in making sure that all the T's are
19 crossed and the I's are dotted. And I'm very
20 comfortable that both sides, both counsel, want to
21 be sure that they have as complete a record as
22 possible so that my report will encompass as much
23 information as you can furnish and make --
24 hopefully, make the Supreme Court's task that much
25 easier.

1 I will set some time frames within the Case
2 Management Order. I'm not prepared to do that at
3 this moment. But I will tell you in advance that
4 there will be a presumption here that we are going
5 to move this matter along. So you will find when
6 I finalize the Case Management Plan, that I have
7 set perhaps in some people's minds some arbitrary
8 time limits for discovery with the -- with the
9 understanding that if those become too tight,
10 people can come back to me. I have been
11 practicing law long enough to know that lawyers,
12 as good as they are and as efficient as they are,
13 will take as much time as they're given to do an
14 assigned task.

15 So we'll start out with a presumption that
16 these matters are going to be handled efficiently,
17 that they're going to be staffed efficiently, and
18 that discovery is going to proceed apace. And
19 that means that we're not going to have discovery
20 in stages. That is, we're not going to complete
21 one phase and then move into another phase. I
22 will expect you to move forward with document
23 discovery as promptly as possible, and I will
24 expect you to confer and exchange documents as
25 rapidly and as thoroughly as possible.

1 Mr. Frederick said that he had been having
2 some difficulty with some elements in New Jersey
3 that were not being as cooperative as he would
4 like. New Jersey is the one that has suggested
5 today that it wants to move this matter along. So
6 I can only assume that the Attorney General's
7 office will do everything in its power to assist
8 Mr. Frederick in getting the information that he
9 requires or thinks he requires from New Jersey
10 entities. And, similarly, that Mr. Frederick will
11 take steps necessary to respond promptly to
12 whatever requests are made by New Jersey.

13 So that I will -- I will set the schedule --
14 a schedule; but you should understand that you
15 should proceed expeditiously, and you should
16 proceed on all fronts at the same time.

17 Now, I understand that we don't want to spin
18 our wheels by perhaps moving into deposition
19 discovery, if it's necessary, without the document
20 discovery having been completed. But if there are
21 some depositions, if any are needed, that can be
22 taken at the same time that document discovery is
23 ongoing, I will expect that you will do that
24 accordingly.

25 So you will get as -- I'm not sure how soon I

1 can turn to this Case Management Order; but,
2 hopefully, it will be out very shortly. And you
3 will have a schedule for discovery which, I hope,
4 will not be too confining, but will be appropriate
5 under the circumstances.

6 Now, I'm -- unless some miracle occurs, I
7 anticipate that before we're done, there will be
8 some procedural disputes in this process. It's
9 been my experience that even well-intentioned and
10 competent counsel have instances in which they
11 can't agree. In all instances I will expect that
12 you will discuss and attempt to resolve any
13 procedural disputes and consult with me only as a
14 last resort. And, as I said, the Case Management
15 Plan will control that process. But I want to be
16 sure -- and I will repeat this in the Case
17 Management Plan -- that you do not unilaterally
18 bring to me some discovery or other procedural
19 dispute without having discussed and attempted to
20 resolve it before you brought it to my attention.

21 Now, let me ask you; are you aware of any
22 potential intervenors or any potential amici?

23 We'll start, again, with New Jersey.

24 MS. HOROWITZ: We are not aware of any.

25 SPECIAL MASTER: Mr. Frederick?

1 MR. FREDERICK: No, sir. We're not aware of
2 any either at this time.

3 SPECIAL MASTER: Well, that -- that will
4 simplify our lives.

5 Now, let me, if I may, for my own
6 understanding, turn to the question of the issues
7 as each party sees them. And we'll start first
8 with any factual issues that we haven't talked
9 about already.

10 New Jersey, Ms. Horowitz, do you see any
11 factual issues, issues of fact here?

12 MS. HOROWITZ: Again, no, we don't see any
13 issues of material fact. We think the language is
14 very straightforward. We see an issue of the law
15 which is whether the Article 7 of that Compact
16 allows New Jersey riparian jurisdiction to
17 regulate construction of improvements appurtenant
18 to its shore within the 12 mile circle free of
19 regulation by Delaware. We don't see any factual
20 issues, strictly an issue as to what is the legal
21 meaning of that language.

22 SPECIAL MASTER: Mr. Frederick?

23 MR. FREDERICK: Well, we haven't -- we break
24 the issues out somewhat differently. And we have
25 just received New Jersey's articulation of its

1 issue late Friday afternoon; and we have not had a
2 time -- an opportunity to consult with our clients
3 about that articulation. But as a preliminary
4 matter, we don't think that that articulation
5 properly or fully encompasses what's in dispute
6 between the parties because it's -- we think there
7 is an issue about the meaning of the word
8 riparian. We think that there's a dispute over
9 the meaning of the phrase "riparian jurisdiction".
10 It is not a term of art. We think that there's a
11 dispute over whether or not the word "exclusive"
12 should be implied in its placement before riparian
13 jurisdiction where the drafters didn't use that
14 word exclusive in Article 7, but they used it in
15 other articles of the Compact, and that New
16 Jersey's argument rests on implying that term.

17 We think that there is a dispute -- and I
18 don't know whether it's necessarily a dispute of
19 fact or law or a combined question -- over the
20 meaning of "its own side of the river" because
21 that is also crucial to understanding what the
22 parties intended.

23 And there are disputes of fact, we think,
24 potentially over whether or not the Compact is still
25 valid. And there are -- those are also combined

1 issues of fact and law that should be resolved.
2 And if the Compact is not valid because of
3 separability issues that we raise as affirmative
4 defenses in our answer, what consequences would
5 flow from that.

6 So we see the issues kind of clustering in
7 and kind of overlapping to some extent with how
8 New Jersey has articulated them, but also going
9 quite substantially beyond where New Jersey has
10 articulated them and that they are combined
11 questions of fact and law that go into resolving
12 them.

13 SPECIAL MASTER: All right.

14 MR. SEITZ: Mr. Lancaster, this is C. J.
15 Seitz. May I supplement something that
16 Mr. Frederick said?

17 SPECIAL MASTER: Please.

18 MR. SEITZ: There also may be a dispute as to
19 the scope and status of BP's project, which is
20 what has brought us all here today. The project
21 has been changing over time. And there is going
22 to probably be a fair amount of discovery directed
23 to just what the size and scope of this project
24 is, how much of Delaware's soil they intend to
25 excavate and things like that. So I wouldn't want

1 to downplay the disputes that might arise as a
2 result of the scope of the project.

3 MS. HOROWITZ: Mr. Lancaster, may I respond
4 to that?

5 SPECIAL MASTER: Certainly.

6 MS. HOROWITZ: As to the last item that was
7 brought up, the scope of the BP project we don't
8 think is at all relevant to the issue of the
9 meaning of the Compact. Also, we think the
10 scope is well defined in the sense that there is
11 public information as to what it is that they're
12 proposing to do. And we don't think that has --
13 there is any need to discover anything else as
14 to the particulars of that project since the case
15 is not about that project. The case is about
16 Article 7 and the rights that it gives New Jersey
17 as we understand them.

18 MR. FREDERICK: The difficulty, Mr. Lancaster --
19 this is David Frederick -- as we see it is that simply
20 in the few months where we have briefed these
21 preliminary issues, the estimate of the amount of
22 submerged lands that BP would excavate has increased
23 by nearly 50 percent. And we think that there is a
24 potential issue of whether or not this kind of massive
25 bulk transfer facility even comes within anybody's

1 reasonable contemplation of a riparian project as the
2 framers would have understood that in the late 19th
3 and early 20th centuries.

4 SPECIAL MASTER: Ms. Horowitz, let me ask
5 you; do you see the subject matter of this issue
6 as raised by Delaware as being amenable to a
7 preliminary motion?

8 MS. HOROWITZ: Yes.

9 SPECIAL MASTER: And when do you think you
10 might be filing that motion?

11 MS. HOROWITZ: 30 days.

12 SPECIAL MASTER: 30 days. Well, the reason I
13 ask that question is because you have got an
14 obvious dispute between the two of you as to
15 whether this is an issue, whether it is an issue
16 that has to be resolved in this particular case.
17 And it seems to me that if there is -- if Delaware
18 intends to take out extensive discovery in this
19 area, the question -- this is one area where the
20 question of relevance and perhaps admissibility
21 might benefit from an early ruling on my part so
22 that in the event -- and I have no idea which way
23 I would rule, but in the event that I ruled in
24 favor of New Jersey, the discovery would be
25 unnecessary.

1 30 days -- now, let me just -- let me just be
2 clear on this. If it's 30 days before you file
3 your motion, and then obviously Delaware requires
4 an adequate period of time to respond, if
5 discovery -- well, let me ask both counsel. Does
6 it make sense to proceed with that and either
7 postpone or delay the discovery on that question
8 until such time as I have ruled on the motion, or
9 does it make sense to proceed simultaneously with
10 the motion and the discovery?

11 And, Mr. Frederick, I'll address that to you.

12 MR. FREDERICK: Well, I -- I think it's
13 relevant for different purposes. And so in some
14 measure it makes sense, I think, to proceed
15 simultaneously. I -- I'm struggling, though,
16 Mr. Lancaster, because as to one aspect of its
17 relevance, the historical piece of it, we're in
18 effect putting this discovery before a full
19 understanding of the key terms of the Compact.
20 And so it's quite possible that in a preliminary
21 motion decided now you might reach a conclusion
22 that would be better informed somewhat later in
23 the process when we have a better grasp on the key
24 terms of the 1905 Compact.

25 SPECIAL MASTER: Well, that certainly --

1 prematurity is certainly a point that you can make
2 in your reply to Ms. Horowitz.

3 All right. Then I will understand that
4 Ms. Horowitz is going to file her motion within
5 30 days. And how much time, Mr. Frederick, do you
6 think you would need for the response?

7 MR. FREDERICK: I think 30 days should be
8 ample.

9 SPECIAL MASTER: All right. 30 days and 30
10 days. We will put that in the -- we'll put that
11 in the Case Management Order.

12 I urge -- let me suggest to you that I would
13 find it very helpful if you would each send me as
14 soon as you can a list of the issues as you see
15 them. And to the extent that you can agree,
16 obviously it will be very helpful. To the extent
17 that you can't agree, then if you would set forth
18 your view of the issues individually. I will at
19 least have an understanding of where each party
20 stands. Can you do that within a short period of
21 time, Ms. Horowitz?

22 MS. HOROWITZ: Yes.

23 SPECIAL MASTER: How short?

24 MS. HOROWITZ: Five days.

25 SPECIAL MASTER: Mr. Frederick?

1 MR. FREDERICK: We would appreciate getting
2 two weeks to respond to that.

3 SPECIAL MASTER: I thought you told me that
4 Ms. Horowitz had sent you a list of her issues?

5 MR. FREDERICK: She sent us one issue. And
6 that encompassed in overlapping form some of the
7 matters that we addressed. But we would like an
8 adequate opportunity to consult with our clients
9 in the state.

10 SPECIAL MASTER: Well, if Ms. Horowitz gets
11 me her list of issues and gets you her list of
12 issues within five days, let me suggest seven days
13 from that point to you -- for you. And if that is
14 inadequate, you can come back to me on it.

15 MR. FREDERICK: Okay.

16 SPECIAL MASTER: Now, counsel, at this
17 juncture -- and it may be too early -- do either
18 of you anticipate that we're going to have an
19 evidentiary trial -- a need for an evidentiary
20 trial?

21 Ms. Horowitz?

22 MS. HOROWITZ: We don't anticipate that given
23 the fact that we think there is strictly legal
24 issue in the case.

25 SPECIAL MASTER: Mr. Frederick?

1 MR. FREDERICK: I don't think at this point
2 that it is going to be necessary to have live
3 witnesses. But it might be helpful to present
4 historical evidence that we have in some kind of
5 format that would facilitate, you know, a proper
6 demonstration of the evidence that would
7 supplement a paper record.

8 SPECIAL MASTER: Sure. In other words, we
9 would gather together somewhere; and you could put
10 on, forgive me for saying this, a dog and pony
11 show?

12 MR. FREDERICK: I was going to put it in
13 terms of evidence that would highlight the paper
14 record.

15 SPECIAL MASTER: Yes. That's what I
16 understood.

17 All right. Fine. That's very helpful.

18 And we talked earlier -- there was mention
19 earlier of summary judgment motions. And I'm
20 assuming that either or both of you anticipates
21 that at some point you will be filing that type of
22 motion; is that correct?

23 MS. HOROWITZ: Yes.

24 SPECIAL MASTER: Ms. Horowitz, thank you.

25 Mr. Frederick?

1 MR. FREDERICK: Yes.

2 SPECIAL MASTER: Okay. Thank you for that.

3 Okay. The -- from what we have said so far,
4 as much as I would like to meet you in person, I
5 don't anticipate the need for many face-to-face
6 status conferences. But let me just tell you that
7 if that event arises, I would propose that they be
8 held on neutral ground; and I would propose that
9 we hold them either in the third circuit in
10 Philadelphia or at the D.C. circuit in Washington.
11 Just a heads-up to you that I will make the
12 arrangements for that if -- for those if it
13 becomes necessary.

14 The next topic on my list is compensation and
15 reimbursement. So that you know in advance, my
16 current hourly rate is \$450 an hour. But I am
17 mindful of a dissent that Judge Burger -- Justice
18 Burger issued in an earlier case in which he
19 emphasized the need for the public service aspect
20 of this appointment. And so I propose to charge
21 \$350 an hour instead of \$450 an hour. And I
22 assume that that will be without objection.

23 Mark Porada's current hourly rate is \$225 an
24 hour. And in these matters, the standard
25 disbursement expenses will be charged, routine

1 things like this conference call, travel,
2 overnight delivery. The only substantial expense
3 and unusual expense will be the printing of the
4 reports which is -- I know you now know can be
5 very, very expensive. The numbers of copies, the
6 method of printing, et cetera. But other than
7 that, the expenses will be routine.

8 Some special masters prefer escrow accounts,
9 either trust accounts or money deposits put up
10 front for their fees and disbursements. I have
11 never done that. And I prefer to send instead
12 periodic bills. In case you're not familiar with
13 the process that we use, when we -- when we deem
14 it's time for an intermediate bill, we will send
15 it directly to the court with copies to you. The
16 cover letter will remind you that you have 10 days
17 to make comments on it. And those comments, as I
18 will repeat over time, should be sent directly to
19 the court and not to me. I don't want to know if
20 somebody is unhappy with my bill.

21 The experience I have had is that most of
22 these are assessed equally, divided equally
23 between the parties. But you should know that I
24 have discretion to modify that allocation if it's
25 warranted by what I deem to be egregious behavior

1 in the process. I have not done it before, and I
2 hope I won't have to do it here.

3 I would like to have with you monthly
4 telephone conferences of this nature so that we
5 are -- I am kept informed of the progress of the
6 matter. And what I will do is set dates three
7 months in advance and then alter the schedule if
8 it's necessary to accommodate either or both of
9 you or if I happen to be on trial somewhere and
10 can't keep my own schedule. I would like to have
11 you send me a brief progress report -- and I
12 emphasize brief -- a brief progress report on
13 discovery steps that have been taken, send me that
14 by e-mail in PDF format before each of our monthly
15 conferences.

16 Now, if you have your calendars available,
17 either electronic or, if you're old-fashioned like
18 I am, a paper calendar, I would like to talk to
19 you about dates. And I have selected these dates
20 arbitrarily. And if they are inconvenient, we can
21 adjust them.

22 The first date I'll give you is a date for
23 the progress report to be e-mailed to me, and then
24 the second date is the date for our telephone
25 conference. And all of the telephone conferences

1 will be scheduled at 10 a.m. and, hopefully, with
2 a correct number next time so we won't have the
3 dial-in problems.

4 The first date for progress report would be
5 Monday, March 6 by the close of business on that
6 day with our first -- our second telephone
7 conference to be held at 10 a.m. on Wednesday,
8 March 8. Our -- and let me pause and see if
9 either of you has a problem with those two dates.

10 Ms. Horowitz?

11 MS. HOROWITZ: No. No problem with that day.

12 SPECIAL MASTER: Mr. Frederick?

13 MR. FREDERICK: That's fine.

14 SPECIAL MASTER: The next one would be the
15 e-mail to me on April 7, which is a Friday, and
16 our conference on Tuesday, April 11.

17 Ms. Horowitz?

18 MS. HOROWITZ: That's fine.

19 SPECIAL MASTER: Mr. Frederick?

20 MR. FREDERICK: I think that should be fine.

21 SPECIAL MASTER: Okay. And the third one is
22 the progress report to me on Friday, May 5 and our
23 conference on Monday, May 8.

24 Ms. Horowitz?

25 MS. HOROWITZ: That's fine.

1 SPECIAL MASTER: Mr. Frederick?

2 MR. FREDERICK: I will be out of the office
3 that day.

4 SPECIAL MASTER: All right. Let's look at
5 May then. How is May 9?

6 MR. FREDERICK: I'll be out both May 8 and 9.

7 SPECIAL MASTER: How is May 10?

8 MR. FREDERICK: I can do May 10.

9 SPECIAL MASTER: Ms. Horowitz?

10 MS. HOROWITZ: That's fine.

11 SPECIAL MASTER: Okay. Now, during the March
12 conference we'll talk about the progress we have
13 made, and we'll add a June date. We're going to
14 have a rolling calendar here so that we'll have
15 three months scheduled so that it won't slip.

16 And I think that pretty much brings us to the
17 end of my list except one thing, settlement.
18 Given the political climate as I have seen it in
19 the newspapers, settlement may be impossible. But
20 I urge both states seriously to consider the
21 possibility of settlement. And if there is any,
22 even if it's a remote possibility, to confer. And
23 I tell you that either side should understand that
24 there is no inference of weakness because one
25 state initiates the discussion as opposed to the

1 other. I won't know about it. And if Delaware
2 calls New Jersey, New Jersey calls Delaware, it's
3 not out of weakness; it's because the special
4 master is pushing settlement. I have never
5 regretted a case that I have settled, and I have
6 regretted some that I have tried. And I assume
7 that experienced counsel are in the same -- have
8 had the same experience.

9 So it won't be because of any weakness; it
10 would be because of my urging that these
11 discussions take place. I will not be involved in
12 any settlement discussions. But if you think the
13 process can be helped by the intervention or
14 assistance of a third party, I'm happy to
15 cooperate with you in the selection or
16 identification of a mediator.

17 And let me just warn you this is not the last
18 time that I will raise this topic because I'm very
19 fond of settlements. It's not that I don't enjoy
20 this work, it's just that I think that when
21 parties can come together and resolve matters
22 amicably, that everything, including the process
23 itself, is served better by it.

24 Now, with that let me ask, are there any
25 other matters that we should talk about today?

1 Ms. Horowitz?

2 MS. HOROWITZ: I just had a question on the
3 issue of the motion that we were going to file on
4 BP and whether there would be no discovery on that
5 issue until that is resolved, which had been your
6 suggestion?

7 SPECIAL MASTER: Well, I understood from
8 Mr. Frederick that he suggested that that
9 discovery would be relevant to other issues; and
10 so I'm not in a position to tell him that he is
11 wrong. I just don't know enough about that. So I
12 think that as I understand it, discovery will be
13 proceeding.

14 But I -- you know, there is -- again, I would
15 be very unhappy if resources were diverted for
16 that topic and taken away from others. I'm
17 assuming that Mr. Frederick will devote whatever
18 and the State of Delaware will devote whatever
19 resources are necessary to moving this matter
20 along. I would not be happy if at a later date I
21 was told that discovery on other matters was
22 postponed because of the need to do discovery on
23 the BP matter.

24 Any other matters, Ms. Horowitz?

25 MS. HOROWITZ: No. No more matters.

1 Thank you.

2 SPECIAL MASTER: Mr. Frederick?

3 MR. FREDERICK: Well, it occurs to me that
4 even if we expeditiously get requests out to BP,
5 that BP may not respond in a fashion that would
6 enable us to incorporate what we discover in our
7 response to New Jersey's motion. And I just would
8 like to put out that given how tight the time line
9 is here, whether -- how you would like us to
10 proceed if we encounter difficulties in obtaining
11 information from BP.

12 SPECIAL MASTER: Same way you proceed with
13 any procedural problem. You advise me of it, and
14 then we proceed to resolve it.

15 MR. FREDERICK: Okay. Secondly, we intend to
16 seek information from a number of third parties,
17 including Dupont, El Paso East or Sun Oil and some
18 others. And so we would like the discovery
19 process to incorporate procedures for obtaining
20 information from third parties.

21 SPECIAL MASTER: It will be in the Case
22 Management Plan.

23 Anything else, Mr. Frederick?

24 MR. FREDERICK: No, sir.

25 SPECIAL MASTER: Well, then the last item is

1 your requests to our very efficient and very
2 silent court reporter who has been sitting here,
3 Ms. Mason. If you will tell her how many copies
4 and in what format you want the copies of the
5 transcript of this and future conferences, I'm
6 sure she would be happy to comply.

7 Ms. Horowitz?

8 MS. HOROWITZ: If we could have one copy by
9 PDF, that would be appreciated.

10 SPECIAL MASTER: Okay. That will take care
11 of that.

12 And Mr. Frederick?

13 MR. FREDERICK: I think one copy by PDF or,
14 if it's easier, in Word Perfect.

15 SPECIAL MASTER: It's your choice.

16 MR. FREDERICK: I think PDF would be fine.

17 SPECIAL MASTER: All right. I have nothing
18 else on my calendar.

19 I thank you all for participating. And I
20 look forward to future conferences. And I look
21 forward to moving this matter along to a report to
22 the Supreme Court.

23 Thank you very much.

24 MS. HOROWITZ: Thank you.

25 MR. FREDERICK: Thank you.

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(The conference was concluded at 11:03 a.m.)

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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 6th day of February 2006.

Claudette S. Mason

Notary Public

My Commission Expires
June 9, 2012.