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IN THE SUPREME COURT OF THE UNITED STATES

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NEW JERSEY, :

Petitioner :

v. : No. 134. Orig.

DELAWARE. :

- - - - - x

Washington, D.C.

Tuesday, November 27, 2007

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:05 a.m.

APPEARANCES:

H. BARTOW FARR, ESQ., Washington, D.C.; on behalf of
the Plaintiff.

DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of
the Defendant.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in case 134 on our original docket, New Jersey v. Delaware.

Mr. Farr.

ORAL ARGUMENT OF H. BARTOW FARR

ON BEHALF OF THE PLAINTIFF

MR. FARR: Mr. Chief Justice, and may it please the Court:

Although the 1905 Compact between Delaware and New Jersey did not settle the boundary dispute between them, New Jersey nevertheless agreed to dismiss the suit that it had filed before this Court to determine the boundary. And the reason for those two seemingly contradictory facts, I think, is because the Compact did resolve permanently certain issues of jurisdiction, implementing rules that could be administered without regard to where the boundary was.

Thus in particular Article VII, the provision of the Compact that's particularly at issue in this case, provided that each State could continue to exercise its traditional riparian authority over the riparian owners on its side of the river according to its laws. Now, the Special Master I think fundamentally

1 changed the nature of the Compact by superimposing the
2 boundary line into the terms of an agreement that was
3 meant to operate without it. And I think he did so
4 because he mistakenly applied the presumption that all
5 promises with respect to jurisdiction and territory must
6 be unmistakable; and this Court, however, had said
7 several years before, in Virginia versus Maryland, that
8 that presumption simply is not applicable to compacts
9 that are entered into when the boundaries between the
10 States are disputed.

11 JUSTICE GINSBURG: Mr. Farr, one of the
12 striking things about this Compact is that to the extent
13 that it is definite, there is a lot in here in detail
14 about service arrests on the river and about fishing,
15 but then you get to these two articles at the end and
16 they certainly don't have that same definite detailed
17 quality. As I read the Article VII that you're
18 stressing, it says -- let's see -- "may continue to
19 exercise." So it seems to me that "may continue to" was
20 just whatever was the status quo, that will continue;
21 not to do anything dispositive, just whatever was will
22 continue.

23 MR. FARR: Well, several things about that,
24 Justice Ginsburg. First of all I think that the
25 language "continue to" necessarily brings in the

1 historical antecedents of regulation of riparian matters
2 by both States. It's undisputed in this case that on
3 New Jersey's side of the river, that is with respect to
4 riparian owners on the New Jersey side, New Jersey had
5 exercised full and exclusive authority over, for
6 example, wharfing out to navigable water, the building
7 of piers and wharfs to do that, the granting of lands,
8 without any involvement whatsoever by Delaware.

9 JUSTICE SCALIA: Was it clear that New
10 Jersey believed when it had authorized somebody to wharf
11 out, that the person who wharfed out was not subject to
12 New Jersey's environmental laws?

13 MR. FARR: No. I think what --

14 JUSTICE SCALIA: The history doesn't show
15 anything about that?

16 MR. FARR: The history doesn't show
17 anything --

18 JUSTICE SCALIA: So if --

19 MR. FARR: -- specific about that kind of
20 law.

21 JUSTICE SCALIA: -- if it -- if it would
22 have been subject to New Jersey's environmental laws,
23 had New Jersey owned the bed of the river into which the
24 wharf was extended, by parity of reasoning it seems to
25 me the wharf would be subject to Delaware's

1 environmental laws if Delaware owns the bed of the
2 river.

3 MR. FARR: I think without the Compact that
4 would be true, but I think what the Compact is saying is
5 that you get to retain the degree of power on your own
6 side of the river that you had before, without regard
7 ultimately to where the boundary is determined to be.

8 JUSTICE SOUTER: So your -- your argument --
9 it seems to me it's not that easy, because your argument
10 is assuming that by virtue of the "may continue"
11 language, the State of New Jersey acquires a new power,
12 and the new power in effect is to -- is to make grants
13 of subaqueous land that belonged not to New Jersey but
14 to Delaware, and that's the stretch.

15 It -- it seems to me that that is such an
16 extraordinary position or proposition, that you've got
17 to have something more specific than "may continue" in
18 order to construe that as meaning an agreement which was
19 intended to give New Jersey the power to grant away
20 Delaware land.

21 MR. FARR: Well, Justice Souter, I think
22 that the difficulty with that question is it assumes
23 knowledge of where the boundary is. In other words,
24 when one talks about New Jersey getting a new power to
25 grant lands that are within Delaware, that is a -- that

1 is a question that necessarily assumes that the boundary
2 has to be part of that understanding.

3 JUSTICE SCALIA: I don't --

4 JUSTICE SOUTER: No, I'm simply saying that
5 your position -- and I accept your position -- that the
6 Compact is intended to continue to operate whether or
7 not the boundary is -- is ultimately determined, and if
8 so, after it is ultimately determined -- and once we get
9 to that point of continuing to operate after, then
10 necessarily the only way it can operate on your theory
11 is to give New Jersey the power to grant Delaware land.
12 And if New Jersey has that power, it must have been a
13 power that was intended in the 1905 Compact, and that
14 intent strikes me as a very extraordinary intent; and --
15 and my -- the point of my question was the application
16 of the Compact in the new circumstances, as you claim it
17 to be, would be so extraordinary that you ought to have
18 language more specific than "may continue" in order to
19 establish that extraordinary result.

20 MR. FARR: Well, of course. It is -- it is
21 saying "may continue to grant riparian rights and lands
22 under its laws." So it is not simply the language "may
23 continue."

24 JUSTICE SOUTER: Well, if you emphasize
25 "under its laws," then don't you lose? Because New

1 Jersey does not -- I presume New Jersey does not have
2 law, for example, in its constitution, providing that it
3 can grant Delaware land.

4 MR. FARR: Well, I don't think that the laws
5 have to refer specifically, obviously, to granting
6 Delaware land. It did have provision for granting laws
7 beyond the low-water mark in New Jersey. Many of the
8 grants before 1905 specifically --

9 JUSTICE SOUTER: But I'm going on the
10 assumption that it, in fact, had jurisdiction; that it
11 had land below -- beyond the low-water mark.

12 MR. FARR: But what I think you're
13 suggesting, Justice Souter, I think, is what -- what
14 fundamentally alters the nature of the Compact is to
15 assume that New Jersey had certain powers up until the
16 time the boundary line was determined, and then it lost
17 those powers after the boundary line was --

18 JUSTICE SOUTER: It didn't so much lose -- I
19 mean it had a generalized recognition of power. In
20 order to exercise that power, it had to possess certain
21 attributes, i.e., land.

22 Once it lost that land, it had nothing to
23 exercise the power over. In fact, it had a little bit
24 left. It had the distance between the high- and the
25 low-water marks, so it still had the power. But the --

1 the recognition of the power in 1905 was, in effect, a
2 formula; and the formula depends on facts to be applied;
3 and the facts changed once the boundary was determined.

4 MR. FARR: You see, I think there are two
5 problems with that, Justice Souter.

6 First of all, the very notion that there
7 would be something left if the boundary line was
8 determined to be at the low-water mark on the New Jersey
9 side -- in other words, that Article 7 would continue to
10 operate; it would just operate subject to the boundary
11 -- at least in the context of the riparian right that we
12 are talking about, the right to wharf out to navigable
13 water, that right is essentially meaningless if you stop
14 at the low-water mark.

15 In other words, what you're saying and what
16 the Special Master's recommendation essentially does, it
17 says New Jersey has no right to authorize wharfing out
18 to navigable water without Delaware's consent.

19 JUSTICE ALITO: What right do you think --

20 MR. FARR: I --

21 JUSTICE ALITO: What right do you think New
22 Jersey has now with respect to the subaqueous land? Is
23 it simply to authorize it to be disturbed to the extent
24 necessary to construct a wharf, or does it go any
25 further than that?

1 MR. FARR: Basically, I think what you have
2 said, Justice Alito, is exactly right. It is --

3 JUSTICE SCALIA: I have a more basic
4 question. Assume -- assuming that the subaqueous land
5 belongs to New Jersey and that New Jersey gives a
6 private individual a right to wharf out into the
7 Delaware, does that individual acquire ownership of the
8 land under the water, assuming New Jersey owns the
9 subaqueous land?

10 MR. FARR: It depends on the form of the
11 grant, but, typically, if New Jersey --

12 JUSTICE SCALIA: But, normally, authority to
13 wharf out doesn't convey the land with it; does it?

14 MR. FARR: It conveys an interest in the
15 land that allows the doing of the activity --

16 JUSTICE SCALIA: Of the wharf.

17 MR. FARR: -- for which the --

18 JUSTICE SCALIA: Of the wharf.

19 MR. FARR: That's correct.

20 JUSTICE SCALIA: Now, if -- if merely
21 authority to wharf out would not even convey New
22 Jersey's own land, how can you argue that, by reason of
23 this Compact, it implicitly conveyed what is now
24 Delaware's land?

25 MR. FARR: Well, because Delaware has

1 essentially said in Article VII, we believe, Justice
2 Scalia, that New Jersey may continue to do this. It was
3 doing -- I mean this land --

4 JUSTICE SCALIA: May continue to wharf out,
5 but not continue to grant subaqueous land, which you say
6 doesn't go with wharfing out.

7 MR. FARR: Well, what we are -- what we're
8 talking about, I think, is we're talking about granting
9 the interest in land that is necessary for the riparian
10 owner to be able to wharf out.

11 CHIEF JUSTICE ROBERTS: So that if you have
12 one of these wharves that goes beyond the low-water mark
13 and there are two people at the end of it and one of
14 them shoots the other, would they be prosecuted for
15 murder in Delaware or New Jersey?

16 MR. FARR: Well, in -- in -- there was a
17 gambling offense at the end of a pier in -- in -- that
18 proceeded from the New Jersey shoreline, in 19 -- in the
19 late 1950's in a case called the Federenco case, which I
20 don't have the cite for immediately. The New Jersey
21 Supreme Court held that that was within the jurisdiction
22 of New Jersey, and Delaware filed a --

23 CHIEF JUSTICE ROBERTS: I suspect the New
24 Jersey Supreme Court would.

25 MR. FARR: Delaware filed a brief, Mr. Chief

1 Justice, supporting that position.

2 So -- but if I could return just for a
3 second to Justice Souter's point and Justice Scalia's
4 point, if one thinks for a moment -- we're -- we're
5 trying to, I think, interpret the -- the 1905 Compact as
6 it must have been understood by the commissioners who
7 drafted it.

8 And so I think that, unlike the Special
9 Master, who at the time he's interpreting it, knows
10 where the boundary line is, we have to think about,
11 first of all, would the commissioners essentially have
12 been saying to New Jersey, as your hypothesis would
13 suggest, that each State on its own side of the river
14 has the right to grant riparian rights and lands and
15 exercise riparian jurisdiction subject to the boundary
16 line, which for New Jersey would mean that, in fact, if
17 it lost the boundary case, it would effectively have no
18 riparian jurisdiction at all?

19 JUSTICE GINSBURG: Mr. Farr, what about the
20 article that follows Article VII? Article VIII says:
21 "Nothing herein contained shall affect the territorial
22 limits, rights, or jurisdiction of either State in or
23 over the Delaware River." So that's a qualification at
24 least on every other article.

25 MR. FARR: Well, Justice Ginsburg, if I may

1 say, the quote is longer than that and in a critically
2 important way. It says it may not do that "except as
3 herein expressly set forth."

4 JUSTICE GINSBURG: Yes, and I don't see
5 anything expressly set forth in VII, which just says
6 "may continue to," which says the status quo is
7 maintained.

8 MR. FARR: Well, I mean, obviously, we're --
9 we're debating the meaning of Article VII, but it seems
10 to me that Article VII is an express provision herein,
11 meaning in the Compact. So that what Article VII is
12 aiming at, it seems to me, if we are correct that it is
13 essentially meant to operate without respect to the
14 boundary, would expressly set forth a cession.

15 And I might point out that when this case
16 was before this Court or the two States were before this
17 Court back in 1934, Delaware's counsel before this Court
18 said pretty much exactly what I'm saying this morning:
19 that -- and this is on page 44 of our blue brief, but
20 said that the Compact of 1905 in his view ceded to the
21 State of New Jersey all the right to control the
22 erection of those wharves, meaning wharves that were
23 constructed by New Jersey riparian owners past the
24 low-water mark, and to say who shall erect them.

25 JUSTICE KENNEDY: Well, are you asking us to

1 reject the concept of concurrent jurisdiction in all
2 circumstances?

3 MR. FARR: As far as State jurisdiction
4 goes, it seems to me there is not concurrent
5 jurisdiction over riparian structures such as piers and
6 wharves and other kinds of acknowledged riparian rights.
7 With respect to matters that are nonriparian, for
8 example, if a riparian owner in New Jersey wanted to
9 construct a hotel that was beyond the low-water mark,
10 that would not be a riparian use. And Delaware --

11 CHIEF JUSTICE ROBERTS: How do we split that
12 difference? I mean let's --

13 MR. FARR: Pardon me?

14 CHIEF JUSTICE ROBERTS: I mean, how do we
15 decide the difference between those two cases? And
16 applicable here, for example, let's say it's perfectly
17 fine for New Jersey to build a wharf out there, but they
18 can't use it for liquified natural gas, which Delaware
19 may conclude poses particular problems that other uses
20 don't.

21 MR. FARR: But I think what you've done, Mr.
22 Chief Justice, if I may, is I think you've detached the
23 purpose of a wharf from the wharf itself. The purpose
24 of a wharf is the loading and unloading of goods.
25 That's what -- what they are used for. Vessels draw up,

1 tie up and unload or load goods and/or passengers.

2 JUSTICE SCALIA: Could New Jersey -- could
3 New Jersey prevent its use for liquified gas?

4 MR. FARR: Under State law, yes, it could,
5 Your Honor.

6 JUSTICE SCALIA: Well -- but New Jersey had
7 given this riparian owner the right to wharf out.

8 MR. FARR: Well --

9 JUSTICE SCALIA: So, obviously, the right to
10 wharf out does not include the right to use the wharf
11 for whatever you like, and the only thing we're arguing
12 about is whether it is New Jersey or Delaware that can
13 impose limitations. But that it is subject to
14 limitation is, it seems to me, absolutely clear.

15 MR. FARR: I agree with that. There's no
16 question that it is subject to limitation. The question
17 is, whose laws apply? Who -- and it seems to me that is
18 the question that Article VII expressly answered.
19 Article VII again says "each State on its own side of
20 the river" -- which is not a designation that is limited
21 by the boundary, because Delaware made that argument to
22 the Special Master, the Special Master rejected it, and
23 Delaware did not file exceptions in this Court. So "on
24 its own side of the river" I think is properly taken to
25 mean with respect to the riparian owners on its bank of

1 the river. Those riparian owners -- I mean, excuse me
2 -- "each State may continue on its own side of the river
3 to exercise riparian jurisdiction of every kind and
4 nature, make grants of riparian rights and land under
5 the respective laws of the States."

6 JUSTICE KENNEDY: And in your view to what
7 extent does this involve subaqueous lands toward -- and
8 I'll just put "toward" -- the New Jersey side?

9 MR. FARR: Unfortunately, I'm not sure I
10 understand the phrase "toward the New Jersey side." I
11 mean, between the low-water mark --

12 JUSTICE KENNEDY: I'm not sure I understand
13 your position on where New Jersey's jurisdiction begins
14 and ends with reference to subaqueous lands.

15 MR. FARR: Well, it's -- literal ownership
16 of the land begins at the high-water mark on the New
17 Jersey side and ends at the low-water mark on the New
18 Jersey side, its actual ownership. Under the Compact,
19 we believe Delaware has ceded to it the right to grant
20 certain interests in subaqueous land to the extent but
21 only to the extent that they are necessary to allow
22 owners in New Jersey, riparian owners, to exercise
23 riparian rights, provided that the New Jersey State law
24 grants them that right.

25 JUSTICE GINSBURG: That suggests --

1 MR. FARR: If they were --

2 JUSTICE GINSBURG: -- it's still an
3 extraordinary power for one State to give up. If
4 Delaware -- if that land -- they didn't settle the
5 boundary, but it might be on the Delaware side. If
6 Delaware was giving up so much, what did it get in
7 exchange?

8 MR. FARR: Well, again, the question that
9 you're asking assumes that the negotiators were coming
10 into the negotiation with their boundary positions fixed
11 and that they were essentially horse-trading within the
12 bounds of the different positions taken by the two
13 States.

14 JUSTICE GINSBURG: No, I'm not assuming
15 that. I'm assuming it's unknown, but there is the
16 possibility that it's going to end up --

17 MR. FARR: There's the possibility that --

18 JUSTICE GINSBURG: -- end up --

19 MR. FARR: I'm sorry.

20 JUSTICE GINSBURG: There's a possibility
21 that it will end up on the Delaware side. And you're
22 suggesting that Delaware relinquished all of its
23 regulatory authority and gave it to New Jersey, no
24 matter where the boundary turned out to be.

25 MR. FARR: That is what I'm suggesting with

1 respect to this narrow category of riparian rights.
2 Just as that's true, for example, in Article I. New
3 Jersey has the right to serve criminal process with
4 respect, for example, to crimes that occur on the
5 eastern half of the river, which is something that New
6 Jersey clearly would not have had if it ultimately lost
7 the boundary dispute; whereas Delaware got, in Article
8 II, the authority to serve process for crimes occurring
9 on the western half of the river, which it would have
10 had anyway, whether it won or lost the boundary dispute,
11 assuming that the half of the river refers to the
12 channel. So I mean -- let me --

13 JUSTICE KENNEDY: But that's -- Article I --
14 that's an exception. And you don't have the benefit of
15 that exception when you're talking about Article VII.

16 MR. FARR: The exception --

17 JUSTICE KENNEDY: The exception is not that
18 specific as to the -- as to the extent of the
19 jurisdiction.

20 MR. FARR: Well, Justice Kennedy, I think
21 you've asked a very good question, but -- but I guess I
22 think it is -- it's quite specific, because the question
23 is, what do the terms "on its own side of the river"
24 mean? Those obviously have some geographical impact
25 here, and indeed in -- before the Special Master,

1 Delaware's position was yes, that is a geographical
2 designation, but what it means is "up to the boundary
3 line." In other words, up to the low-water mark. AS I
4 say, the Special Master rejected that position.
5 Delaware did not file exceptions from that position. So
6 I think we can accept at this point in the case that's
7 not what "on its own side of the river" means. So
8 the question then is: What does it mean? And it seems
9 to me what it means is, with respect to the riparian
10 property owned by New Jersey citizens on the New Jersey
11 side of the river, Delaware citizens on the Delaware
12 side of the river. And what it is therefore doing is
13 saying each State may control and determine the rights
14 of its citizens who own riparian property --

15 JUSTICE STEVENS: Mr. Farr, is there --

16 MR. FARR: -- regardless of where --

17 JUSTICE STEVENS: Is there a limit on New
18 Jersey's rights? As long as it's building a wharf, can
19 it do anything it wants to on that or is there -- for
20 example, could it dam up the navigable part of the river
21 in order to build a superstructure on the wharf?

22 MR. FARR: Well, there are two questions
23 there, Justice Stevens, if I can separate them for a
24 moment. As far as State law goes, purely State law, I
25 think the answer to that question is that New Jersey

1 determines what can and cannot be done --

2 JUSTICE STEVENS: Well, then I should --

3 MR. FARR: -- on a wharf.

4 JUSTICE STEVENS: I should rephrase it. To
5 what extent, if any, does Delaware place a limit on the
6 way in which New Jersey may exercise its riparian
7 rights?

8 MR. FARR: Under State -- by applying
9 Delaware State law, I think it cannot impose any limits.

10 JUSTICE STEVENS: Any limit whatsoever?

11 MR. FARR: With respect to the exercise of
12 riparian rights. Because once it --

13 JUSTICE STEVENS: Even if -- even if the
14 building of the wharf interfered with the navigation on
15 the river?

16 MR. FARR: Well, this is, I think, why I was
17 trying to separate it into two parts. What I've left
18 out, the part I've left out so far, is Federal law.
19 Federal law has a significant amount to say about what
20 happens with respect to piers and wharves --

21 JUSTICE STEVENS: Well, I'm just asking, is
22 it --

23 MR. FARR: -- in any State.

24 JUSTICE STEVENS: -- does Delaware law place
25 any limit on what New Jersey may do in exercising its

1 riparian rights?

2 MR. FARR: I mean, it does impose a limit,
3 but we don't think those limits are valid under Article
4 VII of the Compact. I think the --

5 JUSTICE STEVENS: I mean, can they validly
6 impose a limit?

7 MR. FARR: No, no, they cannot. They --
8 what this does is it says, for New Jersey riparian
9 owners, when they are building wharves and piers, they
10 are subject to the laws of New Jersey. "The respective
11 States" means that the laws of one State or the laws of
12 the other State, depending on which side of the river
13 you're on. So they are subject to New Jersey law. Now,
14 obviously, any pier or wharf that interfered with
15 navigation interferes with the Federal navigational
16 servitude. So that would be subject to review under
17 Federal law.

18 JUSTICE STEVENS: And what about the example
19 of using a -- setting a gambling casino or something at
20 the end of the wharf, well into Delaware territory?
21 You'd say Delaware has no right to object to that.

22 MR. FARR: No, I would say it does have a
23 right there because that is not a --

24 JUSTICE STEVENS: That's not a riparian use.

25 MR. FARR: That's not a riparian use. We're

1 talking about --

2 JUSTICE STEVENS: Anything involving loading
3 and unloading of ships and so forth would be
4 permissible?

5 MR. FARR: Exactly.

6 CHIEF JUSTICE ROBERTS: Then how come your
7 position in my murder hypothetical was what it was?
8 Because I assume murder is not a riparian use either.
9 And yet, why would Delaware have jurisdiction over a
10 casino but not over a crime?

11 MR. FARR: Because I think we're talking
12 about now what happens with respect -- I mean, if we're
13 talking -- this was a gambling -- it wasn't a casino.
14 This was a gambling offense that took place on a
15 facility that actually was used for the loading and
16 unloading of ships. The gambling was an outside
17 activity not relating to the use of the wharf. So I
18 think the understanding was that riparian jurisdiction
19 of every kind and nature would be sufficient to say,
20 once you have built the wharf and it is a legitimate
21 riparian purpose not subject to Delaware laws, then New
22 Jersey would apply its criminal laws as well. And as I
23 say, Delaware filed an amicus brief -- unfortunately, we
24 don't have a copy of it in the record -- but the New
25 Jersey Supreme Court noted that Delaware supported New

1 Jersey's jurisdiction over that gambling offense.

2 JUSTICE SCALIA: Mr. Farr, could you tell me
3 -- one thing in Article VII perplexes me. Why does it
4 say that each State may "make grants, leases, and
5 conveyances of riparian lands and rights"? "Rights" I
6 can understand. But why would they say "conveyances of
7 riparian lands"?

8 MR. FARR: I assume --

9 JUSTICE SCALIA: I mean, obviously each
10 State can -- riparian lands are within each State.
11 Nobody questioned that at the time.

12 MR. FARR: Well, I think the fact is that
13 this is why one needs to give some sort of practical --
14 take a practical view of what Article VII is talking
15 about. Article VII -- the two riparian rights that are
16 of particular interest and were established clearly in
17 1905, obviously subject to the State limitations, were,
18 first of all, the right to draw water, the riparian
19 right that was at issue in Virginia v. Maryland, where
20 the Court said Maryland can't apply its police power, I
21 might point out. The second was piers and wharves.
22 Obviously, a pier and a wharf that stops at the
23 low-water mark is of no use at all. It's got to get out
24 to the navigable water. That's where the ships are.
25 It's the Willie Sutton principle. So once have you

1 that, if you're going to have riparian rights, you've
2 got to have the ability to grant some interest in lands
3 so that they can exercise their right out to the point
4 where it becomes meaningful. And that's, it seems to
5 me, why --

6 JUSTICE SCALIA: So you say "riparian lands"
7 means the land under the wharf? That's a strange use of
8 "riparian lands."

9 MR. FARR: No, that's what -- I mean,
10 "riparian lands" could mean the lands on the bank, but I
11 think that's not what they're talking about in this
12 context.

13 JUSTICE SCALIA: Do you know of any other
14 instance where people talk of riparian lands and they
15 mean land extending under the water?

16 MR. FARR: I think, because of the context
17 here, when it's linked with the rights, that the
18 necessary -- the limitation that Justice Alito mentioned
19 gives -- colors it essentially to say this is what we're
20 talking about. And after all, this is similar --

21 JUSTICE SCALIA: That's your position, that
22 "lands" means the lands under the water?

23 MR. FARR: That's correct, because this is
24 settling -- the point of it is to settle and avoid
25 future controversy with respect to the river, and those

1 are the lands that are under the river.

2 If I could reserve --

3 JUSTICE GINSBURG: And there was in fact in
4 this project, was there not, there was required dredging
5 of 1.24 million cubic yards of submerged soil that would
6 be --

7 MR. FARR: That's true.

8 JUSTICE GINSBURG: -- on the Delaware side
9 of the boundary?

10 MR. FARR: That's true. Although I might
11 point out that, as the Weggles Declaration says in the
12 record -- and I can get a citation to that in a moment,
13 it's in our brief -- that actually is a relatively small
14 amount compared to much dredging that went on prior to
15 1905.

16 JUSTICE GINSBURG: I thought this extended
17 out more than any prior exercise of riparian rights.

18 MR. FARR: In the Delaware River, I believe
19 that is correct.

20 JUSTICE GINSBURG: Yes. This was going to
21 be 2,000 feet, and the greatest extension up until then
22 was between 500 and 600.

23 MR. FARR: I'm not -- I think the second
24 figure may be short. But nonetheless, I don't argue
25 with the premise.

1 CHIEF JUSTICE ROBERTS: Thank you, Mr. Farr.

2 MR. FARR: Thank you, Mr. Chief Justice.

3 CHIEF JUSTICE ROBERTS: Mr. Frederick.

4 ORAL ARGUMENT OF DAVID C. FREDERICK

5 ON BEHALF OF THE DEFENDANT

6 MR. FREDERICK: Thank you, Mr. Chief

7 Justice, and may it please the Court:

8 Our position can be summarized in two words:

9 Boundaries matter. Boundaries determine where States
10 can make grants of land, and they determine where a
11 State can exercise its police powers. And with respect
12 to both principle, the Special Master got it exactly
13 right. Nothing in Article VII or elsewhere in the
14 Compact of 1905 precludes the State of New Jersey from
15 exercising its police powers within the boundary
16 determined by this Court in its 1934 boundary decision.
17 And, in fact, at 291 --

18 JUSTICE STEVENS: May I just interrupt right
19 there, Mr. Frederick? Do you contend that they may no
20 longer build wharves that go beyond the State line?

21 MR. FREDERICK: No. Our position is that --

22 JUSTICE STEVENS: Well, then boundries don't
23 matter completely.

24 MR. FREDERICK: No, they can -- under
25 Delaware law, a riparian owner in New Jersey can extend

1 past the low-water mark as has been permitted by New
2 Jersey, by Delaware in every single instance since 1961
3 when Delaware enacted subaqueous land laws, except the
4 two times where New Jersey riparian owners sought to
5 violate Delaware's laws by building LNG facilities: In
6 1972 when the El Paso Company sought to build an LNG
7 facility and was denied by Delaware and New Jersey
8 acquiesced in that denial, and then in 2005 when
9 Delaware made the status determination that the Crown
10 Landing facility was a prohibited bulk transfer facility
11 precluded by Delaware law.

12 JUSTICE SOUTER: What if Delaware took the
13 position that there simply is the maximum amount of
14 allowable building in the river, and from now on it will
15 not, in fact, agree to grant, authorize, whatever the
16 title is, any further wharves and piers on New Jersey's
17 side? Does Delaware have the authority to do that?

18 MR. FREDERICK: Delaware can exercise its
19 police authority as --

20 JUSTICE SOUTER: It's passed a statute.

21 MR. FREDERICK: Yes.

22 JUSTICE SOUTER: Is the statute effective?

23 MR. FREDERICK: The statute is not effected
24 in the hypothetical that you give. Nothing in Delaware
25 subaqueous land laws goes to clutter, visual or

1 otherwise, on the bank.

2 JUSTICE SOUTER: I'm talking about a new
3 statute. Delaware says enough is enough; no more wharfs
4 and piers from the New Jersey side. Is that statute
5 effective and enforceable?

6 MR. FREDERICK: That statute would be
7 subject to Delaware takings law, and Delaware has found
8 that --

9 JUSTICE SOUTER: But, Mr. Frederick, if
10 the -- if the legislature of Delaware passes that
11 statute, I assume they intend it to mean what it says.
12 And as against a claim by New Jersey or on behalf of a
13 New Jersey grantee, is that Delaware statute effective?

14 MR. FREDERICK: It depends. Justice Souter,
15 it depends.

16 JUSTICE SOUTER: It depends on what?

17 MR. FREDERICK: The Constitution of the
18 United States and the constitution of Delaware. A
19 private --

20 JUSTICE SOUTER: Forget the Federal right
21 now. We're talking about construing a compact. So far
22 as this Compact is concerned, so far as the domestic
23 laws of the two states, New Jersey and Delaware, are
24 concerned, would the Delaware statute be effective?

25 MR. FREDERICK: The Delaware statute would

1 not be affected by the 1905 Compact, Justice Souter,
2 because Delaware would assert presumably, if defending
3 that law, that it was subject to regular police power
4 restrictions. But those police power restrictions --

5 JUSTICE SOUTER: I'm not asking you what
6 Delaware would say. I think I can imagine what Delaware
7 would say. I want to know whether Delaware would
8 prevail when it got here --

9 MR. FREDERICK: No.

10 JUSTICE SOUTER: -- in your view?

11 MR. FREDERICK: I don't think that Delaware
12 would prevail on a blanket prohibition of the exercise
13 of riparian rights by New Jersey landowners.

14 JUSTICE SOUTER: Why?

15 MR. FREDERICK: Because Delaware has always
16 permitted the exercise of riparian rights because --

17 JUSTICE SOUTER: Well, that is before there
18 was all these wharves were out here, and Delaware is now
19 saying the facts have changed.

20 MR. FREDERICK: Delaware certainly has the
21 power, under our theory of the case as recommended by
22 the Special Master, to implement its police powers.
23 Those police powers are always subject to constitutional
24 constraints. And under the hypothetical you posed, as
25 extreme as it is, Justice Souter, the Constitution, both

1 under Delaware law and under the United States
2 Constitution, might well say the State has gone too far
3 in exercising its police --

4 JUSTICE KENNEDY: It seems to me you're
5 running away from the hypothetical. I have the question
6 that Justice Souter has, basically to what extent does
7 concurrent jurisdiction apply, what are the limits that
8 we will apply in later cases to implement this concept
9 of concurrent jurisdiction? In the laws of some States
10 you can't overburden an easement. If you give a power
11 company an easement, it can't put huge 300-foot
12 structures on the easement without taking -- is that the
13 kind of analysis that we have to apply in order to make
14 your concurrent jurisdiction and the Master's concurrent
15 jurisdiction theory work?

16 MR. FREDERICK: I'm not sure that you would
17 need to go that far, certainly in light of the practical
18 realities of the 150 years of shared use of the Delaware
19 River, Justice Kennedy.

20 Importantly, under New Jersey's theory, to
21 go to your hypothetical, Justice Souter, where the
22 entire bed of the river within the Twelve-Mile Circle
23 would be built out, that would be a functional
24 abrogation of this Court's boundary decision, because
25 this Court held that the land under the piers was not

1 belonging to New Jersey and that an attempt to extend
2 the entire boundary outward, water-ward, would be
3 overriding what this Court determined was the --
4 easement.

5 JUSTICE SOUTER: But again, you're changing
6 the hypothetical. Your answer, I -- the answer that you
7 just gave, I presume would be the same whether Delaware
8 had passed any particular statute regarding wharfage
9 from the New Jersey side or whether it had -- you were
10 giving an answer which took into consideration the
11 Compact but which basically depended upon we'll call it
12 the general riparian law.

13 The question, however, is the effectiveness
14 of a Delaware statute directed specifically to this
15 issue that says "no more."

16 MR. FREDERICK: That becomes a dormant
17 Commerce Clause problem, Justice Souter.

18 JUSTICE SCALIA: He is asking about under
19 this thing. Forget about the Commerce Clause. And it's
20 obvious what the purpose of the hypothetical is. You're
21 saying that to give you the right to wharf out does not
22 mean that you can use the wharf for any purpose that's
23 contrary to the police power prescriptions of Delaware.
24 That is reasonable enough.

25 Well, what if one of the police power

1 prescriptions is you can't have a wharf? Now, you know,
2 can you flatly contradict what Article VII says? And I
3 really think you ought to give that one away.

4 (Laughter.)

5 MR. FREDERICK: Justice Scalia, under a
6 broad theory of where the boundary is in matters, it
7 would require New Jersey to have access to grant
8 Delaware lands. And under our theory as accepted by the
9 Special Master, that would not be permitted. If it is
10 simply a question of use, we would acknowledge that the
11 New Jersey riparian owner can --

12 JUSTICE ALITO: I think you're eliminating
13 the right to wharf out. Before 1905, New Jersey was
14 allowing the construction of wharves, isn't that
15 correct?

16 MR. FREDERICK: There were only two proven
17 in the record, Justice Alito, and neither of which was
18 proved in this record to go beyond the low-water mark.
19 But, yes, you're right.

20 JUSTICE SCALIA: It was a wharf that didn't
21 go beyond a low-water mark?

22 MR. FREDERICK: Yes. Parts of the Twelve
23 Mile Circle --

24 JUSTICE SCALIA: What did they do, jump onto
25 the land?

1 (Laughter.)

2 MR. FREDERICK: No. In parts of the Twelve
3 Mile Circle, Justice Scalia, particularly in Gloucester
4 County, there's marshy area where the low-water area
5 extends hundreds of feet into the river. And that is
6 where the boundary is -- is determined. And it was not
7 necessary in some places within the Twelve Mile Circle
8 to go beyond the low-water mark in order to build a
9 pier --

10 JUSTICE ALITO: Isn't it true -- we can look
11 and see what was authorized or not before 1905. But
12 isn't it true that the ability to wharf out is a classic
13 American -- a classic riparian right --

14 MR. FREDERICK: Certainly.

15 JUSTICE ALITO: -- under U.S. law?

16 MR. FREDERICK: Certainly.

17 JUSTICE ALITO: And in deciding whether to
18 allow someone to wharf out, the State with jurisdiction
19 would decide whether the wharf was consistent with State
20 objectives, safety objectives, interference with
21 navigation and so forth?

22 MR. FREDERICK: Yes, Justice Alito.

23 JUSTICE ALITO: And Article VII says that
24 each State on its own side of the river may continue to
25 make conveyances of riparian rights. So why doesn't

1 that mean that each State is continued -- continues to
2 have the ability to authorize the wharfing out and to
3 decide whether particular wharves are consistent with
4 the State's police powers?

5 MR. FREDERICK: The last part of your
6 question, Justice Alito, is where the rub lies, because
7 riparian law was subject to the individual determination
8 of what a riparian right was, and how the State's
9 regulation of that right as a private property right
10 would be determined. What this Court's cases uniformly
11 hold is that the police power trumps that private
12 riparian right, and this was recognized by the attorney
13 general for New Jersey.

14 JUSTICE ALITO: If you separate these two,
15 then the riparian right is worthless, is it not?

16 MR. FREDERICK: I beg your pardon?

17 JUSTICE ALITO: It's worthless if you
18 separate those two.

19 MR. FREDERICK: No.

20 JUSTICE ALITO: If you say, New Jersey can
21 authorize wharfing out, except Delaware can say you
22 can't wharf out, because it's inconsistent with our
23 police power, then -- then the authorization to allow
24 wharfing out is meaningless.

25 MR. FREDERICK: No, because wharfing out is

1 always dependent on whether or not it is so far into the
2 river to impede the navigable channel, to become a
3 nuisance, and none of the cases by this Court talking
4 about wharfing rights concern the police powers issued
5 by the State. *Cummings v The City of Chicago* held that
6 the Federal riparian right given to the wharf owner in
7 Chicago was not -- could not override a State's
8 determination of how the wharf could be built, that
9 police power. *Hudson v McCarter* --

10 JUSTICE KENNEDY: But that assumes that
11 there is going to be a wharf. You want us to say that
12 the police power means that there cannot be a wharf if
13 New Jersey says no.

14 MR. FREDERICK: No.

15 JUSTICE KENNEDY: And that seems to me
16 inconsistent. If Delaware says no.

17 MR. FREDERICK: Justice --

18 JUSTICE KENNEDY: That seems to me
19 inconsistent with saying that New Jersey has a right to
20 wharf out.

21 MR. FREDERICK: We are not going that far,
22 Justice Kennedy. What we are saying --

23 JUSTICE KENNEDY: I don't know where -- what
24 -- where do you draw the line, what is your distinction?

25 MR. FREDERICK: A wharf that impedes

1 navigation is a nuisance that is subject to classic
2 police power restrictions. A wharf that does not have
3 any of those consequences is permitted and Delaware has
4 permitted those wharves. In fact even recently when the
5 State of New Jersey petitioned to Delaware to obtain a
6 permit for the Fort Mott State Recreational Park,
7 Delaware granted that to them.

8 JUSTICE SCALIA: So a wharf that is just
9 ugly is okay. Your answer to Justice Souter is,
10 Delaware can't say no more wharfs.

11 MR. FREDERICK: Delaware cannot say no more
12 wharfs, but that doesn't answer the question that's
13 really at the rub of this case, which is what you do on
14 the wharf.

15 CHIEF JUSTICE ROBERTS: So we here decide --
16 under your view the case comes down to whether or not
17 use of the wharf for a liquified natural gas terminal is
18 a traditional riparian right.

19 MR. FREDERICK: And all of the law and
20 evidence suggests that it is not. In fact, the riparian
21 grants that New Jersey issued after its Wharf Act of 18
22 never contained a specification of use. They admitted
23 in the record --

24 CHIEF JUSTICE ROBERTS: So let's say
25 Delaware, it's not liquified natural, gas but it's, you

1 know, bulk shipments. Is that a traditional riparian
2 right that Delaware could not prohibit or is it
3 something that it could prohibit?

4 MR. FREDERICK: Delaware has permitted that.
5 The Keystone facility allows for bulk shipments of coal
6 to be delivered and offloaded within the Twelve Mile
7 Circle.

8 JUSTICE KENNEDY: Under your view a riparian
9 right exists only to say whether there should be a
10 wharf. The -- the State with jurisdiction over the
11 riparian right has no interest in what's going to happen
12 on that wharf, or what the wharf is going to look like?

13 MR. FREDERICK: They are distinctive rights.
14 It's like -- it's like zoning laws, Justice Kennedy.
15 You can own a piece of land but that does not mean that
16 you can override the police powers of the State by what
17 you do on land.

18 JUSTICE ALITO: Well, what's the point you
19 just made that Delaware can't permit a coal wharf but it
20 cannot prohibit a liquified natural gas wharf?

21 MR. FREDERICK: Delaware's Subaqueous Lands
22 Act makes that distinction.

23 JUSTICE ALITO: No, but --

24 MR. FREDERICK: As a matter of police power
25 --

1 JUSTICE ALITO: -- not what Delaware will do
2 or did do. Can it, could it do that?

3 MR. FREDERICK: Delaware has to --

4 JUSTICE ALITO: Could Delaware prohibit a
5 coal wharf?

6 MR. FREDERICK: It -- yes. It could. That
7 if -- if it were deemed to be a proper exercise of its
8 police authority, yes, it could.

9 JUSTICE SOUTER: Well, that's the question.

10 MR. FREDERICK: And the answer, Justice
11 Souter, is not decided by the facts on the case here but
12 rather on the individual circumstances. I appreciate
13 that there are hypotheticals that --

14 JUSTICE SOUTER: Then your answer to Justice
15 Alito is, tell me more about the circumstances and I
16 will then give you an answer.

17 MR. FREDERICK: Indeed. Because there are
18 constitutional constraints. There are dormant Commerce
19 Clause considerations.

20 CHIEF JUSTICE ROBERTS: No. So what we want
21 to know is whether or not there are constraints in the
22 Compact.

23 MR. FREDERICK: The Compact does not contain
24 the constraints, the Attorney General of New Jersey
25 recognized it, and this is at the appendix starting at

1 905 of the Delaware appendix. In 1867 in New Jersey,
2 Attorney General Robeson issued a very lengthy and
3 scholarly opinion on the difference between the powers
4 that a State could exercise over riparian rights, and he
5 distinguished in that opinion between what he called the
6 great public uses, which would be for defense, for the
7 environment, for protection of the people's safety, and
8 what were deemed to be public uses. Those who would be
9 using those riparian lands for a railway bridge or a
10 terminal that would be for commercial purposes.

11 And he said that in the instance of the
12 great public uses, there would not be a need to pay
13 compensation because that great public right overrode
14 the riparian proprietor's exercise of riparian right.
15 With respect to the public use, however, and this is at
16 page 910 to 911 Delaware's appendix, he said that with
17 respect to those public uses, there might be a
18 requirement for a taking or a payment of compensation.

19 And so Justice Souter, I appreciate that our
20 position has a frustration, in the sense that it does
21 require individual facts. But I would submit to you
22 that in the 160 years in which the -- New Jersey
23 citizens have been wharfing into the Delaware River,
24 Delaware has permitted that in every single instance,
25 except two. And there are both liquified natural gas

1 facilities.

2 JUSTICE GINSBURG: It's rather recent that
3 Delaware has gotten into the business of regulating at
4 all. I thought that for most of this period until the
5 '60s, Delaware just wasn't doing anything unless
6 something was a nuisance, and that didn't come up.

7 MR. FREDERICK: It is correct that Delaware
8 regulated by the common law, Justice Ginsburg, but as
9 the Special Master correctly found just because the
10 limitation under the FX judicial precedents is for
11 nuisances does not mean there is no regulation. When
12 Delaware chose to override its common law riparian
13 jurisdiction by implementing statutes, New Jersey
14 acceded to them to the point that in its consideration
15 of coastal zone management laws in the 1970s, the
16 attorney general of New Jersey was specifically
17 consulted whether compliance with the Federal statute
18 and Delaware statutes was necessary.

19 And in 1980 issued a coastal zone management
20 plan, New Jersey did -- that recognized that if there
21 was an LNG facility, the agreement of both states was
22 necessary. The deponents in this case, every single one
23 of them from the New Jersey side, including persons who
24 had worked for the State for nearly 30 years, said that
25 the entire time they had worked for the State, if the

1 project crossed the boundary there had to be a permit
2 obtained from the State of Delaware. We would submit
3 that the constant --

4 CHIEF JUSTICE ROBERTS: A permit -- a permit
5 for the project or a permit for the wharf?

6 MR. FREDERICK: If the wharf extended beyond
7 the boundary line, Mr. Chief Justice, a permit for the
8 wharf, and that permit --

9 CHIEF JUSTICE ROBERTS: Well, then what does
10 the 1905 Compact give New Jersey?

11 MR. FREDERICK: It gives New Jersey the
12 right to say who shall be the riparian owners to
13 exercise their rights, what they can do, and up to the
14 point where there would be an encroachment of the police
15 power of the State, the permission to do that.

16 JUSTICE KENNEDY: What case -- and I could
17 ask Mr. Farr the same question -- do I consult in order
18 to give content to the term riparian rights? Where can
19 I see what the substance of riparian rights is, in the
20 -- in the decisions of this Court or in other leading
21 decisions.

22 MR. FREDERICK: The leading decision of this
23 Court, Justice Kennedy, is a case called Shively v
24 Bowlby, which was decided a few years before the 1905
25 Compact; and in that case this Court went through an

1 exhaustive determination to show what the riparian
2 rights were, State by State by State. The purpose there
3 was to determine whether or not an Oregon riparian land
4 owner had rights that were consistent under Oregon
5 common law with those granted in a deed by Congress, and
6 in order to do that the Court went through a very long
7 examination and analysis of riparian rights as they
8 existed in all --

9 JUSTICE SCALIA: If I understand you
10 correctly, Mr. Frederick, you say that the -- that the
11 police power of Delaware, despite Article VII, includes
12 the power to require you to get a license before you can
13 wharf out from the New Jersey Shore?

14 MR. FREDERICK: I'm saying yes, that under
15 Delaware's -- no, it's --

16 JUSTICE SCALIA: In other words, Delaware
17 can say no you can't wharf out unless, you get a license
18 from us, despite Article VII.

19 MR. FREDERICK: If it goes beyond the
20 boundary, that is the position New Jersey --

21 JUSTICE SCALIA: Of course it goes beyond
22 the boundary. If it --

23 MR. FREDERICK: They have --

24 JUSTICE SCALIA: If the other side of the
25 boundary you don't need Article VII. New Jersey can

1 allow anything to be done up to -- up to the low water
2 mark, but you're saying that despite Article VII
3 Delaware can say no, you cannot wharf out until you get
4 a license from us?

5 MR. FREDERICK: Yes. There are prohibited
6 uses, Justice Scalia.

7 JUSTICE SCALIA: Oh --

8 MR. FREDERICK: You have to get a license
9 under New Jersey law, too, and that's the whole point of
10 State officials by New Jersey saying compliance had to
11 be with both laws.

12 JUSTICE SCALIA: You've just read Article --
13 Article VII out of the Compact.

14 MR. FREDERICK: No.

15 JUSTICE SCALIA: It gives nothing to New
16 Jersey.

17 MR. FREDERICK: It protects the New Jersey
18 landowners who in the interregnum between the 1905
19 Compact and this Court's boundary determination would
20 have faced the uncertainty that their grants would be
21 deemed puerperous by Delaware.

22 What this Court said in its boundary
23 decision was that the mere use of those was recognized
24 by Delaware under the common law, was not deemed to be a
25 nuisance, but in this Court's decision in *Coffee versus*

1 Groover, a grant made by a state that does not have
2 lawful title to the land would be deemed invalid. That
3 case, which was decided in the late 1880s, invalidated
4 grants that had been made by the State of Florida at a
5 time when the boundary was uncertain. And this Court
6 said that those grants were invalid in light of the
7 uncertain title that the State had when it made those
8 grants.

9 JUSTICE ALITO: Why wouldn't Delaware's
10 police power allow it to require the demolition of all
11 existing wharfs?

12 MR. FREDERICK: Those would be deemed
13 takings, Justice Alito.

14 JUSTICE SCALIA: That's fine. They can do
15 it.

16 MR. FREDERICK: But it can be acquired by
17 compensation, yes.

18 JUSTICE SCALIA: So long as it pays.

19 MR. FREDERICK: Yes.

20 CHIEF JUSTICE ROBERTS: What's left under
21 your reading of Virginia v. Maryland? I understood that
22 case to say -- I mean it's the same thing, the Maryland
23 boundary goes to the low-water mark on the Virginia
24 shore. Yet this Court held that that did not include
25 police power to prevent the particular riparian use at

1 issue there.

2 MR. FREDERICK: The decision in Virginia v.
3 Maryland is distinguishable in a number of ways, and if
4 I could take a moment to go through those ways.

5 The first is that it involved a different
6 Compact with different language. The 1785 Compact
7 between Virginia and Maryland specifically provided that
8 each -- the citizens of each State shall have "full
9 property in the shores of the Potomac River." The court
10 construed the phrase "full property" to include riparian
11 rights.

12 JUSTICE SCALIA: Excuse me. New Jersey does
13 not have full property in the shore of the Delaware?

14 MR. FREDERICK: Yes.

15 JUSTICE SCALIA: Well, then that's no basis
16 for distinguishing. What else is there?

17 MR. FREDERICK: The Black-Jenkins award
18 issued to resolve the boundary line was decided in 1877.
19 And in that arbitration decision, Maryland specifically
20 represented that the boundary should be drawn around the
21 wharves that were on the Virginia side of the boundary
22 so that the boundary, instead of being at the low-water
23 mark, would carve out every pier that had been
24 constructed.

25 The arbitrators rejected that, but in the

1 process provided that the riparian owners on the
2 Virginia side could go beyond the low-water mark -- that
3 is a direct quote -- "beyond the low-water mark to
4 exercise their riparian rights." Congress --

5 CHIEF JUSTICE ROBERTS: That's the case here
6 as well. There's no doubt that New Jersey under the
7 Compact has the right to grant riparian rights,
8 including wharfing out, that go beyond the low-water
9 mark.

10 MR. FREDERICK: The doubt here, Mr. Chief
11 Justice, is what the phrase "own side" means. And we
12 think the better reading of own side is captured by the
13 grants part of the Special Master's recommendation is
14 that own side means the boundary. But to the extent
15 that a right can be exercised, a riparian right
16 authorized by New Jersey beyond the low-water mark, it
17 is still subject to the police powers.

18 And at page 10 of the Special Master's
19 report in Virginia v. Maryland, the Special Master
20 specifically said this case does not concern the
21 exercise of the police powers, but rather the mere
22 withdrawal of the water. There is no issue here as to
23 the types of general police powers that would apply to
24 the riparian right.

25 And finally, I would note that the Special

1 Master was the same. He was uniquely positioned in this
2 case to assess the applicability of Virginia v. Maryland
3 because he had been the special master in that case,
4 too.

5 JUSTICE STEVENS: I don't understand the
6 difference between withdrawing water as not being
7 subject to the police powers. That could mean they
8 could drain the river, in effect.

9 MR. FREDERICK: Well, what the court held
10 and what was decided in that case was that the taking of
11 the water by Virginia was not to the level where it
12 would give rise to the kind of police concern that
13 Maryland might express. The court left that issue open.

14 JUSTICE SCALIA: I don't understand that.
15 It's up to Maryland what's a concern. If Maryland
16 doesn't want any water taken, why isn't that a valid
17 exercise of Maryland's police power?

18 MR. FREDERICK: It would be a valid
19 exercise, but I was answering Mr. Chief Justice's
20 question about what is left of it. And the question,
21 what is left of it is that Virginia can continue to
22 withdraw water from the Potomac River. Whether there
23 should be a problem in the future about overwithdrawing
24 or an exercise --

25 CHIEF JUSTICE ROBERTS: As I understand our

1 decision in Virginia v. Maryland it's that withdrawing
2 of the water is a carve out of Maryland's police power
3 that would otherwise apply.

4 MR. FREDERICK: It would -- it would be a
5 limited carve out, that is correct.

6 CHIEF JUSTICE ROBERTS: Right. Now why
7 isn't there a limited carve out on the New Jersey side
8 of similar riparian rights? In other words, New Jersey
9 has the authority to authorize wharfing out and to that
10 extent, it's a carve out of Delaware's police power.

11 MR. FREDERICK: It is a limited carve out to
12 the extent of permitting the wharfing out, Mr. Chief
13 Justice. But that --

14 JUSTICE SCALIA: You don't even acknowledge
15 that. You deny even that. You have said that Delaware
16 can prevent the wharfing out and say you can't wharf out
17 unless you get a license from us.

18 MR. FREDERICK: If it is a nuisance you
19 cannot get a license. That is classic riparian law,
20 Mr. -- Justice --

21 JUSTICE SOUTER: Well, I understood your
22 earlier answer to be exactly what Justice Scalia said.
23 Are you now saying that Delaware can prevent it only on
24 the grounds of preventing a nuisance?

25 MR. FREDERICK: I'm saying yes. That would

1 be a classic exercise of riparian --

2 JUSTICE SOUTER: I'm not saying whether that
3 would be a classic exercise. Is that the only
4 circumstance in which it can be exercised, or
5 conversely, does Delaware have the authority to say no
6 simply because it says no?

7 I thought your answer the first time around
8 finally was the latter. It can say no. And I think
9 that's what my brother Scalia thought.

10 Now are you saying it can say no only if
11 there is a nuisance or some other specified reason?

12 MR. FREDERICK: Let me try it this way. As
13 a limitation of a riparian right, the State of Delaware
14 can limit the length of the wharf, whether the wharf
15 goes in ordinary circumstances, but as to a prohibition,
16 it cannot do so unless it is a nuisance as a matter of
17 riparian jurisdiction. As a matter of police power --

18 JUSTICE GINSBURG: I don't.

19 JUSTICE SCALIA: Wait. He is not done. As
20 a matter of police power, however, they can do anything?

21 MR. FREDERICK: No. The State can limit the
22 activities that can occur on the wharf. And that is the
23 crucial distinction here.

24 JUSTICE SOUTER: And it can limit it, I
25 presume, subject to some reasonable rule of health and

1 safety?

2 MR. FREDERICK: That's correct.

3 JUSTICE SOUTER: Okay. It simply cannot say
4 as a matter of legislative view case no more wharfs?

5 MR. FREDERICK: That's correct.

6 JUSTICE ALITO: Who decides whether it's a
7 nuisance? If Delaware says that docking a sailboat is a
8 nuisance, who decides that? Does all of this have to be
9 decided by us in original cases?

10 (Laughter.)

11 MR. FREDERICK: Typically the Corps of
12 Engineers determines that issue as a matter of
13 application of the 1899 Rivers and Harbors
14 Appropriations Act. Section 10 of that act, Justice
15 Alito, the Corps of Engineers has the authority to
16 determine whether or not a docking or wharfing in a
17 navigable waterway of the United States would constitute
18 a nuisance to --

19 JUSTICE GINSBURG: But you're not talking
20 about nuisance. You're talking about Delaware's
21 environmental laws. That's what this project concerns.

22 MR. FREDERICK: That's correct.

23 JUSTICE GINSBURG: And you were saying
24 Delaware's environmental laws trump whatever riparian
25 right New Jersey can grant?

1 MR. FREDERICK: The environmental laws would
2 apply to the project. The position of Delaware is not
3 that BP can't build its wharf. It's that it can't
4 engage in a prohibited use on that wharf. The wharf
5 itself is not a nuisance. It does not violate any
6 normal standard of riparian use.

7 JUSTICE KENNEDY: Could the State of New
8 Jersey allow the wharf to be built for some unspecified
9 purpose, just let it stick out there until it decides
10 what it wants to do with it?

11 MR. FREDERICK: As I matter of both States'
12 laws, Justice Kennedy, that's not how either state does
13 it. Both States now require as part of the
14 environmental --

15 JUSTICE KENNEDY: I'm asking a hypothetical,
16 could it do that? It would seem to me that would be a
17 very stupid riparian use, but could it do that?

18 MR. FREDERICK: I think that, yes, it could
19 do that if its intent was to achieve access to the
20 navigable waterway. But both states, both New Jersey,
21 outside the Twelve-Mile Circle, and Delaware apply
22 police powers now so that permits have to be required
23 when --

24 CHIEF JUSTICE ROBERTS: How does that work?
25 What if New Jersey says to the wharf owners you must

1 dredge around your wharf because we think it's -- you
2 know, silt is depositing, and Delaware says you may not
3 dredge around your wharf because we think it's going to
4 disturb the oysters? Who -- how do you concur
5 jurisdiction work in that case?

6 MR. FREDERICK: That is an easy one, Mr.
7 Chief Justice, because New Jersey has conceded that it
8 does not have the authority to regulate dredging within
9 the Twelve Mile Circle.

10 CHIEF JUSTICE ROBERTS: Well, it's something
11 they do have the authority to regulate.

12 MR. FREDERICK: That's the point. Riparian
13 jurisdiction is quite limited. It concerns only certain
14 aspects of the riparian owner's access to the waterways,
15 and that limitation of that property right has been
16 recognized for centuries by this Court and others
17 courts.

18 JUSTICE GINSBURG: You used the word
19 "riparian jurisdiction." We have riparian rights.
20 That's a familiar term. Riparian jurisdiction which is
21 used in Article VII is a novelty.

22 MR. FREDERICK: That's correct, Justice
23 Ginsburg. I'm using it in the term that the Special
24 Master did it, which is the State's jurisdiction to
25 govern the exercise of riparian rights. It is not a

1 term of art.

2 Farnham's treatise, which is another source
3 of where riparian rights traditionally have been
4 recognized, did not use that phrase, and the parties
5 could not find any --

6 JUSTICE STEVENS: Mr. Frederick, does the
7 riparian right include the right to dump refuse or
8 sewage into a river?

9 MR. FREDERICK: It is a -- yes, it is a part
10 of the classic riparian right, intakes and discharges,
11 Justice Stevens.

12 JUSTICE STEVENS: And even though that would
13 create a nuisance across the river, you could -- they
14 still would have -- who would trump? Who would prevail?

15 MR. FREDERICK: The police power would
16 prevail on that, because what you dump is what -- is
17 where everything matters. If the dumping is simply
18 water that doesn't have any ecological effects, that --

19 JUSTICE STEVENS: No, I'm assuming something
20 that pollutes the river.

21 MR. FREDERICK: That would be subject to the
22 environmental laws. That's classic police power
23 recognized by this Court in Hudson v. McCarter.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Mr. Frederick.

1 Mr. Farr, you have three minutes remaining.

2 REBUTTAL ARGUMENT OF H. BARTOW FARR

3 ON BEHALF OF THE PLAINTIFF

4 MR. FARR: Thank you, Mr. Chief Justice.

5 May I just say two things, and, first of all, something
6 that we haven't really talked about this morning.

7 With respect to matters of nuisance and all,
8 Federal law provides a substantial array of laws: The
9 Clean Water Act, the Clean Air Act, the Coastal Zone
10 Management Act, the Rivers and Harbors Act, all of those
11 things.

12 Anything built out from New Jersey has to
13 undergo Federal review; and, subject to the Compact,
14 Delaware has rights to participate at that Federal
15 level. So what we are talking about here, and what the
16 bill of complaint deals with, is the question of whether
17 Delaware can do what it did here, which is apply its
18 State law enacted under its police power to say that a
19 proposed project, riparian project, for the New Jersey
20 side is impermissible and cannot be built. So we are
21 dealing just with the law of State versus State.

22 Now -- so I'd like to suggest if -- if we
23 put ourselves in the shoes of the Commissioners who were
24 negotiating this Compact in 1905, what is the likely
25 reaction if Article VII -- if, now, Delaware had

1 proposed at the time that, instead of the language as it
2 is now, at the end of Article VII the words were added
3 "subject to the police power of the other State"?

4 New Jersey obviously would have had the
5 reaction to that that that is something that depends on
6 the boundary. There is no chance that New Jersey is
7 going to be able to exercise any police power on the
8 Delaware side, because there is no boundary dispute that
9 would involve that.

10 So this would essentially be a one-way veto
11 that Delaware would be trying to add to the contract to
12 say: Could we -- we'll be able to override any riparian
13 structure under our police power.

14 JUSTICE SCALIA: It's a one-way pass. Why
15 shouldn't it be a one-way veto?

16 MR. FARR: Well --

17 JUSTICE SCALIA: It doesn't give Delaware
18 anything.

19 MR. FARR: Well, except for the fact that,
20 again, if we put ourselves in their shoes, it seems to
21 me what New Jersey would say is: If you are proposing
22 that you can veto all of our riparian projects using
23 your police power because of your view of the boundary,
24 why are we dismissing the case that we just filed, or
25 filed in 1877 --

1 JUSTICE KENNEDY: You are saying that the --

2 MR. FARR: --to determine the boundaries?

3 JUSTICE KENNEDY: You are saying that the
4 concept of "riparian rights" displaces the police power,
5 to a large extent.

6 MR. FARR: To the extent that the exercise
7 of the police power is inconsistent with the power of
8 the State, the authority of the State, to authorize a
9 pier or wharf for the purposes for which piers and
10 wharves are used, which is the loading and unloading of
11 goods.

12 If that is what the State -- if that is what
13 New Jersey has done, that is not subject to an override
14 or a veto by Delaware exercising its police power. I
15 mean this was an important value at the time that the
16 Compact was enacted, and New Jersey would not have
17 lightly let Delaware veto it.

18 CHIEF JUSTICE ROBERTS: Mr. Farr, can I ask
19 you a question as purely a --

20 MR. FARR: Of course.

21 CHIEF JUSTICE ROBERTS: -- matter of
22 curiosity? The parties talk about the Duke of York's
23 grant to William Penn in this case, but nobody ever
24 explains where Delaware came from. How did that --
25 where did Delaware -- I mean a grant to William Penn is

1 Pennsylvania. Where -- when did Delaware --

2 MR. FARR: Oh, there were -- I think there
3 were further grants along the process and further
4 division of -- of territory. I think some of that is
5 actually explained in New Jersey v. Delaware, too. I
6 may be leading you in the wrong direction, but I don't
7 think so.

8 CHIEF JUSTICE ROBERTS: Thank you. The case
9 is submitted.

10 (Whereupon, at 12:06 p.m., the case in the
11 above-entitled matter was submitted.)

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