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SUPREME COURT OF THE UNITED STATES

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NEW JERSEY *v.* DELAWARE

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

No. 134, Orig. Argued November 27, 2007—Decided March 31, 2008

This is the third original action between New Jersey and Delaware involving the boundary along the Delaware River (or River) separating the two States. The first action was settled by a compact the two States approved in 1905, and Congress ratified in 1907 (1905 Compact or Compact). See *New Jersey v. Delaware*, 205 U. S. 550 (*New Jersey v. Delaware I*). The 1905 Compact addressed fishing rights but did not define the interstate boundary line. Two provisions of the Compact sowed the seeds for further litigation. Article VII provided: “Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature.” But Article VIII added: “Nothing herein . . . shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.” The second action, resolved by this Court in 1934, conclusively determined the location of the interstate boundary: Delaware owned “the river and the subaqueous soil” within a twelve-mile circle centered on New Castle, Del., “up to [the] low water mark on the easterly or New Jersey side”; south of the twelve-mile circle, the middle of the River’s main ship channel marked the boundary. *New Jersey v. Delaware II*, 291 U. S. 361, 385.

The current controversy was sparked by the Delaware Department of Natural Resources and Environmental Control’s (DNREC) refusal to grant British Petroleum permission to construct a liquefied natural gas (LNG) unloading terminal projected to extend beyond New Jersey’s shore some 2,000 feet into Delaware territory. DNREC determined that, under Delaware’s Coastal Zone Act (DCZA), the proposed terminal would be an “offshore bulk product transfer facilit[y]” as well as a “heavy industry use,” both prohibited by the Act. New Jersey commenced this action, seeking a declaration that Article VII

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of the 1905 Compact gave it exclusive regulatory authority over all projects appurtenant to its shores, including wharves extending past the low-water mark on New Jersey's side into Delaware territory. Delaware's answer asserted that, under, *inter alia*, Article VIII of the Compact and *New Jersey v. Delaware II*, it had regulatory authority, undiminished by Article VII, over structures located within its borders. On cross-motions for summary judgment, the Special Master filed a report recommending a determination by this Court that the "riparian jurisdiction" preserved to New Jersey by Article VII is not exclusive and that Delaware has overlapping jurisdiction, within the twelve-mile circle, to regulate improvements outshore of the low-water mark on the New Jersey side of the River. New Jersey filed exceptions.

Held: Article VII of the 1905 Compact did not secure to New Jersey *exclusive* jurisdiction over all riparian improvements commencing on its shores; New Jersey and Delaware have overlapping authority to regulate riparian structures and operations of extraordinary character extending outshore of New Jersey's domain into territory over which Delaware is sovereign. Pp. 8–23.

(a) The Court rejects New Jersey's argument that Article VII, which accords each State "riparian jurisdiction of every kind and nature," bars Delaware from any encroachment upon New Jersey's authority over improvements extending from New Jersey's shore. Pp. 8–16.

(1) The novel term "riparian jurisdiction," as used in Article VII, is properly read as a limiting modifier and does not mean "exclusive jurisdiction." "[R]iparian jurisdiction" has never been a legal term of art, and appears to be a verbal formulation the 1905 Compact negotiators devised specifically for Article VII. Elsewhere in the 1905 Compact—most notably, in Article VIII—the more familiar term "jurisdiction" or "exclusive jurisdiction" appears. Attributing to "riparian jurisdiction" the same meaning as "jurisdiction" unmodified, or equating the novel term with the formulation "exclusive jurisdiction," would deny operative effect to each word in the Compact. See *United States v. Menasche*, 348 U. S. 528, 538–539. Presumably drafted in recognition of the still-unresolved boundary dispute, Article VIII requires an express statement in the Compact in order to "affect the territorial . . . jurisdiction of either State . . . over the Delaware River." The Court resists reading the uncommon term "riparian jurisdiction," even when aggrandized by the phrase "of every kind and nature," as effectuating a transfer to New Jersey of Delaware's entire "territorial . . . jurisdiction . . . over [the portion of] the Delaware River [in question]." Pp. 10–11.

(2) A riparian landowner ordinarily enjoys the right to build a

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wharf to access navigable waters far enough to permit the loading and unloading of ships. But that right, New Jersey agrees, is subject to state regulation for the protection of the public. New Jersey sees itself, however, as the only State empowered to regulate, for the benefit of the public, New Jersey landowners' exercise of riparian rights. Commonly, the State that grants riparian rights also has regulatory authority over their exercise. But the 1905 Compact's negotiators faced an unusual situation: As long as the boundary issue remained unsettled, they could not know which State was sovereign within the twelve-mile circle beyond New Jersey's shore. They likely knew, however, that "[t]he rights of a riparian owner [seeking to wharf out into] a navigable stream . . . are governed by the law of the state in which the stream is situated." *Weems Steamboat Co. of Baltimore v. People's Steamboat Co.*, 214 U. S. 345, 355. With the sovereignty issue reserved by the 1905 Compact for another day, it is difficult to gainsay the Special Master's conclusion that Article VII's reference to "riparian jurisdiction" did not mean "exclusive jurisdiction." Endeavoring to harmonize Article VII with the boundary determination, the Special Master concluded that Article VII's preservation to each State of "riparian jurisdiction" gave New Jersey control of the riparian rights ordinarily and usually enjoyed by landowners on New Jersey's shore. But once the boundary line at low water is passed, the Special Master further concluded, New Jersey's regulatory authority is qualified. Just as New Jersey cannot grant land belonging to Delaware, New Jersey cannot authorize activities that go beyond the exercise of ordinary and usual riparian rights in the face of contrary regulation by Delaware. Pp. 12–16.

(b) An 1834 compact between New Jersey and New York establishing the two States' common Hudson River boundary casts informative light on the 1905 New Jersey-Delaware Compact. Similar to the boundary settled in *New Jersey v. Delaware II*, the 1834 accord located the New Jersey-New York boundary at "the low water-mark on the . . . New Jersey side [of the Hudson River,]" 4 Stat. 710. Unlike the 1905 Compact, however, the 1834 agreement expressly gave New Jersey "the *exclusive right* of property in and to . . . land under water" and "*the exclusive jurisdiction of and over the wharves, docks, and improvements . . . on the shore of the said state . . .*," *ibid.* (emphasis added). Comparable language is noticeably absent in Article VII of the 1905 Compact, while other provisions of the Compact appear to have been adopted almost verbatim from the 1834 New Jersey-New York accord. New Jersey, therefore, could hardly claim ignorance that Article VII could have been but was not drafted to grant it "exclusive jurisdiction" (not merely "riparian jurisdiction") over wharves and other improvements extending from its shore into navigable wa-

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ters. Pp. 16–17.

(c) *Virginia v. Maryland*, 540 U. S. 56, 75—in which this Court held that a Maryland-Virginia boundary settlement gave Virginia “sovereign authority, free from regulation by Maryland, to build improvements appurtenant to [Virginia’s] shore and to withdraw water from the [Potomac] River”—provides scant support for New Jersey’s claim. As the Special Master explained, the result in *Virginia v. Maryland* turned on the unique language of the 1785 compact and 1877 arbitration award there involved. The 1785 compact addressed only “the right [of the citizens of each State] to build wharves and improvements regardless of which State ultimately was determined to be sovereign over the River,” *id.*, at 69. Concerning the States themselves, the 1877 arbitration award that settled the boundary was definitive. See *id.*, at 75. By recognizing in that award Virginia’s right, “*qua* sovereign,” “to use the River beyond low-water mark,” *id.*, at 72, the arbitrators manifested their intention to safeguard Virginia’s authority to construct riparian improvements outshore of the low-water mark free from regulation by Maryland. By contrast, neither the 1905 Compact nor *New Jersey v. Delaware II* purported to give New Jersey all regulatory oversight (as opposed to only “riparian jurisdiction”). Pp. 17–19.

(d) Delaware’s claim to regulatory authority is further supported by New Jersey’s acceptance (until the present controversy) of Delaware’s jurisdiction over water and land within its domain to preserve the quality and prevent deterioration of its coastal areas. When New Jersey sought federal approval for its coastal management program, it made the representation—fundamentally inconsistent with its position here—that any New Jersey project extending beyond mean low water within the twelve-mile circle would require coastal permits from both States. The DNREC, with no objection from New Jersey, had previously rejected as a prohibited bulk transfer facility an earlier request to build a LNG terminal extending from New Jersey into Delaware. The DNREC issued permits for each of the three structures extending from New Jersey into Delaware built between 1969 and 2006, one of them undertaken by New Jersey itself. Even during the pendency of this action, New Jersey applied to Delaware for renewal of the permit covering the portion of New Jersey’s project that extended into Delaware. Pp. 19–22.

(e) Nowhere does Article VII “expressly set forth,” in Article VIII’s words, Delaware’s lack of any governing authority over territory within the State’s own borders. The Special Master correctly determined that Delaware’s pre-1971 “hands off” policy regarding coastal development did not signal that the State never could or never would assert any regulatory authority over structures using its subaqueous

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land. In the decades since Delaware, pursuant to the DCZA, began to manage its waters and submerged lands, the State has followed a consistent course: Largely with New Jersey's cooperation, Delaware has checked proposed structures and activity extending beyond New Jersey's shore into Delaware's domain in order to protect the natural environment of its coastal areas. Pp. 22–23.

(f) Given the authority over riparian rights preserved for New Jersey by the 1905 Compact, Delaware may not impede ordinary and usual exercises of the right of riparian owners to wharf out from New Jersey's shore. The project British Petroleum sought to construct and operate, however, goes well beyond the ordinary or usual. Delaware's classification of the proposed LNG unloading terminal as a "heavy industry use" and a "bulk product transfer facilit[y]" under the DCZA has not been, and hardly could be, challenged as inaccurate. Consistent with the scope of Delaware's retained police power to regulate certain riparian uses, it was within that State's authority to prohibit construction of the LNG facility. P. 23.

Delaware's authority to deny British Petroleum permission to construct the proposed LNG terminal confirmed; New Jersey's exceptions overruled; and the Special Master's proposed decree entered with modifications consistent with the Court's opinion.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, SOUTER, and THOMAS, JJ., joined, and in which STEVENS, J., joined as to paragraphs 1(c), 2, 3, and 4 of the Decree. STEVENS, J. filed an opinion concurring in part and dissenting in part. SCALIA, J., filed a dissenting opinion, in which ALITO, J., joined. BREYER, J., took no part in the consideration or decision of the case.