No. 120, Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF NEW YORK,
Defendant.

OFFICE OF THE SPECIAL MASTER

FINAL REPORT OF THE SPECIAL MASTER

MARCH 31, 1997

PAUL R. VERKUIL
Special Master

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES — Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

No. 120, Original

STATE OF NEW JERSEY,
Plaintiff,
v.
STATE OF NEW YORK,
Defendant.

OFFICE OF THE SPECIAL MASTER

FINAL REPORT OF THE SPECIAL MASTER

I. OVERVIEW AND PROCEDURAL HISTORY

A. Summary Of The Issues And Recommended Decision

Pursuant to the original jurisdiction of the Court, U.S. Const. art. III, § 2, 28 U.S.C. § 1251(a), the issues in this case are:

1. Is the State of New Jersey or the State of New York sovereign over the landfilled portion of Ellis Island (sometimes "the Island")?

2. To determine the answer to the issue posed in paragraph 1 above, what is the sovereign boundary between the States of New Jersey and New York (the "States") under the Compact of 1834?

3. If New Jersey is sovereign over the landfilled portion of Ellis Island, did New York nonetheless acquire sovereignty over the landfilled portion of the Island after 1834, either by prescription and acquiescence, or by laches?

4. If New Jersey vindicates her sovereign claim, how should the sovereign boundary on the present Island be drawn between the States given that survey information about the 1834 Island is inherently imprecise?

Pursuant to the authority accorded me as Special Master in this case, *see New Jersey v. New York*, 115 S. Ct. 309 (1994), I recommend the following:

1. The sovereign boundary of the States on Ellis Island lies at the division between New York's "original" Island (to the low-water mark, an area of just under 5 acres) and New Jersey's landfiled additions (an area of about 22.5), as more particularly set out in paragraph 4 below.

2. The sovereign boundary between the States is set out in Article First of the Compact of 1834, which draws a boundary line down the middle of the Hudson River, "of the bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay."

3. Since the Compact of 1834, New Jersey has exercised jurisdiction over her sovereign territory on Ellis Island, and she has not acquiesced in New York's isolated acts of prescription over the landfilled portions of Ellis Island.

4. In the interest of practicality, convenience, and fairness, New York's sovereign claim to the original Ellis Island is best vindicated by according her an area of land that estimates the size of the original Island to the low-water mark but reconstitutes it as an area including the entire Main Building and land immediately surrounding it, as more particularly set out in the survey to accompany the final recommendation to the Court.

B. Summary And Overview Of This Recommendation

The State of New Jersey initiated this original action on April 23, 1993 by her motion for leave to file a complaint against the State of New York.[1] In her pleadings, New Jersey asks the Court to adjudicate her sovereign boundary with the State of New York as it relates to Ellis Island under the Compact of 1834 ("Compact" or "Compact of 1834"), an agreement entered into law in both States and approved by the United States Congress as part of the Act of June 28, 1834. 4 Stat. 708 (1834); 1834 N.Y. Laws 8; 1833-34 N.J. Laws 118 (reproduced as App. A). The dispute is about those portions of the Island (roughly 24.5 acres of the total 27.5 acres of fast land) added by landfill since the Compact was drawn, nearly all of which was added by the United States during its use of the Island as the nation's principal immigration center in the late nineteenth and early twentieth cen-

---

[1] Mot. for Leave To File Compl., Compl., and Br. in Supp. of Mot. for Leave To File Compl. ("N.J. Mot. for Leave"; "N.J. Compl."; "N.J. Br. in Supp. of Mot. for Leave") (Apr. 26, 1993) (Docket Item No. ("DI") 1).

The United States Constitution provides that "[i]n all cases . . . in which a State shall be a party the Supreme Court shall have original jurisdiction." Art. III, § 2, cl. 2.

turies.[2] The present Island is over nine hundred percent larger than the fast land of the original Island.

New Jersey described her claim at the start of this case:

> The State of New Jersey and the State of New York presently have a dispute concerning which state has jurisdiction over the approximate 24.5 acres of filled land of Ellis Island for the purposes of taxation, zoning, environmental protection, elections, education, residency, insurance, building codes, historic preservation, labor and public welfare laws, civil and criminal law, and for all other purposes related to the jurisdiction of any state.

N.J. Mot. for Leave ¶ 12. This is consistent with New Jersey's claims during trial. She opened her case by stating:

> In this action, the State of New Jersey seeks a declaration that the portions of Ellis Island created by artificial fill are within the boundaries of New Jersey and subject to its sovereignty and jurisdiction. . . .
>
> New Jersey's claims are based upon the Compact of 1834, an agreement that was reached by New

---

[2] Ellis Island was one of three islands in upper New York Bay, known as the Oyster Islands, during colonial times. It has been called many different names:

> The 3-acre island now called Ellis was purchased from the Indians by the Dutch in 1630 to reward Michael Paauw (Paw) for shipping goods to the emerging colony. Variously known as [Kioshk or] Gull Island to the [Mohegan] Indians, Dyre's or Bucking Island in the late 17th and early 18th century, and Gibbet or Anderson's Island in the pre-revolutionary period because of hangings of traitors and pirates there, its present name is derived from Samuel Ellis who had come into possession of the island by 1785.

Harlan D. Unrau, U.S. Dep't of Interior/Nat. Park Serv., Historic Resource Study: Ellis Island, Statue of Liberty National Monument, New York-New Jersey 2 (1984) (Def.'s Ex. ("DE") 74).

> Jersey and New York to resolve a longstanding boundary dispute.

Trial Transcript ("Tr.") 7/10/96 at 10 (Mr. Yannotti for New Jersey).

New York initially opposed the jurisdiction of the Court over this action, asserting that the "claims by New Jersey are inaccurate, overstated, and insufficient to state a controversy which warrants an exercise of jurisdiction by this Court." Br. in Opp'n to Mot. for Leave to File Compl. ("Br. in Opp'n to Mot. for Leave") at 15 (June 24, 1993) (DI 2). In her answer, following the Court's assumption of jurisdiction, New York agreed that this dispute arose under the Compact of 1834. She stated:

> While the provisions of the 1834 Compact established the general boundary line between the two States as the middle of New York Bay (Article I), that boundary was modified by several exceptions, both general and specific. Under Article Two, New York was to "* * * retain its present jurisdiction of and over Bedlow's and Ellis' islands * * *"; under Article Three, New York was to have "exclusive jurisdiction" over all waters of the bay and of the lands covered by said waters subject to certain rights of New Jersey. The Compact did not limit New York's sovereignty over Ellis Island to a fixed geographic dimension.

Answer ¶ 20 (July 15, 1994) (DI 8). New York agreed that "Ellis Island was approximately three acres in size when the boundary . . . was established by compact in 1834." *Id.* ¶ 2. At trial, New York set forth her modified theory, noting that

> by virtue of the 1834 Compact, New York granted and New Jersey accepted a generous settlement where New Jersey received for the first time the right to own all of the property under the water

> located on its side of the Hudson River and New York Bay and the right to govern exclusively its existing wharfs and docks extending *below the low water mark on its shoreline,* as well as those wharfs and docks which would be later added by New Jersey.

Tr. 7/10/96 at 74 (emphasis added) (Ms. Kramer for New York).

The States' dispute over Ellis Island occurs within the framework of a larger border controversy that has been simmering, and periodically boiling, since the mid-seventeenth century. Historic English land grants were the genesis for creating what became the States of New Jersey and New York. In 1664 King Charles II of England granted part of New Netherlands (named earlier by the Dutch) to James, Duke of York. The Duke of York that same year granted part of those lands, the area west of Long Island and Manhattan Island " 'bounded on the east part by the main sea, and part by Hudson's River' " to Lord Berkeley and Sir George Carteret, the original proprietors of New Jersey. N.J. Statement of Undisputed Facts ¶¶ 1-2 (attached to N.J. Mot. for Summ. J.) (Mar. 5, 1996) (Pl's Ex. ("PE") 484) (citation omitted). The grant thus formed the colony—later the State—of New Jersey. *Id.* ¶ 2; *see also* Aff. of James P. Shenton for the State of N.J. in Supp. of Mot. for Summ. J. ¶ 10 (Mar. 5, 1996) (PE 487).[3]

New York and New Jersey seem to have always been at odds over whether the Duke of York intended the conveyance to be bounded by the Hudson River but not to include it, as New York argues, or whether the States were granted equal access to and sovereignty over the Hudson River, as New Jersey maintains. Before the

---

[3] Mr. Shenton's affidavit in support of New Jersey's motion for summary judgment, described in the record as his "Trial Affidavit," is referred to as "Shenton Summ. J. Aff."

Compact of 1834 was signed, the States negotiated their boundary disagreement thrice—in 1807, 1827, and 1833. As the historical context is the fabric on which the Compact of 1834 was embroidered, this Report describes it in some detail. This background is crucial to understanding what was resolved in 1834 between the States' commissioners negotiating the boundary issues.

As much as any one historical event, the advent of the steamboat in the early nineteenth century—and its impact on commerce on the Hudson River and the Bay of New York—forced the States to resolve their conflicting claims. The necessity of delineating intrastate and interstate commerce led to New Jersey's suit against New York in this Court in 1829. *See New Jersey v. New York*, 28 U.S. (3 Pet.) 461 (1830). Ellis Island was not an issue in that suit, as New Jersey conceded in her Bill in Equity that the Island had become New York's by adverse possession:

> [W]hile the said two states were Colonies, New York became wrongfully possessed of Staten island and the other small islands in the dividing waters between the two states . . . [which] had been since acquiesced in. . . . New York has no other pretense of title to said lands but adverse possession; that, as such possession has been uniformly confined in its exercise to the fast land thereof . . . .

In re Devoe Mfg. Co., 108 U.S. 401, 407 (1883) (describing bill in equity filed in the 1829-30 *New Jersey v. New York* case). The *New Jersey v. New York* lawsuit prompted the 1833 settlement negotiations between commissioners from New Jersey and New York that ultimately led to the Compact of 1834.

Article First of the Compact draws the boundary between the States down the middle of the Hudson River and the Bay of New York. Subsequent terms of the Compact declare some jurisdictional detours. It is undis-

puted that Ellis Island lies on New Jersey's side of the boundary set forth in Article First. Article Second of the Compact, however, retains for New York her "present jurisdiction" over Ellis Island; this phrase has caused much consternation. New York relies upon it to assert claims to the entire Island as presently configured. New Jersey does not contest that New York has sovereignty over Ellis Island as it existed at the time of the Compact, but she interprets "present" as a limitation on size (excluding the significant filled portions subsequently created by the United States) and also as a limitation on jurisdiction (which New York shared with the United States at the time of the Compact negotiations).

The dispute between the States is interwoven with the history of the United States's presence on Ellis Island. Even before the Compact was drawn, New York ceded jurisdiction of Ellis Island to the federal government for fortification purposes, subject to New York's continued jurisdiction to serve process. 1800 N.Y. Laws 7. New York conveyed title to the fast lands of the Island to the federal government in 1808. 1808 N.Y. Laws 278; *see also* Stipulated Facts ¶ 1 (July 10, 1996) (DI 338a). A reverter clause in the conveyance—that was never exercised by New York, *see* Tr. 7/10/96 at 82-83—provided that New York could reclaim the Island "if the Federal government no longer used it for safety or defensive purposes." 1808 N.Y. Laws at 279. The federal government then built Fort Gibson on Ellis Island before the War of 1812.

In the 1880s the federal government transferred Ellis Island to the Department of the Treasury for use as an immigration station. The federal government enlarged the Island by about 24.5 acres of landfill between 1890 and 1934, purchasing title to the tidal submerged lands around Ellis Island by way of a recorded deed from New Jersey in 1904. N.J. Stat. Ann. §§ 12:3-1, *et seq.* (West 1990). The main landfill additions took the form of one

expanded and two additional land masses, the former often known as "Island Number One" and the latter as "Island Number Two" and "Island Number Three." The three land masses were later consolidated into one by landfill.

In 1954 the federal government ceased using Ellis Island, either as an immigration station or detention center. After lengthy hearings on its future use, in which representatives from both States were actively involved, the United States included the Island within the Statue of Liberty National Monument, administered by the National Park Service. The United States has title to all but about 0.57 acres of the expanded Ellis Island.[4]

Two steps are required to draw the boundary on Ellis Island: first, determination of the sovereign boundary between the States as it was drawn in 1834; and second, resolution of the boundary on Ellis Island itself. New York's evolving theories of sovereignty in this case require that both of these boundaries be established. Initially,

---

[4] A stipulation presented to the Special Master on the final day of trial states:

> In response to a question posed by the Court inquiring whether the filled portions of Ellis Island extend beyond the bounds of the 1904 grant from New Jersey to the United States, the parties stipulate to the following:
>
> 1. .572 acres along the seawall on the northeast side of Ellis Island as it existed on October 13, 1995 are outside of the bounds of the 1904 grant.
>
> 2. As of October 13, 1995, the outside face of the seawall on the western portion of Ellis Island behind the area of the ferry house was approximately ⅛ of an inch over the 1904 grant line on the northeastern corner of the seawall. As the seawall moves in a southwesterly direction its placement outside of the 1904 grant line gradually increases until it reaches a point where it is 57/100 of a foot, or 6⅞ inches, outside of the 1904 grant on the southwestern corner of the seawall.

Stipulation (Aug. 15, 1996) (DI 353a); *see also* Marchuk Aff. ¶ 11 (Aug. 7, 1996).

New York argued that under Article Second of the Compact she was given jurisdiction over the entire Ellis Island, by virtue of "present jurisdiction." Her theory was that New Jersey was granted only underwater property rights to the middle of the Hudson River and, once those were conveyed by deed in 1904 to the federal government, New Jersey forfeited all claims to the filled portions of the Island. By that theory, New Jersey's sovereign claims were limited by her shoreline, subject to wharfing-out rights.[5]

After trial, New York modified her theory. She argued that Article First of the Compact, which draws the boundary line down the middle of the Hudson River and New York Bay "except as hereinafter otherwise particularly mentioned," creates what amounts to a boundary theme in the Compact, and that, pursuant to that theme, boundary has five different meanings:

> But New Jersey is wrong [that boundary equals sovereignty]. . . . The truth is, as the record shows, boundary does not have to equal sovereignty, and in this case, with reference to the Compact of 1834, it clearly does not rule along the 20 miles of its length.
>
> In fact, a close examination of the 1834 Compact shows that there are five meanings of the term boundary as it is used in Article I, and that its meaning changes at various geographical points referred to in the Compact.

---

[5] Actually, New York has described New Jersey's sovereign line as "extending below the low water mark on its shoreline." Tr. 7/10/96 at 74 (Ms. Kramer for New York); *see also* Tr. 8/15/96 at 4123. There is, of course, no possible line of legal demarcation between sovereigns "below the low water mark," but this description apparently tied into New York's theory of the boundary as being on New Jersey's eastern shore and based upon New Jersey's wharfing-out rights. New Jersey, according to that theory, can change the boundary at will by wharfing-out below the low-water mark without New York's consent (subject only to federal navigational laws). *See infra* Part IV.B.2.a.(2).

Tr. 8/15/96 at 4098 (Ms. Kramer for New York); *see* App. C (graphic representation of the five different meanings of boundary under the Compact of 1834, produced by New York during closing arguments at trial).

Under this interpretation of the Compact, the boundary line divides sovereign territory only at the very top of the Hudson River "from the Bergen Rockland border . . . to the tip of Manhattan." Tr. 8/15/96 at 4100 (Ms. Kramer for New York). In the section of the Hudson River encompassing Ellis Island, however, "by the express terms of the Compact, New York has exclusive jurisdiction over the whole of the Hudson River and New York Bay to the low water mark on the New Jersey shore." *Id.* Therefore, in analyzing the sovereign boundary under the Compact of 1834, New York in effect revived her pre-Compact theory of the boundary between the States—namely, that New York has dominion to the low-water mark of New Jersey's shore (or below the low-water mark, *see supra* note 5), including dominion over an Ellis Island of any size.

New York raises as an affirmative defense the doctrine of prescription and acquiescence. She argues that, even if New Jersey has legal claims to the filled portion of the Island, New York has nevertheless acquired sovereignty over the entire Ellis Island via prescription and acquiescence, or alternatively through laches.

I have concluded that New Jersey has established her territorial claims in the River and Bay and also to the landfilled portion of Ellis Island. My recommendation, therefore, is that Article First of the Compact sets a single sovereign boundary between the States, as opposed to a variable boundary;[6] the remaining articles of the Com-

[6] This Court earlier ruled in a unanimous opinion written by Justice Holmes that "boundary" divided the sovereign territory between New Jersey and New York in the Compact of 1834. *Cen-*

pact describe jurisdictional refinements (wherein each State was accorded some authority within the other's sovereign waters) consistent with Article First's overarching purpose of establishing a territorial division. In making this recommendation, I have recognized that this litigation must resolve not only the sovereign fate of Ellis Island, but also the lingering and in some ways more profound disagreement between the States over the boundary set by the Compact of 1834.

Sovereignty over the landfilled portion of Ellis Island is not determined by the equitable doctrines New York raised as affirmative defenses, largely because New York's efforts to establish prescription and acquiescence are undercut by a dominant reality: the federal government's almost continuous and uninterrupted ownership and control over Ellis Island pre-dating the Compact. I evaluated the evidence of prescription adduced at trial by New York in light of the pervasive federal presence. I find that New York did not meet her burden of proving she acquired the landfilled parts of Ellis Island by prescription and acquiescence during the critical period from 1890, when the federal government launched its landfill program on the Island to develop the immigration station, to 1955, when the federal government abandoned the station on the Island and the subject of future use was launched. After that date, New Jersey's non-acquiescence is beyond cavil.

Relying on the Compact, pre-Compact negotiations between the States' commissioners, and jurisprudence of the Court, I further find that New Jersey and New York intended the low-water mark to define the boundary on Ellis Island. Thus, my recommendation to the Court is that New York has jurisdiction over Ellis Island as it existed when the Compact was drawn, to the low-water

---

tral R.R. Co. v. Mayor of Jersey City, 209 U.S. 473 (1908). *See infra* Part IV.B.2.b.(2)(a).

mark thereof, while New Jersey has jurisdiction over the landfilled portion added to her sovereign territory by avulsive or sudden action, such as landfill, after the Compact was drawn. The evidence from trial suggests that any accretive or slow, natural changes to the Island from 1833 (when the Compact was drawn) to the 1890s (when landfill began) are negligible. *See* table *infra* Part VII.B.2. Thus, the focus is on the 1833 Island.

As set forth in Part VII below, I urge the Court take into account well-established and compelling practical and equitable considerations in dividing the States' sovereign territories on Ellis Island consistent with the analysis set out above. A solution that respects history and original bargains, but does not pretend that they can be applied mechanically one hundred and sixty years later, is the best outcome. The final stage in this proceeding will be to draw New York's portion of Ellis Island on a map, *see infra* Part VII.B.3., and then to have the States jointly survey that area so as to produce for the Court a metes and bounds description capable of immediate implementation once this proceeding is final.

C. Procedural History

1. *The Complaint And Responses*

New Jersey's prayer for relief asked the Court to enter a decree "declaring the true and correct boundary line between the State of New Jersey and the State of New York on Ellis Island." N.J. Compl. at 15. New Jersey requested that the Court declare the boundary "to be the former mean high water line of the original natural island, approximately 3 acres in size" leaving the "original island . . . within the territory and jurisdiction of the State of New York" and the rest of Ellis Island—the portion added by landfill—within New Jersey's "territory and jurisdiction." *Id.* New Jersey also asked the Court to

enjoin New York permanently "from enforcing its laws or asserting its jurisdiction within the filled portions of Ellis Island." *Id.*

New Jersey described the questions she raised as "a serious and long-standing dispute between New York and New Jersey concerning the location of their common boundary on Ellis Island, in the Hudson River and Upper New York Bay." N.J. Br. in Supp. of Mot. for Leave at 19. She complained that New York was "expand[ing her] governmental authority over the filled portion of Ellis Island" as a result of a fairly recent opinion issued by the United States Court of Appeals for the Second Circuit, which applied New York's workers' compensation law to the filled portions of Ellis Island. *Id.* at 20 (citing *Collins v. Promark Prods., Inc.*, 956 F.2d 383 (2d Cir. 1992)). New Jersey also pointed to development proposals for the filled areas of Ellis Island that might be funded by New York as necessitating "immediate resolution . . . of the boundary dispute." N.J. Compl. at 3.

New York opposed New Jersey's motion for leave to file a complaint. Br. in Opp'n to Mot. for Leave. She argued that New Jersey had failed to allege facts "sufficient to describe a serious current controversy." *Id.* at 14. She described the "claims by New Jersey [as] inaccurate, overstated, and insufficient." *Id.* at 15. She urged that judicial economy thus weighed in favor of denying the motion. *Id.* at 20-22. After reviewing the history of Ellis Island and its jurisdiction, New York argued that New Jersey had engaged in a "lengthy history of acquiescence to New York's sovereignty," *id.* at 16, and that New Jersey's "alleged assertions of jurisdiction are facially insufficient to establish a claim over the Island," *id.* at 18. In particular, New York argued:

> Conspicuously lacking in this list [of assertions of jurisdictions by New Jersey] are instances of legis-

> lative or sovereign action by that State over any portion of the Island remotely comparable to the electoral, judicial, tax, and other claims made by New York. These random and isolated claims of jurisdiction simply do not amount to an attempt by New Jersey "for many decades to resolve the issues concerning Ellis Island. . . ." They comprise instead stark evidence of the lengthy indifference of New Jersey to the Island in the face of extensive claims by New York during this period.

Id. (quoting N.J. Br. in Supp. of Mot. for Leave). Finally, New York denied allegations that she was expanding her jurisdiction over Ellis Island as a consequence of the *Collins* decision. *Id.* at 18-20.

The United States filed an amicus brief, also urging the Court to deny New Jersey's motion for leave to file a complaint. Noting that the "political boundary in the area of New York Bay and the Hudson River" had been in dispute between New Jersey and New York "[s]ince the founding of the United States," Br. for the United States as Amicus Curiae ("U.S. Br.") at 2 (Apr. 28, 1994) (DI 6), the United States argued that its own ownership and use of Ellis Island left "very little, if any, practical conflict between New York and New Jersey arising from activities on the island." *Id.* at 9. It pointed to the 1808 conveyance by New York of all her " 'right, title and interest' " in Ellis Island, the 1880 cession by New York of her " 'right and title' to and 'jurisdiction over' " submerged lands surrounding Ellis Island, among other islands, for wharfing, docking, and other purposes, and the 1904 conveyance by New Jersey for value of " 'all [her] right, title, claim and interest of every kind' " to underwater land around Ellis Island. *Id.* at 5. The United States urged the Court to await "a more concrete controversy respecting some aspect of state authority." *Id.* at 13.

Over these objections, this Court granted New Jersey leave to file the complaint on May 16, 1994. *New Jersey v. New York*, 114 S. Ct. 1828 (1994). New York filed her answer on July 15, 1994. She admitted that the States entered into the Compact of 1834, establishing a boundary between them and assigning property and jurisdictional rights. She further admitted that in 1834 Ellis Island "was approximately three acres in size" and that subsequent expansion by artificial fill caused "the Island [to be] approximately 27.5 acres in size." Answer ¶ 2. New York claimed that the entire Island was within her own "territorial and sovereign jurisdiction," *id.*, and stated that her "Landmarks Preservation Commission [had] declared Ellis Island to be a New York City landmark on November 16, 1993," *id.* ¶ 3.[7] New York defended her alleged jurisdiction over the Island under the terms of the Compact of 1834. She raised as an affirmative defense the doctrine of prescription and acquiescence. *Id.* ¶¶ 17-26.

This matter was referred to me as Special Master on October 11, 1994.[8] I met with the parties on November

---

[7] New Jersey filed her motion for leave to file a complaint against New York several months earlier, on April 26, 1993. I have excluded from discovery and trial any testimony concerning acts of prescription by either State subsequent to the launching of this litigation. It is my view that acts of prescription taken after the Complaint was filed are inherently self-serving and unreliable. *See* Tr. of Apr. 4, 1996 Prehearing Telephone Conference Concerning an Exchange of Letters between N.J. and N.Y. at 10 (Apr. 8, 1996) (DI 267).

[8] The Court's Order referring the matter to me states in relevant part:

> It is ordered that Paul Verkuil, Esquire, of Heathrow, Florida, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to

3, 1994 for a preliminary status conference, to tour Ellis Island and its facilities, and to develop the first litigation management order controlling the schedule in this case. *See* Tr. of Status Conference (Nov. 3, 1994) (DI 13); *see also* Litigation Management Order No. 1 (Dec. 2, 1994) (DI 19). During February 1995, with the States' approval, Saône B. Crocker, a partner in the District of Columbia law firm of Wright & Talisman, P.C., began to assist me.[9]

The States' counsel prosecuted their cases efficiently and effectively and it has been a pleasure to work with them. Pre-trial practice was conducted according to schedules contained in five additional litigation management orders [10] that were developed with the States during regular status conferences held on Ellis Island.[11] The States pro-

---

call for. The Special Master is directed to submit such reports as he may deem appropriate.

New Jersey v. New York, 115 S. Ct. at 309.

[9] This is an appropriate point for me gratefully to acknowledge the exemplary and indispensable service of Ms. Crocker on this case. Her experience in original cases has been invaluable. I also want to recognize the dedicated research efforts and other contributions of Ted Normand, Esq. (Univ. of Penn. Law 1995) and the organizational efforts at trial of Jonathan Boies (Tulane Law 1997).

[10] Litigation Management Order No. 2 (May 15, 1995) (DI 85); Order Revising Litigation Management Order No. 2 (July 26, 1995) (DI 120); Second Amended Litigation Order No. 2 (Aug. 22, 1995) (DI 144); Litigation Management Order No. 3 (Sept. 29, 1995) (DI 165); Litigation Management Order No. 4 (Jan. 31, 1996) (DI 223); Litigation Management Order No. 5 (Mar. 22, 1996) (DI 249); and Litigation Management Order No. 6 (May 21, 1996) (DI 291).

[11] On the following dates, status conferences were convened among the parties and amici: Nov. 3, 1994 (Ellis Island) (DI 13); Mar. 16, 1995 (by telephone) (DI 52); Mar. 20, 1995 (Ellis Island) (DI 71); Apr. 25, 1995 (National Archives, Wash., D.C.) (DI 77); May 16, 1995 (by telephone) (DI 88); June 23, 1995 (Phil., Pa.) (DI 117); July 19, 1995 (Ellis Island) (DI 128);

ceeded to trial in just over two and a half years from the date we first convened.

After being denied intervention status at my recommendation, *New Jersey v. New York*, 115 S. Ct. 1996 (1995),[12] the City of New York actively participated in the case as an amicus. *See* Decision and Op. of Special Master on Mot. of N.Y. City for Leave to Intervene as Party-Defendant (Apr. 28, 1995) (DI 70) (inviting New York City to participate as an "active" amicus). Subsequently, I also granted the City of Jersey City's motion to participate in this case as an active amicus. Decision, Op. and Order of Special Master on Mot. of the City of Jersey City for Leave to Participate as Active Amicus Curiae (Nov. 21, 1995) (DI 192). In addition, at her request, I granted Hudson County, New Jersey amicus brief filing privileges; several other amici were granted permission to file briefs on the cross-motions for summary judgment and after trial. *See* Order Granting Mot. of Hudson County for Leave to File a Br. as Amicus Curiae (Oct. 19, 1995) (DI 180); Br. of Amici Curiae National Trust for Historic Preservation, N.Y. Landmarks Conservancy, Municipal Art Society of N.Y., Preservation League of N.Y. State and Historic Districts Council (Mar. 25, 1996) ("Preservation Amici Br.") (DI 256).[13]

Aug. 17, 1995 (Ellis Island) (DI 149); Nov. 1, 1995 (Ellis Island) (DI 189); Dec. 4, 1995 (Ellis Island) (DI 219); Jan. 30, 1996 (Ellis Island) (DI 222a); Feb. 27, 1996 (by telephone) (DI 238); Mar. 20, 1996 (by telephone) (DI 248); Mar. 11, 1996 (Ellis Island) (DI 261); Apr. 4, 1996 (by telephone) (DI 267); Apr. 11, 1996 (Ellis Island) (DI 271); Apr. 18, 1996 (by telephone) (DI 277); Apr. 25, 1996 (Ellis Island) (DI 288); and May 31, 1996 (U.S. Supreme Court) (DI 303).

[12] The Court had earlier referred to me New York City's Motion to Intervene. *See New Jersey v. New York*, 115 S. Ct. 1352 (1995).

[13] Hudson County and the Preservation Amici were permitted to file briefs but, unlike New York City and the City of Jersey City,

2. *The Cross-Motions For Summary Judgment*

Following more than a year of factual and expert discovery, both New Jersey and New York filed motions for summary judgment.[14] The issues raised by these motions were fully briefed and argued. I held a hearing on summary judgment on Ellis Island on April 11, 1996. *See* Tr. of Summ. J. Hr'g ("Hr'g Tr.") (Apr. 11, 1996) (DI 296).

New Jersey supported her summary judgment claims with affidavits and relied heavily on the interpretation of the Compact of 1834 by New York's high court in 1870. *See People v. Central R.R. Co.*, 42 N.Y. 283 (1870), *appeal dismissed*, 79 U.S. (12 Wall.) 455 (1872). That case gave priority to Article First's establishment of the boundary, holding that the New York courts do not have jurisdiction over the wharves, piers, docks, and other improvements on the New Jersey side of the Hudson River because New York's jurisdiction over the waters under Article Third of the Compact of 1834 is "qualified and limited." *Id.* at 300. The court concluded that "[i]t clearly could not have been the intention in these words [of Article Third] to re-cede to New York what had just been relinquished in respect to the boundary between the two States in the first article or to nullify the force of such article." *Id.* at 296.

---

they were not granted the privileges of "active" amici, which included leave to depose or cross-examine witnesses, file motions, or deliver oral argument at hearings or at trial.

[14] N.J. Mot. for Summ. J.; Shenton Summ. J. Aff.; Castagna Aff. (Mar. 5, 1996) (DI 237); Br. of N.J. in Supp. of Its Mot. for Summ. J. ("N.J. Br. for Summ. J.") (Mar. 5, 1996) (DI 237); N.Y. Notice of Mot. (Mar. 5, 1996) (DI 235); Aff. of Judith T. Kramer in Supp. of N.Y.'s Mot. for Summ. J. ("Kramer Aff.") (Mar. 5, 1996) (DI 235); Aff. of Michael R. Finamore in Supp. of N.Y.'s Mot. for Summ. J. ("Finamore Aff.") (Mar. 5, 1996) (DI 235); Mem. of Law in Supp. of N.Y.'s Mot. for Summ. J. ("N.Y. Mem. for Summ. J.") (Mar. 5, 1996) (DI 235).

New Jersey argued:

> [I]n 1870 . . . the highest state court of New York [held that] . . . the language of Article 3 when it spoke of jurisdiction was not [meant to say] sovereignty, the full range of governmental authority.
>
> What [the framers of the Compact were] speaking to . . . was the limited jurisdiction conferred for police and sanitary jurisdiction and to promote the interest of . . . navigation. . . .

Hr'g Tr. at 15-16 (Mr. Yannotti for New Jersey).

New Jersey also relied on the opinion by Justice Holmes in *Central Railroad Co. v. Mayor of Jersey City*, in which this Court resolved the continuing tax dispute addressed in the 1870 New York State court litigation, holding that New Jersey has authority under the Compact to impose a tax on the underwater lands on her side of Article First's boundary line. Justice Holmes interpreted "boundary" in Article First to mean "sovereignty," an analysis New Jersey has promoted in this case and one which New York has vehemently disputed.

Relying on this Court's holding in *Georgia v. South Carolina*, 497 U.S. 376 (1990), New Jersey argued that the landfill added by the federal government after 1890 caused the size of Ellis Island to be changed by avulsion, not accretion. Under the common law, avulsion does not change the boundary line that was drawn on Ellis Island in 1834 under Article Second of the Compact, according to which New York retained whatever jurisdiction she still had over the original 1833 Island. *See* N.J. Br. for Summ. J. at 53; Hr'g Tr. at 78.

New Jersey also highlighted several instances in which the federal government recognized the filled portions as a part of New Jersey's sovereign territory. She pointed, for example, to a 1904 legal opinion by United States Attorney General William Henry Moody at the time

the United States purchased the tideland deed from New Jersey to start the landfill; a 1963 legal opinion by the General Services Administration; a 1968 National Park Service ("NPS") preliminary master plan for the use of Ellis Island and subsequent statements by the NPS; and the 1992 position taken by the United States in the *Collins* litigation with respect to Article Second of the Compact. *See* N.J. Br. for Summ. J. at 55-58. New Jersey thus implied that the federal government had bolstered repeatedly her interpretation of the terms of the Compact of 1834.

With regard to New York's affirmative defense of prescription and acquiescence, New Jersey took the position that New York "cannot establish that it has been in possession and control of the filled portion of Ellis Island" by virtue of New York's two-time cession of jurisdiction to the United States. Hr'g Tr. at 76. Further, she argued that her own assertion of rights or prescriptive acts and long series of acts of non-acquiescence "created a live and standing dispute." *Id.* at 95-106. Affidavits by two of New Jersey's expert witnesses, the historian for the Immigration and Naturalization Service, Marian L. Smith, and historian James P. Shenton, described New Jersey's acts of non-acquiescence. *See* Aff. of Marian L. Smith for the State of N.J. ("Smith Summ. J. Aff.") (Mar. 26, 1996) (PE 490);[15] Shenton Summ. J. Aff. Both affiants concluded that New Jersey repeatedly asserted her sovereignty over the filled portions of Ellis Island from 1890 to the present. *See* Smith Summ. J. Aff. ¶¶ 72-74, 78, 135-36; Shenton Summ. J. Aff. ¶¶ 7, 19-20, 24, 30-31, 49-53, 55, 79-80, 92.

In her cross-motion for summary judgment, New York interpreted the Compact of 1834 to have separated property rights from jurisdiction, giving New Jersey only the former on her side of Article First's boundary line; this,

[15] Ms. Smith's summary judgment affidavit is also referred to in the record as her trial affidavit.

declared New York, was the " 'great object' " of the Compact. N.Y. Mem. for Summ. J. at 41. She argued that "present jurisdiction" in Article Second qualified only the scope of New York's sovereignty, not its geographical limits. *Id.* at 50; *see also* Preservation Amici Br. at 22-23 (present jurisdiction was meant to be " 'coterminous' with the entity of Ellis Island, no matter how its physical boundaries might change over time").

New York relied on case law in her favor, especially the New Jersey Supreme Court case, *State v. Babcock*, 30 N.J.L. 29 (Sup. Ct. 1862), where Justice Elmer, one of New Jersey's commissioners in the negotiations of the Compact, opined:

> Although, for some purposes, New Jersey is bounded by the middle of the Hudson river, and the state owns the land under the water to that extent, exclusive jurisdiction, not only over the water, but over the land to the low water line on the Jersey shore, is, in plain and unmistakable language, granted to, or rather acknowledged to belong to the state of New York.

Id. at 31-32. New York also pointed to the recent decision in the *Collins* case, in which the Second Circuit held that New York's workers' compensation laws applied to the filled portions of Ellis Island, which "remains a part of New York by acknowledgement of the government and without objection (except in this case) by New Jersey." 956 F.2d at 387.

As to this Court's *Central Railroad* case, New York contended that Justice Holmes erred in equating "boundary" in Article First with "sovereignty." New York declared:

> New York had sovereignty all the way to the high water mark on the Jersey shore. [Justice Holmes] was wrong, therefore, in saying that boundary means

> sovereignty. . . . [Under the Compact] New York retained jurisdiction and sovereignty over the western side of the Hudson River in exchange for which New Jersey got jurisdiction over its own docks, wharves and piers, riparian rights and the right to regulate the fisheries on its side of the border.

Hr'g Tr. at 29 (Mr. Hughes for New York). New York pointed out that, in any event, the *Central Railroad* Court did not have the benefit of New York before it as a party nor a full briefing of Compact negotiations or subsequent history. N.Y. Mem. for Summ. J. at 53.

New York documented her acts of prescription over the Island, including application of her wage levels and laws, workers' compensation laws, safety regulations and specifications, judiciary systems, police services, fire services, and health services. *See id.* at 18-34. New Jersey acquiesced in her prescriptive acts, concluded New York, "and, most importantly, [New Jersey] has never suffused the hearts of every immigrant whose first, precious step onto United States soil caused a tear to spill on the card pinned to his or her lapel which read . . . destination 'New York.' " *Id.* at 68-69.

I denied both motions for summary judgment, without prejudice to renewal at trial, for three reasons. First, many material facts were still in dispute, as ultimately evidenced by post-trial papers. After trial, the States proposed a total of 1,017 findings of fact. *See* New York's Proposed Findings of Fact ("NYPFF") (Oct. 3, 1996) (DI 365); New Jersey's Proposed Findings of Fact ("NJPFF") (Oct. 12, 1996) (DI 366). Prior to trial, they stipulated to eighteen. *See* Stipulated Facts (July 10, 1996) (DI 338a).

Not only had there been little resolution of material facts at that time, but the Court's referral of the case to me compelled a careful examination of all factual issues. *Cf. California ex. rel. State Lands Comm'n v. United*

States, 457 U.S. 273, 278 (1982) (no special master appointed because "[n]o essential facts" were disputed); *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966) (no special master appointed because "no issues of fact were raised in the complaint"). The Court's jurisprudence teaches that, in original jurisdiction cases, full and liberal factual development is important because of the lofty historical, territorial, and financial implications of these cases to the states involved. *See United States v. Texas*, 339 U.S. 707, 715, *modified*, 340 U.S. 848 (1950). I noted that the Court had found a case and controversy, taken jurisdiction, and assigned the case to a Special Master. I thus inferred that the Court believed that factual issues were raised. New York's theory of the case in her motion for summary judgment had not changed from her brief opposing jurisdiction, and those factual issues persisted. *See* Interim Op. of Special Master on Cross-Mots. for Summ. J. ("Interim Op.") at 34-37 (May 9, 1996) (DI 286).

Under the prevailing standards articulated in *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248-50 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986), and *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990), I concluded that "several of the outstanding fact, or mixed fact and law, questions may be reasonably resolved in favor of either party and, indeed, they have been in the past." Interim Op. at 39 (citations omitted).

Second, the Compact of 1834 appeared ambiguous on its face. Not only were New Jersey and New York deducing exactly opposite facial meanings from its terms, but there were counterpoint interpretations from each State's courts. As I saw it, an evidentiary proceeding would introduce extrinsic evidence of Compact history and subsequent Compact operations that would help to clarify its terms.

The parties even disagreed about the nature of the litigation. New Jersey's complaint raised a boundary issue, but during the hearing on summary judgment, New York City, arguing on behalf of New York, asserted that it was a property, not a boundary case:

> It is not conceptually [a boundary case]. It has to do with New York territory that happens to be in the middle of New Jersey territory. It is boundary in the sense of the geographical limitations of a property like an individual riparian property. It is not boundary in the sense of the center line between two states.

Hr'g Tr. at 45-46 (Ms. Helmers, for Amicus New York City arguing for New York).

Finally, although I found New Jersey's evidence of non-acquiescence to be fairly convincing at the time of the summary judgment hearing, I ruled that New York should nevertheless have the opportunity to develop her evidence of prescription during trial. In particular, New York had at that time submitted only post-complaint evidence of her taxing activities on Ellis Island, *see* Finamore Aff., which I advised her would be irrelevant. I noted that she should have the opportunity to introduce timely tax evidence at trial. *See* Interim Op. at 24 n.85, 31. I further concluded with respect to New York's affirmative defense of prescription and acquiescence that New York "will be challenged [during trial] to defend her theory that, despite numerous legislative, administrative and public efforts over the decades to settle the border issues, New Jersey has acquiesced by failing to file a lawsuit before 1993." *Id.* at 31. I denied both States' motions for summary judgment on May 9, 1996.

3. ***The Trial***

Following a pre-trial conference held in the West Conference Room of the United States Supreme Court on

May 31, 1996, the States expeditiously prepared for trial. They filed a Joint Pre-Trial Order (July 8, 1996) (DI 337), which detailed their intended cases, listed proposed stipulated and contested facts, presented the credentials of their intended expert witnesses, and generally set forth the plan for trial.

Pursuant to Litigation Management Order No. 6, by June 10, 1996 both parties had filed various pre-trial motions. New York requested that she be permitted to conduct a voir dire of expert witnesses at trial. *See* Letter from Judith T. Kramer to Paul R. Verkuil (June 4, 1996) (DI 304). New York also objected to the qualifications or scope of expertise of certain of New Jersey's expert witnesses. In particular, New York objected to certain testimony of Ms. Smith, Dr. Shenton, and Mr. Castagna as speculative or irrelevant. New York concluded:

> It is New York's understanding that the purpose of this hearing is to develop as full a factual record as possible for the United States Supreme Court. Accordingly, New York does not believe that preclusion is an appropriate remedy in most instances. However, if the Court is inclined to grant New Jersey's application for preclusion in whole or in part, New York's application for preclusion should also be granted.

Letter from Judith T. Kramer to Paul R. Verkuil Regarding Objections to Expert Ops. at 4-5 (June 10, 1996) (DI 311). New York also objected to certain of New Jersey's documents on various grounds. Letter from Judith T. Kramer to Paul R. Verkuil Regarding Objections to Docs. (June 10, 1996) (DI 311).

New Jersey had earlier moved to exclude portions of expert testimony to be presented by New York experts, Drs. Hershkowitz and Kraut and Mr. Unrau. New Jersey's

bases for requesting exclusion included relevancy and speculation. Mot. of the State of N.J. to Exclude or Limit Expert Test. and to Bar the Admis. of Test. Concerning the Collection of Taxes by the State of N.Y. or the City of N.Y. (Mar. 5, 1996) (DI 237). New Jersey renewed that motion on June 10, 1996 and further objected to the testimony of Dr. Squires as beyond the scope of his expertise. Proposed Joint Final Pre-Trial Order at 14 (June 10, 1996) (DI 309). In addition, New Jersey raised objections to the testimony of several of New York's proposed fact witnesses, *id.* at 10-11, and to certain of New York's documents, *id.*, Ex. E at 3.

In response to those motions or requests I issued an order and memorandum on pre-trial issues. *See* Order and Mem. of Special Master on Pre-Trial Issues (June 21, 1996) (DI 323). I agreed to permit a focused voir dire of the expert witnesses during trial and afforded the parties an opportunity to submit additional qualifications for their expert witnesses before trial. I further denied all motions or requests to limit expert testimony and denied all objections to the testimony of fact witnesses or to documents, subject to renewal at trial.

Shortly before trial, New York requested that she be permitted to amend her pleadings to add the affirmative defense of laches. New York had not raised the defense in her answer, during pre-trial proceedings, or in her motion for summary judgment. I noted this in my interim opinion denying the cross-motions for summary judgment, stating:

> The defense of prescription and acquiescence appears to be a fallback position for New York should she not prevail on her interpretation of the Compact of 1834. At this juncture, her arguments would benefit from stronger references to the relevant facts and law. Finally, she should distinguish between

> acquiescence and laches, as this Court has held that laches is inapplicable to cases of original jurisdiction.

Interim Op. at 51 (citing *Illinois v. Kentucky,* 500 U.S. 380, 388 (1991) (where the Court held the defense of laches inapplicable to boundary disputes in cases of original jurisdiction)).

In response to my request that she distinguish the defense of laches, New York requested that she be permitted to add that defense in the final joint pre-trial order which New York believed "supersedes the pleadings previously filed in this case." N.Y.'s Responses to N.J.'s Objections at 3 (June 12, 1996) (DI 315). New York relied on *Kansas v. Colorado,* 115 S. Ct. 1733 (1995) (an interstate river compact case), which noted that the question of whether laches would apply in a case involving "the enforcement of an interstate compact" was unresolved. *Id.* at 1742.

Although I did not permit New York formally to raise the defense of laches before trial, I did admit evidence of prejudice introduced by New York's experts during trial, *see, e.g.*, Tr. 7/25/96 at 1952-61; Tr. 7/30/96 at 2477-78, and most of the evidence supporting an affirmative defense of laches entered the record as part of New York's proof of acquiescence. Thus, in addition to my legal conclusions, the Court has the factual record it needs to apply the doctrine of laches, should it decide to do so.

Trial was conducted for twenty-three days between July 10 and August 15, 1996. Two days of trial were held on Ellis Island to accommodate those witnesses whose testimony benefitted from being on the scene.[16] New Jersey

[16] The trial created its own historic legacy, as it was apparently the first to be held in the stately venue of the West Conference Room of the United States Supreme Court as well as the first trial held on Ellis Island itself.

proffered the testimony of three fact witnesses and five expert witnesses, including two historians and three scientists. New York put forward eight fact witnesses and five experts—three historians and two scientists. The biographical data for the expert witnesses is contained in the Final Joint Pre-Trial Order.

The trial record yielded over four thousand pages of testimony and just under two thousand documents.

4. *Post-Trial*

The parties submitted memoranda of law and proposed findings of fact. *See* Post-Trial Br. of N.J. ("N.J. Post-Trial Br.") and NJPFF (Oct. 12, 1996) (DI 366); N.Y.'s Post-Trial Mem. of Law ("N.Y. Post-Trial Mem.") and NYPFF (Oct. 3, 1996) (DI 365). Two amicus briefs were filed in support of New York, by the City of New York and by the Preservation Amici respectively. *See* Post-Trial Br. of the City of N.Y., as Amicus Curiae, in Supp. of the State of N.Y. ("The City Post-Trial Br.") (Oct. 12, 1996) (DI 367); Post-Trial Br. of Amici Curiae National Trust for Historic Preservation, N.Y. Landmarks Conservancy, Municipal Art Society of N.Y., Preservation League of N.Y. State and Historic Districts Council ("Preservation Amici Post-Trial Br.") (Oct. 12, 1996) (DI 368). Both New Jersey and New York filed reply memoranda on October 24, 1996. *See* Reply Br. of N.J. ("N.J. Reply") (Oct. 24, 1996) (DI 369); N.Y.'s Reply Mem. of Law ("N.Y. Reply") (Oct. 24, 1996) (DI 370).

In a telephone conference with the parties on November 23, 1996, I encouraged them to meet for settlement negotiations. I then advised the parties that I would continue to prepare this report pending their meeting. Letter from Paul R. Verkuil to Peter Verniero, Attorney General of N.J. and Dennis C. Vacco, Attorney General of N.Y. (Dec. 3, 1996) (DI 375a). Counsel for the parties ad-

vised me in a telephone meeting on January 24, 1997 that the Attorneys General and counsel from both States discussed settlement options on January 15, 1997, but settlement would not be possible.

D. The Role Of The Special Master

In conducting the pre-trial proceedings and the trial itself, and in offering my recommendations to the Court in this report, I was guided by the following principles.

1. *Approach To Procedural Matters*

With respect to the minor discovery disputes that arose before trial and the evidentiary motions brought by the parties during trial, I adopted a flexible approach suggested by Supreme Court Rule 17.2.[17] Relying on the Court's pronouncements, I took a generous view of the admission of evidence and factual development. *See, e.g., United States v. Texas,* 339 U.S. at 715. I generally favored a principle of inclusion over exclusion in creating a record. *See, e.g.,* Tr. 7/30/96 at 2778. This seemed the best course in a proceeding before a special master sitting without a jury, whose task is to prepare a complete picture for this Court to evaluate.

My tendency toward over-inclusiveness prompted objections from both States, in particular New York. Her objections in this respect became increasingly pointed, as her attorneys suggested that I was admitting evidence and testimony in an evenhanded manner. *See, e.g.,* Tr. 7/23/96 at 1610 (Ms. Kramer for New York opines that "I think, frankly, there has been an un-evenhandedness in the rulings here."); Tr. 7/25/96 at 1971 (Ms.

[17] Rule 17.2 addresses procedure in original jurisdiction cases. It states: "The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In all other respects, those Rules and the Federal Rules of Evidence may be taken as guides."

Kramer comments that "[i]t's unusual" when New York prevails on an objection); Tr. 7/26/96 at 2139 (Ms. Kramer reiterates the "un-evenhandedness" of the Court's rulings). Sensitive to this criticism, I carefully evaluated my rulings and believe that they were, indeed, fair, reasonable, and supported by law. All rulings were made in the interest of the smooth and expeditious progression of trial and were squarely supported by the federal rules and Supreme Court practice.

2. *Substantive Bases For The Decision*

I have reached my recommendations after a thorough review and analysis of the initial pleadings and subsequent briefs by the parties and amici, the extensive record of testimony and exhibits produced by and for trial, the applicable jurisprudence, pre-Compact, Compact and related history, post-Compact events, pre-trial motions, closing arguments of counsel and post-trial memoranda.

I have been presented with an interstate border case based upon an interstate compact. The Compact of 1834 was approved by the Congress of the United States and is thus tantamount to a federal statute.[18] My primary task has thus been to interpret that Compact. I have regarded the plain meaning of the Compact to be controlling in the instances where it is unambiguous—for example, in Article First's delineation of the boundary between the States.

Where it has been necessary to probe beyond the language of the Compact for guidance, I have relied mainly on primary sources placed in the record by the parties or their experts during trial or on congressional or state docu-

---

[18] Technically, negotiations under the Compact were concluded in 1833, but because it did not become law until Congress approved it in 1834, I have used that date to describe it, unless the prior year was more appropriate for the context of discussion.

ments of accepted probative value. The primary documents in the record are the most important extrinsic evidence. Later interpretations of these documents by judges in various cases, by commissioners or by experts at trial, while probative, are not as reliable. *See Arizona v. California*, 292 U.S. 341, 360 (1934) (declining to consider evidence of oral statements by negotiators "which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body."). The extrinsic evidence I have considered includes the original record in the 1829-30 *New Jersey v. New York* case; pre-Compact history, including facts stipulated by the parties in the Joint Pre-Trial Order; pre-Compact negotiations; pre-Compact and post-Compact related jurisprudence from this Court and the courts of both States; expert testimony; and written reports. I have evaluated and relied upon historic maps prepared during relevant time periods and submitted in evidence, as well as maps and surveys prepared by the parties for this case.

I have also given weight to the course of conduct of the parties and the federal government in operating according to the terms of the Compact after 1834. This conduct, while not direct evidence of the intent of the States in framing the Compact, is probative of theories about Compact meaning because it preceded the litigation-inspired theories offered in this case. In this regard, I find the 1921 Port Authority amendment to the 1834 Compact ("Port Authority amendment"), as well as the legislative reports submitted in connection with that amendment, significant and revealing. This amendment—the only such amendment—to the Compact raised vital issues concerning Harbor management for both States.

In addition to construing the Compact, I discuss and draw upon various principles of common or international

law, in particular the doctrines of avulsion and accretion and prescription and acquiescence. These rules of law are incorporated into this Court's original jurisdiction jurisprudence.

To fashion the recommended remedy, I have relied upon this Court's decisions that emphasize the practical and equitable dimensions of my task. While construing the Compact according to intrinsic and extrinsic evidence in order to determine the appropriate boundary line on Ellis Island, I have borne in mind that this Court sits as a court of both law and equity, a dual role it has long assumed in original jurisdiction cases. Thus, I have sought to devise a boundary line that satisfies legal theory, and also that is fair, practical, and convenient. In short, I try to recommend a boundary that would actually work in a situation where two sovereign states must co-exist cheek-by-jowl on a small island under constant public scrutiny.

II. THE HISTORICAL SETTING

This Court has emphasized that in resolving boundary disputes between states "the nature and history of the controversy must be considered." *Vermont v. New Hampshire,* 289 U.S. 593, 605 (1933); *see also Leo Sheep Co. v. United States,* 440 U.S. 668, 669 (1979) (stating that " 'courts, in construing a statute, may with propriety recur to the history of times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it.' " (citation omitted)). This section is designed to meet that charge.

Few controversies ever to come before the Supreme Court have a stronger hold on our history and traditions. This boundary dispute is at least one hundred seventy years old, and may exceed three hundred years. Metaphorically, one could even place the beginning of the controversy almost four hundred years ago, when Henry Hudson, as recorded by his first mate, noticed the "soft

ozie ground" of several small islands while sailing into what would become New York Harbor.[19] In terms of literary tradition, moreover, how many "little islands" can claim to have been celebrated in verse by Walt Whitman? [20]

One of those islands, named after Samuel Ellis, an early owner, retains a profound hold on the American psyche. Ellis Island symbolizes the hopes of a new land, opportunity and redemption; for many, it is the place where the American dream began. From 1892 to 1954, twelve million immigrants were processed through its doors. Estimates suggest that one hundred million Americans, or forty percent of our citizens, trace their ancestry to that spot. *See* Dr. Alan M. Kraut Expert Report at 1 (undated) (DE 933). For them, Ellis Island is probably a more powerful symbol than Jamestown or Plymouth Rock.

The controvery between New Jersey and New York regarding their sovereign boundary was formally launched

---

[19] One of New York's expert witnesses, Dr. Hershkowitz, commenced his report and trial testimony with references to Henry Hudson's journal (written on the *Half Moon* in 1609) in which Hudson apparently describes what became Ellis, Bedlow's, and Governors Islands. *See* Dr. Leo Hershkowitz Expert Report, *Ellis Island, the "Soft Ozie Ground"* 1 (Oct. 16, 1995) (DE 938) (citing J. Franklin Jamison, *Narratives of New Netherlands* 17, 19-21 (1909)); *see also* Tr. 7/23/96 at 1567-68.

[20] In her brief accompanying her motion for summary judgment, New York quotes from Whitman's poems *Manahatta* and *City of Ships*:

> The following sea—currents, the little Islands, larger adjoining islands, the heights, the villas . . . City nestled in bays! My City.
>
> . . . .
>
> O the black ships!
>
> O the fierce ships.
>
> O the beautiful sharp-bow'd steam ships and sail ships,
>
> City of the world. . . .

in 1829 with an original suit before this Court that was itself extremely controversial. *New Jersey v. New York*, 28 U.S. (3 Pet.) 461 (1830). That suit was brought to resolve an underlying boundary dispute between the States that predated the Constitution. The primary source of contention arose from the 1664 grant from King Charles II of England to the Duke of York that established New York as a royal colony. That grant led to a further transfer that same year from the Duke of York to Lord Berkeley and Sir George Carteret, the proprietors of the area that became New Jersey. This grant transferred the lands west of Long Island and Manhattan Island "bounded on the east part by the main sea, and part by Hudson's river." Report of the Commissioners on the Controversy with the State of New-York Respecting the Eastern Boundary of the State of New-Jersey ("Report of the Commissioners") at 6 (Oct. 30, 1807) (PE 199-221); Shenton Summ. J. Aff. ¶ 10 (Mar. 5, 1996) (PE 487). This language spawned a history of disputed interpretation. New York interpreted the New Jersey grant to be bounded on the east by the Hudson River, but not to include it. New Jersey countered that she, as a co-equal colony and state, was entitled to consider the middle of the river as the correct boundary. Shenton Summ. J. Aff. ¶ 11. In any event, their clashing interpretations of the terms of the 1664 grant were central to the lengthy negotiations that culminated in the 1834 Compact, which settled the 1829 lawsuit.

A. The Steamboat Controversy

The question of why the boundary dispute intensified when it did is itself interesting historically. In effect, the controversy matured with the advent of the steamboat and the growth of river commerce. The development of the steamboat was a boon to commerce on the Hudson River and the Bay of New York and it forced the States to determine territorial rights to navigable waters. In its practical dimensions, the boundary dispute thus has an

intriguing connection to one of the landmark decisions of this Court, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the steamboat monopoly case, through which Chief Justice Marshall announced the essential role of the federal government in the regulation of interstate commerce. An understanding of that decision illuminates the stakes behind the first *New Jersey v. New York* case, helps to explain why it arose when it did, and thus informs the analysis of the Compact.

The seeds of *Gibbons v. Ogden* were planted before the nineteenth centry had even begun. In 1798 Robert Livingston secured from New York a monopoly for the operation of steamboats upon the waters of the State. The monopoly was over the entire Hudson River and Bay of New York, hence even traffic between New Jersey ports fell within its purview. On the basis of the monopoly and with Livingston's support, Robert Fulton built the *Clermont*. Her first voyage was in 1807. *See* Maurice G. Baxter, *The Steamboat Monopoly: Gibbons v. Ogden, 1824* 12-13 (Paul Murphy ed., 1972).

By exercising monopoly control of steamboat traffic over the entire Hudson River and New York Bay, New York effectively forced a resolution of the territorial issue. When steamboat traffic from Hudson River cities like Albany and Troy journeyed to the City of New York and across to ports in New Jersey such as Elizabethtown and Jersey City, clashes became inevitable. The same year that Livingston and Fulton launched their steamboat, commissioners from both States first met to resolve the question of the "eastern boundary of New Jersey." The States had authorized by legislative acts separate sets of commissioners to negotiate the boundary issue. *See* Report of the Commissioners; *see also* Governor's Message (Feb. 5, 1908) (PE 222-57). But after extensive written and face-to-face negotiations during September and October 1807, each set of commisisoners reported back to their governors that they had been unsuccessful. *See* Report of Commissioners.

After the negotiations between the commissioners failed, each State staked her legislative claim to the River and Bay. The New Jersey legislature enacted a statute establishing "the boundary lines of the County of Bergen to be the middle or midway of the [Hudson River] waters adjoining the said county." Votes and Proceedings of the 43rd General Assembly of the State of N.J. ("Proceedings of the N.J. General Assembly") (Jan. 12, 1820) (PE 258). For her part, New York enacted a statute declaring "that the whole of river Hudson, southward of the northern boundary of the City of New York and the whole of said bay between Staten Island and Long or Nassau Island, shall so forth be deemed to be within the jurisdiction of the City and County of New York." 1808 N.Y. Laws 313-15.

It soon became clear that despite their legal monopoly, Livingston and Fulton did not exercise a technological monopoly over the use of steamboats. In 1808 John Cox Stevens at Hoboken built the *Phoenix,* intended to ply as a passenger boat between New Brunswick and New York. The monopoly held by Livingston and Fulton, however, prevented the *Phoenix* from entering New York waters. Stevens thus ran her between Philadelphia, Pennsylvania and Trenton, New Jersey.

A year later Fulton built the *Raritan,* which made trips between New Brunswick, New Jersey and New York City. The route between the two chief cities of the country thus essentially required travel on both the *Phoenix* and the *Raritan.* By 1810 the two ships ran in connection with each other as part of one route. The significant profits of the *Raritan,* of course, went only to Livingston and Fulton.

Irked, New Jersey demanded that if her citizens could not build a steamboat and send it across the Hudson River to New York without the permission of Fulton and Livingston, then no boat having the Fulton and Livingston

license should enter the waters of New Jersey. The States became engaged in a legislative jousting contest. New York had enacted a statute providing that if anyone should navigate a steamboat in New York waters without the Livingston and Fulton license, the party aggrieved by such unlicensed steamboating was authorized to seize the unlicensed boat. Referring to this New York law, New Jersey passed a statute providing that if anyone did seize such an unlicensed boat belonging to a citizen of New Jersey and lying on the waters between the States, the owners of the unlicensed boat were authorized to seize in return any boat belonging to any citizen of New York found in any waters of New Jersey. *See* Charles Warren, *The Supreme Court in United States History* 597-99 (rev. ed. 1926).

Fulton and Livingston now threatened to withdraw the *Raritan,* grant no licenses to run steamboats to New Jersey and thus ruin New Brunswick. Progress Report ("Report"), *N.Y. Legis. Docs.*, 142d Sess., No. 103, at 71-73 (1919) (citing 3 *McMaster's History of the People of the United States* 490-91). A formal challenge to the monopoly was inevitable.

The parties who brought the great test case that wound up in this Court were particularly well-suited to the task. Aaron Ogden personified the connections between the steamboat monopoly and the territorial claims by New York and New Jersey. He had been one of the four commissioners selected by the State of New Jersey in 1807 to present her claims to New York. Initially, he operated a steamboat between New York and Elizabethtown, New Jersey in defiance of the monopoly, but he ultimately accepted a license from the successor-owner of the license and ended up supporting the monopoly. The defendant was Thomas Gibbons, a partner of Ogden's, who operated a second steamboat from New Jersey to New York in derogation of the monopoly.

The irony of Ogden suing a New Jersey partner in New York to enforce a monopoly granted by New York could not have been lost on the legal community of the time. The New York Chancery Court granted Ogden an injunction against Gibbons's competing operation and its decision was upheld by the New York Court of Errors.

On appeal to this Court, Gibbons argued that the state monopoly by itself violated interstate commerce and that, in any event, his *federal* coasting license had the effect of preempting state regulatory law. *See* 22 U.S. at 3-33.[21] The existence of the federal license allowed the Court to vindicate Gibbons's position and also to avoid resolving whether states retained power to legislate on matters of interstate commerce in the absence of federal legislation. *See* 22 U.S. at 212-15. The actual holding of *Gibbons* was therefore a narrow one, even though its implications set the stage for the expansion of federal power over interstate commerce. After *Gibbons* the distinction between inter- and intrastate commerce remained elusive and led to further litigation in New York.

Some holders of the Livingston-Fulton monopoly were not prepared to quit. Promptly after this Court's decision, an interloping steamboat, deceptively named *The Olive Branch*, challenged the intrastate dimension of the monopoly. Interstate routes were obviously precluded by *Gibbons v. Ogden*; the legality of purely intrastate trips, however, was unresolved. On appeal from the Chancery Court, Chief Justice John Savage, writing for a majority in the New York Court of Errors, refused to enjoin competitive traffic even if it involved a purely intrastate trip. *North River Steamboat Co. v. Livingston*, 3 Cow. 714 (N.Y. 1825). With this decision, the steamboat monop-

---

[21] Daniel Webster argued the first point for the appellants and William Wirt, Attorney General of the United States, the second.

oly was brought to an end after some thirty contentious years.

The question of territorial rights between New Jersey and New York, brought to the surface by the steamboat monopoly, only increased in importance. It has been estimated that the number of commercial steamboats grew from eight to sixty-four a year after *Gibbons v. Ogden* was decided. *See* John Steele Gordon, *The Steamboat Monopoly*, 44 Am. Heritage 20-21 (Nov. 1993). As competitive steamboat traffic brought increasing commercial activity, shorelines and harbor access became even more crucial.[22]

---

[22] During the era of the steamboat controversy, Ellis Island, although not a focal point in the use of the Harbor, also changed hands. In 1800 New York enacted legislation ceding substantial jurisdiction over Governors, Bedlow's and the Oyster Islands (of which Ellis Island was one) to the federal government. 1800 N.Y. Laws 7. New York reserved to herself "the execution of any process, civil or criminal, issuing under the authority of this state." *Id.*

In 1808 New York enacted legislation authorizing her governor to purchase Ellis Island, which had been in private hands, for $10,000; it was then conveyed to the United States on June 30, 1808. That deal has been described as follows:

> [Lieutenant Colonel] Williams [of the United States War Department] ran into "all manner of difficulties" about the title [to Ellis Island] and decided to ask the state of New York to give the federal government title and buy up the different claims. The necessary legislation was forthcoming, calling for condemnation by a special jury. The jury priced the island at $10,000, and Williams was outraged. They had "estimated capabilities instead of real estate . . . taking into consideration the advantage of setting fish nets on the flatts all around, letting rakes to the oystermen, & keeping a house of entertainment for all these amphibious customers" [he wrote]. It was a very high price to pay for "2¾ acres of sand bank."

Thomas M. Pitkin, *Keepers of the Gate: A History of Ellis Island* 5 (1975).

The federal government built Fort Gibson on the Island in the period immediately preceding the War of 1812. Shenton Summ. J. Aff. ¶ 9.

B. The Original *New Jersey v. New York* Case

In order to resolve the extent to which each could control the traffic calling at her own ports, or indeed still control the burgeoning traffic on the navigable waters of the Hudson and the Harbor, the States renewed negotiations. Soon a new set of commissioners with a familiar mission—drawing the interstate boundary between New Jersey and New York—was appointed. They began meeting in June 1827 and continued through September of that year. By January 1828 both sides acknowledged that, like their 1807 brethren, they had failed to reach an amicable resolution. Report of the Commissioners of New York (Jan. 26, 1828) (PE 280-92).[23] They then concurred in the "expediency of referring the decision of the controversy to some indifferent and impartial tribunal." This language was stated in New Jersey's letter to New York of September 15, 1827, and quoted in apparent agreement by New York on September 17, 1827. *Id.* By "impartial tribunal," however, New Jersey had intended the United States Supreme Court, whereas New York expressed the view that perhaps their respective governors should meet. *Id.*

On February 20, 1829 New Jersey filed suit against New York in this Court. *New Jersey v. New York,* 28 U.S. (3 Pet.) 461 (1830).[24] The purpose of the lawsuit was to settle the sovereign boundary between the States, but New Jersey conceded in her complaint that New York had acquired Ellis Island by adverse possession. *See supra*

---

[23] The commissioners for New York were John T. Irving, Nathaniel Pitcher, Samuel A. Talcott, Harmanus Bleeber, and Hemm I. Redfield. New Jersey was represented by Richard Stockton, John Rutherford, Theodore Frelinghaysen, James Parker, and Lucius Q.C. Elmer. James Parker had also served as a New Jersey commissioner in 1807.

[24] New Jersey was represented by William Wirt, Attorney General of the United States, who had earlier represented Gibbons before the Court in *Gibbons v. Ogden. See supra* note 21.

Part I.B. New York refused to respond to New Jersey's complaint, raising reservations about the power of this Court to compel sovereign states to appear before it.[25] At New Jersey's request, this Court issued a subpoena ordering New York to appear, adding the threat of proceeding to judgment ex parte if no response was forthcoming. *See New Jersey v. New York*, 30 U.S. (5 Pet.) 284, 287 (1831). In that Order, Chief Justice Marshall stated: "This is a bill filed by the state of New Jersey against the state of New York, for the purpose of ascertaining and settling the boundary between the two states." *Id.* at 284.

New York did not respond directly to the Court's order, but rather filed a demurrer in lieu of an appearance. New Jersey objected to this approach as not constituting a proper answer, but upon briefs filed, the Chief Justice ruled that the demurrer constituted an appearance before the Court and an "answer" to the bill filed by New Jersey. Thus, three years after the case was filed it seemed ready for hearing. *See New Jersey v. New York,* 31 U.S. (6 Pet.) 323, 327 (1832). At that point, however, the States once again moved to the negotiating table and the talks that would lead to the Compact of 1834 began.

III. THE COMPACT OF 1834

In 1833 the States once again appointed commissioners to resolve their longstanding territorial dispute. This third attempt at settlement was finally to bear fruit.[26]

---

[25] New York's attorney general rendered a legal opinion that this Court's power under the Constitution to hear original cases between states was a dormant one that had to be activated by congressional action. New York's governor agreed, and supported his attorney general's refusal to appear "without intending any disrespect to that high tribunal." Governor's Communication to Assembly (Mar. 11, 1831) (PE 297-A).

[26] The commissioners for New York were Benjamin F. Butler, Peter Augustus Hay, and Henry Seymour; for New Jersey they

A. Description Of The Compact

On September 16, 1833 the commissioners entered into a Compact that was enacted into law by the legislatures of both States in February 1834. Article Eighth of the Compact made it binding upon the States only after their legislatures confirmed it and the United States Congress approved it. On June 28, 1834 Congress enacted a statute that recited the agreement and declared that

> the consent of the Congress of the United States is hereby given to the said agreement, and to each and every part and article thereof, PROVIDED, That nothing therein contained shall be construed to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

Id. at 711. By in effect preserving federal jurisdiction over navigable waters in the Hudson River and New York Bay, the above provision reflected the interstate commerce determination in *Gibbons v. Ogden* as well as the fact that Ellis Island was then owned and occupied by the United States as a defense installation.

The statute also contained annotations from Supreme Court decisions describing Congress's role in approving Compacts:

> It is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between the respective limits; and the boundaries so established and fixed

---

were Theodore Frelinghaysen, James Parker, and Lucius Q.C. Elmer. (The three New Jersey commissioners had also served as part of New Jersey's 1827-28 negotiating team.) Both sets of commissioners were appointed by statutes enacted by New York and New Jersey respectively on January 18, 1833 and February 6, 1833. Both statutes stated the purpose of their mission to be the settlement of the "territorial limits and jurisdiction" between the States. Act of June 28, 1834, 4 Stat. 708, 709 (1834).

> by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated, to all intents and purposes, as the real boundaries. This right is expressly recognised to exist in the states of the Union, by the constitution of the United States; and is guarded in its exercise by a single limitation or restriction, only, requiring the consent of Congress.

4 Stat. at 708 n. (b). These references serve to highlight that states enter into compacts to set sovereign boundaries, and that, under the Constitution, only sovereign states may fix and only Congress may approve boundaries between states.

B. The Terms Of The Compact

The Compact is divided into eight articles.[27] The States have focused their attention on the first three articles, which they agree encompass the core of the dispute. These articles provide:

> ARTICLE FIRST. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned.

---

[27] *See* App. A. Appendix B contains a recently drawn map of the Article First boundary line to provide a visual depiction of the Compact's otherwise complicated descriptive terms. This map was prepared by the NPS. *See* U.S. Dep't of Interior/Nat. Park Serv., Analysis of Alternatives for the General Management Plan, Statue of Liberty National Monument, New York, New Jersey (1980) (PE 484). It was accepted into evidence. *See* Tr. 7/25/96 at 2004-06.

ARTICLE SECOND. The state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state.

ARTICLE THIRD. The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson river lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel creek; and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the state of New Jersey, that is to say:

1. The state of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey.

2. The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state: and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York, which now exist or which may hereafter be passed.

3. The state of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of the said waters, *Provided,* That the navigation be not obstructed or hindered.

Article First draws the "boundary line" between the States down the middle of the Hudson River and of the Bay of New York. Article Second reserves for New York

"present jurisdiction" over Ellis Island, which was on New Jersey's side of the boundary established in Article First. Article Third describes New York's "exclusive jurisdiction" over the waters of the Bay and the Hudson and over the land covered by those waters to the low-water mark on the New Jersey side. This article also describes New Jersey's "exclusive right of property" in the land under water on its side of the Hudson River boundary and "exclusive jurisdiction" over her wharves, docks, and improvements. As discussed below, these terms are not a model of drafting clarity.

IV. INTERPRETATION OF THE COMPACT OF 1834

A. Relevant Jurisprudence Of The Supreme Court

The Compact Clause of the United States Constitution, art. I, § 10, cl. 3, provides that "[n]o State shall, without the consent of the Congress, . . . enter into any Agreement or Compact with another State. . . ." The Court has indicated that "congressional consent transforms an interstate compact within [the Compact] Clause into a law of the United States." *Cuyler v. Adams,* 449 U.S. 433, 438 (1981). The Court observed that "[b]y vesting in Congress the power to grant or withhold consent . . . the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative State action that might otherwise interfere with the full and free exercise of federal authority." *Id.* at 439-40 (citing Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution: A Study in Interstate Adjustments,* 34 Yale L.J. 685, 694-95 (1925)). Thus, this Court has noted that "unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms." *Texas v. New Mexico,* 462 U.S. 554, 564 (1983); *see also Texas v. New Mexico,* 482 U.S. 124, 128 (1987); *Arizona v. California,* 373 U.S. 546, 565 (1963).

These cases treat an interstate compact as a statute, and thus employ ordinary rules of statutory construction in its interpretation. The most important and well-established of those rules is that, if possible, the Court will undertake a plain-language reading of the terms of a compact. The Court has declared this unambiguously:

> [W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law, until a judicial construction of those instruments had been obtained.

Green v. Biddle, 21 U.S. (8 Wheat.) 1, 89-90 (1821). The Court will explore "textual reasons" for compact terms and examine the structure and the entirety of an agreement to evaluate the reasonableness of an interpretation of one portion. *See Cuyler,* 449 U.S. at 446-47; *see also Carchman v. Nash,* 473 U.S. 716, 724-26 (1985); *United States v. Utah, Nev. & Cal. Stage Co.,* 199 U.S. 414, 423 (1905).

Where a compact is ambiguous, however, the Court may also consider reliable extrinsic evidence. *See, e.g., United States v. Texas,* 339 U.S. 707, 715, *modified,* 340 U.S. 848 (1950). The question of whether to look outside the four corners of a compact is one that this Court has addressed in a variety of contexts. *See, e.g., Texas v. New Mexico,* 482 U.S. at 128; *Arizona v. California,* 292 U.S. 341, 359-60 (1934). Recently, the Court indicated that the parol evidence rule is not applicable to the interpretation of an interstate compact because of a compact's dual character:

> [I]t is appropriate to look at extrinsic evidence of the negotiation history of the Compact . . . [because]

> a congressionally approved Compact is both a contract and a statute and we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous. . . . Thus, resort to extrinsic evidence of the Compact negotiations . . . is entirely appropriate.

Oklahoma v. New Mexico, 501 U.S. 221, 234 n.5 (1991) (citations omitted). In that case the Court first looked at compact language, but found it ambiguous, noting a literal reading would produce an outcome demanded by neither litigant. The Court established the "central purpose" of the Compact, partly informed by legislative history, and overlaid the "apparent intent" of the drafters on Compact terms to achieve harmony in interpretation. *Id.* at 237-38.

Much time was devoted to interpretation of the 1834 Compact both before and during trial. In denying summary judgment, I set out a series of questions about the Compact and its history and operation that I asked the parties to address at trial. *See* Interim Op. at 43-45 (May 9, 1996) (DI 286). At trial, the parties responded in part to these questions. This recommended decision will review that evidence in finding facts and reaching conclusions about the meaning of the Compact. The Compact sets the boundary, and thus the boundary question is subsumed into one of Compact interpretation.

My approach begins with the Compact as the source of authority and resorts to extrinsic sources as necessary to illuminate opaque or vague terms. In the end, however, my conclusion will be based upon what the evidence shows the parties actually intended at the time they signed the Compact. That conclusion will drive my recommended remedy.

B. Analysis Of The Compact

Certainly it would be preferable to resolve interpretative issues solely in terms of Compact language. The

intent of the drafters of the Compact ideally would be determined from what was recorded between them. If the Compact clearly expresses what the parties negotiated, more tentative ventures into extrinsic sources and their legitimacy could be avoided. But as I indicated in denying the States' cross-motions for summary judgment—and neither State has objected to that decision—this Compact is incapable of interpretation solely on its face. Thus, Compact "meaning must be fleshed out by further analysis and explication of extrinsic and intrinsic evidence." Interim Op. at 31.

1. *Positions Of The States And Amici*

The States have urged this Court to consider at least four interpretative sources: (1) pre-Compact history; (2) contemporaneous and later judicial decisions and other legislative and executive declarations by each State; (3) subsequent decisions of this Court and other federal courts; and (4) other federal actions and statements concerning Ellis Island and the boundary issue.

a. *New Jersey's Position*

New Jersey urges this Court to interpret the central purpose of the Compact in Article First as setting the sovereign boundary. She points out that resolution of that issue was achieved only after three sets of negotiations over more than twenty years between commissioners from both States. N.J. Post-Trial Br. at 1-2 (Oct. 12, 1996) (DI 366). In sum, during pre-Compact negotiations: "It is obvious that New Jersey's primary objective was the establishment of a sovereign boundary at the middle of the waters between the States and that New Jersey filed suit [in 1829] when it could not secure that objective from New York by voluntary means." *Id.* at 5. She points to judicial precedents that support this view, notably *Central Railroad Co. v. Mayor of Jersey City,* 209 U.S. 473 (1908) and *People v. Central Railroad Co.,* 42 N.Y.

283 (1870), *appeal dismissed,* 79 U.S. (12 Wall.) 455 (1872).

This conclusion is also supported, suggests New Jersey, by subsequent actions by the two States. In the 1880s, for instance, a bi-State Commission identified the boundary as having been established in the middle of the Hudson and Bay waters in 1834. *See* App. D; *see also* N.J. Post-Trial Br. at 3. The 1921 Port Authority Act did the same. N.J. Post-Trial Br. at 3.

Because the Compact established the sovereign boundary, it follows, argues New Jersey, that "the Ellis Island referred to in Article II was the Ellis Island that existed in 1834." *Id.* at 7. This preserved the status quo at the time, as shown by the Compact's use of "present-tense language" in Article Second. *Id.* at 8. After Article First set the "boundary" as the supreme operating principle and the object of the Compact, all else must be understood within the framework of a mid-River and Bay boundary line. To New Jersey, "jurisdication" means different (and perhaps inconsistent) things under the terms of the Compact. In Article Second, for instance, "present jurisdiction" means whatever governmental authority New York had not ceded to the federal government over Ellis Island in 1808, as well as a geographical limit. In Article Third, "exclusive jurisdiction" means police power. Thus, the meaning of "jurisdiction" needs to be understood in the contemporary context of 1833 to 1834. New Jersey's proposed remedy is for divided sovereignty on the Island with a boundary at the high-water mark of the 1834 Island.

b. *New York's Position*

New York, whose position on Compact interpretation was further refined even during trial, now argues that as "the original proprietor" she *granted* New Jersey only property rights on her side of the River. N.Y. Post-Trial Mem. at 4 (Oct. 3, 1996) (DI 365). New Jersey's Com-

pact goals, she maintains, were "to extract from New York the wharfing-out rights [New Jersey] needed to control and promote its commercial development." *Id.* at 7. New York argues that "boundary" under Article First means five different things:

> Thus, the term "boundary" in the 1834 Compact acquires a different meaning at different points along the Compact's 20 mile border. This is because the terms "property" and "jurisdiction" in the Compact refer to categorically different rights. . . .
>
> Boundary under the Compact, then, includes sovereignty only when the Compact gives one state or the other " 'jurisdiction.' "

Id. at 8. This theory of the boundary revived New York's pre-Compact assertions that New Jersey's eastern boundary was at the shore.

New York imbues "boundary" with a chameleon-like character, attributing a traditional meaning to that word only when it is specifically linked to "jurisdiction." Thus, she creates an analytical tool to permit the introductory sentence of Article Third to overpower the terms of Article First. She accords the word "property" heightened importance because that is the interest she believes was accorded New Jersey to the mid-line side of her eastern shore.

Article Third, under New York's theory, gives New York sovereign jurisdiction to New Jersey's low-water mark, leaving for New Jersey only "property rights, fishing rights, and the right to wharf-out from its shores." N.Y. Post-Trial Mem. at 9. New York concludes that "[i]n Article Three, then, as the 1890 commissioners recognized, the mid-Hudson River boundary is not a sovereignty line, but, rather, a property line. The real sovereignty line in this part of the Compact . . . is at the low water mark along the New Jersey shore." *Id.* at 10 (citations omitted); *but see supra* note 5 (during trial, New

York asserted a boundary *below* the low-water mark). New York further maintains that, by conceding that "jurisdiction" means sovereignty over Ellis Island in Article Second, New Jersey has to be consistent and recognize that "jurisdiction" means "sovereignty" wherever it is used in the Compact. *Id.* at 12. In addition, New York has argued several times during this case that Justice Holmes was wrong in concluding that "boundary" means sovereignty and that the *Central Railroad* case is in any event distinguishable.

Thus, New York would have this Court maintain the status quo as New York interpreted it after trial, that is, to declare the boundary in the relevant portion of the Hudson River at the low-water mark of New Jersey's eastern shore (subject to New Jersey's wharfing-out rights). This would leave New York sovereign over the entire Island by virtue of her sovereignty over the waters and underwater land around Ellis Island.

c. *Positions Of The Amici Curiae*

The City of New York argues that the Compact of 1834 must be construed against "the conceptual backdrop of the contemporary legal and political debates which led to its genesis," as well as according to normal canons of statutory construction. The City Post-Trial Br. at 14 (Oct. 12, 1996) (DI 367). The City argues that "exclusive jurisdiction" under Article Third grants New York sovereignty over the waters and underwater lands west of the boundary line set out in Article First. The City points in particular to Article Third's provision to New Jersey of "exclusive jurisdiction" over the improvements on her own shores, which would not have been necessary to point out if New York had not been accorded sovereignty over these waters and underwater lands. *Id.* at 16-17.

The City of Jersey City has noted that its boundaries and those of Hudson County "extend to the midpoint of

the Hudson River" through nineteenth-century legislation "[i]ncorporating, reincorporating and expanding the City's boundaries." Br. in Supp. of Mot. to Intervene or in the Alternative to Participate as Amicus Curiae of the City of Jersey City, Ex. A (Oct. 10, 1995) (DI 172). The City of Jersey City further points to its authority to "tax property under the Hudson River, lying to the west of the middle of the river." *Id.* at 21. Hudson County notes her direct interest in Ellis Island, particularly because "water and sewage and other utilities to the island are governed from the state of New Jersey, Hudson County and the City of Jersey City." Mot. for Leave to File a Br. Amicus Curiae of Hudson County at 20 (Oct. 6, 1995) (DI 168).

2. ***Discussion***

a. *Intrinsic Evidence: A Compact Reading*

My intrinsic reading of the Compact presumes that the drafters were drawing an interstate boundary. Both the filing of the 1829-30 *New Jersey v. New York* case and the structure of the Compact support this presumption.

(1) The Key Articles: First, Second And Third

(a) *Background*

Three key terms must be interpreted to understand the Compact: "boundary," "jurisdiction" ("exclusive" and "present"), and "property." "Sovereignty," although a critical concept much discussed during trial, does not appear in the Compact.

The term "property" has an agreed, traditional meaning of ownership and is relatively free from ambiguity. It produces interpretative difficulties because of its relationship to the other key terms, but both States agree that property is a concept that is subordinate to jurisdiction or sovereignty.

The purpose and structure of the Compact help to determine the meaning of these terms. The Congress's introduction and "whereas" clause make clear that the overarching purpose of the agreement was to settle a territorial boundary dispute and delineate "territorial limits and jurisdiction" between the States. Indeed, that phrase is repeated four times at the outset of the agreement. The power of Congress was invoked precisely because the States were finally settling their age-old boundary dispute. Because only Congress is empowered to approve agreements settling interstate boundaries, its adoption of the Compact as a statute highlights the sovereign dimensions of its role. *See supra* Part IV.A.

Such an interpretation is reinforced by the fact that this Court had previously stated that the purpose of Article First was to draw the territorial boundary. In the 1829-30 *New Jersey v. New York* case, Chief Justice Marshall announced that the purpose of the litigation was territorial. *See supra* Part II.B. Because original jurisdiction cases are brought to resolve interstate disputes, and keeping in mind the language Congress used to introduce the Compact, the terms "territorial limits" and "boundary" are synonymous. Moreover, the word "boundary" was used frequently by the States in a territorial sense throughout the earlier negotiations that attempted to draw a boundary. Once "boundary" is connected to territory, the sovereign nature of the determination follows as a matter of course. Thus while the word "sovereignty" does not appear in the Compact, it pervaded the Compact drafting process.

(b) *Article First: The Territorial Boundary Between The States*

Article First of the Compact describes a "boundary line" between the States, as one would expect from the foregoing. The ordinary and natural meaning of "boundary line" in the context of an interstate compact—both today and in 1833—is the line dividing the sovereign ter-

ritories of states. *See Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 194 (1824) (discussing interstate commerce and stating that commerce among the states "cannot stop at the external boundary line of each State."); *Id.* at 97 n.26 (noting an act of New York, passed February 26, 1803, which describes the "north boundary line" of New Jersey); *Vermont v. New Hampshire,* 289 U.S. 593, 600 (1933) (interpreting the provision of the 1764 "Order-in-Council" of King George III describing the "boundary line" between the states as fixing the sovereign territory of the states).[28] The placement of the singular phrase "boundary line" in the first article gives it controlling importance.

Article First describes the sovereign boundary between the States with the qualifier "except as hereinafter otherwise particularly mentioned." Here the plain meaning of the words in the Compact must be evaluated within the context of the entire Compact. Although the qualifier suggests that subsequent articles will describe exceptions to the boundary line set out in Article First, the words "boundary line" do not appear in the Compact again. If the drafters intended to change the boundary line set out in Article First, presumably they would have used the same locution elsewhere in the Compact. Thus, I conclude that the boundary line between the States is not changed by the subsequent articles.

This interpretation of Article First is buttressed by Articles Third and Fifth. If subsequent articles are con-

---

[28] *See also Nebraska v. Iowa,* 409 U.S. 285, 285 (1973) (per curiam) (issuing decree describing interstate boundary and noting that in 1943 the states had "determined to agree by compact upon a permanent location of the boundary line."); *Virginia v. Tennessee,* 148 U.S. 503, 519 (1893) (explaining that whether an interstate agreement fits within the Compact Clause depends on whether "the establishment of the boundary line may lead or not to the increase of the political power or influence of the states affected" and thus encroach on federal authority).

strued to change the boundary line, the opening paragraphs of Articles Third and Fifth would significantly contradict Article First. The Compact should be construed so that one section will not contradict another. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana,* 472 U.S. 237, 249-54 (1985) (if the literal language of the controlling section of the statute contradicts another section, the controlling section should be harmonized so as not to render the other section inoperative, and the minimal ambiguity of the harmonizing interpretation does not mean that such interpretation fails as the most reasonable). If the drafters intended to describe the territorial boundary itself between the States in these opening paragraphs of subsequent articles, they would not have included Article First at all. The opening paragraphs of subsequent articles would do the work of Article First and the numbered exceptions of Articles Third and Fifth would have been articles themselves—that is, exceptions to the rule.

(c) *Subsequent Articles: Exceptions To Sovereign Jurisdiction*

The Article First qualifier "except as hereinafter particularly mentioned," of course, must be read to comport with the articles that follow. The Compact should be read so as to give effect to all of its provisions. *See Cuyler,* 449 U.S. at 446-48; *Utah, Nev. & Cal. Stage Co.,* 199 U.S. at 423; *see also Plaut v. Spendthrift Farm, Inc.,* 115 S. Ct. 1447, 1451-52 (1995) (effect must be given, if possible, to every word, clause, and sentence of a statute). This analysis requires interpreting the meaning of "jurisdiction" ("present" and "exclusive") in the Compact. The natural and ordinary meaning of "jurisdiction" is the power to proscribe, prescribe, adjudicate, and enforce law. Rebecca M.M. Wallace, *International Law* 101 (1986). This core meaning of jurisdiction is the same today as it was in 1834. Although jurisdiction is an attribute of state

sovereignty, a state may exercise jurisdiction outside its territory. *Id.* The most reasonable reading of the Compact, based upon the above analysis of Article First, is that articles subsequent to Article First describe exceptions to the jurisdiction concomitant with the sovereignty suggested by the boundary line.

The opening paragraphs of Articles Third and Fifth thus confer on New York and New Jersey, respectively, power to make and enforce law that diverges from the authority otherwise suggested by the boundary line of Article First. These paragraphs confer extra-territorial jurisdiction without changing the boundary between the States, thus satisfying the role suggested by Article First's qualifier.

The numbered exceptions to the opening paragraphs of Articles Third and Fifth clarify that these articles do not confer extra-territorial jurisdiction to the absolute exclusion of the powers of jurisdiction of each State in her territory. Each State retains attributes of sovereignty over her lands and waters over which the other State would otherwise exercise "exclusive" extra-territorial jurisdiction. Even the numbered exceptions, moreover, contain exceptions. Articles Third and Fifth describe specific forms of extra-territorial jurisdiction, but do not confer unqualified jurisdiction to either State in the territory of the other.

Thus, although New York exercises extra-territorial legal authority over the navigable waters in New Jersey's territory under Article Third, the first exception in that article clarifies that (consistent with Article First) New Jersey has the "exclusive right of property." The most reasonable interpretation of that phrase is that New Jersey remains sovereign over these underwater lands. This is restated to ensure that the jurisdictional exception to the boundary is not over-interpreted.

Under this reading, "jurisdiction," as a fundamental and ubiquitous term of legal parlance, assumes several

meanings. I cannot agree with the meaning that both New York and amicus The City of New York urge upon this Court—the territorial one.[29] New York's position would have "jurisdiction" in Article Third trump "boundary" in Article First. That conclusion cannot be accepted. Instead, in Article Third, the word "jurisdiction" connotes the role described above.

My analysis is buttressed by the appearance of "jurisdiction" many times in the Compact while "boundary" appears just once, in Article First; in my view that elevates rather than diminishes the territorial significance of "boundary" over "jurisdiction." "Boundary" becomes a more reliable single indicator of the purpose and design of the Compact than "jurisdiction," which takes on—even according to New York—a chameleon-like character that changes with location.

New York posits an interpretation of "boundary line" as describing the property boundary between the States. Under that reading, the phrase "exclusive right of property" in Articles Third and Fifth would echo Article First. This interpretation fails for several reasons. First, as explained above, the ordinary and natural meaning of the locution "boundary line" in a compact is a line dividing the sovereign territories of states. Second, and complementing the first point, in light of the controlling position of Article First, it is reasonable to interpret its provisions as of the greatest importance—that is, describing sovereign territory. If Article First describes merely a

---

[29] The City of New York's amicus brief goes to considerable effort to elevate the term "jurisdiction" to a sovereign level and thereby to minimize the meaning of the term "boundary." By citing Vattel's *Law of Nations* (J. Chetty ed., 7th Am. ed. 1849), a French treatise which by 1797 was available in the United States, the City seeks to equate jurisdiction with sovereignty. The City's efforts are creative and thoughtful, but they are not ultimately convincing. Jurisdiction, even under the City's definition, must also assume several meanings, not all of which imply sovereignty. The City Post-Trial Br. at 4-18.

property boundary, the subsequent articles do not carve out exceptions, but instead reduce Article First to an exception to Articles Third and Fifth. Third, Article First fails on a literal reading if interpreted as drawing a property boundary: there would be no exceptions to this property line. Under this reading, the Article First property boundary *does* describe the boundary of the States' "exclusive right of property" in Articles Third and Fifth; these articles do not function as exceptions at all. Article Second, moreover, defines jurisdiction; it does not describe an exception to the Article First property *line*. Finally, as set out below, the extrinsic evidence supports a reading of Article First as describing a sovereign boundary, not a property boundary. *See infra* Part IV.B.2.(b).

While it is not necessary to my decision, I also note that the Compact becomes capable of a *facial* interpretation if the central purpose of the Compact and the mission of the negotiators is overlaid on Article First, and one elliptical phrase, "with concomitant sovereign jurisdiction," is inserted into that article immediately before the qualifier "except as hereinafter otherwise particularly mentioned." *Cf. Cuyler*, 449 U.S. at 446-47; *Oklahoma v. New Mexico*, 501 U.S. at 237-38 (examining "apparent intent" of the drafters of an interstate compact); *see also Central R.R. of New Jersey v. Mayor of Jersey City*, 56 A. 239, 243-44 (N.J. Sup. Ct. 1903). If the Court, for analytical purposes, inserts those four words, the Compact becomes unambiguous. The jurisdictional exceptions are then clearly set forth in subsequent articles. Those exceptions, then, do not complicate or nullify the sovereign boundary established in Article First. Further, this reading is fully supported by all of the extrinsic evidence from trial and is an inevitable conclusion concerning the meaning of Article First.

By contrast, the meaning overlaid on Article First under New York's view effectively dismantles the article.

Her interpretation—that is, the five-boundary interpretation she ultimately adopted—is illustrated by inserting, after Article First's qualifier, a phrase resembling the following: "such that the only portion of the boundary line set out in this Article that is not entirely changed by the articles that follow is the line running through the Hudson River above the Spuyten Duyvil." This interpretation renders most of Article First functionally irrelevant: the exceptions are made to swallow the rule. In my view, New York's creative interpretation stretches beyond its breaking point the apparent intent of the drafters.

(d) *Article Second: Ellis Island*

The locution "exclusive jurisdiction" in the opening pargraphs of Articles Third and Fifth should be interpreted to convey a similar meaning in Article Second. *BankAmerica Corp. v. United States,* 462 U.S. 122, 129 (1983) (the same terms in the same statute should be interpreted in conjunction with each other); *Mohasco Corp. v. Silver,* 447 U.S. 807, 826 (1980) (same). Thus, Article Second accords New York some degree of extra-territorial law-making and law-enforcing authority over the 1833 islands in New Jersey's territorial waters. In contrast to Articles Third and Fifth, Article Second confers jurisdiction, both "present" and "exclusive," without exception. The plain and ordinary import of jurisdiction without exception is the authority of a sovereign. In context, then, "exclusive jurisdiction" conveys complementary but distinct meanings in Articles Second and Third. The distinction between "present" and "exclusive" jurisdiction in Article Second, which becomes clear upon consideration of extrinsic evidence, is thus not important. Although Article Second does not change the boundary of Article First, harmonized with the entire Compact, it provides that New York will retain her sovereignty over islands in New Jersey's sovereign waters as they existed at the time of the Compact.

The "present jurisdiction" formulation in Article Second applies to Bedlow's Island as well, but the other islands, over which New York was granted "exclusive jurisdiction" in Article Second, are no longer in existence. Hr'g Tr. at 24.

The word "present" has been the source of conflicting interpretation in this litigation. New Jersey would give the phrase two meanings—one legal and one geographical. She suggests that present jurisdiction in a legal sense refers to the fact that New York had already ceded jurisdiction of Ellis Island to the United States to erect harbor fortifications which were in place in 1834.[30] New York concurs in that interpretation.[31]

---

[30] [MR. YANNOTTI for New Jersey:] . . . "[P]resent jurisdiction" clearly confines New York's authority to the 2.74 acres that existed in 1834.

Justice Holmes, in his review of Article II in *Central Railroad* . . . stated that the phrase "present jurisdiction" was intended to preserve the status quo that pertained in 1834.

To interpret the Compact in the free-wheeling, expansionist manner New York proffers would contradict the plain language of the agreement . . . .

SPECIAL MASTER VERKUIL: Well, New York does say that the status quo, if you will, which the words "present jurisdiction" was intended to maintain, was the status quo that the Federal Government had possession of the island for purposes of a fort to protect the harbor from invasion.

MR. YANNOTTI: . . . [In] 1834, New York had already ceded its jurisdiction to the Federal Government over the 2.74 acres. It did not retain governmental authority.

So, the Federal Government was operating a military facility on the island in those years, and the reference to present jurisdiction is reference to virtually no jurisdiction, as we see it. It was merely [that] you couldn't refer to it as exclusive jurisdiction.

Tr. 7/10/96 at 26-27.

[31] New York stated:

New York will show that the fact that the 1834 commissioners used the word "present" in describing New York's jurisdic-

But New Jersey goes further and asserts that "present" is also a geographical limitation on the size of Ellis Island in 1834. This would suggest that Article Second somehow determines sovereignty over the much later landfill, which was certainly not contemplated or discussed at the time. The Compact does not decide sovereignty over the landfill. It makes more sense to read "present," as New York does and New Jersey does in part, to refer to the fact that Ellis Island was owned and operated by the United States at the time of the 1834 Compact, whereas the other islands were not. This means that the word "jurisdiction," whether present or exclusive, is territorial in Article Second but not in Article Third.

In short, the Compact settles only the question of which State was sovereign over the 1833 Island; it does not address the question of which State has sovereignty over *an expanded Ellis Island.* That question is resolved pursuant to the age-old common law doctrine concerning the effect of avulsion and accretion on legal territorial boundaries.

> tion over Ellis and Bedlow's islands, and the word "exclusive" in describing New York's jurisdiction over "the other islands," has nothing to do with the geographical size of New York's jurisdiction. Rather by this careful selection of adjectives, the commissioners recognized that in the 1800 and 1808 cessions New York had specifically conveyed partial jurisdiction over Ellis and Bedlow's islands to the federal government, while retaining full jurisdiction over the "other islands."

Def.'s Pre-Trial Mem. of Law at 11-12 ("N.Y. Pre-Trial Mem.") (June 26, 1996) (DI 329); *see also* N.Y. Post-Trial Mem. at 15.

> The compactors used the term "present jurisdiction" under Article II when referring to the jurisdiction over Bedloe's and Ellis Island because prior to 1834, New York had ceded partial jurisdiction over both Ellis and Bedloe's islands to the United States government, whereas the other islands alluded to under Article II, New York has ceded no jurisdiction to anyone.

Tr. 7/10/96 at 169 (Mr. Hughes for New York).

(2) New York's Theory Of The Shifting Interstate Boundary

New York advances the theory that New Jersey's eastern boundary is defined by New Jersey's ever-shifting shoreline due to her unlimited (except by federal regulation) wharfing-out rights under Article Third, and that, beyond that shoreline, New Jersey has only a property interest on New Jersey's side of Article First's boundary. *See supra* Parts IV.B.2.a.(1)(c) and I.B. Thus, postulates New York, the sovereign line is to be determined by the extent of the wharves, docks, and improvements to New Jersey's shoreline. Her interpretation would create a jagged and indeterminate boundary line that would shift as New Jersey added to or removed her wharves or created new ones. This consequence counsels strongly against adopting New York's reading of the Compact.

Before trial, New York drew a conceptual distinction between imperium and dominion and relied on that distinction to support her theory that Article Third of the Compact reserved for New Jersey only property rights on New Jersey's side of Article First's boundary. N.Y. Pre-Trial Mem. at 4-6.

New York juxtaposed Articles Third and Fifth to argue that these "mirror images . . . give New York and New Jersey exclusive jurisdiction over areas located on the other's side of Article One's boundary." *Id.* at 8. Thus, she concludes, "the 1834 Compact treated New York as the sovereign and New Jersey as the subject concerning the West side of the Hudson River." *Id.* at 11; *see also* Tr. 4/11/96 at 22 (Mr. Hughes for New York: "[T]he mid-Hudson was not a jurisdictional line but rather a territory boundary line.") Indeed, urges New York, the object of the Compact was to say that the jurisdiction over the whole Hudson River up to the high-water mark to the Jersey shore would have been retained

by New York.[32] New York's theory that she is sovereign to the shifting Jersey shoreline persisted after trial. *See* N.Y. Post-Trial Mem. at 9.

Article Third explicitly grants both States exclusive jurisdiction over different things: New York over the waters of the New York Bay and the Hudson and New Jersey over the wharves, docks, and improvements on her shore. Because New York's "exclusive jurisdiction" is subordinate to the boundary line created in Article First, the word jurisdiction here conveys powers less than territorial.[33] With regard to New Jersey's exclusive jurisdic-

---

[32] At the start of trial, New York again declared, going back to colonial grants and the historical bases of the States' boundary dispute, the following:

> [MR. HUGHES for New York:] . . . The evidence is also going to show, Your Honor, that in an effort to settle this dispute, the compactors [in 1833] drew a critical distinction between imperium, or jurisdiction, and dominion, or property.
>
> . . . .
>
> SPECIAL MASTER VERKUIL: Do these terms appear anywhere in the documents?
>
> MR. HUGHES: They don't appear in the Compact. They appear in the 1920 Port Authority Commissioners' reports.
>
> . . . .
>
> SPECIAL MASTER VERKUIL: [Do they appear] in anything preceding the 1834 compact that might be relevant to it?
>
> MR. HUGHES: Well; the concept of the separation of property and jurisdiction. I'm not sure that the two latin terms appear there, but that's really irrelevant.

Tr. 7/10/96 at 159-60. Later, New York reiterated that the conceptual distinction between those terms supports her theory that "New York was the sovereign on the western side of the Hudson River to the New Jersey shore from the grant and the King. It was New York who granted New Jersey, as the subject, the rights that we'll talk about under Article III." *Id.* at 161 (Mr. Hughes for New York).

[33] New York's grant of exclusive jurisdiction in Article Fourth explicitly mentions "quarantine laws" and "laws relating to passengers" whereas those explanatory limits are not mentioned in Article

tion over "wharves, docks and improvements," however, the term adds powers to territory over which she is sovereign. This term essentially clarifies that New Jersey reserves police powers on her existing or fast lands, while Article Third otherwise grants these powers to New York over the Bay and River.[34]

New York conceded at trial that, under her reading, New Jersey can change her boundary at will. When New York produced her closing exhibit illustrating her theory of the differing meaning of "boundary" in the Compact, she drew a red area almost to New Jersey's eastern shore, representing New York territory, and a small yellow area representing New Jersey's wharfing-out rights. *See* App. C. When questioned, New York agreed that, under Article Third as New York would interpret it, New Jersey alone could alter that yellow area and the dividing line between the red and yellow areas, and therefore the interstate boundary:

> MS. KRAMER [for New York]: . . . . New York's sovereignty plainly runs from its own shores to the low water mark on the New Jersey shore, subject only to New Jersey's wharfing out rights and fishing

---

Third. Articles Sixth and Seventh also grant each State powers to serve civil and criminal process in certain circumstances on land or waters under the exclusive jurisdiction of the other. These are further explicit qualifications upon the power of the words "exclusive jurisdiction" and help demonstrate that, from that time to the present, the boundary line has been the more reliable demarcation point. In fact New York's own courts have concluded that legal jurisdiction over persons stops at the boundary line established by the Compact. *See, e.g., Bunge v. C & N Truck Leasing Inc.*, 329 N.Y.S.2d 458 (Civ. Ct. 1972); *see also* discussion *infra* Part IV.B.2.b.(3).

[34] This, of course, makes for a sensible jurisdictional alternative because New York had long controlled traffic in navigable water and sought to retain such control under the Compact. On the other hand, New Jersey and not New York could sensibly claim such jurisdiction over her wharves, docks, and build-outs.

rights and everything else, but primarily up to that yellow territory.

SPECIAL MASTER VERKUIL: So New Jersey would not be allowed to wharf out beyond the edge of the yellow line.

MS. KRAMER: Well, Your Honor, the yellow line is not drawn to scale. The yellow line is simply an illustration of what the Compact means. Theoretically, I suppose New Jersey could wharf out as long as the current U.S. Corps of Army Engineers decides that it can . . . . New Jersey could, if the Federal Government didn't object, I guess, theoretically, wharf out to Mars, but I don't think the Federal Government would allow it.

SPECIAL MASTER VERKUIL: But you wouldn't object, even though it's on your sovereign territory.

MS. KRAMER: I think, Your Honor, that if New Jersey wharfed out . . . and improved its territory, we would have to concede that they had the exclusive jurisdiction to do that under Article Three, Section Two.

SPECIAL MASTER VERKUIL: So you're saying the exclusive jurisdiction in Article Three, Section Two gives them sovereign power over the wharfs beyond the edge of this yellow line perhaps.

MS. KRAMER: We are saying that they have the right to wharf out . . . and that I don't believe it's the State of New York's position or right to determine how far they can wharf out. I think these boundaries, as we've established in this case, are established by the federal government . . . [which has] the overriding authority to determine the bulkhead and pierhead lines.

Tr. 8/15/96 at 4106-08. New York's view of New Jersey's boundary under the Compact as one that produces a different meaning at different locations on the

Hudson River and New York Harbor could easily produce an anomalous result.

Interpreting "exclusive jurisdiction" in Article Third to mean police or legal jurisdiction is the only reading of Article Third that prevents such serious anomalies. If New York were right that her territorial boundary shifts in jagged wharfing-out fashion to New Jersey's eastern shore under Article Third, it would contradict principles set out in key decisions of this Court. In effect, New York's "solution . . . would create a regime of continually shifting jurisdiction." *Georgia v. South Carolina,* 497 U.S. 376, 396 (1990). This does not "comport[] with . . . the respect for settled expectations that generally attends the drawing of interstate boundaries." *Id.* at 397 (citing *Virginia v. Tennessee*, 148 U.S. at 522-25). In that case Georgia argued that each time a new island appeared in the Savannah River, which divided the states, the boundary would shift because she was granted sovereignty over all islands in the River. This Court proposed a construction that limited Georgia's rights to islands in existence at the time the boundary was drawn in the Treaty of Beaufort, thereby avoiding "sudden changes in the boundary." 497 U.S. at 397. Under New York's interpretation, New Jersey could change the interstate boundary at will by wharfing-out further, or by removing a wharf, and thus impose a boundary change upon New York without the latter's permission. Such an interpretation should be precluded by the rationale of *Georgia v. South Carolina.*

New York's Compact reading is convoluted. It sacrifices clarity and certainty for interpretative advantage. These efforts by New York to reinvent what the term "boundary" means in Article First encourage instead a construction that favors a Compact boundary line as a single territorial line. If the drafters had intended to delineate five distinct boundaries, as New York argues, surely the Compact would have described this explicitly.

(3) Summary Of The Implications Of The Compact Reading

Although I believe the above analysis is the most reasonable interpretation of the Compact, it cannot be said that the Compact is unambiguous. Article Third may be internally consistent and capable of being harmonized with Article First, but it is awkwardly drafted. The Compact describes the States' rights and powers in the form of exceptions to sweeping, general rules: the sovereign authority delineated in Article First appears to be significantly qualified by the opening paragraph of Article Third, but that exception is qualified by the numbered exceptions, which themselves are qualified in some instances. Articles First and Third are thus layered, confusing, and somewhat redundant. If Articles Third and Fifth are not harmonized with Article First in the manner set forth above, however, the Compact is significantly self-contradictory, and even more awkwardly drafted.

Whether somewhat redundant or significantly self-contradictory, the Compact remains ambiguous. I thus turn to extrinsic evidence to clarify the Compact's meaning. This evidence supports the intrinsic reading of the Compact that I have found to be the most logical and reasonable.

b. *Extrinsic Evidence*

As this Court has counseled, where there are ambiguities to be resolved concerning the language of the Compact, extrinsic evidence may be employed to help determine meaning. Where neither State has offered a fully satisfactory interpretation based upon intrinsic evidence, further inquiry is justified. The most important extrinsic evidence is the negotiating history of the Compact set forth below, and the various reports of commissioners from 1807, 1828, and 1833 which describe each State's claims and counterclaims. These contemporaneous reports, a kind of "legislative history" to the Compact, are

probative and reliable.[35] Other important sources include statements and actions of state legislators and executive officers, and relevant judicial precedents, including decisions by this Court. Further enlightening information may be derived from actions by various federal entities with responsibility for Ellis Island. Finally, legislative history of the Port Authority amendment of 1921, which was drafted to supplement the Compact of 1834, provides compelling insights into the States' interpretation of the Compact.

(1) Review Of Prior Boundary Settlement Attempts

As explained above, the States had a long negotiating history prior to the 1833 agreement that became the 1834 Compact. The earlier disputes stemmed from the terms of the original Royal Grant of 1664, disputes that had not been resolved when the colonies became states. New York and New Jersey were not unique among the original thirteen states in this regard; it is estimated that ten of the thirteen had boundary disputes pending during the constitutional period, several of which invoked the original jurisdiction of the Court. *See generally* Charles Warrent, *The Supreme Court in United States History* (rev. ed. 1926).

A review of these earlier failed negotiations between the States of New York and New Jersey illuminates what

---

[35] Unlike legislative history, which typically includes statements proffered by legislators *after* a statute is passed that may not accurately reflect the debates, these reports were exchanged between the parties, referred to in the negotiations, and reported to their respective legislatures and governors *before* the Compact was drawn. Because of this process of deliberation and exposure and the fact that they represent the history of Compact negotiations, I believe these reports are more probative and reliable than traditional legislative history. *Cf.* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 29-37 (1997) (highlighting a variety of interpretative difficulties with judicial use of legislative history).

was at stake in the 1833 negotiations. The reports describing these negotiations were all submitted into evidence.

(a) *The 1807 Negotiations*

New York maintains that her hegemony over the Hudson River and the Bay of New York was the product of the Royal Grant of 1664 and the lesser (that is, non-royal) transfer to the proprietors of New Jersey that same year. New York held this view throughout the colonial and independence periods. In reporting that "all attempts to procure an amicable adjustment proved entirely abortive," the 1807 New Jersey commissioners acknowledged New York's stated claim to be "over the whole waters lying between the respective states, including shores, roads and harbors, within the natural territorial limits of New-Jersey." Report of the Commissioners at 3 (Oct. 30, 1807) (PE 199-221).

In 1807 New York justified her claims on the language of the Royal Grant referring to the boundary as defined "part by the main sea and part by Hudson's river." *Id.*, No. I, at 6. By this formulation, she claimed the entire Hudson to the *high-water mark* of the New Jersey shore. The term "main sea," however, provided comfort for New Jersey because it created an ambiguity with respect to sovereignty over Staten Island. If the waters between that Island and the New Jersey shore (the Kill van Kull) were not the *main* sea, then New Jersey could make a claim to Staten Island even though New York had long been in possession. New Jersey argued that "Kill" means river in Dutch and therefore could not be interpreted as the main sea. *See* Report of the Commissioners, No. VII.

By the Montgomerie Charter of 1730, the New York colony had sought to place all of the Oyster islands as well as Staten Island and Long Island within the boundaries of the City of New York. Report of the Commissioners at

11; *see also* Dr. Leo Hershkowitz Expert Report, *Ellis Island, the "Soft Ozie Ground"* 16-17 (Oct. 16, 1995) (DE 938) (citing Jerold Seymann, *Colonial Charters, Patents and Grants to the Communities Comprising the City of New York* 281 (1939)); Thomas M. Pitkin, *Keepers of the Gate: A History of Ellis Island* 2-3 (1975).

The compromise proposals came to a head in an exchange of letters on October 6, 1807. New Jersey offered to forego her claims to Staten Island and the Oyster Islands in return for an acknowledgement that the boundary between the States was in the middle of the Hudson and the Bay. *See* Report of the Commissioners, No. XV, at 54. New York rejected this compromise and offered "use" jurisdiction over the contested navigable waters, subject to New York's "laws of quarantine" and police-power jurisdiction. *See* Report of the Commissioners, No. XVI, at 55-56. New Jersey's final rejection reads as follows: "[I]t is not for the state of New Jersey to ask and receive *benefits* from the State of New York . . . ." Report of the Commissioners, No. XXI, at 58. Here the 1807 settlement attempts end.

The States' dispute also implicated issues of jus publicum, that is, whether navigable waters are open to all traffic no matter what private claims are asserted over them. Report of the Commissioners, No. II, at 17. As discussed above, this issue became increasingly important with the advent of steamboat commerce on these waters. *See supra* Part II.A. The 1807 attempts at compromise foundered over these issues, as New York resolved to maintain her claimed royal prerogatives over navigable waters.

This review of issues raised in early negotiations is helpful in addressing ambiguities in the 1834 Compact because it amplifies today's claims. New York's commissioners stated that "we conceive the subject of the present reference to be a question of boundary and resolving it-

self into three questions. Whether New Jersey is to be restricted to high-water mark? Or whether she is to extend to low-water mark? Or whether she is to extend to the channel?" Report of the Commissioners, No. VI, at 34. After describing these boundary issues, New York declares "there was no reputation or understanding as to a boundary or line of jurisdiction" with respect to the waters between Staten Island and New Jersey. *Id.* at 36. Use of the term "boundary," however, abounds in the written exchange between the States, each time in its sovereign sense of marking territorial lines.

(b) *The 1827 Negotiations*

In 1827 the States again appointed commissioners to resolve their dispute. *See* Report of the Commissioners of New York, Senate Report ("Senate Report") (June 26, 1828) (PE 280-92). The States both described the purpose of their efforts as the establishment of "territorial lines." The first meeting was set in Newark on August 1, 1827, after which they agreed to exchange positions to be discussed at Hoboken on August 3. There, New York offered a single proposition to New Jersey: exclusive jurisdiction over land and wharves on the west shore of the Hudson; provided such wharves or piers did not obstruct navigation. New Jersey, in turn, countered with three propositions: (1) a "boundary" line down the middle of the Hudson and Bay (to include Staten Island); (2) "concurrent" jurisdiction in the navigable waters established by such boundary line; and (3) "the islands called Bedlow's Island, Ellis' Island, Oyster Island and Robins Reef, *to the low water mark of the same,* be held to be and remain within the exclusive jurisdiction of the state to New-York." *Id.* at 3 (emphasis added).

No agreement having been reached on these propositions, the States exchanged further proposals in Newark on August 6. New York expanded her list as follows:

(1) New Jersey to enjoy "the fisheries on the west side of the Hudson river, . . . and in the waters between Staten Island and New-Jersey"; (2) exclusive jurisdiction over wharves (as before) but with additional control over all land *to the low-water mark*; and (3) rights to serve criminal process upon persons or things in the waters of the Hudson. *Id.* at 3-4.[36] New Jersey countered with three propositions: (1) the waters of the Hudson and between Staten Island and the main land of New York to be the boundary, with claims to Staten Island explicitly relinquished; (2) New York to have "exclusive jurisdiction" over the waters of the Hudson; and (3) New Jersey to have exclusive jurisdiction over the waters between Staten Island and mainland, with service of process rights reserved for New York.

Again unable to agree, the States met in Albany on April 13, 1827. Further propositions were exchanged over the following week, but New Jersey's ultimate goal of securing her boundary claim continued to be denied by New York. New York did grant New Jersey further rights to serve process on her side of the Hudson, but New Jersey saw these as inadequate concessions. *See* Senate Report, Letters of Sept. 15, 1827, *et seq.* Thus, by 1828, efforts at compromise once again foundered. The *New Jersey v. New York* case was filed in this Court shortly thereafter.

This history is probative in two key respects. One, it underscores that the purpose of the original suit between the States and thus the Compact negotiators themselves was to set a sovereign boundary between the States. Two, because the earlier exchanges reveal that the States contemplated jurisdictional trading in each other's domains, it strongly supports New Jersey's argument that "jurisdic-

[36] These process rights were also exchanged over the waters in the Compact of 1834. *See* Articles Sixth and Seventh (App. A).

tion" as used in the Compact, even "exclusive jurisdiction," has variable meanings, and does not necessarily connote sovereignty.

(2) Review Of Related Jurisprudence

(a) *The Supreme Court's Interpretation Of The Compact:* Central Railroad Co. v. Mayor of Jersey City

My conclusions in this Report draw support from *Central Railroad Co. v. Mayor of Jersey City,* 209 U.S. 473 (1908). Because that case interpreted the Compact at the time Ellis Island was expanding, it has obvious relevance to the case at hand. *Central Railroad* involved the issue of Jersey City's taxing authority over the wharves that extended into New Jersey's side of the Hudson River. Because neither State was a party, and Ellis Island was not at issue, the decision is not the law of the case. Nonetheless, it persuasively addressed issues, notably the meaning of boundary in the Compact, that are central to this case.

Mid-way between the adoption of the Compact of 1834 and the commencement of this litigation in 1993, Justice Holmes concluded for a unanimous Court that the terms "boundary," "territory," and "sovereignty" were interconnected, while the word "jurisdiction" conveyed several meanings. Justice Holmes rejected the theory New York now advances that Article Third simply grants New Jersey property rights on her side of the Hudson River, overriding the boundary delineation in Article First. He stated for the Court:

> It appears to us plain on the face of the agreement that the dominant fact is the establishment of the boundary line. The boundary line is the line of sovereignty, and the establishment of it is not satisfied, but is contradicted, by the suggestion that the agree-

> ment simply gives the ownership of the land under water on the New Jersey side to that state as a private owner of land lying within the state of New York. On the contrary, the provision as to exclusive right of property in the compact between states is to be taken primarily to refer to ultimate sovereign rights, in pursuance of the settlement of the territorial limits, which was declared to be one purpose of the agreement, and is not to be confined to the assertion and recognition of a private claim, which, for all that appears, may have been inconsistent with titles already accrued, and which would lose significance the moment that New Jersey sold the land. We repeat that boundary means sovereignty, since, in modern times, sovereignty is mainly territorial, unless a different meaning clearly appears.

Id. at 478-79.

This passage addresses several relevant issues. First, Justice Holmes's equation of the concepts of territory, boundary, and sovereignty comports with my conclusion that the overriding purpose of the enterprise was to draw the territorial boundary between the States. But Justice Holmes also helps tie together the potentially ambiguous terms "jurisdiction" and "property" that appear in Articles Second and Third. By this analysis, Article Third simply reaffirms that this is New Jersey's sovereign territory while ceding certain aspects of political jurisdiction to another sovereign. He refuses by that reading to allow the property rights granted to New Jersey in Article Third to contradict or limit the boundary set out in Article First.

New York has seized upon Justice Holmes's last quoted phrase ("unless a different meaning clearly appears") as a potential escape from the conclusion that boundary equals sovereignty. *See, e.g.*, N.Y. Post-Trial Mem. at 12-13. But that phrase is a cul de sac, not an escape hatch. It allowed Holmes to reject the argument that Article Third, in giving New York "exclusive jurisdic-

tion" over the water and lands under it on the New Jersey side of the boundary established in Article First, somehow contradicted or retracted the sovereign power accorded to New Jersey in Article First. Reasoning that jurisdiction had to mean "something less" than sovereignty in this Article Third, Justice Holmes concludes that the term referred primarily to "commerce and navigation" over the Bay and River, police-power activities that New York had historically exercised. In my view, Justice Holmes's opinion for this Court on the meaning of the Compact has stood the test of time.

The *Central Railroad* decision reiterates that a state's control over some aspects of jurisdiction such as safety and public health (for example, quarantine restrictions) has long been recognized even in situations where other forms of legal jurisdiction were not. In *Gibbons v. Ogden,* for example, Chief Justice Marshall carefully acknowledged New York's continuing role over what might be termed harbor and river management, even while preempting her monopoly over steamboat traffic. *See* 22 U.S. at 234-38. The exercise of these powers by New York later helped produce in 1921 the Port Authority amendment to the 1834 Compact. This amendment is also relevant extrinsic evidence in determining Compact meaning. *See infra* Part IV.B.2.(b)(3).

(b) *Other Courts' Interpretations Of The Compact*

The States, like Justice Holmes in *Central Railroad,* rely in part upon decisions of each of their courts that have interpreted the relevant language of the Compact. New Jersey argues, for instance, that New York is bound by the decision of her own court of appeals in the *People v. Central Railroad* case discussed below, which supported Holmes's analysis that boundary divides sovereign territory.

These state-court decisions are not binding in this case. The construction of a compact sanctioned by Congress presents a federal question. *Petty v. Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275, 278 (1959); *Delaware River Joint Toll Bridge Comm'n, Pa.-N.J. v. Colburn,* 310 U.S. 419, 427 (1940). The general rule is thus that neither the decisions of the courts of the respective states to the controversy nor the decisions of the federal courts of appeals are binding precedent. *Georgia v. South Carolina,* 497 U.S. at 392; *Durfee v. Duke,* 375 U.S. 106, 115-16 (1963). At the same time, this Court has, on occasion, noted the relevant holdings of state courts, especially where they are persuasive and informative. *See, e.g., Mississippi v. Arkansas,* 415 U.S. 289, 291 n.4 (1974); *Ohio v. Kentucky,* 444 U.S. 335, 340 (1980). With this in mind, I analyze the significant cases cited by the States.

In *People v. Central Railroad Co.,* New York's Court of Appeals—like Justice Holmes later—noted how ironic the 1834 Compact would have been if it sought to take away in Article Third the very territorial powers set out in Article First. The attorney general of New York sued "to abate as nuisances, and cause the removal of certain wharves, bulkhead, piers, and railroad tracks, and other erections, placed by [New Jersey] . . . in the harbor of New York . . . and the Hudson River, about a mile from the New Jersey shore" on the basis that these were within New York's jurisdiction. *Id.* at 284. Interpreting the Compact of 1834, the New York court held that, because the territorial boundary was drawn down the middle of the waters between the States, and because Article Third gave New York only limited jurisdiction, that is, "police jurisdiction of and over all vessels, ships, boats or craft of every kind that did or might float upon the surface of said waters," *id.* at 299-300, New York courts "have no jurisdiction to restrain the erection, or order the removal of structures extending into the bay or river from the New Jersey shore," *id.* at 283.

The New York court was unequivocal in its interpretation of the Compact. With respect to Article First, the court declared:

> The language of this article is certainly very clear and explicit. Aside from the *exception* at its close, it leaves no room for constructive doubt. . . . It fixes definitely the boundary line . . . at or in the middle of the Hudson river, and of the Bay of New York. . . . It relinquished, in legal effect, whatever right or claim [New York] formerly had to the bed of the Hudson river [in New Jersey territory].

Id. at 292. The court noted further that the Compact "yielded the precise point in controversy" between New York and New Jersey in the 1829 original jurisdiction case in this Court, quoting New Jersey's complaint in that case. *Id.* at 292-93. Said the New York court: "The boundary line, it appears, is thus established between the two states, precisely as prayed for by New Jersey in the said [1829] bill of complaint, at and in the middle of the Hudson river and other waters therein mentioned." *Id.* at 293. This, added the New York court, established unequivocally that Article Third gave New York limited jurisdictional rights in New Jersey's waters: "It clearly could not have been the intention [in Article Third] . . . to re-cede to New York what had just been relinquished in respect to the boundary between the two states in the first article or to nullify the force of such article. . . ." *Id.* at 296. New Jersey's sovereign rights had been "so long and so earnestly and persistently claimed by New Jersey, and thus so formally renounced by [New York] . . . in the first article of said treaty." *Id.* at 298. Having so concluded, the New York court found the three subdivisions of Article Third "to have been entirely unnecessary." *Id.; see also Ferguson v. Ross*, 27 N.E. 954 (N.Y. 1891) (similar analysis).

The Supreme Court of New Jersey in the *Central Railroad* case adopted a similar view. After reviewing pre-

Compact history and the implementing statutes of both States, Judge Garrison declared, unequivocally, that "boundary" in Article First means sovereignty; that sovereignty is separate from jurisdiction in the Compact; and that subsequent articles contain exceptions to jurisdiction:

> [T]he question at issue between [the two states] was, in its ultimate essence, one of sovereignty. . . . That this was recognized by each State in providing a modus of settlement is evident from the language of the statutes by which the respective commissioners were appointed and empowered. . . . In plain terms, therefore, the Commissioners were empowered to negotiate respecting two things, and thereby to settle two things, namely, limits of territory and jurisdiction. Nowhere is there any intimation that those two were deemed to be one and the same thing. Bearing this fact in mind, and that the main point in controversy was that of sovereignty, the Compact itself may be [used accordingly]. . . .

Central R.R., 56 A. at 243. Later, the New Jersey court made clear that the "limits of territory" were sovereign, not pure property, limits:

> The grounds for thinking that sovereignty is disposed of under the head of "Territorial Limits" rather than under that of "Jurisdiction" are several and various. In the first place, the legislative direction to each set of commissioners was to deal with both territorial limits and jurisdiction, which was the merest tautology if the jurisdiction referred to was in itself sovereignty. In the next place, the commissioners did, in several instances, deal with jurisdiction in its juridical sense, a matter to which they were in no wise empowered if the term "jurisdiction," used in the statutes under which they were appointed was governmental. Furthermore, the facts that sovereignty was the main point at issue, that territorial limits preceded jurisdiction in the enumeration of the commissioners' authority, and that the first article

> dealt conclusively with the question of territorial limits, are all indications that in dealing with this power the commissioners were settling the main point at issue. More conclusive still is the circumstance that having, in article 1, settled the matter of territorial limits, the jurisdiction with which the commissioners dealt was excepted from it, which is perfectly rational if the jurisdiction was juridical, and hence a mere incident of sovereignty; but was palpably irrational, not to say inconceivable, if jurisdiction was of itself that very sovereignty.

Id. at 244.

One other New Jersey decision, however, is notable for its contradictory conclusion. In *State v. Babcock,* 30 N.J.L. 29, 33-34 (Sup. Ct. 1862), Justice Elmer, who had served as a New Jersey commissioner during the 1833 negotiations, expressed reservations about the interpretation subsequently given the Compact by New York's courts. Justice Elmer's interpretation emphasizes New Jersey's property rights rather than sovereign rights in Article Third. At the same time, it also describes New York's police-power jurisdiction over the entire Bay and River. His interpretation is thus not entirely at odds with the intrinsic reading detailed above. To the extent his opinion is offered as evidence of the commissioners' intent, moreover, his post-hoc comments are not particularly probative. This Court has reasoned with regard to extrinsic evidence of legislation that "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent." *Blanchette v. Connecticut Gen. Ins. Corps.,* 419 U.S. 102, 132 (1974); *see also United States v. United Mine Workers,* 330 U.S. 258, 281-82 (1947) (finding remarks of legislator made eleven years after passage of act not probative of intent of drafters).

A recent Second Circuit decision that was a catalyst for filing this case also interpreted the Compact in New

York's favor. *Collins v. Promark Products, Inc.*, 956 F.2d 383 (2d Cir. 1992) held that New York's workers' compensation laws applied to an injury on the landfilled portion of Ellis Island. The court thus determined that New York was sovereign over that territory and rejected Justice Holmes's reasoning in the *Central Railroad* litigation. While a recent decision of the court of appeals is important, its analysis is far less probing given that the sovereignty issue has been the subject of a full trial in our case. The *Collins* result made for easier management of workers' compensation claims on Ellis Island, but I find its reasoning unpersuasive on the boundary issue. Although they appeared as amici, the States were not parties to that case, nor was it an original action. Thus, the decision is not binding on the parties here. As this Court has admonished: "[T]his Court, not a Court of Appeals, is the place where an interstate boundary dispute usually is to be resolved." *Georgia v. South Carolina,* 497 U.S. at 392.

(3) The Port Authority Amendment of 1921

New York and New Jersey established a bi-state commission in 1917 to explore greater cooperation in operating their respective ports and related transportation arteries. The findings of the New York, New Jersey Port and Harbor Development Commission ("Commission"), set forth in the report discussed further below, led to the enactment of the Port Authority of New York and New Jersey amendment to the Compact of 1834. *See* N.Y. Unconsol. Laws §§ 6401, *et seq.* (McKinney 1979); N.J. Stat. Ann. §§ 32:1-1, *et seq.* (West 1990). The Port Authority amendment set boundaries for a "Port of New York district" and was approved by Congress on August 23, 1921. *See* Sen. Joint Res. 88, 67th Cong., 1st Sess. (1921); *see generally* Frankfurter & Landis, *supra* at 696-97 (describing the evolution of the Port Authority amendment); *Hess v. Port Auth. Trans-Hudson Corp.*, 115

S. Ct. 394, 398 (1994) (referring to creation of the Port Authority of New York and New Jersey). The conclusions they reached during this process are relevant to each State's operating assumptions under the Compact.

The Supreme Court has noted that such assumptions are relevant. In *Vermont v. New Hampshire,* 289 U.S. 593 (1933), for example, the Court relied in part on the "practical construction" given by both states to the boundary that the Court held properly divided the states. As evidence of this "practical construction," the Court pointed to, inter alia, the fact that certain towns in New Hampshire recognized the low-water mark on the west bank of the Connecticut River as the town and state's boundary. The Court regarded the town's actions as having "some persuasive force." *Id.* at 615. Similarly, as discussed below, the Commissioners who drafted the bi-State reports for the Port Authority amendment regarded interstate cooperation as necessary in the Port of New York in part because the territorial boundary between the States ran down the middle of the Hudson River and the Bay. Thus, while not dispositive, the "practical construction" of the boundary evidenced in these reports is of "some persuasive force" in affirming that Article First describes the territorial boundary between the States, which informs the analysis of sovereignty over Ellis Island.

(a) *Legislative Background*

Although the documents describing the Commission's findings and the text of the Port Authority amendment do not discuss Ellis Island specifically, they are relevant in two respects: they support New Jersey's interpretation of "boundary" in the 1834 Compact; and they buttress her argument against New York's claim of prescription during this period. The most voluminous and earliest of the legislative materials is the full text of the Report of the Commission. *See N.Y. Legis. Docs.,* 142d Sess., No.

103 (1919). The Report was addressed to the governors of New York and New Jersey, Alfred E. Smith and Walter E. Edge, respectively, and was submitted to the New York legislature by Governor Smith on April 14, 1919.

The Report, as well as the summary of the Report submitted to the governors of the States in 1920, supports New Jersey's interpretation of the word "boundary" in the 1834 Compact. The indirect evidence lies primarily in Appendix B of the Report, titled "Preliminary Report of Counsel to Accompany the Tentative Draft of Proposed Treaty Amendatory and Supplementary to the New York-New Jersey Treaty of 1834." The Preliminary Report sets out in detail the early commercial relations between the States, explaining that the "boundary dispute" was framed for purposes of the 1833 negotiations by the advent of the steamboat and the concomitant monopolies it produced. *See* Report at 71-76. Later in the Preliminary Report, discussing the treaty-making power of the States, counsel to the Commissioners ("Counsel") explain that

> [i]f the compact or agreement between the States does not affect the political power of either, it would seem, therefore, as though approval by Congress were unnecessary. The treaty between New York and New Jersey of 1834, however, was approved by Congress. That treaty did seriously affect the political relations of the two States, and as we have seen . . . settled and disposed of a matter that had been the subject of serious controversy between the two States.

Report at 162. Counsel thus interpreted the Compact as having set a sovereign boundary, which they made clear was at issue prior to 1833.[37]

---

[37] The legislative history of Congress's approval of the Port Authority Act is not probative. The relevant history merely acknowledges the Report filed by the Commission without analyzing

Similarly, in the same discussion, Counsel note that the 1834 Compact contemplates the exercise of extra-territorial jurisdiction, consistent with an interpretation of the Compact drawing the boundary as set out in Article First of the 1834 Compact. They state:

> If a State may alienate a part of its territory in perpetuity to an individual, it may, of course, alienate to another State. This is the theory underlying all boundary treaties. Each State grants and conveys to the other—or releases, as the case may be—all its right, title and interest in the property on the other side of the boundary. . . . But we are not to change in any respect the boundary lines between New York and New Jersey as settled by the Treaty of 1834. *We are simply to vest sovereign authority within a certain portion of territory in both States, and such sovereign authority only to a limited degree, sufficient to accomplish the main purpose. This is already done in the Treaty of 1834.*

Report at 164 (emphasis added). This allusion to the 1834 Compact supports New Jersey's view that the "jurisdiction" conferred in Article Third of the Compact does not undermine the sovereign boundary set out in Article First, but rather confers on New York certain powers of jurisdiction in New Jersey's sovereign territory. Consistent with Counsel's analysis, Article Third vests "sovereign authority only to a limited degree" over the otherwise sovereign territory delineated in Article First.

Counsel in the excerpt above refer to "boundary lines," in the plural, which New York uses to support her contention that the Compact does not set merely a single boundary. "Boundary lines" as used above, however, should logically be read in context as describing the boundaries of the States distinctively in both the Hudson

---

it and focuses more generally on the benefit the Port Authority Act would work for the entire nation. *See* 61 Cong. Rec. 4920-21 (1921); *see also id.* at 8589-90 (remarks of T. Frank Appleby as to the benefits of the Act in both New York and New Jersey).

River and New York Bay under Article First; the plural may also be reasonably interpreted to describe the boundaries of each State's respective extra-territorial jurisdiction. There is no intrinsic or extrinsic support for New York's view on the meaning of the term.

In at least two other parts of these legislative documents, moreover, the Commissioners clearly adopt an interpretation of the 1834 Compact that is inconsistent with New York's theory. First, the Preliminary Report analyzes Justice Holmes's decision in *Central Railroad Co. v. Mayor of Jersey City*. In particular, Counsel quote the case as follows:

> "But we agree with the state courts that have been called on to construe that part of the agreement, that the purpose was to promote the interests of commerce and navigation, not to take back the sovereignty that otherwise was the consequence of article I. This is the view of the New York as well as of the New Jersey court of errors and appeals, and it would be a strange result if this court should be driven to a different conclusion from that reached by both the parties concerned."

Report at 79. One would certainly expect that if Counsel disagreed with Justice Holmes's interpretation they would have noted as much, given that it related to the respective sovereignty of the States, an issue so fundamental to the Port Authority amendment.

Second, New Jersey's interpretation of the 1834 Compact is clearly adopted in the "Summary of Joint Report with Comprehensive Plan and Recommendations" ("Summary"), submitted to the governors of New York and New Jersey on December 16, 1920. *See N.Y. Legis. Docs.*, 144th Sess., No. 33 (1921). In the Summary, the Commissioners discuss the "Geography of the Port,"

and in particular the "Political Geography." *Id.* at 12-13. The Commissioners begin their analysis by noting that "[t]hrough the Hudson River and the Upper Bay runs the State line between New York and New Jersey," *id.* at 13, an interpretation of the Compact congruent with New Jersey's. This suggests that "boundary lines" meant the lines in the Hudson River and in the New York Bay under Article First, not the tortuous set of boundary lines proposed by New York in her post-trial brief.

The Report also mentions the Compact of 1834 in its discussion of the "Treaty-Making Power of the States and What May Be Done Under It." Report at 161. Counsel analyze the "North Atlantic East Fisheries Case" before the Hague Tribunal for the purpose of showing that a sovereign state may subject its territory to a myriad of obligations which do not derogate from the state's sovereignty. *Id.* at 169-72. The Commissioners point to a colloquy before the Tribunal in which one of the participants states that " 'general sovereignty is a thing wholly apart and not affected by the grant of particular territorial rights.' " *Id.* at 172. Counsel then state:

> Indeed, we may say that the framers of the treaty between New York and New Jersey of 1834 had clearly in mind this distinction between the preservation of general sovereignty and governmental functions and the grant of title to land, the distinctions between the title to the land under water, which, in the case of New Jersey, extends to the middle of the stream, and the exercise of *governmental police power*, which is granted to one State even to the shores of the other.

Id. (emphasis added). This discussion reveals Counsel's understanding that the 1834 Compact distinguished between jurisdiction and sovereignity. It also supports New Jersey's view that "present jurisdiction" in Article Second referred to the police powers New York reserved to her-

self when she ceded the pre-1834 Island to the federal government.

(b) *Text Of The Amendment*

The text of the Port Authority amendment (while also not specifically mentioning Ellis Island) also supports New Jersey's interpretation of "boundary." The purpose of the Compact amendment is described as follows:

> Whereas in the year 1834 the States of New York and New Jersey did enter into an agreement fixing and determining the rights and obligations of the two States in and about the waters between the two States, especially in and about the bay of New York and the Hudson River; and
>
> Whereas since that time the commerce of the port of New York has greatly developed and increased and the territory in and around the port has become commercially one center or district . . . .
>
> . . . .
>
> . . . Now, therefore, The said States of New Jersey and New York do supplement and amend the existing agreement of 1834 in the following respects . . . .

N.Y. Unconsol. Laws § 6401; N.J. Stat. Ann. § 32:1-1. Article 20 of the Act refers to the 1834 Compact as follows: "The territorial or boundary lines established by the agreement of 1834, or the jurisdiction of the two states established thereby, shall not be changed except as herein specifically modified." N.Y. Unconsol. Laws § 6421; N.J. Stat. Ann. § 32:1-21. The Preamble and Article 20 of the Act thus suggest an important awareness about the meaning of two crucial terms in the 1834 Compact: boundary and jurisdiction. By equating boundary and not jurisdiction with territorial lines, and by using the disjunctive to separate boundary and territory on the one hand from jurisdiction on the other hand, the 1921

amendment endorses New Jersey's view of the word "boundary."

The significance of the 1834 boundary line also was accepted by the New York courts after the 1921 amendment. On several occasions they refused to read the Port Authority amendment as modifying the 1834 boundary line between the States. In *Bunge v. C & N Truck Leasing, Inc.*, 329 N.Y.S.2d 458 (Civ. Ct. 1972), for example, the New York court was faced with a suit over an accident that occurred at a New Jersey toll plaza on the George Washington Bridge. The defendant moved to dismiss the complaint for lack of jurisdiction. The court granted defendant's motion, citing earlier cases that established the state boundary line in the middle of the Hudson River. *See, e.g., Clarke v. Ackerman*, 278 N.Y.S. 75 (App. Div. 1935). The *Bunge* court stated:

> The conclusion that I reach is that the compact confirmed the underlying jurisdictional premise of the treaty, that the boundary line between the two states is the middle of the Hudson River, and explicitly affirmed that the creation of the Port Authority did not modify the jurisdiction of either State. There is no persuasive reason, in my view, in the light of the text of the compact and the precedents for deciding that the compact changed the concept that the jurisdiction of the courts of each state extends to but not beyond the middle of the Hudson River.

329 N.Y.S.2d at 460.[38]

New York's judicial opinions after the 1921 amendment confirm that State's acceptance of the essential point that the amendment endorses the boundary line established by the Compact in 1834.

---

[38] The George Washington Bridge is located at that part of the boundary which New York's counsel claims in her five-part boundary description was meant to be in New York's territory. *See* App. B. The *Bunge* court's opinion thus appears to contradict New York's legal theory.

C. Conclusions From Compact Analysis Based Upon Intrinsic And Extrinsic Evidence

In 1829 the original jurisdiction of this Court was invoked in *New Jersey v. New York* to resolve a boundary dispute. Boundary relates to territory or sovereignty. The resulting settlement negotiations, which led to the Compact of 1834, were prompted by that lawsuit. Article First is thus first for a reason: it establishes the interstate boundary line in logical order.

The other articles, including Articles Second and Third, must be read consistently with Article First, not the other way around. The word "boundary" is used only once in the 1834 Compact while "juisdiction" appears numerous times in the preamable and in other articles of the Compact. "Jurisdiction" is sometimes qualified by "exclusive" and once by "present." Jurisdiction, in this setting, denotes different meanings in different contexts. The subsequent articles create exceptions for each State to the jurisdictional attributes of sovereignty in the other's sovereign territory as declared by Article First.

The "present jurisdiction" term of Article Second accords New York sovereignty over the Island at the time of the Compact and thus locates the 1833 boundary. Neither Article Second nor any other provision of the Compact addresses the question at issue—which of the two States is sovereign over the landfill additions made to Ellis Island after the Compact. Rather, that extra-Compact question must be decided under principles of common law to be explored next. This understanding and analysis of the Compact's terms as they affect the interstate boundary in general and on Ellis Island in particular are informed by both the intrinsic and extrinsic evidence set forth in this section.

V. SOVEREIGNTY OVER THE LANDFILLED PORTIONS OF ELLIS ISLAND: THE COMMON LAW OF ACCRETION AND AVULSION

New York's "present jurisdiction" over Ellis Island under Article Second of the Compact constitutes sovereign power over an entity within the territory of New Jersey. If Ellis Island were still the size it was originally in 1833, there would be no case before this Court. It is the enlargement of the Island that creates the controversy.

The Compact does not resolve the interstate boundary on an expanded Ellis Island because it treats the Island as it then existed. Subsequent changes to the size of the Island must be addressed through principles of common law then and now in effect. The common law of accretion and avulsion is the primary vehicle for the parties to determine sovereignty over the landfilled portions of the Island.

A. The States' Positions

New Jersey argues that the acreage added by landfill almost entirely after 1890 is her sovereign territory because it sits in her territorial waters, and on her underwater land. New Jersey also claims that the fill after 1834 was not wharfing-out but represented "the construction of [the] new and separate islands." N.J. Post-Trial Br. at 9 (Oct. 12, 1996) (DI 366). Further, argues New Jersey, since under Article Third she had the property rights of a sovereign to underwater lands on her side of the boundary, the 1834 Ellis Island could have extended only to the high-water mark of 1834. *Id.* at 11. The high-water mark boundary in 1834 is further evidenced by New York's 1808 deed of conveyance to the United States of around three acres. *Id.* at 12. As discussed below, *see infra* Part VI.D.3., New York's 1880 attempt to convey Ellis Island lands below the high-water mark to the United States was to no avail because in 1904 "the United States recognized that New York had no

authority to sell the lands and consequently obtained title to them from New Jersey." *Id.* The subsequent fill added by the United States is an avulsive change which did "not disrupt sovereignty." *Id.* at 15.

New York argues that even assuming New Jersey is right on the Article First boundary issue, the entire Ellis Island, by whatever means created, belongs to her under Article Second because there are no descriptive limits to the size of the Island contained in the Compact's grant of "present jurisdiction" (that is, no metes and bounds description or "fastlands" limitation). New York contends: "Had the commissioners, who were fully aware of the possibility of fill, really wanted to geographically limit New York's jurisdiction, they could have easily done so with simple, everyday language." N.Y. Post-Trial Mem. at 15-16.

New York posits that this conclusion is strengthened by Justice Holmes's reference to present jurisdiction as preserving " 'the status quo ante, whatever it may be,' " *id.* at 16, and by the *Collins* decision. *Collins v. Promark Prods., Inc.*, 956 F.2d 383, 386 (2d Cir. 1992) (stating that "[t]he language of the Compact concerns power over the entity known as Ellis Island and in no way implicates the size of the entity").

New York City adds an argument that the State of New York did not attempt to make. The City argues that under common-law principles the filled portions of Ellis Island are rightfully New York's because an upland owner may make extensions and add fill to his property beyond the low-water mark, provided such extensions and fill do not prejudice "the common rights of navigation or fishery, or violate the reasonable needs of the public interest." The City Post-Trial Br. at 21-22 (Oct. 12, 1996) (DI 367).

B. Discussion

New York's position raises the question of what the States would have contemplated in 1833 if Ellis Island were to grow to many times its "original" size. After all, the Island ultimately grew by more than nine times the size of the original fast land. Would no limits have been contemlated on the ultimate size of the Island over which New York had jurisdiction? One could speculate that New York, by this theory, would be sovereign over an ever-expanding Ellis Island on New Jersey's underwater territory. Under this interpretation of the Compact, and subject only to navigational restrictions, New York theoretically could add to her territory an area as large as Governors Island within New Jersey's sovereign territory. I am unpersuaded the Compact accommodates this possibility. If such territorial expansion of a small island were contemplated in 1833, some references to it would logically have been set forth in the 1834 Compact. Silence cannot bear such interpretative weight.

I therefore agree with New Jersey that the Compact does not address expansion by landfill,[39] and also with the *Collins* court's conclusion that the Compact language does not "implicate" or resolve the size of Ellis Island. Justice Holmes's reference to "status quo ante" in *Central Railroad Co. of N.J. v. Mayor of Jersey City*, 209 U.S. 473 (1908) also does not resolve this question. The cases do not focus on the issue of which State has jurisdic-

[39] New York argued during trial that, at the time of the Compact, the use of fill on islands in the harbor and on the Manhattan or Jersey shores was already an accepted practice. Tr. 7/23/96 at 1594-1601; N.Y. Post-Trial Mem. at 15 (Oct. 3, 1996) (DI 365). New Jersey disputed these claims. Tr. 7/23/96 at 1596-97. I find the evidence too ambiguous to permit a factual finding that the practice of fill or wharfing-out had been established and thus taken for granted during that time. In any event, given the scheme of the Compact, the absence of any allusion to such practices in the Compact, and this Court's application of the doctrines of accretion and avulsion in original jurisdiction cases, such a finding would not affect my analysis.

tion over the expanded areas of Ellis Island; they are Compact interpretation cases, and the Compact itself did not resolve that question. This is understandable because, in 1833, bigger issues were at stake for the Compact drafters. Indeed, the "grand scheme" of the Compact was to declare territorial rights to the Bay of New York and most of the Hudson River, as well as large land masses like Staten Island, not to speculate on the growth potential of the small islands in the Harbor.

1. *Collateral Factors*

Before turning to the relevant legal principles that address the landfill issues, some collateral factors must be noted. These include the intertwined role of three sovereigns on the Island, the fact that Ellis Island at one point was three distinct islands, and the relevance of "wharfing-out" to the present size of the Island.

a. The Presence Of Three Sovereign Entities

Three, not two, sovereign entities are involved on Ellis Island. The United States, by deeds of 1808 from New York and 1904 from New Jersey, is owner of Ellis Island; New York, by Article Second of the Compact, retains sovereignty over the 1833 Island; and New Jersey under the Compact, particularly Article First, is sovereign over the waters around the Island. The additions to the Island after 1890 were made by the United States, not New York, and the United States received a deed from New Jersey for nearly all of those underwater lands. I note this here to alert the Court even though I do not believe that it has any impact upon the accretion and avulsion analysis. Instead, the three-sovereign question will bear heavily upon the discussion of prescription and acquiescence in the next section.

b. One Island Or Three Islands

At trial, the States argued over whether Ellis Island was one island or three islands during the period of land-filling. This fact could be relevant to the decision if the Compact is interpreted, as New York argues, to grant sovereignty over an enlarged Island. In this event, if Ellis Island were at some point three islands rather than one island, the case for limiting New York's claim to the first and original island would be made. New York would be hard-pressed to claim that she was also sovereign over separate islands added to New Jersey waters in the Bay. There is no basis anywhere in the Compact for New York to claim sovereignty over new islands in New Jersey's sovereign waters. New Jersey made this point:

> [MR. YANNOTTI for New Jersey]: In these documents, the separate land masses are referred to as islands one, two and three . . . .
>
> . . . .
>
> Under New York's theory of the case, the Federal Government could have dotted the whole harbor with islands, and so long as they were called Ellis Island, New York would acquire jurisdiction over the territory.

Tr. 7/10/96 at 25.

Indeed, New York's counsel conceded during trial that an imaginary island emerging in the Hudson River on New Jersey's side of Article First's boundary might be New Jersey's sovereign territory under Article Second:

> SPECIAL MASTER VERKUIL: Suppose the [hypothetical] island is between Bedlow's and Ellis Island. It's not connected. And it emerges like Atlantis out of the sea.
>
> MS. KRAMER [for New York]: Like Mr. Cragin's island almost did, right?

> SPECIAL MASTER VERKUIL: Whose Island is it? Then New Jersey has it, then that's Jersey's Island.
>
> MS. KRAMER: Under Article Two, it would not be so clear. Under Article One, if New York's interpretation of Article One is accepted, New York would have it. But under Article Two, New York would not necessarily have it.

Tr. 8/15/96 at 4140.

I find that there were three islands for at least a brief period in time. New York's witness, Mr. Unrau, placed into evidence his Historic Structure Report, which is replete with evidence supporting this conclusion. The three land masses were initially separate and interconnected for purposes of communication by gangways built on pilings. Until they were later connected by fill, they were technically separate. Mr. Unrau stated, for example, that

> [d]uring the 15 months that it operated the two hospital islands, the army constructed the covered way between islands 2 and 3 to provide a sheltered passage for communication between the two hospital complexes. Up to that time, the two islands had been connected by an uncovered trestle bridge about 500 feet long.

Harlan D. Unrau, U.S. Dep't of Interior/Nat. Park Serv., Historic Structure Report: Ellis Island, Statue of Liberty National Monument, New York-New Jersey 468 (1981) (DE 952); *see also id.* at 415, 416, 491, 503-04, 505 ("the proposed additional island"), 506 ("a new island," "land newly built"), 507 ("proposal for a new island . . . 410 feet from the present island and with 200 feet of clear water space between the two islands"), 508 ("In July the boundaries of the new island were staked out."). Tr. 7/26/96 at 2225-35. New York's witness, Dr. Squires, testified that Islands Two and Three were con-

nected by a "breakwater" built of pilings, and conceded that "a breakwater constructed in that manner is not fill." Tr. 8/2/96 at 3067. Mr. Unrau attempted to discount his earlier descriptions of three separate islands by claiming it was a designation used for "administrative convenience." Tr. 7/26/96 at 2226; *see also* Tr. 8/8/96 at 3551-54 (Mr. Unrau hedged on the divergence between his trial testimony and his written description before trial). I am more convinced by the precise and detailed references described in his report written prior to litigation.

Much of the dispute at trial over whether Ellis Island was in fact one or three islands centered on how one views the water running between Islands Number One and Two in a photograph which the Court can review in Appendix E. The testimony of New York's expert, Dr. Squires, sought to contradict the visual appearance of a separation in that photograph by arguing that the walkway was supported by pilings that were embedded in cribbing. Tr. 8/2/96 at 2079-81. The legend on the photograph however, shows that Island Number Three, which was built to house the infectious-diseases hospital, was intended to be separate. Tr. 8/8/96 at 3522-58. I believe the photograph shows that Island Number Two was surrounded by water at one time. *See* Tr. 7/26/96 at 2233 ("[SPECIAL MASTER VERKUIL]: I can't help but observe that in a moment like this a picture is worth a thousand words"); *see also* Tr. 8/8/96 at 3526, 3528 (Mr. Unrau conceded that Island Number Two was once surrounded by water, although he also believed it was connected by fill to Island Number One).

Under the Compact, Islands Two and Three, which were once separate islands, are in New Jersey's sovereign territory. Under the accretion and avulsion doctrine, those landfilled areas are in New Jersey, as is the landfill added to Island Number One. The fact that there was a synaptic moment in time when three islands existed is legally

significant only if I conclude that the Compact defined "one" Ellis Island. Because, in my view, the issue of jurisdiction over the landfilled portions of the Island was not settled by the Compact, the question of the size of the original Island after filling is not dispositive. Under the applicable common-law doctrine of accretion and avulsion, New Jersey is entitled to prevail whether or not Ellis Island was originally one, two, or three islands.

c. Wharfing-Out

Nor is the Ellis Island issue one of wharfing-out. New Jersey concedes that the owner of Ellis Island would have the right to "wharf-out" under applicable law. N.J. Post-Trial Br. at 9. Some minor wharfing-out did occur on the Ellis Island dock pre-1834, but the main additions that occurred after 1890 were far too extensive to be considered wharfing-out. The fast land of the Island grew over nine hundred percent.[40]

2. The Common Law Of Accretion And Avulsion

There is no dispute in this case that the substantial additions to the Island after 1890 were artificially added by fill. *See* Stipulated Facts ¶ 13 (July 10, 1996) (DI 338a); *see also* App. F (Map of Ellis Island Historical Development 1920-1936; Map of Structural Development of Ellis Island, 1890-1935). There is also no dispute between the parties that the landfill is an avulsive (not an accretive) occurrence. The only question is whether this avulsive action served to expand the territory of the sovereign State of New York under the Compact or whether the landfill is in New Jersey's territory under the common law. The United States as owner purchased a

[40] Another dispute arises over whether New York as sovereign over the 1833 Island is entitled to claim only to the high-water mark, or also to the low-water mark. I address this question in the remedy section. *See infra* Part VII.B.1.

deed from New Jersey to cover the land added by fill; it therefore owns all of the Island (except for the 0.57 acres that New Jersey did not convey).

The Court traditionally has applied the common law of avulsion and accretion when analyzing the impact of changes to land on a boundary between states. "Accretion is the increase of riparian or littoral land by the gradual deposit, by water, of solid material, whether mud, sand, or sediment, so as to cause that to become dry land which was before covered by water." 78 Am. Jur. 2d *Waters* § 406 (1975); *Alexander Hamilton Life Ins. Co. of Am. v. Governor of the Virgin Islands*, 757 F.2d 534, 538 (3d Cir. 1985). Avulsion, by contrast, is "sudden and major shift of land," such as "human placement of artificial fill." *Id.* at 538.

Under federal common law, and the state law of both New Jersey and New York, the "ancient rule" is that acts of avulsion do not expand territorial lines. *See Arkansas v. Tennessee*, 310 U.S. 563, 566, 569-71 (1940); *Missouri v. Nebraska*, 196 U.S. 23, 35-36 (1904); *County of St. Clair v. Lovington*, 90 U.S. (23 Wall.) 46, 67 (1874) ("[I]f the alluvion [avulsion] be sudden or considerable, in this case it belongs to the king. . . ." (citing 2 William Blackstone, *Commentaries* * 262)); *Alexander Hamilton*, 757 F.2d at 538-39 (describing ancient rules of the common law concerning limits on upland owners' power to add to lands by artificial filling); *see also Borough of Wildwood Crest v. Masciarella*, 240 A.2d 665, 668-69 (N.J. 1968); *In re Town of Hempstead*, 144 N.Y.S.2d 440 (Sup. Ct. 1954), *aff'd*, 156 N.Y.S.2d 219 (App. Div. 1956). This is also a long-standing principle of international law, which has been accepted by this Court to resolve interstate boundary disputes. *See Nebraska v. Iowa*, 143 U.S. 359, 368 (1892); 2 *Digest of Int'l Law* at 1084-85 (Marjorie Whitman ed., 1963); John M. Rogers, *Applying the International Law of Sovereign Im-*

munity to the States of the Union, 1981 Duke L.J. 449, 467 (1981); Christopher C. Joyner, *Ice-Covered Regional International Law,* 31 Nat. Res. J. 213, 229 (1991). This is a rule of fairness as well as common sense; otherwise, sovereigns could intentionally and willfully change their boundaries to the disadvantage of other sovereigns.

In *Georgia v. South Carolina,* 497 U.S. 380 (1990), this Court emphasized the general proposition that avulsion works no change in a boundary and that "one cannot extend one's own property into the water by landfilling or purposefully causing accretion." *Id.* at 404.

Under the test in *Georgia v. South Carolina,* the additions to Ellis Island by landfilling post-1890 are "avulsive action[s]." *Id.* Neither the United States nor New York can expand ownership or territorial claims to Ellis Island merely by adding to land under water. Thus, while nearly all of the landfilled portion of Ellis Island is *owned* by the United States pursuant to deed, it is still within the sovereign territory of New Jersey as determined by the 1833 boundary set out in the Compact.

C. Summary

In summary, I recommend that this Court reach the following conclusions: (1) The interstate boundary between the States is set forth in Article First of the Compact of 1834; (2) The Compact accords New York sovereignty over Ellis Island as it existed in 1833 to the low-water mark thereof, *see infra* Part VII.B.1; (3) All land added by fill beyond the limits in (2) that is owned by the United States is land over which New Jersey remains sovereign under common-law doctrine; and (4) The 0.57 acres of Ellis Island that was not deeded to the United States is both owned by New Jersey and within her sovereign territory.

VI. PRESCRIPTION AND ACQUIESCENCE

New York raised the affirmative defense of prescription and acquiescence in her answer, and much of her evidence during trial was introduced to prove that she has satisfied the elements of this common-law doctrine. In that event, although the Compact of 1834 established New Jersey's sovereignty over the landfilled portion of Ellis Island, New York's claims to sovereignty would still be superior because of New Jersey's acquiesence.

A. Description Of The Doctrine

The equitable doctrine of prescription and acquiescence has long been applied to original jurisdiction cases. A state may acquire sovereignty over the territory of another through a regime of such continuous and undisputed exercise of jurisdiction (possession and prescriptive acts) that her domain becomes the new accepted order. The other sovereign acquiesces by failing to enforce rights of dominion against a recognizable challenge. *See generally Georgia v. South Carolina,* 497 U.S. 376, 389 (1990); *Arkansas v. Tennessee,* 310 U.S. 563 (1940). In essence, the doctrine of prescription and acquiescence is "the uninterrupted exercise of dominion by a State for a sufficient length of time over territory belonging to another and openly adverse to the claim of that other, suffic[ient] in itself to transfer the right of sovereignty over the area concerned." Charles Cheney Hyde, 1 *International Law* § 116, at 386 (1945). Unlike laches, which is a product of the common law, the doctrine of prescription and acquiescence derives from international law and suits between sovereigns, thereby gaining relevance and legitimacy when sovereign states sue each other in original cases.

The standard for non-acquiescence has been the subject of debate in this case. New York has argued that the only way New Jersey could show non-acquiescence was by filing a lawsuit against New York, which she failed to do for

"more than 100 years." Hr'g Tr. at 39 (Ms. Kramer for New York). And, declared New York, "[t]here is not a single case that suggests in any way that anything less than filing suit can establish nonacquiescence. It is New York's position that that is the law." *Id.* at 40; *see also* N.Y. Reply at 16 (Apr. 1, 1996) (DI 259). After trial, although she reiterated that proposition, New York did not maintain that this strict standard was the only one for proving non-acquiescence. She explained her view: "Under prevailing case law, New Jersey had to object to New York's exercise of sovereignty or prescription over Ellis Island and its adjacent lands at or near the time New York exercised its sovereignty or prescription, not, as it did, 103 years later." N.Y. Post-Trial Mem. at 26 (Oct. 3, 1996) (DI 365).

This Court has not required the filing of a lawsuit as a precondition to avoiding a shift in sovereignty via prescription and acquiescence. Rather, the test for non-acquiescence is a multi-faceted one that permits an expression of sovereignty to be shown in any "practical way," including litigation. *See, e.g., Michigan v. Wisconsin,* 270 U.S. 295, 316-19 (1926) (analyzing state's assertion of ownership over the land in question); *Indiana v. Kentucky,* 136 U.S. 479, 509-12 (1890) (analyzing whether state continuously asserted title to land in question); *Rhode Island v. Massachusetts,* 40 U.S. (15 Pet.) 233, 271 (1841) (undertaking prescription and acquiescence analysis and noting that, although Rhode Island had never prosecuted her claim of right, she "has from time to time made efforts to regain her territory by negotiations with Massachusetts"). A state may interrupt the continuity of the other state's adverse claim by "protest, in the international context, short of 'use of force.' " Hyde, *supra* § 116, at 387.

As this Court has stated on numerous occasions, most recently in *Georgia v. South Carolina,* "long acquiescence

in the practical location of an interstate boundary, and possession in accordance therewith, often has been used as an aid in resolving disputes." 497 U.S. at 389. The Court added that "[p]ossession and dominion are essential elements of a claim of sovereignty by prescription and acquiescence" and that "[i]naction, in and of itself, is of no great importance; what is legally significant is silence in the face of circumstances that warrant a response." *Id.* The Court noted later that "inaction alone may constitute acquiescence when it continues for a sufficiently long period." *Id.* at 393. *Cf. New Jersey v. Delaware,* 291 U.S. 361, 376-77 (1934) (noting that "almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them" and concluding that "[a]cquiescence is not compatible with a century of conflict").

The *Georgia v. South Carolina* Court was interpreting a boundary between states defined in a "Convention known as the Treaty of Beaufort of April 28, 1787." 497 U.S. at 380. The treaty, having been ratified by the legislatures of each state and by the Continental Congress, *id.* at 381, was comparable to an interstate compact. As with this case, the dispute between Georgia and South Carolina had been the subject of related litigation in prior years.[41] The Court held that South Carolina had acquired certain islands (the Barnwell islands) via prescription and acquiescence even though the islands had been granted to Georgia in the Treaty of 1787. The prescriptive acts included South Carolina's exercise of "dominion or control," *id.* at 391, through "almost-uniform taxation of the property," *id.* at 392, her seizure and subsequent sale of the

---

[41] The first case before the Court arose in 1876 and the second in 1922. *See South Carolina v. Georgia,* 93 U.S. (3 Otto.) 4 (1876); *Georgia v. South Carolina,* 257 U.S. 516 (1922). Thus, if *New Jersey v. New York* in its antecedents is the "oldest" original case, *Georgia v. South Carolina* should be awarded second place.

property for non-payment of taxes, policing and prosecutorial activities and other factors. Georgia defended by asserting that inaction alone, without reasonable notice, cannot constitute acquiescence. The Court found, however, that there were numerous acts that put Georgia on notice, such as cultivation by South Carolina residents, a failure to assert taxing authority, and Georgia deeds describing the islands as within South Carolina. In light of this evidence, the Court concluded that under "ancient principles of adverse possession" the islands belonged to South Carolina.

As discussed below, New York's acts of prescription on the filled portions of Ellis Island do not meet the standards set forth by the Court in *Georgia v. South Carolina* and related jurisprudence.

B. The Related Doctrine Of Laches

Laches, a related equitable doctrine that requires proof of (1) lack of diligence and (2) prejudice, has been held inapplicable to suits between sovereigns involving interstate boundary disputes. In *Illinois v. Kentucky,* 500 U.S. 380 (1991), the Court held that "[a]lthough the law governing interstate boundary disputes takes account of the broad policy disfavoring the untimely assertion of rights that underlies the defense of laches and statutes of limitations, it does so through the doctrine of prescription and acquiescence." *Id.* at 388 (citing *Georgia v. South Carolina,* 497 U.S. 376).

Recently, however, the Court noted that "[t]his Court has yet to decide whether the doctrine of laches applies in a case involving the enforcement of an interstate compact." *Kansas v. Colorado,* 115 S. Ct. 1733, 1742 (1995). The Court did not resolve the question because it concluded that an essential element of the doctrine, lack of diligence, had not been proved. *Id.* at 1743.

I have therefore assumed that, as New York urges, the laches doctrine could apply to this case, which is essentially a compact interpretation case, and have preserved the record in the event this Court should chose to readdress the question left open in *Kansas v. Colorado*. *See also supra* Part I.C.3. The parties during trial submitted or countered evidence relevant to the doctrine of laches and debated its applicability. Ultimately, there are no issues raised by the laches doctrine that cannot be subsumed under the more established doctrine of prescription and acquiescence. This is especially true of the overriding equitable principle at play in both defenses, namely acquiescence or lack of diligence. *See* Interim Op. at 51 (May 9, 1995) (DI 286).

The issue of prejudice, which New York averred to in her offer of proof, is based on her claim that documents may have been destroyed prior to the time suit was commenced.[42] Because it is impossible to know from the

---

[42] New York's expert, Mr. Unrau, testified, for example, that documents may have been lost or neglected after 1954, once the federal immigration station was closed:

> [MR. UNRAU: Historical records] were on the Island at the time the Island closed, and . . . they were taken [to Federal Hall at some point] because Ellis Island was basically just falling apart after it closed [in 1954] . . . .
>
> . . . .
>
> [MS. KRAMER for New York]: So between 1954 and 1965, the boxes were sitting there unattended?
>
> [MR. UNRAU]: I would say they probably were . . . .
>
> . . . .
>
> [MS. KRAMER]: As you sit here today, is there any way for you to know whether or not any of the documents that were left on Ellis Island unattended for nine years comprised the entire record as we would like to figure it out today?
>
> [MR. UNRAU]: I wouldn't say they would comprise the total record, no.

Tr. 7/25/96 at 1957-58.

[Continued]

record whether that speculation is correct, I cannot find prejudice on the facts before me. Moreover, I am satisfied that New York's concerns can be addressed through an analysis of prescription and acquiescence. Therefore, application of the laches doctrine is not necessary to a just resolution of this case. This is especially so in light of this Court's traditional reluctance to apply the laches doctrine against states, because states as sovereigns have been free to act since time immemorial under English common law without traditional bars such as the statute of limitations or laches. *See Block v. North Dakota*, 461 U.S. 273, 294 (1983) (O'Connor, J., dissenting); *United States v. Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1824). Thus, having raised the issue of laches sua sponte, I put it to rest on the same basis. Nevertheless, the Court has the record before it to address laches should it decide to do so.

C. Distinct Prescriptive Periods

Because the federal government did not begin significant filling of Ellis Island until 1890, the years prior to that time cannot give rise to claims of prescription over the landfilled area. Moreover, from 1955, when Ellis Island ceased to be used as an immigration or detention

---

[42] [Continued]

Mr. Unrau also testified that pilferage and theft occurred on the Island between 1954-65:

> There . . . are numerous references in newspapers and so on that people would sneak out to Ellis Island during the night and help themselves to plumbing, dishes. I'm told that some people have whole sets of dishes from Ellis Island in their private collection. . . . Ellis Island was subject to all kinds of depredations after '54.

Id. at 1958-59; *see also* Tr. 7/30/96 at 2477-78; N.Y. Post-Trial Mem. at 44 ("At this juncture, one can only assume that at least some of the documents lost or destroyed would have supported New York's claim even further.").

center, both States were much involved with the federal government in the Island's proposed redesignation and reuse. Therefore, prescriptive acts are much more difficult to show after that time.

Thus, to analyze whether New York has acquired sovereignty over the landfilled portions of Ellis Island through prescription and acquiescence, I recommend that this Court examine four periods from the Compact of 1834 to the present:

Prescriptive Period	Significance
1834-1890	No landfill over which New York could exercise prescription.
1890-1934	United States hegemony over the island under its immigration program. A critical period for prescription and acquiescence.
1934-1955	A second critical period of United States's control (post-immigration) for analyzing prescription and acquiescence.
1955-present	New Jersey much too active in opposition to New York's jurisdiction for New York to carry her burden on acquiescence.

In my view, the crucial time periods for evaluating prescriptive acts are the two eras from 1890 and 1955. New York's sovereign assertions and New Jersey's actions of non-acquiescence during those two periods will be the focus of the analysis.

D. Discussion

New York offered into evidence documents, expert reports, and testimony of three historians to support her affirmative defense. The documents included twenty-two

death certificates (twenty-one of which were dated 1924); twenty-two birth certificates; five marriage certificates; New York City voting records; census documents; and various other materials documenting public perception or belief concerning the sovereign attributes of the Island. She also produced maps and charts designating Ellis Island as in New York or New York Harbor. The documents were introduced into evidence through her historical witnesses (Drs. Hershkowitz and Kraut and Mr. Unrau) and are discussed below.

New Jersey counters by listing her own acts of non-acquiescence and challenging New York's acts of prescription. The most significant of New Jersey's acts are addressed below. Moreover, New Jersey discounts New York's ability to exercise prescriptive acts over the Island because of New York's sale and cession of jurisdiction to the United States and points out in detail why New York's prescriptive acts are insufficient to establish the defense. N.J. Post-Trial Br. at 16-21, 31-41; NJPFF ¶¶ 64-94 (Oct. 12, 1996) (DI 366). After trial, New Jersey summed up her position as follows:

> Ellis Island was, and is, a federal enclave. And in the circumstances, there was little, if any, opportunity for New York to exercise the sort of governmental authority that would allow it any basis upon which to assert a claim of prescription.
>
> . . . .
>
> New York could not and did not build public roads on the Island. New York could not and did not build public schools or other public buildings on the Island. Its police did not patrol the Island. And New York has admitted that it had no evidence of any civil or criminal complaint filed by New York authorities for alleged unlawful acts on Ellis Island. New York's Fire Department did not routinely provide fire pro-

> tection services on the Island. New York did not sweep the streets or collect the garbage.

Tr. 8/15/96 at 4032-33 (Mr. Yannotti for New Jersey).

1. *The Notice Requirement And The Burden Of Proof*

In her articulation of her affirmative defense, New York has misinterpreted or overlooked an important distinction of the notice requirement attendant to the doctrine of prescription and acquiescence. It is New York's burden to establish her prescription over the filled portions of the Island and New Jersey must have notice of these acts under the *Georgia v. South Carolina* rationale discussed above. *See supra* Parts V.B. and VI.A. Both in her briefing and in particular during trial, however, New York consistently questioned whether New Jersey gave formal, direct notice of *her* acts of non-acquiescence to New York. *See, e.g.*, Tr. 7/17/96 at 955, 970-72; Tr. 7/18/96 at 1043, 1046, 1057, 1076-79, 1098, 1108-09, 1120; Tr. 7/19/96 at 1189, 1262-63, 1291-92. New York maintains that "New Jersey never notified New York in any letter, document or communication whatsoever that it was asserting sovereignty over the filled portions of Ellis Island." N.Y. Post-Trial Mem. at 27; *see also* NYPFF ¶¶ 516-730 (Oct. 3, 1996) (DI 365) and transcript references therein.

This stance suffers from at least two related problems. First, it consitutes a misinterpretation of the doctrine of prescription and acquiescence. That doctrine, analogous to adverse possession, *Georgia v. South Carolina*, 497 U.S. at 393, provides that in order to meet its burden, the state proving prescription must prove "notice" to the other state. *Id.* (quoting *Landes v. Brant*, 51 U.S. (10 How.) 348, 375 (1850)). But New Jersey is not attempting to establish her prescription over the filled portions of the Island; she is seeking to prove non-

acquiescence. Second, New York's theory that New Jersey needed to provide direct notice to New York attempts to shift to New Jersey New York's clear burden of proving prescription. Thus, to hold New Jersey to a burden of providing direct "notice" to New York of her claims to the landfilled portions of the Island would both inappropriately shift the burden to New Jersey and misinterpret the relevant jurisprudence.

2. *Important Considerations*

At the outset, this analysis is influenced by several considerations. The alleged prescriptive acts are (1) subject to the possession and control of the Island by the United States during the entire period; and (2) limited to the filled portions of Ellis Island because New Jersey has not challenged New York's sovereignty over the "original" Island.

a. Possession And Control By The United States

New Jersey argues that New York's two-time cession to the federal government "vest the federal government with exclusive authority over the ceded area and result[] in a complete dilution of State control." N.J. Post-Trial Br. at 29-30. Thus, avers New Jersey, citing various precedents, New York cannot establish "possession and control." *Id.* at 30.

New York counters that she ceded only "partial jurisdiction" to the federal government in 1808 "for the limited purpose of safety and defense," and did so involuntarily. N.Y. Post-Trial Mem. at 18. Therefore, New York claims, she has been able to establish her sovereignty over the filled portion of the Island by prescription. Despite the federal government's continued possession of and jurisdiction over the Island, New York prescribed "the voting, tax, education, health (including maintenance of vital statistics), labor, environmental and marriage laws on Ellis Island, including the landfill." *Id.*

at 21. New York also points to "the indelible public perception" that she was sovereign over the Island. *Id.*

As this Court ruled in *Georgia v. South Carolina*: "Possession and dominion are essential elements of a claim of sovereignty by prescription and acquiescence." 497 U.S. at 389. Both New Jersey and New York have been able to exercise only limited dominion over Ellis Island because the Island and its filled portions have been in the possession of the United States government by deeds obtained from both States. Indeed, the United States suggested to this Court in 1994 that its own jurisdiction over Ellis Island from 1800 to the present, based on cessions by both sovereigns, left "very little, if any, practical conflict betwen New York and New Jersey arising from activities on the Island." U.S. Br. at 9 (Apr. 28, 1994) (DI 6).

The kind of open and notorious adverse possession acknowledged in *Georgia v. South Carolina* cannot readily be found under these circumstances, because the usual indicia of state control such as taxation and exercises of police power are more difficult to demonstrate when the United States rather than a private party is owner and operator of the Island. On the other hand, the cases do not demand that a state maintain actual ownership to establish possession and control. Thus, while it may be harder to demonstrate sovereign control without possession, a state must still be able to demonstrate prescriptive acts even when the United States is owner of the property in question. *See, e.g., Arkansas v. Tennessee*, 310 U.S. at 568-71; *New Jersey v. Delaware*, 291 U.S. at 377 (Delaware obtained jurisdiction by prescription over an island ceded by New Jersey to the United States "for the erection of a fort"); *Kleppe v. New Mexico*, 426 U.S. 529, 544 (1976) (mere "federal ownership of lands within a State does not withdraw those lands from the jurisdiction of the State"). Federal ownership, while not fatal to the analysis, is thus a relevant and complicating factor in

interpreting the quality of New York's prescriptive acts and New Jersey's countervailing acts of non-acquiescence.

b. Distinguishing Prescription Over The Original Island From The Filled Portion

New York has been challenged to prove that her several prescriptive acts over the Island extend to the filled portion. It is assumed that New York is involved in the administration of the Island because she has long been sovereign over the original Island—indeed, even before the Compact years. New Jersey continually pointed to this complicating factor during trial:

> [MR. MARSHALL:] While Dr. Kraut's conclusions are based upon scant documentary evidence and are speculative at best, it is undisputed that a portion of Ellis Island is within New York's jurisdiction and evidence of such designations on landing cards, certificates of arrival, and steamship tickets is irrelevant or, alternatively, should be precluded since such evidence tends to confuse the pertinent issues and is a waste of time.
>
> Similarly, with respect to certificates of marriage, New York, produces less than a dozen certificates of marriage and admits . . . that it is without sufficient information to admit or deny whether any of the certificates . . . [evidenced] a marriage ceremony actually held on Ellis Island.
>
> . . . .
>
> . . . [and if they were, it would have been] on the original Ellis Island in the Great Hall.

Tr. 7/29/96 at 2289 (Mr. Marshall for New Jersey). This excerpt emphasizes the difficulty of proving prescription on the landfilled portion of the Island in the context of divided sovereignty with a third sovereign in control.

3. New York's Acts Of Prescription

At trial, New York introduced proof of several prescriptive acts. Her list begins long before the relevant

time periods. In 1730 Governor John Montgomerie granted a charter to New York City that included within New York's political jurisdiction Bucking Island, which became Ellis Island. *See* N.Y. Mem. for Summ. J. at 4 (Mar. 5, 1996) (DI 235) (citing Jerold Seymann, *Colonial Charters, Patents and Grants to the Communities Comprising the City of New York* 281 (1939)). This is an unambiguous act of political control and New York refers to it repeatedly. Of course, this 1730 exercise of political jurisdiction over the Island hardly decides this case. New York's jurisdiction over Ellis Island was recognized in the 1834 Compact and, without more, it does not resolve the filled portion issue.[43]

New York has introduced evidence of a series of activities after 1834, including maps that place Ellis Island in a New York City voting district and the use of New York City marriage laws and death certificates. In addition, New York points to her provision of police and fire protection to the Island, including the filled portion.

Prior to any of these activities, New York undertook an apparent act of sovereignty. In 1880 the United States obtained a deed from New York for certain underwater lands around Ellis Island. *See* Tr. 7/17/96 at 886, 925-27, 953-54; Tr. 8/15/96 at 4014, 4039, 4159. This deed, however, is not particularly probative of New York's assertion of sovereignty over these lands. Under either State's interpretation of the Compact of 1834, New Jersey possessed property rights in these lands;

---

[43] New York asserts that her political jurisdiction over the Island did not change when it was expanded by fill to 27.5 acres and the only evidence that New Jersey included it within her own political limits was that Hudson County carried the filled portion on her tax rolls. New Jersey also has sought to demonstrate that the political maps of New York City did not change the shape of the Island after it was filled. *See* New York State Assembly District Maps (1918, 1926, 1927, 1929, 1930, 1939, 1945, 1946, 1953) (DE 957-65). I have examined those maps, which are in evidence, and they do appear to depict the original almond-shaped Island.

thus, only she could sell or deed the lands to the United States. *See* Tr. 7/17/96 at 925-26. In this respect neither the States nor their experts were able to explain on what basis New York granted this deed to the United States, and New York made little of this deed during trial. As explained in more detail below, moreover, in 1904 the United States obtained from New Jersey a grant that contained these same lands, acknowledging that the 1880 deed was incorrect or insufficient, or both. *See* Tr. 7/17/96 at 886, 953-54; Tr. 8/15/96 at 4039-40. For these reasons, this peculiar act of New York is worthy of little weight.

The testimony of Dr. Kraut, one of New York's expert witnesses, further details New York's acts of prescription in this period. I describe here the most important of those acts, which New Jersey does not contest. As described further below, however, most of these acts either simply describe the general association between New York City and immigration through Ellis Island, without describing specific acts of prescription, or else fail to detail activity on the filled portion of the Island.

Between 1890 and 1900, for example, the "Barge office" in New York City was the interim federal immigration depot during the reconstruction of Ellis Island after the great fire of June 14, 1897, which burned to the ground the wooden structures on the Island. Dr. Alan M. Kraut Expert Report at 7 (undated) (DE 933). In 1915 the Immigration Commissioner in the Port of New York, Frederick Howe, invited New York City officials to utilize several reception buildings on Ellis Island to house an overflow of homeless and unemployed people, chiefly immigrants. *Id.* at 21.

When the federal government undertook construction on the landfilled portions of the Island, it was undertaken "in cooperation with New York and in compliance with the laws and standards of New York City or State." *Id.*

at 8. In computing probable contract costs in the early 1900s, New York rates were the standard against which federal costs were estimated. *Id.* at 10-11. In 1909 and 1910, federal officials sought to set the wages of the workers on the construction projects to conform to hourly wages paid construction workers in New York City. *Id.* at 10-12. Similarly, in 1932, federal specification for contracts on the installation of equipment for Island Number Three stipulated that the prevailing rate of wages for New York City "shall be enforced" on all contractors and sub-contracts. *Id.* at 12-13.

The few birth certificates available describe the place of birth of babies born on the Island as New York City; these certificates were issued by the New York City Department of Health. *Id.* at 16-17. With regard to marriages, in November 1907 the New York State Legislature enacted a bill that required all persons wishing to get married as of January 1, 1908 to first obtain a marriage license from the city or town of their residence; all those on Ellis Island were required to get their marriage licenses at City Hall, New York. *Id.* at 17. In 1908, of the 267 individuals who died on Ellis Island, 201 were buried by a Manhattan contractor; he conducted most of the burials in Brooklyn, New York. *Id.* at 18.

Ellis Island has apparently always been included in the jurisdiction of the New York City Metropolitan Police Department and is included as part of New York County. *Id.* at 19. There are at least two examples of New York City's acting on its police jurisdiction over Ellis Island in cases of crime on the Island. *Id.* This evidence is offset by some involvement by New Jersey in policing the Island as well. Mr. Unrau, New York's witness, admitted this on cross-examination. Tr. 8/8/96 at 3636-37.

The evidence of many of these acts is inconclusive with respect to the landfilled portion of the Island. The death certificates are almost all from one year. There is no con-

clusive evidence that the marriages represented by the marriage certificates took place on the Island. Indeed, New York was unable to prove that the births, marriages, and deaths she documented occurred on the Island, let alone the landfilled portion. New York's witness, Mr. Unrau, confirmed that, in Fiorello La Guardia's memoirs, La Guardia describes having travelled to Manhattan with couples so they could get married, but does not include recollections of marriages having occurred on the Island. Tr. 8/8/96 at 3615-18. With respect to New York taxes allegedly paid by Island residents after 1984, the evidence was unconvincing; it consisted largely of testimony by a NPS witness that he handed out New York City non-resident tax forms to federal employees. There was no direct evidence of taxes paid by these employees.[44]

Finally, New York introduced a series of maps, post cards, letterheads, and other documentation that use the description "Ellis Island, New York" or similar designation during the post-1890 period. Indeed, New York's expert witnesses, historians Drs. Hershkowitz and Kraut, testified that in their opinion it was the public perception that even the post-fill Island was in New York, not New Jersey. *See, e.g.,* Tr. 7/24/96 at 1751-59. Such documentary evidence is relevant, New York argues, to a public perception of her sovereignty over Ellis Island. New York uses public perception both to establish prescriptive claims and to prove notice to New Jersey of New York's claims to Ellis Island.

---

[44] New York even produced a fact witness who testified that he lived on the Island for a year and a half from mid-1940 until late 1941 while his father was stationed on Ellis Island as a physician for the United States public-health service. Mr. William J. Hewitt testified that, "from family stories and photographs," Tr. 8/5/96 at 3137, he remembered that, *as a one-year old,* he had lived in New York when his family was on Ellis Island, a location he later described in his 1965 application to the New York Bar as "USPHS Hospital, Ellis Island, New York, (Manhattan)." *Id.* at 3141.

Public perception is a relevant consideration but hardly dispositive. *See Virginia v. Tennessee,* 148 U.S. 503, 527 (1893) (noting that although certain residents living near the boundary line set out in a compact between the states regarded an area of land as Virginia, contrary to the provisions of the agreement, "[t]hat fact . . . cannot affect the potency and conclusiveness of the compact between the States by which the line was established in 1803"); *see also Louisiana v. Mississippi,* 202 U.S. 1, 55 (1906).

New Jersey counters New York's prescriptive evidence on two grounds. First, she asserts that virtually everything New York submitted to demonstrate public perception fails to distinguish between the original and filled portions of Ellis Island. Second, she contests the weight and factual accuracy of New York's evidence. I agree with New Jersey on both bases.

For example, testimony at trial was directed at the significance of the Immigration and Naturalization Service's ("INS") designation of the Post Office on the Island as "Ellis Island, New York." New Jersey introduced evidence that the Post Office itself was in the Main Building located substantially on the original Island, and therefore that the designation was consistent with her view of New York's sovereign territorial limits. The historian for the INS, Ms. Marian L. Smith, testified to that effect:

> [MR. MARSHALL for New Jersey:] . . . Ms. Smith, in your investigation in this matter do you have an opinion as to where that post office, if there was a post office, was located on Ellis Island?
>
> . . . .
>
> [MS. SMITH:] It's my opinion that the evidence that we do have shows that there was a post office and that it was on the original portion of the Island.

Tr. 8/9/96 at 3944; *see also* Tr. 7/22/96 at 1494 (Ms. Smith testified that the Post Office was in the Main Building on the original three-acre island). While New York contested this locational evidence, I found Ms. Smith's sources reasonable and her opinion convincing. Because of the conflicting testimony and the lack of conclusive evidence, however, I am unable to determine exactly where the Post Office was located. Because New York bears the burden of proving prescription, I conclude that the Post Office could have been on the original part of the Island—whose sovereignty is not contested by New Jersey.

Moreover, testimony on behalf of New Jersey by Ms. Smith suggested that INS Post Office designations at that time did not follow state lines or declare boundaries, but rather designated geographical areas. Smith Summ. J. Aff. ¶¶ 129-34 (Mar. 26, 1996) (PE 490). She even pointed out that these designations once included part of New Jersey within the New York area: "During the earlier decades, the whole of New Jersey was in the New York District. In later decades, northern New Jersey was in the New York District." *Id.* ¶ 131. Ms. Smith also showed that while the United States might have New York State building codes in its construction projects, it was not bound to do so. *Id.* ¶¶ 119, 121-22.

New Jersey was also able to show, through the same witness, that the connection between immigrant arrivals on Ellis Island and their transfer to New York City was not an exclusive one. This was confirmed on cross-examination of Mr. Unrau, expert witness for New York. Tr. 8/8/96 at 3629-30. In that regard, Ms. Smith testified, and I find as a fact that, in addition to the well-known ferry from Ellis Island to the Battery in New York City, a ferry from the Island to Jersey City also was available to take immigrants to the New Jersey railroad terminals:

> [MS. SMITH]: Well, ferries ran to the New York shore, so people going to New York or points northeast . . . would take the ferry. Other transport took them to the railroad terminals on the New Jersey side to take them west.
>
> [MR. MARSHALL for New Jersey]: And do you have any idea of the percentage breakdown of percentage of immigrants that travelled to New York versus the New Jersey railroad areas?
>
> [MS. SMITH]: I have heard different claims. I think I have heard that 60 percent went to New York. I have also read that two-thirds went through the New Jersey terminals.

Tr. 7/22/96 at 1349; *see also* Tr. 8/9/96 at 3916-17, 3976-80. Dr. Kraut, New York's expert, testified that he was not aware of a ferry service between New Jersey and the Island prior to 1990. Tr. 7/29/96 at 2406-07. But the weight of the evidence suggests that, Dr. Kraut's view notwithstanding, such a service did exist.

As New Jersey points out, New York's evidence is scant. New York has been able to establish only isolated or episodic prescriptive actions—and without certainty that these acts occurred on the landfill. The evidence taken as a whole does not prove prescription over the landfill. New York rebuts by arguing that New Jersey has not asserted her sovereignty over the landfill area. But New Jersey, as sovereign, legally does not need to exercise prescriptive acts over her own territory. Rather, she has to counter New York's prescriptive acts of which she has notice by not acquiescing in those acts. New Jersey's acts of counter-prescription are thus best viewed as evidence of non-acquiescence.

4. *Important Maps Of Ellis Island*

Between New York's acts of prescription and New Jersey's acts of non-acquiescence is the presumptively neu-

tral ground of the mapmaker. The Court's jurisprudence illustrates that maps produced during the period of a state's putative dominion and possession are a relevant measure of the extent of that state's prescription. That is, maps published during the relevant periods of prescription that describe the territory at issue as part of the state claiming sovereignty can be probative of the extent of the state's prescription. *See Michigan v. Wisconsin,* 270 U.S. at 316-19 (evaluating Wisconsin's successful prescription over a group of islands in Green Bay by noting that the United States Land Department had "uniformly and notoriously recognized the islands" as a part of Wisconsin); *Louisiana v. Mississippi,* 202 U.S. at 55-57 (noting the United States Commission of Fish and Fisheries, as well as the General Land Office of the United States, had created maps that described the land at issue as part of Louisiana). These maps are thus probative evidence in the analysis of prescription and acquiescence, independent of acts undertaken by the States.

Eight maps from the 1890s and early twentieth century, during the central prescriptive period, that are prominently entitled "Ellis' Island, New Jersey," are the first set of key documents in this regard. *See* App. G (reproducing one such map). These maps were prepared for the Chief of Engineers of the United States Army by the Federal Harbor Line Board and they provided important information about New York Harbor which was intended to be relied upon for navigational and defense purposes. *See, e.g.*, Tr. 7/18/96 at 1039-40, 1044-52; Tr. 7/30/96 at 2537-43. The significance of these maps is that they were approved by the Secretary of War, Elihu Root, and produced over his signature.[45] These Harbor Line maps

[45] From my observation of the evidence at trial, the Secretary of War actually signed these maps. Tr. 7/30/96 at 2537-38. The plates that produced these Harbor Line Board maps were the subject of much discussion at trial by one of New York's expert

are especially probative of the federal view about sovereignty over Ellis Island. They gain credibility because Mr. Root, President McKinley's Secretary of War, was a distinguished lawyer who was active in New York City politics; he later became a United States Senator from New York.[46] Although one can only speculate about his awareness of the Ellis Island controversy, his signature on a map near the designation "Ellis' Island, New Jersey" makes this weighty evidence.

The other Harbor Line maps published after 1890 are relevant in examining the extent of New York's prescription during the period of filling around Ellis Island. Even assuming that New York is correct in her allegation that subsequent maps were printed through the routine utilization of the same copper plate on which the 1890 map was engraved, *see supra* note 45, these later maps reflected changes occurring on the Island. The fact that the changing shape and size of the Island were recorded while the title remained constant suggests that New York's

---

witnesses, Dr. Alan M. Kraut. He attempted to explain away the "Ellis' Island, New Jersey" designation as a "mistake" or an "error." Tr. 7/30/96 at 2523-32. While he could not explain how or why this "error" occurred, he sought the advice of another of New York's experts to help him do so. I am unpersuaded by their efforts to undermine the credibility of the maps' title. In 1890 the map did not yet reflect the substantial fill upon which New Jersey bases her claims, but it did set out pierhead and bulkhead lines that would support the forthcoming fill. *See* Tr. 7/30/96 at 2542-43 (Mr. Yannotti for New Jersey) ("[T]he enlargement was going to extend into the New Jersey land and this was on the New Jersey side of the boundary."). Because the title on the map was reproduced subsequent to 1890, I find it probative evidence supporting the United States's acceptance of New Jersey's legal position.

[46] *See* Phillip Jessup, *Elihu Root* (1938). Mr. Root served as an attorney for New York City on numerous occasions. *Id.*, Vol. 2, at 183-84; *see also* Richard Leopold, *Elihu Root and the Conservative Tradition* (1954) (documenting Mr. Root's extensive public and private career).

alleged acts of dominion and possession, in this instance over the landfilled portions of the Island, were not so conspicuous or continuous as to change the view of the Army concerning which State was sovereign.

The description of these later Harbor Line maps also undercuts the significance of New York's 1880 cession of land to the United States. Little more than a decade after having bought the land from New York as the putative sovereign, the United States—albeit via a different arm—described the Island and its landfill as part of New Jersey. At the very least, these maps establish that during this period the United States, in the neutral role of mapmaker, did not assume that the landfilled Island was part of New York. This alone distinguishes the extent of New York's prescription from the cases considering maps produced by the United States. *Cf. Michigan v. Wisconsin,* 270 U.S. at 316-19; *Louisiana v. Mississippi,* 202 U.S. at 55-57.

Similarly probative with regard to the boundary lines between the States is the map prepared by Commissioners from both States in 1889. *See* PE 383(n) (App. D). This map should be accorded the same probative weight as the maps prepared by the United States depicting Ellis Island, as the presence of officials from both States protects against bias. The map depicts the boundary line between the States consistent with the boundary line of Article First of the Compact of 1834. Complementing the analysis of the extrinsic evidence of Compact meaning, this map thus describes a sovereign boundary under which the landfilled portions of Ellis Island lie on underwater lands over which New Jersey is sovereign.

These maps constitute the understanding of neutral parties with respect to the boundary line between the States, and thus undercut New York's assertion that she

exercised continuous and uninterrupted dominion and possession of the entire Island during this period. The same lack of consensus among similarly neutral parties characterizes descriptions of the Island during the period 1955 to 1993. *See infra* Part VI.D.5.b.(3).

Some of New York's evidence of prescription naturally shows the converse, that is, maps and other documents with the "Ellis Island, New York" or "Ellis Island, New York Harbor" designations. *See, e.g.*, Tr. 7/23/96 at 1701 (postcards designating Ellis Island in New York); *id.* at 1706-10 (maps designating Ellis Island in New York). One of these maps, prepared prior to any filling activity, was prepared by the United States Corps of Army Engineers. Prepared in 1889, this map depicted the basin or ship channel between "Jersey City and Ellis Island, New York." DE 932; *see also* NYPFF ¶¶ 287, 299, 300.

The point of this analysis, however, is not to determine what percentage of maps describe the territory as belonging in one State or the other. This is not a balancing exercise. The maps that New Jersey produces confirm the lack of consensus among federal and other mapmakers, which in itself undercuts New York's assertions of prescription during this period. As explained below, moreover, New Jersey undertook certain acts during these prescriptive periods that themselves undercut New York's acts of prescription.[47]

---

[47] Moreover, since much of New York's case regarding prescription is directed to supporting the overall proposition that the public perception was that all of Ellis Island belonged to her, these maps by a responsible federal body would in likelihood have been seen, if not used, by New York officials, thereby undercutting the public-perception position. *See infra* Part VI.D.5.b.(1)(c).

5. *New Jersey's Acts Of Sovereignty And Non-Acquiescence*

a. New Jersey's Sovereign Acts

New Jersey introduced evidence of her own acts of prescription, the most important of which may well be the recorded deed of a transfer of her underwater territory to the United States in 1904 for purposes of the landfill. Another example of New Jersey's exercise of sovereignty over the landfilled portions—and thus evidence supporting non-acquiescence—is that Hudson County placed the filled portion of the Island on her tax rolls, albeit in a non-payment status due to its federal ownership. Hr'g Tr. at 58-59, 64-65.

New Jersey also demonstrated through New York's fact witness, Mr. John Compani, that although taxes on Ellis Island largely from activities related to tourism and construction were levied after 1955 by New York, utility taxes for water and gas were metered in and paid to New Jersey. Tr. 8/5/96 at 3283. Other instances include an application from the federal government for a New Jersey waterfront development permit for Ellis Island from 1933 to 1934; New Jersey Congresswoman Mary T. Norton's efforts to gain employment for New Jersey workers on Ellis Island projects in 1934; a federal government application to New Jersey for a permit to construct a water main for Ellis Island in 1937; and the application of New Jersey's wage rates by the Department of Labor on Ellis Island from 1947 to 1949. *See generally* NJPFF ¶¶ 95-191.

b. New Jersey's Acts Of Nonacquiescence During Important Prescriptive Periods

During the critical prescriptive periods from 1890 to 1955 (including the active immigration and expansion period from 1890 to 1934 and the more quiescent immi-

gration and detention center period of 1935 to 1955), New York undertook various acts of prescription, but failed to prove that she exercised dominion and possession over the landfilled area of the Island. Even had she done so, however, New Jersey's evidence of non-acquiescence throughout these years is conclusive. New Jersey maintained her dominion over the filled portion of the Island. She did not acquiesce in New York's sporadic assertions of prescription. New Jersey's claims and objections were current and active during both key periods.

(1) 1890-1934

(a) *1904 Recorded Deed Of Transfer To The United States*

From 1890 on, New Jersey responded to the federal expansion of Ellis Island. The Court has noted in evaluating prescription and acquiescence that a state's acts of non-acquiescence for purposes of determining sovereignty include not only the "right of sovereignty," but the right of "ownership over its soil." *Indiana v. Kentucky,* 136 U.S. at 510; *see also Michigan v. Wisconsin,* 270 U.S. at 316-19 (analyzing extent of Wisconsin's prescription over islands in Green Bay by examining whether she continuously possessed and asserted title to the islands). Most important, soon after the expansion began, New Jersey requested of the United States that it recognize her claims by securing a deed to the lands under water that were being filled in. The deed itself was recorded in New Jersey. New York challenges the sovereign nature of this act of recordation based on her proposition that New Jersey had only property or riparian rights to the land underwater around the Island. But once I have concluded that under the Compact of 1834 New Jersey actually had sovereignty over these underwater lands on her side of the boundary, acts to protect property rights also become sovereign acts.

The United States's recognition of New Jersey's legal status was real and measured. The Attorney General of the United States, William Moody, wrote to the Riparian Commissioners on July 15, 1904, requesting New Jersey's grant of her ownership rights to underwater parts to the United States. The letter acknowledges New Jersey's claims under the Compact, as follows:

> While there is no question as to the ownership and jurisdiction of New York of and over Ellis Island proper and its power to convey the same to the United States, it would seem from the boundary agreement between New York and New Jersey of September 16, 1833, that the ownership of the lands under water west of the middle of the Hudson River and of the Bay of New York is in the State of New Jersey.

Letter from William Moody, Attorney General of the United States 2 (July 15, 1904) (PE 338). Of course, Moody's letter also contends that the request is a matter of comity, because in his view Congress has an absolute right to regulate commerce or navigable waters and the Island expansion fell within that power. *Id.*

Nevertheless the Department of Justice's acceptance of New Jersey's claims to Ellis Island is relevant to rebutting New York's acquiescence argument. The July 15, 1904 letter also indicated Moody's awareness of the issues arising from the 1834 Compact, which is noteworthy in light of his later participation as an associate Justice of the Supreme Court in the *Central Railroad* case.[48] Justice Holmes wrote an opinion for a unanimous Court on which sat Justice Moody. Presumably, Holmes's opinion met

---

[48] Following his stint as Attorney General from 1902 to 1904, Moody was an associate justice of the Court from 1906 to 1910. *Congressional Quarterly's Guide to the U.S. Supreme Court* 837-38 (1979).

with Moody's informed approval; or at least it did not trigger his disapproval.

(b) *The Port Authority Amendment*

The legislative history of the Port Authority amendment, as well as the substance of the amendment itself, not only serves as extrinsic evidence of the drafters' intent, *see supra* Part IV.B.2.b.(3)(a), but also buttresses New Jersey's arguments against prescription and acquiescence. From 1917 to 1921, both States met over port matters. The Report documenting the history is voluminous, setting forth an exhaustive analysis of nearly every aspect of the Port of New York.[49] Indeed, the legislative documents and the amendment itself address seemingly every facet of the operations of the Port, including the operation of each State on her respective shores bordering New York Harbor. The legislative documents detail the contributions and shortcomings of each State to the present and future condition of New York Harbor.

Despite meticulous attention to detail,[50] the Report does not discuss Ellis Island, which by that time had grown

---

[49] The Report defines the Port as "that single community by Yonkers and New Rochelle on the north, Great Neck and Far Rockaway on the east, Perth Amboy and Sandy Hook on the south, Paterson, Newark and New Brunswick on the west." Report, *N.Y. Legis. Docs.*, 142d Sess., No. 103, at 8 (1919). The amendment also provided for a later renaming to the Port of New York and New Jersey, a title it assumed in 1972. N.Y. Unconsol. Laws § 6404 (McKinney 1979); N.J. Stat. Ann. § 32:1-4 (West 1990).

[50] The Report notes, for example, that the Commissioners considered twenty-three "special investigations," including the following, suggesting that the question of which state exercised jurisdiction over Ellis Island paled in comparison with the listed aspects of state control: West Side Railroad, Manhatttan; Markets and Food Distribution; Exterior Belt Line, New Jersey; Mechanical Equipment of Harbor; Banking and Commercial Operations; Tariff —Charges—Rates; Stevedoring—Longshoremen—Pilotage; Disposal of Municipal Waste; Handling of Building Material; Condi-

in size and stature as America's primary immigration station. The absence of any discussion of Ellis Island in the legislative history and in the amendment itself reflects the reality that its sovereign status was not a contentious issue at the time. Their silence is conspicuous in at least three respects.

First, the Commissioners were not blind to the Port of New York as a focal point for the activities of foreign countries, and presumably, their citizens arriving at the Port. In the Report they note that "New York has become the established gateway between the United States and foreign countries." Report at 6. In the Summary they explain the necessity of a Port Authority by pointing out that "[s]ome eight million persons live within twenty-five miles of the Statue of Liberty in New York Harbor." Summary, *N.Y. Legis. Docs.*, 144th Sess., No. 33, at 6 (1921).

Second, the Report devotes several pages to set forth the "Main Criticisms" of the proposed Compact between the States, *see* Report at 45-51, which were offered in public discussion after the participants had been given the chance to examine a draft of the proposed Port Authority Act. There is no mention of Ellis Island in the criticisms.

Third, the Report points to certain shortcomings in the 1834 Compact without discussing Ellis Island. The Report states that the 1834 Compact "furnishes at once an historical precedent and a classical example for us to follow," but further elaborates that "[f]or our present purposes, however, it is defective and inadequate in many respects." Report at 159. As its only example of such

---

tions at New York Piers; Barge Canal Terminals; Canals and Waterways; Private Terminals; Warehouses; Ferries; Handling of Fuel; Handling of Ice; Handling of Grain; Express Business; Electric Power Supply; Water Supply; Trucking; Channels and Dredging. *See* Report at 17.

inadequacies, the Report points to "the regulation of the rates of ferriage," made tortuous by the ambiguous language of the Compact. *Id.* at 159-61.

The omission of any discussion of Ellis Island in these documents, as well as the amendment itself, is curious given the conflicting claims the Island has generated in this litigation. The question of how to read this silence is an important one. It shows at a minimum that neither State was intimately involved with the operations on the Island, nor did either State plan to incorporate the Island into the operations of the Harbor in the future. The Island was by all appearances accepted as a federal immigration enclave within the Port Authority's territorial limits. The absence of discussion about Ellis Island undermines New York's prescriptive acts because few such acts were noted and recorded during this critical period.

This silence also indicates that the current dispute was not significant, because the two antagonists were able to execute an amendment that stressed "faithful cooperation" without mentioning it. Alternatively, one could speculate that the silence showed the views of one State with respect to her sovereignty were clearly accepted by the other. The fact that the Harbor Line maps with the "Ellis' Island, New Jersey" designation were available at the time supports this inference. In the case before us, however, I am not willing to draw such far-reaching conclusions. I am most comfortable with the conclusion that the Port Authority amendment's silence is a tacit recognition of federal hegemony over the Island. This interpretation and the deference it implies undercuts New York's assertion of prescription during this period.

The Port Authority amendment process also serves as evidence of New Jersey's non-acquiescence, if not of New York's acceptance of New Jersey's position on the boundary question. Because both States had the opportunity to

discuss any and all issues of State activity in and around New York Harbor, the absence of such discussion concerning Ellis Island weakens New York's case for New Jersey's acquiescence, a proposition on which she bears the burden of proof.

(c) *The Public-Perception Issue*

New York argues that most immigrants processed through Ellis Island for entry into the United States during the peak immigration period thought that Ellis Island was part of New York, and that the general public perception confirmed this view. *See, e.g.*, Tr. 7/25/96 at 2083-87; Tr. 8/11/96 at 4079-80. Although the factual testimony in this regard at trial (principally the testimony of Drs. Hershkowitz and Kraut) was conjectural and emotional, New Jersey did not devote time to challenge this assertion except to point out that it was impossible to separate public perception between the original Island and the filled portion. *See, e.g.*, Tr. 7/29/96 at 2257.

In my view, most immigrants thought first and foremost that they were coming to America, but because they arrived in *New York* Harbor and since *New York* City undoubtedly attracted more attention than Jersey City, they possibly considered Ellis Island as part of New York. But because no poll was taken, we will never know for certain in which State most immigrants perceived they were landing. It hardly matters in any event.

While not irrelevant in analyzing a state's exercise of prescription over the land at issue, public perception as to which state is sovereign is hardly dispositive. *See supra* Part VI.D.3.

The immigrants were processed largely through the Main Building. Thus, their perception of sovereignty over the Island is not necessarily probative of public perception with respect to the filled portions of the Island.

It is uncontested that the immigration process mainly involved use of the Main Building, which I recommend that the Court find is located on the original—New York—part of the Island. In this regard, I cannot give this factor much prescriptive weight.

(d) *Taxing Activity*

Finally, New York has presented evidence of her taxing activities on Ellis Island. *See* Tr. 8/5/96 at 3211-37; *see also* Dr. Leo Hershkowitz Expert Report, *Ellis Island, the "Soft Ozie Ground"* 25 (Oct. 16, 1995) (DE 938). Whether a state has exercised taxing authority over the land in question is a factor that the Court has traditionally considered in original jurisdiction cases analyzing prescription and acquiescence. *See, e.g., Illinois v. Kentucky,* 500 U.S. at 385-86; *Georgia v. South Carolina,* 497 U.S. at 390-93; *Arkansas v. Tennessee,* 310 U.S. at 567-68; *Louisiana v. Mississippi,* 202 U.S. at 55.

New York first argues that New York City continued to tax individuals residing on Ellis Island after New York's cession of the Island to the federal government in 1800. *See* Hershkowitz Expert Report, *Ellis Island, the "Soft Ozie Ground"* at 25. There are at least two problems with this limited evidence.

First, New York failed to present more than a scintilla of evidence of her taxing authority in the relevant prescriptive periods before 1955. Her limited evidence from later years failed to pinpoint the filled portions of the Island. The Court recently addressed a similar issue in an original jurisdiction case. In *Illinois v. Kentucky,* 500 U.S. 380, the Court drew a distinction between Kentucky's act of sovereignty over most of the Ohio River and her absence of such acts over the "sliver" of the river at issue, "where barges and watercraft would rarely venture." *Id.* at 386. The Court noted that although Ken-

tucky had taxed craft traveling on the River, the absence of such craft on the "sliver" meant that, as to that area, "Kentucky's acts of taxation have been, at best, equivocal." *Id.* In light of the few—if any—tax-related activities that took place on the filled portions of the Island, New York's acts of taxation are similarly equivocal.

Second, New Jersey presented her own evidence that Ellis Island was included on the tax rolls of Hudson County, New Jersey, during the immigration period. Hr'g Tr. at 58. While New Jersey presented no evidence that she assessed taxes, except for utility taxes, Tr. 8/5/96 at 3283, this was to be expected in light of the United States's ownership and control over the Island, which New Jersey deemed complete. New Jersey's laws do not permit taxing other sovereigns, federal or state. Hr'g Tr. at 58. In any event, this evidence distinguished New York's limited proof of taxing authority—especially on the filled lands—from the complete and unchallenged taxing authority presented in the cases above.

New York also points to her taxing activities following the immigration period to show that individuals and corporations have paid New York State taxes since at least 1984. *See* Tr. 8/5/96 at 3211-37; NYPFF ¶¶ 272-74. These taxing activities could be acts of prescription, and, as New York asserts, there is no evidence that New Jersey directly contested New York's authority to impose these taxes. As explained above, however, by 1984 the States' dispute regarding the landfilled portions of the Island had been cemented. Therefore, New York's post-1984 taxing of these activities were not undertaken in the course of continuous and uninterrupted dominion over the Island on the part of New York. Independent of New Jersey's acts of non-acquiescence prior to 1984, moreover, by 1986 the governors from both States had entered into the Memorandum of Understanding. *See infra* Part VI.D.5.b.(3)(b). This agreement nullifies

whatever probative value these relatively recent taxing activities might have otherwise been accorded. Notwithstanding the Memorandum of Understanding, finally, New York collected these taxes for under ten years prior to the filing of this suit, hardly long enough to establish prescription under the Court's jurisprudence. For all of these reasons, New York's relatively brief taxing activities are of limited probative value to the prescription and acquiescence analysis.

(2) 1934-1954: The Labor Disputes Of The 1930s And 1940s

New Jersey's requests to the United States Department of Labor and other federal agencies for the employment of her citizens on Ellis Island construction projects also evidence non-acquiescence. The Court has consistently pointed to perceptions of the United States government in evaluating the extent of a State's exercise of prescription over the land in question. *See, e.g., Michigan v. Wisconsin*, 270 U.S. at 316 (noting the United States Land Department's recognition that land in question belonged to Wisconsin); *Louisiana v. Mississippi*, 202 U.S. at 56-57 (noting the United States Commission of Fish and Fisheries, as well as the General Land Office of the United States, had created maps that described the land at issue as part of Louisiana).

Not surprisingly, the issue of jobs heated up during the Depression years. Over this period, New Jersey representatives and unions made numerous requests to be included on the Island's register of eligible construction workers. While these requests were directed to the United States, as owner and operator of the Island, they reached high political levels not only in Washington, but in New York as well. Because New Jersey was basing her claims to jobs for her citizens on her sovereignty over the filled portion of Ellis Island, these assertions became overt acts of non-acquiescence. The fact that Washington was involved made New York aware of New Jersey's claims.

New Jersey officials and unions, led by congresswoman Mary Norton of Jersey City, asserted rights to jobs on Ellis Island. The record is replete with these exchanges. *See, e.g.*, Tr. 7/10/96 at 55-56; Tr. 7/17/96 at 889-90; Tr. 7/18/96 at 1069, 1073-77; Tr. 7/22/96 at 1371-72; Tr. 7/24/96 at 1887-89. Yet, after much correspondence and discussion, the federal contractor on Ellis Island refused to employ New Jersey workers and threatened to pull out of the contract. *See* Smith Summ. J. Aff. ¶ 78. His actions were not further challenged.

While some federal officials questioned both New Jersey's and New York's claims of sovereignty, all seemed to accept that a sharing of jobs between the States would be the equitable outcome. The following response of Charles Wyzanski Jr., Solicitor of Labor, on October 6, 1934, to a request from the Treasury Department for a determination as to state sovereignty over Ellis Island is notable:

> The Secretary of Labor has asked me to acknowledge your letter of October 4 enclosing and commenting upon a letter you have received from John J. Gleeson, Secretary of the Bricklayers, Masons and Plasterers International Union.
>
> The question that Mr. Gleeson puts is "Whether Ellis Island and Bedloe's Island are considered by the United States Government as being located in the State of New York or in the State of New Jersey."
>
> To that question it seems to me perfectly apparent that your answer is sound: Ellis Island and Bedloe's Island are no more a part of New York or New Jersey than the Philippine Islands or Hawaii are. They are territories of the United States not falling under the jurisdiction of any one of the forty-eight states.
>
> The specific problem with which Mr. Gleeson is concerned can, however, be settled, even though Ellis Island and Bedloe's Island do not fall within the

> boundaries of the forty-eight states. *I see no reason to disagree with the formula which the Procurement Division of the Treasury Department has devised. It seems to me technically skillful, politically wise and thoroughly just.*

(PE 43) (emphasis added).

Solicitor Wyzanski's letter is revealing at several levels. First, it acknowledges that a sharing of jobs in the Island between the States ("the formula") is the best outcome ("technically skillful, politically wise and thoroughly just"). Second, Mr. Wyzanski challenges both New York and New Jersey's claims of sovereignty. He undoubtedly overstates the case by comparing Ellis Island to a United States territory like the Philippines and Hawaii. Because Ellis Island was within the territory of the (then) forty-eight states, like many other federal enclaves such as Governors Island, the federal government was still subject to the sovereignty of the states in which her property sat. *See Kleppe v. New Mexico*, 426 U.S. at 543 ("[A] State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause.").

This extensive documentation on the labor disputes during the 1930s helps to establish New Jersey's non-acquiescence. Indeed, in Charles Wyzanski's grand view, these exchanges also diminish New York's prescriptive acts, because he posits preemptive federal sovereignty. These exchanges show New Jersey's resistance to New York's authority, such as it was, over construction in the filled portions of the Island. They also indicate that the States were communicating about labor issues, and by extension, the sovereignty question.

In a related context, the Commissioner of Immigration for the Port of New York, Edward Corsi, applied to the State of New Jersey for a Waterfront Development Per-

mit in 1933. *See* Application for Permit (Aug. 31, 1933) (PE 10); Form of Permit (Nov. 9, 1933) (PE 11). Edward Corsi was a prominent New Yorker; his actions manifested an understanding that although New Jersey had transferred pure property rights to the submerged lands in 1904, she retained sovereign authority in waterfront development matters. Tr. 7/19/96 at 1288-90; Tr. 7/30/96 at 2549-53; Tr. 7/22/96 at 1367-68. This view was also accepted by the Department of Treasury and the Army Corps of Engineers, who uniformly referred to the 1933 construction projects as located at "Ellis Island, New Jersey" in plans and maps, continuing federal recognition of New Jersey sovereignty which began with the Harbor Line Board Surveys in 1890. *See* Shenton Summ. J. Aff. ¶ 27 (Mar. 5, 1996) (PE 487); *see also* Letter from Assistant Secretary of the Treasury to the Secretary of War (Oct. 13, 1933) (location of work is "at the Ellis Island, New Jersey, Immigration Station") (PE 374); Report of Corps of Engineers (Oct. 24, 1933) (property is "Ellis Island, N.J. Immigration Station") (PE 376); *see also* PE 377-80 (similar designations).

Labor and wage disputes were still prominent in the late 1940s. In 1948 the assistant INS administrator on Ellis Island requested a determination from the Department of Labor as to which State's wage rates controlled for Davis-Bacon purposes. *See* Correspondence between the INS and the Dep't of Labor (PE 76-85); Smith Summ. J. Aff. ¶ 79. Several decisions were rendered by the Solicitor or Assistant Secretary of Labor that applied New Jersey's wage rates. For example, on August 18, 1938 the Solicitor, William Tyson, reviewed a contract "for repairs of turbines Nos. 4 and 5, Power Plant, Ellis Island, Hudson County, New Jersey." Decision of the Secretary of Labor (Aug. 18, 1948) (PE 85). The power plant, located in the filled portion of Ellis Island, was understood by the federal government to be in New Jer-

sey. One can fairly conclude that matters like wage rates (which must have varied between New Jersey and New York) were of interest to unions and officials of both States. By the 1940s the Island was used more as a detention center for enemy aliens and not much activity at either the federal or state level was underway. Throughout this period, New Jersey actively asserted her proprietary and sovereign interests, either directly or through surrogates such as trade unions.

(3) The Post-Prescriptive Period: 1955-1993

(a) *The 1950s And 1960s*

By 1955 the immigration era on Ellis Island had officially ended, although for years before the Island had ceased to be a significant immigration center.[51] Sadly, the Island was declared to be surplus government property. *See* Gen. Servs. Admin. Declaration (Mar. 15, 1955), *cited in* Unrau Study at 1146. Attempts to sell Ellis Island to private parties brought the territorial dispute into sharper focus.[52] Both States and their respective representatives debated the status and future of Ellis Island at length and their sovereign claims were fully reviewed.

---

[51] As a practical matter, the peak period of immigration at Ellis Island was reached by the early 1920s. Thereafter Congress placed quotas on immigration and restricted entry. *See* Thomas M. Pitkin, *Keepers of the Gate: A History of Ellis Island* 135-36 (1975); Harlan D. Unrau, U.S. Dep't of Interior/Nat. Park Serv., Historic Resource Study: Ellis Island, Statute of Liberty National Monument, New York-New Jersey ("Unrau Study") 892-95 (1984) (DE 74). New processing concepts, such as immigrant inspections at United States embassies, further reduced the flow. During the World War II and Korean war years the Island served as a detention center for enemy aliens. Unrau Study at Ch. 6.

[52] No purchase offers were forthcoming either from New York or New Jersey or their respective cities. Moreover, according to trial testimony, New York, whose original deed of 1808 contained a reverter clause (should the Island not be used for safety or defense purposes), did not activate the provision. *See* Tr. 7/10/96 at 82-84.

In analyzing the extent of a State's prescriptive acts, this Court has noted that "we are concerned not only with what its officers have done, but with what they have said, as well." *Illinois v. Kentucky*, 500 U.S. at 386. During the 1950s and 1960s much was said regarding Ellis Island by representatives of both States. Significantly, in 1962 and 1963 extensive hearings were conducted before the United States Senate. *See Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations,* 87th Cong. (1962) (PE 143). The United States Senators from both States were actively involved. New York's Senator Kenneth Keating acknowledged: "This is a matter of interest to the Senators of New York and New Jersey." *Id.* at 64. In addition the mayors of New York City and Jersey City testified. New York City Mayor Wagner also testified about his City's involvement with Ellis Island. His testimony undermines New York's claims of prescription:

> Senator MUSKIE. One other question.
>
> I know I am not going to be able to persuade the mayor of the city of New York to give up anything that the city of New York considers to be its property, but, with respect to the legal problem which has been referred to in these hearings as to jurisdiction over the island as between New Jersey and New York, would you consider this legal problem to be a substantial obstacle to the final determination of a use for the island?
>
> Mayor WAGNER. I would not believe so. I am sure my friends in Jersey City are very reasonable, but then I have a special attachment there because my mother was born in Jersey City. I think the question of jurisdiction could be ironed out by a meeting of the minds, if there would be an agreement on the purpose to which the island would be put.
>
> I know that we do not assert that it is part of New York City or New York State merely because we

want to assert it. Our people think as a historical fact it is, but that should not stand in the way of any use, I am sure.

Senator MUSKIE. Assumption of jurisdiction, of course, would involve responsibility for providing services. Would the city of New York find it possible to provide services? *I understand the city has never provided services of any kind for the island.*

Mayor WAGNER. *No; it has been under Federal jurisdiction.*

Senator MUSKIE. But services such as have come from outside the island have come from the Jersey shore. As a practical matter, would this not have to be continued?

Mayor WAGNER. *Jersey is closer.*

Id. at 250 (emphasis added). Mayor Wagner's statements contradict or at least minimize New York's claims concerning the provision of services by New York City to Ellis Island during this period and earlier. *See supra* Part VI.D.3. Indeed, Mayor Wagner appears to acknowledge that Jersey City, through its proximity, may have had closer connections to the Island. This documentary evidence highlights the fragility of New York's prescriptive claims.

After the issuance of the Subcommittee Report, the States worked together to resolve the Ellis Island dispute. In June 1963 United States Senators Clifford P. Case of New Jersey and Jacob K. Javits of New York urged Senator Muskie to arrange for a meeting of all interested parties to discuss a proposal that New Jersey and New York enter into a compact for the jurisdiction of Ellis Island. Shenton Summ. J. Aff. ¶ 73 (citing Newark Evening News (June 28, 1963) (PE 151)). Congressman (later New York Mayor) John V. Lindsay then introduced a bill concerning the future use of Ellis Island. In his supporting statement,

"he recognized that the twenty-four acres of fill on Ellis Island 'were never New York property, but as subaqueous territory, pertained to the jurisdiction of New Jersey.' His statement in the *Congressional Record,* July 24, 1963, reads in relevant part:

> Ellis Island was ceded by the State of New York to the U.S. Government in 1808, and until 1861 remained a harbor defense installation of the Army known as Fort Gibson. Further quasi-military uses continued until its formal opening in 1892 as an immigration station. The new activity was matched by extensive operations on the island: The construction of 35 buildings at a cost of nearly $6½ million; the increase in area of the original island by earthen fill and bulkhead construction from its original 3 acres, residually New York property, to 27½ acres. The 24 differential acres puzzle the task of redesignating this property to private use because these were never New York property, but, as subaqueous territory, pertained to the jurisdiction of New Jersey. A private Ellis Island would create a knotty problem in interstate jurisdiction."

Shenton Summ. J. Aff. ¶ 73 (quoting Cong. Rec. 13,300 (July 24, 1963) (PE 154)); *see also* Tr. 7/19/96 at 1214-21.

As custodian of the Island, the General Services Administration ("GSA") also had occasion to comment on the Island's legal status. An extensive legal opinion by Henry Pike, special assistant to the General Counsel of GSA, carefully analyzing both States' rights under the Compact, has become a much-documented part of the record of these proceedings. *See* Ellis Island, Its Legal Status (Feb. 11, 1963) (PE 144). The GSA adopted the opinion.

I find the legal opinion of Mr. Pike to be highly probative. He produced a comprehensive analysis of the legal history and reviewed many of the documents and cases discussed in this record. After doing so, he concluded that the 1833 Ellis Island to the low-water mark was New York territory, while the surrounding territory was New Jersey's:

> On the basis of the foreging, it is concluded that Ellis Island proper is a part of the State of New York, it, together with Liberty Island, constituting true exceptions to the boundary line as otherwise fixed by Article First of the 1833 compact between the States of New York and New Jersey. This conclusion is in accord with the conclusion reached in the memorandum dated June 21, 1961, from the American Law Division of the Legislative Reference Service of the Library of Congress to the Honorable Kenneth B. Keating, the junior Senator from New York. *Under the conclusion reached in this memorandum, the term Ellis Island includes all the land to the low water mark around the island as of September 16, 1833. The submerged lands outside that low-water mark, including such areas as may have been filled in since the date of the compact, are deemed to be a part of the State of New Jersey,* subject to such police jurisdiction thereover as is vested in the State of New York by Article Third of the 1833 compact. This conclusion accords with the position intimated, but not decided, by the Assistant Attorney General of the United States for the Lands Division, in a letter dated April 22, 1960, to the General Counsel of General Services Administration, wherein he referred to "a distinct possibility that the final decision [on a suit to determine the status of Ellis Island] would be to the effect that different parts of the island are subject to the sovereignty of different States (New York and New Jersey)".

Id. at 70 (alteration in original) (emphasis added).

Mr. Pike further concluded that New Jersey was therefore entitled to the filled portions of the Island. His eighty-two-page report concludes with the following summary:

> The United States has title and exclusive jurisdiction over that [original 3-acre] part of the Island [that is New York's], both being derived from the State of New York. The remainder of the Island, containing approximately 24.5 acres, and the submerged land surrounding the Island are a part of the State of New Jersey. The United States has title to that remainder of the Island and to approximately 20.5 acres of submerged lands surrounding the island, having derived it from the State of New Jersey. The United States has only a proprietorial interest in both such areas, except that it has a partial (criminal) jurisdiction over such part of the still submerged lands that are covered by the Act of May 7, 1880, of the State of New York, the United States having been ceded the "exclusive jurisdiction" which was vested in the State of New York by Article Third of the 1833 compact between the States of New York and New Jersey, and which would now be described as partial jurisdiction or criminal jurisdiction.

Id. at 81-82. Mr. Pike's report was widely circulated and reviewed. It helped to form the legal basis for the United States's position in the *Collins* litigation and has been relied upon by other federal agencies, such as the NPS.

These events and documents represent only a portion of the available record evidence supporting New Jersey's non-acquiescence during this period. It is evident that, had New York established sovereignty by prescription and acquiescence over the Island before this time, New Jersey would not have been treated as an equal by New York State and federal representatives in the determination of the Island's future. These statements and legal opinions undercut New York's legal claims. In sum, activities dur-

ing this period show sister sovereigns hard at work to determine Ellis Island's future.

(b) *The 1970s To 1993*

From the many suggestions for future uses of Ellis Island, the concept of a federal immigration museum took hold and prospered. Today the Main Building, where immigrants arrived and were processed, has been beautifully restored. This classic 1903 Beaux Arts structure was brought back to life in the 1980s as part of the Statue of Liberty Centennial project. The NPS is now the custodian of Ellis Island and the Statue of Liberty; the two sites form a national park that draws over two million visitors per year.

Throughout the 1970s and 1980s the NPS engaged in a variety of planning initiatives that involved representatives from both New Jersey and New York. It is not necessary to detail those activities here. In this period the NPS sought to stay neutral on the pulsating sovereignty question. Significantly, however, the NPS labelled the cover and title page of its planning documents "Ellis Island—New York and New Jersey." *See* Analysis of Alternatives for the General Management Plan, Statue of Liberty National Monument, New York/New Jersey (Dec. 1980) (PE 484);[53] That document contains the following description of the "regional setting":

> Both Islands lie on the New Jersey side of the state line; however, all of Liberty Island and the original 3.5-acre portion of Ellis Island belong to the state

---

[53] Henry Pike, who wrote this analysis, was also involved with GSA's efforts to dispose of Ellis Island to the States or others. In the course of that effort, New York's witness, Dr. Kraut, stated that Pike became "frustrated," a conclusion he based on the "tone" of Pike's report. Tr. 7/30/96 at 2447-49; *see also* Tr. 8/15/97 at 4045-47. While Ms. Kramer (for New York) cleverly referred to this alleged frustration as "Pike's Pique," I cannot find anything in the record that would undermine Mr. Pike's credibility.

> of New York. The remainder of Ellis (24 acres created by landfill), the submerged lands, and the surrounding waters are part of the state of New Jersey.

Analysis of Alternatives for the General Management Plan at 9. That description reflects the NPS's overall view of this case; through its public distribution of the documents it also makes the public aware of both States' claims. *See also* Harlan D. Unrau, U.S. Dep't of Interior/Nat. Park Serv., Historic Structure Report: Ellis Island, Statue of Liberty National Monument, *New York-New Jersey* (1981) (DE 952) (emphasis added).

After the Main Building was restored, the NPS engaged in planning efforts for the buildings on the remainder of Island One and those on Islands Two and Three. Efforts were ongoing and involved officials from both States. In 1984 the NPS (through its historian Harlan D. Unrau, an expert witness for New York in this case) nominated the property for inclusion in the National Register. The form Mr. Unrau filled out declared Ellis Island to be both in "New York County, New York" and "Hudson County, New Jersey."[54]

Intermittently during this period the governors of both States sought to resolve their differences over Ellis Island. The final attempt was made by Governors Cuomo of New York and Kean of New Jersey. They signed an agreement on June 23, 1986 that sought to place revenues each State received from Ellis and Liberty Islands into a trust fund for the benefit of the homeless population. *See* Memorandum of Understanding in Regard to Establishing a Bi-State Public Corporation to Be Known as the Statue of Liberty Trust Fund (PE 180) (App. H); *see also* Tr.

---

[54] At trial Mr. Unrau sought to distance himself from that geographic description, saying it had been prepared by others and merely reviewed by him. Tr. 7/26/96 at 2188-97. I find that he was the party responsible for the statement.

7/10/96 at 50-54; Tr. 8/15/96 at 4051-53. This agreement never went into effect because it was not approved by the New York legislature. Tr. 7/10/96 at 53.

These actions, among others, leave the clear impression that both States were trying to resolve a nettlesome issue with regard to sovereignty over Ellis Island. So long as the NPS was administering Ellis Island on behalf of the federal government, the sovereignty question was manageable. It was only after the *Collins* case was decided that New Jersey decided it was time to seek resolution by this Court.

6. *Summary Of New York's Prescriptive Acts And New Jersey's Non-Acquiescence*

I draw two principal conclusions based on this evidence. First, while New York through the City of New York probably had more contact than did New Jersey (or Jersey City) with Ellis Island—particularly with the Main Building on the original Island—during the crucial 1890 to 1934 period, New York has not sustained her burden of showing that she has prescripted the filled portion of the Island during the critical eras. Instead, her acts were intermittent, often inconclusive and certainly disputed. Even assuming, arguendo, sufficient proof of prescription on New York's part, New Jersey did not acquiesce in her neighbor State's actions during the telling historical periods. The record reflects that from 1890 until this case was filed, New Jersey made consistent assertions of her underlying sovereign claims despite the pervasive federal presence in the Island's life. The substantial non-acquiescence evidence New Jersey has placed in the record easily rebuts New York's claims of prescription.

Although she later retreated from this position, New York initially argued that the *only* act of non-acquiescence New Jersey could have asserted would be to commence

litigation before this Court. *See* Tr. 7/29/96 at 2316-17. Since the trial, New York has somewhat relaxed that standard, stating that "[n]o state has ever proved non-acquiescence in a compact case without first filing a timely lawsuit against the State that co-signed the compact *or, at the very least, asserting its claim by other legally cognizable means*." N.Y. Post-Trial Mem. at 38 (Oct. 3, 1996) (DI 365) (emphasis added). New York has cited no precedent for a standard that demands the filing of a lawsuit, and I have found none. *See supra* Part VI.A. To impose such a standard here given that the United States has possession and control of the Island would be particularly inappropriate, because many of New Jersey's acts of non-acquiescence have been directed to the United States rather than New York.

New York's attempts to cobble together intermittent and equivocal prescriptive acts from each period apparently assume that the legal value of prescription is greater than the sum of its parts. Moreover, her prescriptive acts were repeatedly refuted by New Jersey's assertion of dominion over the landfill. In none of these periods, therefore, is New York able to demonstrate the unequivocal acts of prescription demanded by this Court's jurisprudence. *Cf. California v. Nevada,* 447 U.S. 125, 130-32 (1980) (evidence established California's recognition of a putative boundary for over one hundred years); *Arkansas v. Tennessee*, 310 U.S. at 567-72 (applying the doctrine where the unchallenged evidence showed unchallenged an unequivocal dominion by Tennessee for one hundred and fifteen years); *Louisiana v. Mississippi*, 202 U.S. at 53-57 (involving over ninety years of acquiescence by Mississippi). A more accurate assessment of the activity of the States during these periods comes from the Court's decision in *New Jersey v. Delaware*, 291 U.S. at 377: "Acquiescence is not compatible with a century of conflict."

VII. REMEDY: DRAWING THE BOUNDARY ON ELLIS ISLAND

A. Nature Of The Role Of Special Master

Drawing an appropriate boundary line on Ellis Island raises an interesting question about the nature of the Court's and therefore the Special Master's role in an original jurisdiction case. As Special Master, I am compelled to operate in two capacities. Because the Court delegated legal authority to interpret the Compact of 1834 and apply the doctrine of prescription and acquiescence, I view my role as equivalent to that of a court of law. Thus, in finding that this Court should draw the boundary at the low-water mark of the original 1833 Island, I apply well-settled jurisprudence to the issues and focus on legal principles, rather than equitable ones. The relevant question at this juncture, however, is whether I am free to recommend a remedy based not solely on legal principles but also in part on notions of equity. A review of the relevant cases compels me to fashion a remedy that is just, fair, and convenient to the parties and the public.

In original jurisdiction cases, this Court sits in equity as well as at law. *See New Mexico v. Colorado,* 267 U.S. 30, 33 (1925) ("This is a suit in equity, within the original jurisdiction of this Court, brought by the State of New Mexico against the State of Colorado, in 1919, to settle a controversy as to the location of their common boundary line."); *see also Texas v. New Mexico,* 462 U.S. 554, 569 (1983) (pointing to the Court's "equitable power to apportion interstate streams"); *Arizona v. California,* 373 U.S. 546, 565-66 (1963) (same); *United States v. California,* 332 U.S. 19, 26 (1947) (actions to determine sovereign boundaries "are in the nature of equitable proceedings"); *Kansas v. Colorado,* 185 U.S. 125, 145 (1902).

The Court has long reached equitable conclusions in resolving original jurisdiction cases. In *Maryland v. West*

Virginia, for instance, the Court concluded that "[u]pon the whole case, the conclusions at which we have arrived, we believe, best meet the facts disclosed in this record, are warranted by the applicable principles of law and equity, and will least disturb rights and titles long regarded as settled and fixed by the people most to be affected." 217 U.S. 1, 46 (1910). In *Handly's Lessee v. Anthony*, Chief Justice Marshall, speaking for the Court, explained that

> in great questions which concern the boundaries of States, where great natural boundaries are established in general terms, with a view to public convenience, and the avoidance of controversy, we think the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals.

18 U.S. (5 Wheat.) 374, 383-84 (1820). The Chief Justice was writing at a time when "great questions" of state boundaries were indeed being determined by this Court, one of which, of course, was the very *New Jersey v. New York* case that would come before him a few years later in 1829.

A century later, in *Vermont v. New Hampshire,* Vermont brought suit before the Court "for the determination of a boundary line between that state and the state of New Hampshire." 289 U.S. 593, 595 (1933). The issue was whether New Hampshire was sovereign over the lands on the west bank of the Connecticut River, which separates the two states. The key document was another early English precedent—an Order of the King-in-Council of King George III. Significantly, the 1664 grant from Charles II to the Duke of York, central to our case, was invoked there as well. This Court found it "difficult to conclude that in settling that dispute [between New Hampshire and New York over the authortiy to grant land west of the Connecticut River] it was intended to deny to New

York or the grantees lawful access to the river." *Id.* at 605. This Court ultimately reached the conclusion that New Hampshire's territorial line would extend to the low-water mark, not the high-water line, as she had argued. *Id.* at 612-13.

In reaching its decision, the *Vermont v. New Hampshire* Court relied on Chief Justice Marshall's opinion in *Handly's Lessee*:

> "Even when a State retains its dominion over a river which constitutes the boundary between itself and another State, it would be extremely inconvenient to extend its dominion over the land on the other side, which was left bare by the receding of the water. . . . Wherever the river is a boundary between States, it is the main, the permanent river, which constitutes the boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark."

Id. at 606 (quoting *Handly's Lessee,* 184 U.S. at 380-81); *see also Missouri v. Iowa,* 48 U.S. (7 How.) 660 (1849) (states are bound by the practical line that has been established as their boundary, although not precisely a true one).

In *New Jersey v. Delaware,* 291 U.S. 361 (1934), the Court determined that the boundary between the states below a twelve-mile circle about New Castle is the thalweg of navigation in the Delaware River and Delaware Bay. The Court adopted the thalweg boundary despite the argument that the geographical center of the River and Bay would be the proper place to draw the boundary. The Court noted that at one point the thalweg would be an inconvenient boundary because it would take a "sharp turn." Nonetheless, that inconvenience was balanced against the more pervasive inconvenience of having the River and Bay boundary drawn at the geographic center. The Court explained that

> the inconvenience is a reason for following the *Thalweg* consistently through the river and the bay alike instead of abandoning it along a course where it can be followed without trouble. If the boundary be taken to be the geographical centre, the result will be a crooked line, conforming to the indentations and windings of the coast, but without relation to the needs of shipping. If the boundary be taken to be the *Thalweg,* it will follow the course furrowed by the vessels of the world.

Id. at 385 (citation omitted). The Court observed that "[t]he underlying rationale of the doctrine of the *Thalweg* is one of equality and justice." *Id.* at 380. Where, as here, the "true" boundary cannot be rationally adopted or even determined, the same considerations of justice and convenience are an appropriate guide to a remedy.

In recommending that the interstate boundary on Ellis Island be drawn with convenience in mind, and that surveyors be called upon by both States to describe that boundary in metes and bounds, I also draw strength from the special master's recommendations and the Court's holding in the more recent case of *Ohio v. Kentucky,* 444 U.S. 335 (1980). There the Court found the boundary line to be " 'the low-water mark on the northerly side of the Ohio River as it existed in the year 1792 . . . not the low-water mark on the northerly side of the Ohio River as it exists today.' " *Id.* The Court observed:

> Locating that line, of course, may be difficult, and utilization of a current, and changing, mark might well be more convenient. But knowledgeable surveyors . . . have the ability to perform this task. Like difficulties have not dissuaded the Court from concluding that locations specified many decades ago are proper and definitive boundaries.

Id. at 340. The Court therefore accepted the special master's recommendation that, after the Court's decision

on the merits, the precise boundary should be determined either by the parties' agreement, "if reasonably possible," by a joint survey, or by the special master after conducting his own survey in a follow-up hearing. *Id.* at 336-37.[55] The precise boundary determination there was not an easy one to draw. It took another five years after the Court's decision on the merits to complete. *See Ohio v. Kentucky*, 471 U.S. 153 (1985). Thus, while I am proposing a similar procedure, as set out below, it is my judgment that it can be implemented promptly and therefore may be accomplished before the filing of exceptions (and without prejudice thereto).

I thus respectfully recommend the exercise of this Court's equitable powers in the remedy phase of this proceeding. I acknowledge that neither the Court nor its Special Master can draw boundaries that do not respect the boundaries set by the States themselves with congressional approval. Under principles of separation of powers, the congressional expression of state sovereign will control. I am confident that my recommended remedy respects these constitutional principles; it is squarely based on my analysis of the intrinsic and extrinsic evidence, the consequent determination of the Island's boundaries, and the areas of land to which the respective States are entitled. The principles of flexibility and practicality I recommend do not undermine but fulfill the sovereign will as set forth in the Compact of 1834. *See supra* Part II.B. (quoting congressional standards established by this Compact).

---

[55] *Cf. California v. Nevada*, 447 U.S. 125, 132 n.9 (1980) ("[T]he Master recommends that he be authorized to arrange for surveys, at the parties' expense, if necessary to resolve disputes over the precise location of portions of either of the lines we approve today. That, too, seems appropriate."); *see also United States v. California*, 332 U.S. at 26 (It is a "commonplace" practice to generally determine the sovereignty over land but hold detailed hearings later "to determine with greater definiteness particular segments of the boundary.").

B. The Precise Boundary

To draw a boundary between the States on Ellis Island that reflects the area of the Island at the time of the Compact of 1834, three discrete questions must be addressed: (1) Should the boundary of the original Island be drawn based on the mean low-water ("MLW") mark or mean high-water ("MHW") mark?[56] (2) How much area does the boundary of the original Island encompass on the present Island? and (3) What should be the shape and configuration of the original Island boundary line on the present Island?

1. *Mean Low-Water Mark Versus Mean High-Water Mark*

New Jersey has prayed for the following relief:

> That the boundary line be declared to be the former mean high water line of the original natural island, approximately 3 acres in size, so that the original island is thereby declared to be within the territory and jurisdiction of the State of New York, and so that the balance of the island, approximately 24.5 acres in size, and the surrounding waters, are thereby declared to be within the territory and jurisdiction of the State of New Jersey. . . .

N.J. Compl. at 15. New Jersey argues thus that the boundary line on Ellis Island should be drawn at the MHW mark.

She bases this view on Articles Second and Third of the Compact of 1834. Article Second, she points out, addressed the Island "as it existed in 1834" and "Article III gave New Jersey property rights in all under water

---

[56] The concept of "mean" high and low water describes a systematic calculation of observations over time, a process that the experts at trial explained was not always available in early map- or chart-making. *See* Tr. 8/1/96 at 2943-44; N.J. Post-Trial Br. at 11-13. My use of the term is informed by this testimony.

lands in the western part of the Hudson River and Bay of New York." N.J. Post-Trial Br. at 11. Because property rights "are an attribute of sovereignty and extend to all tidally flowed lands or navigable waters up to the mean high water line," *id.*, it is the MHW mark that defines the boundary according to New Jersey.

For further support, she looks to New York's 1808 cession to the federal government, which was an area of under three acres above the high-water line. *Id.* at 12; *see also* Tr. 7/11/96 at 326-27; Castagna Expert Report, Ex. DD (PE 478). She asserts, further, that while New York did attempt to deed her land under water to the United States in 1880, that conveyance was nullified by New Jersey's similar grant to the United States in 1904. N.J. Post-Trial Br. at 12.

New York City, arguing for New York, counters that "[t]he 'sovereign-holding-to-high-water-mark' theory is untenable" because, first, "it applies only to a state's own citizens and their private holdings"; second, navigation should not be impeded for the uplands owners; and third, "where two sovereigns share a boundary on tidally flowed waters, the teaching of *Handly's Lessee* is that the sovereign owner of title and jurisdiction over such a river holds to the low-water, not the high-water mark on the shores of the sovereign whose territory is merely bounded by the river." The City Post-Trial Br. at 24 (citation omitted). New York's position is that, if a boundary be drawn on the Island, it should be at the MLW mark. She relies principally on her interpretation of the boundary line the drafters of the 1834 Compact must have intended to draw, based upon the negotiations and language of the Compact.

None of the cases cited by New Jersey support that State's contention that the high-water mark is the appropriate boundary line on Ellis Island. The cases she relies upon are not interstate border cases, but rather address

whether the states acquired property and dominion from the federal government over underwater soils within state limits.[57]

I agree with New York's proposed boundary around the 1834 Island, but not with all of her reasons. Like New York, I rely primarily on the apparent intent of the parties. While the Compact itself is silent on the dimensions of the Island, the prior settlement negotiations addressed the relationship between MLW and MHW marks and territorial limits.[58]

But, significantly, during Compact negotiations New Jersey accorded New York sovereignty over Ellis Island "to the low water mark." *See supra* Part IV.B.2.b.(1)(b). Admittedly this language, while part of earlier concessions, was not contained in Article Second of the Compact. Nevertheless, nothing in the pre-Compact negotiations contradicted such a construction and by 1833 New York had conceded that she would not press her claim to the Hudson River on the New Jersey side beyond the MLW mark.[59]

---

[57] New Jersey relied on the following cases: *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57 (1873); *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423 (1867); *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367 (1842). N.J. Post-Trial Br. at 11.

[58] New Jersey's reliance on *United States v. California*, 382 U.S. 448 (1966) for the proposition that as a general rule an island is defined with reference to the high-water mark is not compelling. The case does not involve the Court's own conclusions on low-water mark versus high-water mark; instead, the Court merely adopts with some modifications the decree authored by the special master and the parties. *See id.* at 448. In that respect, neither the Court nor the special master was articulating a rule of riparian law. The case merely constitutes the Court's acceptance of the parties' definition for purposes of approving their proposed decree.

[59] This was a reversal of her earlier position claiming the Hudson to the MHW mark on New Jersey's shore and challenging New Jersey's ability to build wharves and improvements. *See supra* Part IV.B.2.b.(1)(a).

Because there is no discussion of the size of Ellis Island (or any of the other islands) in Article Second, the question remains open to interpretation.

In the course of negotiating the Compact, both sides seem to be assuming that the low-water mark, not the high-water mark, would define the respective territorial limits, however they came out. This assumption was a product of longstanding negotiations. It may well have been influenced, as New York has argued, by this Court's 1820 decision in *Handly's Lessee,* which had granted to Kentucky rights in the Ohio River to the low-water mark of the Indiana shore line. *See supra* Part VII.A. Chief Justice Marshall's opinion held that "it would not be doubted that a country bounded by the river would extend to low water mark. This has been established by the common consent of mankind." *Handly's Lessee,* 184 U.S. at 602. The conduct of the parties and the legal assumptions under which they were operating indicate that they intended to have the Island boundary extend to the low-water mark.

While I cannot resolve with complete confidence what the parties intended with respect to the Island's MHW mark or MLW mark in the 1833 Compact, contemporary understanding and relevant judicial decisions make the 1833 size of Ellis Island to the MLW mark the more plausible construction. I therefore recommend that the Court grant to New York sovereignty over the original or 1833 Ellis Island to the low-water mark thereof.

In addition to construing the intent of the parties under the Compact, I invoke practicality and public convenience in drawing the boundary at the low-water mark. As noted above, in both *Handly's Lessee and Vermont v. New Hampshire,* the Supreme Court cited public convenience as a factor in drawing an interstate boundary at the low-water mark. Quoting *Handly's Lessee,* the *Ver-*

mont v. New Hampshire Court noted that, as regards the boundaries of a river, it would be " 'extremely inconvenient' " to accord sovereignty to one State to the land to the high-water mark or vegetation line, and to accord to the other State sovereignty on the land below the high-water mark. 289 U.S. at 606. Similarly, here it would be "extremely inconvenient" for New York not to exercise sovereignty to the MLW mark. If the MHW mark is invoked, on some parts of her territory on the original Island, a thin strip of tidelands could conceivably prevent her from accessing New York Harbor from the Main Building on Ellis Island without crossing New Jersey sovereign territory.[60] Public convenience thus counsels that New York should have access to the Harbor from her sovereign territory. Drawing the boundary at the MLW mark satisfies this concern.

For all of the reasons above stated, and because New Jersey, who bears the burden of proof in this respect, has not convinced me otherwise, I find that the MLW mark of the original Island is the appropriate starting point in drawing the sovereign boundary on the Island today.

2. *Area Of Land Accorded Each State On The Present Ellis Island*

To determine the total area accorded each State on the present Island, I have relied upon the maps that most accurately depict the shape and size of the original and present Island to the low-water mark. I have also relied upon the credible testimony of New York's scientific experts, Dr. Squires and Captain Swanson, who estimated the area of the original Island above the MLW mark as

---

[60] The fact that I ultimately reconfigure the precise boundaries of the MLW mark on the present Island does not obviate a threshold consideration of convenience in determining where the boundary line on the original Island was meant to be drawn.

depicted in several maps.[61] Comparing that figure to the total area of the Island as depicted in a recent map, the area of both States' sovereign territory at present can be estimated.

Because current technology for evaluating and mapping MLW and MHW marks was unavailable in 1833, the best the Court can do to estimate size of the Island over one hundred sixty years ago is engage in speculation informed by contemporaneous mapping and the credible testimony of scientists. I am satisfied that the experts from both States who testified on the boundary issue and surveyed the Island are as qualified as anyone could be to draw conclusions about its past and present size. The possibility of neater precision has been doomed, not only by the lack of technology earlier, but also by the passage of time.

I find that the 1857 United States Coast Survey map advocated by New Jersey for use in delineating the boundary on Ellis Island most accurately depicts the size and shape of the original Ellis Island to the MLW mark. *See* App. I. I rely substantially on the testimony of one of New Jersey's experts, Richard G. Castagna.[62] Mr. Castagna determined that the 1857 United States Coast Survey map, and the enlargement thereof, were "highly accurate,"

---

[61] While I will cotinue to use the term "mean low water" it should be noted that some of the maps discussed did not employ techniques designed to produce a mean. *See supra* note 56.

[62] When I inquired of New York's expert witness, Dr. Squires, whether, despite his reservations about the 1857 map, he had a better map to offer, he said "I have not made a judgment on that." Tr. 8/7/96 at 3349-50. Thus my decision to adopt the 1857 map as the best available evidence, even though potentially flawed, benefits not only from Mr. Castagna's convincing testimony, but also from the thought that it is the best we can do (or, to borrow from Sir Winston Churchill's description of democracy, it is the worst map except for all of the others).

Tr. 7/11/96 at 301, 306, and provide the most reliable depiction of the size and contours of the original Ellis Island, *id.* at 427-29.

Mr. Castagna concluded that the 1857 map was the most precise map available between 1834 and the start of the landfilling activities in the 1890s on several reasonable bases. One, the United States Coast Survey mapmakers are presumptively careful and reliable. *Id.* at 304. Two, the 1857 map was prepared specifically to depict only Ellis, Bedlow's (Liberty), and Governors Islands, *id.* at 300, rather than a greater portion of New York Harbor, and thus does not sacrifice accurary for breadth, *id.* at 429-30. Three, the enlargement of the 1857 map depicts the northeastern seawall of Liberty Island at the same locations as a reliable 1980 map of the islands, allowing the seawall to be used as a control point. *Id.* at 415-22; Tr. 7/12/96 at 568-70; Tr. 7/17/96 at 817-18. Mr. Castagna found the 1980 map "extremely accurate," Tr. 7/11/96 at 404, and further noted that it meets today's stringent national map-accuracy standards, *id.* at 406-08. Thus, the coincidence between the two maps is important. Four, relying on the location of Fort Gibson on the 1857 and 1980 maps, Mr. Castagna compared these maps with a survey of Ellis Island prepared in 1995 by the New Jersey Department of Transportation, which he regarded as "precise" in conjunction with the other maps. *Id.* at 422-26, 429.

Mr. Castagna concluded that the 1980 map and 1995 survey of the Island accurately depict the current size and contours of Ellis Island. *Id.* at 402-26. The 1980 map was created using aerial photography and depicts only Ellis and Liberty Islands, thus providing extensive detail. *Id.* at 402-04. New York did not contest the accuracy of this map.

Although New York contested Mr. Castagna's reliance on the 1857 map, I did not find her efforts convincing.

One, she was not able to elicit testimony that would dissuade Mr. Castagna, or me, from the conclusion that the 1837 map, which New York prefers, and which is closer in time to the 1834 Compact, provides a less accurate depiction of the original Island. The 1837 map is simply not as detailed as the 1857 map; its accuracy is not buttressed by the 1980 map and 1995 survey of the Island in the way that the 1857 map is. *See* Tr. 7/12/96 at 565-69; Tr. 7/17/96 at 818-19. Two, she was not able to cast doubt on Mr. Castagna's conclusion that no fill (beyond part of an earlier created pier) was added to the Island itself between 1834 and 1857. *See* Tr. 7/12/96 at 570-71, 584-86. Finally, despite her extensive cross-examination of Mr. Castagna in this regard, New York did not succeed in refuting his identification of the seawall on Liberty Island in the 1857 and 1980 maps. Mr. Castagna satisfied me that he could distinguish between the water marks and the seawall depicted in both of these maps. *See* Tr. 7/11/96 at 309-11; Tr. 7/12/96 at 478-79, 496-502; Tr. 7/17/96 at 812-15. Mr. Castagna did not, however, offer an opinion as to the size of the original Ellis Island at the MLW mark, which is also depicted on the 1857 map. *See* Tr. 7/12/96 at 487, 492-93, 496-97, 547, 579-81.

While I accept Mr. Castagna's testimony that no fill was added to Ellis Island between 1833 and 1857, I do not agree that no fill was added to Ellis Island before 1833, *see* Tr. 7/10/96 at 250; Tr. 7/11/96 at 338, especially as that conclusion relates to the "L-shaped pier or dock" at the southwest side of the original Island. This pier is clearly defined in the 1819 map, *see* Castagna Aff., Ex. G (PE 479) (reproduced as App. J), and much time was spent at trial to determine if it was undergirded by fill. Dr. Squires testified that at least half of the pier was supported by artificial fill. Tr. 8/1/96 at 2927-45; Tr. 8/2/96 at 3020-23. I am convinced by that testimony for the following reasons: (1) The 1839 chart

shows a filled area around at least two thirds of the dock; and (2) Logically, according to Dr. Squires, this dock was initially constructed to carry ammunition by rail car to the cannons at the Fort Gibson redoubts, and it needed to be structurally sound. Moreover, as Dr. Squires added, pile-driving techniques (as an alternative to fill) adequate to hold such weight were not in use at that time. Tr. 8/1/96 at 2932; Tr. 8/2/96 at 3022-35.

The consequence of including this pier as part of the fill to the pre-1833 Island is to make a small addition to New York's land. This difference can be illustrated best by looking at the various overlays of the original Island over the present Island. Mr. Castagna's tidelands map, Castagna Expert Report, Ex. AA (PE 478), excludes the dock, whereas the historic base map, prepared by the NPS (App. F) and supported by New York, includes it. I follow the latter version in drawing the boundary.

I further find that the survey map prepared by another New Jersey expert, Lewis J. Marchuk, most accurately depicts the current size and shape of the Island. At the request of the State Attorney General's Office of New Jersey, in September and October of 1995, Mr. Marchuk prepared a "location and area survey" of the present Ellis Island. Tr. 7/15/96 at 645. He prepared this survey with the assistance of a "Geodetic Survey Unit," including Frederick A. Czepiga, an experienced licensed surveyor; Ronald J. Kuzma, a senior engineer at the New Jersey Department of Transportation; Edward Berchtold, an experienced engineering technician at the Department; Charles Lesko, an experienced engineering technician at the Department; and Michael Cline, a "national geodetic survey advisor" to New Jersey. *Id.* at 646. Utilizing what the parties appear to agree was state-of-the-art equipment, Mr. Marchuk and his team set up eight "control points" on the Island with which to calculate the area and location of the Island. *Id.* at 646-52. In addition, utilizing similar state-of-the-art methodology, they located the

southerly and northerly angle points of Fort Gibson Wall on the Island. *Id.* at 652-53. New York did not object to the accuracy of this map. I am satisfied that Mr. Marchuk's survey and testimony provide the Court with an accurate description of the location of the angle points of Fort Gibson on the Island, and that the survey accurately describes the size and shape of the present Island.

Finally, I turn to Dr. Squires's and Captain Swanson's testimony.[63] Utilizing what the parties again appear to agree is state-of-the-art methodology, these experts estimated the total area of the original Island above the MHW and MLW marks on several historical maps, including the 1857 map. For convenience, I set out in the table below the various sizes of the five charts or maps that Dr. Squires and Captain Swanson considered.[64]

Date of Map or Chart	Area above MHW (acres)	Area from MHW to MLW (acres)	Area above MLW (acres)
1819[65]	3.26	2.00	5.26
1836	3.73	2.21	5.94
1841	3.75	1.44	5.19
1857	2.97	1.72	4.69
1879	3.18	1.41	4.59

[63] Testimony at trial demonstrated that these two experts worked together as a team, Tr. 8/1/96 at 2940-41, with Dr. Squires instructing Captain Swanson to make calculations utilizing equipment such as a digital planimeter. Over New Jersey's objections, I find their collaboration probative and convincing.

[64] Dr. Squires testified with respect to the numbers set out in this chart. *See* Tr. 8/1/96 at 2940-43, 2946-50.

[65] The 1808 transfer deed from New York to the United States described the Island as " 'two acres, three roods and thirty-five perches.' " Shenton Summ. J. Aff. ¶ 9; Tr. 7/17/96 at 974. New Jersey's expert, Mr. Castagna, translated this as 2.97 acres:

> Two acres is two acres. A square rood is a quarter of an acre. So three square roods is three quarters of an acre. One perch

There are several ways to utilize the information set out in this table in shaping the remedy phase of this case. For one, given the boundary determination in this recommendation, these area estimates set the outside parameters of New York's claims to the original 1833 Island as established by her witnesses and demonstrate that accretive changes to the fast land of the Island in the period from 1833 to the commencement of land-filling are negligible. While I have accepted the 1857 map as the best estimate of the "original" Island, I could also have used these five area estimates above to calculate an average. The MLW mark average would be 5.13 acres and the MHW mark would be 3.39 acres. Such an exercise would assume that no one map was any more reliable than any other and therefore spreading the margin of error would produce a more reliable "mean" error.

Instead, I have chosen the 1857 map as the most reliable, based upon the testimony at trial. In so doing I have decided to accept its MLW size of 4.69, as calculated by New York's own experts, with one small addition. I have added the one half of the pier not included in Dr. Swanson's more conservative calculation. Conservatively, this would add about 0.2 acres to MLW. Thus, the 4.69 MLW mark acres calculated from the 1857 map and an additional 0.2 results in a MLW total of 4.89 acres, or close to five acres. Accordingly, I conclude that, consistent with the MLW boundary lines of the original Island, New York's sovereign area on the present Island is almost 5 acres. New Jersey's sovereign area is the difference between New York's territory and the 27.40 acres of the entire Island as surveyed by her expert, Mr. Marchuk. This will total about 22.5 acres, as the next section explains.

---

is 16½ feet. If you squared 16½ feet and then you multiplied that by 35, you would come up with 2.97 [acres].

Tr. 7/11/96 at 326-27 (Mr. Castagna for New Jersey).

In working with such detailed calculations, I am mindful of Dr. Squires's admonition that it is difficult if not impossible to estimate acreage of a 140-year-old map to the tenths (or certainly hundredths) of an acre. Tr. 8/1/96 at 2950-52. He was comfortable with a range of 3 to 3.75 acres for MHW mark and 4.50 to 6 acres for MLW mark. *Id.* This range, proffered by New York's own expert, strikes me as reasonable, realistic, and difficult to contradict. In establishing New York's territory as discussed in the next section, the range will be similarly informed. Should a little flexibility in terms of tenths of acres be needed to shape the remedy proposed, I will rely on Dr. Squires's testimony to support it.

3. *Shape And Configuration Of New York's Sovereign Territory On Ellis Island*

The most obvious way to determine the shape and configuration of New York's sovereign territory on Ellis Island is to place over the 1995 map a transparency with the 1857 map of the original Island to the MLW mark printed on it. For this purpose, I have chosen the Historic Base Map in Appendix F and compared it with Mr. Castagna's 1995 map with the 1857 overlay (which omits the dock I find connected by pre-1833 fill). By lining up predetermined reference control points, such as the seawall on Liberty Island, the boundaries of the original Island can be traced on the current map. Surveyors could determine the metes and bounds of this sovereign boundary.

This facially simple solution, however, has many shortcomings, and I am thus reluctant to use it. This "template" approach introduces impracticalities and inconveniences. It would create a sovereign territory with portions of the Main Building, the Baggage and Dormitory Building, and the Boathouse Building all intersected by the putative boundary line. *See* App. F. In addition,

New York would be left with relatively thin strips of New Jersey's sovereign territory between New York and the ferry slip. In effect, New York would be enclaved by New Jersey on the Island. Because New York City runs Circle Line boats delivering millions of visitors annually to this location, the template approach could cause disruption. By ending New York's sovereign territory along a large portion of the ferry slip in front of the Main Buildings, well short of the slip's seawall, New York would not have access to, nor authority over, the area of land most intimately and functionally connected to the operation of the Main Building, which itself would be partitioned by this approach. In this last respect, more than any other, the precise 1834 boundary, even as buttressed by the additional acreage to mean low water, would create an overly literal status of divided sovereignty that would be neither just nor fair to New York.

There is no question that, while there is nothing wrong with divided sovereignty as a remedy, it does raise complications, and therefore should be administered thoughtfully. My obligation is thus to recommend a remedy to this Court that works as well as can be in light of the reality of divided sovereignty.

The *Collins* court appeared concerned with a divided sovereignty outcome because of the "impracticability" of a "haphazard and uneven" boundary line for determining the application of workers' compensation laws. *Collins v. Promark Prods., Inc.*, 956 F.2d 383 (2d Cir. 1992).[66] Similarly, the Preservation Amici, who questioned the practicability of applying historic preservation laws to parts of historic buildings, encourage me to find a solu-

---

[66] I do not accept the underlying premise of *Collins*, which rejected the interpretation of the United States that the 1833 Compact granted jurisdiction over the filled lands to New Jersey. Impracticality is a relevant consideration for drawing a boundary but not for determining sovereignty.

tion that does not divide jurisdiction over the Main Building.[67]

I recommend that the Court find that the most practical, convenient, just, and fair boundary line consistent with the language of the 1834 Compact and applicable law, to be as follows. First, New York should be accorded a total sovereign territory constituting at least 4.89 acres (4.69 plus a minimum of 0.2 for the pre-1833 dock) of the present Island, the amount to which she is entitled as set forth above. Second, none of the three buildings intersected by the "template" boundary of the original Island should in practice be intersected by a boundary line. Limiting New York's sovereign territory in this manner serves

[67] *See* Preservation Amici Post-Trial Br. at 5-10. The Preservation Amici argue that the "split jurisdiction" remedy that New Jersey proposes for the Island cannot be "implemented without adverse consequences for the Island's future as a national landmark." *Id.* at 2. Arguing that "the outcome advocated by New Jersey would necessarily give rise to future disputes over the preservation of the Island," especially if the federal government were to abandon the Island, they conclude that such disputes would create "deleterious and irreversible effects on the Island's historic buildings." *Id.* at 3. The Preservation Amici reason that New Jersey's proposed solution would create a boundary that intersects three or four of the buildings on the main Island (the portion of the Island on which the Main Building, built in 1903 as the Immigration center, is located). They are thus concerned that the boundary on Ellis Island "would wind haphazardly through the Island's core without apparent rhyme or reason." They also point to substantive differences in the States' landmark laws. *Id.* at 17-28. Finally they argue that New Jersey's proposed boundary line would require the Court to exercise " 'continuing supervision' " over the Island, because of the "strange and difficult" boundary that New Jersey proposes. *Id.* at 11-16 (citation omitted).

By drawing the boundary in rectangular form as I do here, that difficulty is minimized, if not eliminated. The fact that these amci believe that New York's preservation laws and practices are superior to New Jersey's, *see id.* at 17-29, simply means that in the future they must be more creative in asserting their members' interests under that State's laws.

as a reasonable constraint on my use of practicality in recommending a remedy to this Court.

Accordingly, I find the boundary of New York's sovereign territory on the present Ellis Island to be as follows: all of the Main Building (which is encompassed substantially within the template boundaries of the original Island in any event) is included in New York's sovereign territory. New York's territory should also include all of the land in front of the Main Building, from the south corner of Island Number One, on the seawall of the ferry slip, to a point on the seawall of the ferry slip intersected by a line parallel to the northwest side of the Main Building that bisects the corridor connecting the Main Building and the Kitchen and Bathhouse.

The boundary on the northwest side of the Main Building should form a ninety-degree angle with the boundary line drawn behind the northeast side of the Main Building. The boundary on the northeast side of the Main Building will not be a straight line: it will bisect the area between the Main Building and the Baggage and Dormitory Building (thus determining the location of its intersection with the boundary line on the northwest side of the Main Building), cut diagonally at a forty-five degree angle across the corridor connecting the Baggage and Dormitory Building and the Railroad Ticket Office behind the Main Building, then continue parallel to the northeast side of the Railroad Ticket Office, at a margin of ten feet. A line drawn from the point where the east side of the triangle-shaped area on the southeast side of Island Number One intersects the southeast side of Island Number One (the "triangle line") will intersect the boundary line behind the Railroad Ticket Office. The angle of this corner will be determined by drawing the triangle line parallel to the south side of the triangle-shaped area. If the triangle line, drawn as described above, intersects the remains of the original Fort Gibson, it should be drawn to

encompass those remains within New York's territory. This description is depicted in Appendix K.

New York's sovereign territory will thus roughly be a rectangle encompassing all of the Main Building, none of the Baggage and Dormitory Building or the Boathouse, all of the land to the ferry slip directly in front of the Building, and the entire triangle-shaped area on the southeast side of Island Number One. If more than 4.89 acres is needed to encompass the territory so described, I recommend that New York is entitled to additional territory purely for the purpose of reaching this result up to a maximum of 6 acres (which is the high side of Dr. Squires's estimate of New York's acreage to the MLW of the original Island). He stated that 6 acres "would be on the high side of our measurements but it would not be totally out of range." Tr. 8/2/96 at 3107. To be equitable to New Jersey, however, New York's territory should be contained as nearly as possible within the lower estimate of 4.89 acres, because a tidewater acre is not equivalent to an acre of fast land under any scale of values.

The proposed remedy resolves several issues of concern. First and foremost, it is a workable and clean boundary line. Second, it retains the time-honored connection between the Main Building—the immigration locus—on the original Island and the City of New York. Moreover, because the restored Main Building remains part of New York, and the ferry slip in front of it will still be New York's territory, visitors coming from the battery on the Statue of Liberty/Ellis Island ferries will continue to land on New York territory.

To be sure, all the buildings on the Island, not just the Main Building, are in the National Register of Historic Places. Thus, as the Preservation Amici point out, both States' preservation laws will apply to Ellis Island in the future. The States will be required by this outcome to

achieve a regime of mutual cooperation.[68] Moreover, as the entire Island will remain under the control of the NPS for the foreseeable future, all changes and modifications must meet that agency's stringent planning process as well as the preservation standards of state historic preservation officials.[69] Because the NPS currently consults both States about its plans, little will change in that regard in the future. The only difference will be that both States and the NPS will know the limits of their sovereign territory on the Island, something that for too long has been the subject of guesswork.

4. *Summary And Subsequent Steps*

I believe this boundary reflects the most appropriate reconciliation of law, equities, and practicality. It rejects the false objectivity of the template approach and creates a workable boundary. New York will retain no more total sovereign territory than she was originally accorded under the 1834 Compact. In addition, she will retain for herself the symbolism and functional integrity of the Main Building and ferry slip, the aspects of the Island perhaps most closely associated with her historic role in American immigration. New Jersey will be accorded the amount of land that has been added to the original Island on her sovereign territory,[70] and will receive

---

[68] This solution will create a boundary that intersects the Wall of Honor established by gifts in honor of relatives who arrived as immigrants on Ellis Island. This is not a structural entity and its shared jurisdiction seems not only manageable but appropriate.

[69] *See* National Historic Preservation Act, 16 U.S.C. § 470a(b)(3)(1995); 36 C.F.R. §§ 800.1(c)(1)(i), (ii) (requiring federal officials to review and consult with State Historic Preservation Officers regarding the impact of "major" federal projects on historic properties).

[70] In addition, the 0.57 acres of New Jersey territory not included in her 1904 deed to the federal government will remain within her sovereign control.

due recognition of her rightful claim to these lands and her shared role in the operations of the Island today. In the words of Charles Wyzanski Jr., who commented on the possibility of awarding jobs in Ellis Island between the two States' citizens in the 1930s, I have sought to recommend a solution to this Court that is "technically skillful, politically wise and thoroughly just." *See supra* Part VI.D.5.b(2).

Because I cannot describe my recommended remedy in precise metes and bounds, I propose to retain jurisdiction over a portion of this case until I have done so. Therefore, I shall order each State, without prejudice to her claims on the merits, to appoint a surveyor to define in precise terms the boundary I have described above. I will review the work of those surveyors (and call one of my own, if necessary) and render a recommended survey decision on the location of the precise boundary line. I expect to file this decision reflecting the results of the survey as soon as feasible following the completion of the survey work.

VIII. PROPOSED DECREE

I propose that the Court issue the following Decree, subject to any refinements that may be required by the work of the surveyors.

Respectfully submitted,

PAUL R. VERKUIL
Special Master

STATE OF NEW JERSEY

v.

STATE OF NEW YORK

No. 120, Original

Decided ————————————

Decree Entered ————————————

Decree effecting this Court's Opinion of ————————

S. Ct. ———— (199).

DECREE

This Court having exercised original jurisdiction over this controversy between two sovereign States; the issues raised having been heard in an evidentiary proceeding before the Special Master appointed by the Court; the Court having studied and heard arguments on the final report of the Special Master and the exceptions filed by the State parties; and the Court having issued its Opinion on all issues announced in ———— S. Ct. ———— (199), IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The State of New Jersey's prayer that she be declared to be sovereign over the landfilled portions of Ellis Island added by the federal government after 1834 is granted and the State of New York is enjoined from enforcing her laws or asserting sovereignty over the portions of Ellis Island that lie within the State of New Jersey's sovereign boundary as set forth in paragraph 3 below.

2. The sovereign boundary between the State of New Jersey and the State of New York is as set forth in Article

First of the Compact of 1834, put into law in both States and approved by Congress.

3. The State of New York remains sovereign under Article Second of the Compact of 1834 and by concession of the State of New Jersey to the original Ellis Island as it was structured in 1834 to the low-water mark as more particularly described in the 1857 Map. The boundary between the two States on Ellis Island lies along the line described as follows:

[TO BE SUPPLIED FOLLOWING SURVEYS]

4. The Court retains jurisdiction at the foot of this Decree to entertain such further proceedings, enter such orders and issue such writs as may from time to time be considered necessary or desirable to give proper force and effect to this Decree or to effectuate the rights of the parties.

5. The States of New Jersey and New York shall share equally in the costs of this litigation, in the fees paid to the Special Master and his staff, and in costs and fees associated with a metes and bounds survey of the interstate boundary on Ellis Island.

APPENDICES

APPENDIX A

COMPACT OF 1834

Act of June 28, 1834, 4 Stat. 708 (1834)

CHAP. CXXVI.—*An Act giving the consent of Congress to an agreement or compact entered into between the state of New York and the state of New Jersey, respecting the territorial limits and jurisdiction of said states.*[b]

WHEREAS commissioners duly appointed on the part of the state of New York, and commissioners duly appointed on the part of the state of New Jersey, for the purpose of

---

[b] The decisions of the Supreme Court upon the compacts between states have been:—

The compact of 1789, between Virginia and Kentucky, was valid under that provision of the constitution which declares, that "no state shall, without the consent of Congress, enter into agreement or compact with another state, or with a foreign power:" no particular mode, in which that consent must be given, having been prescribed by the constitution; and Congress having consented to the admission of Kentucky into the Union, as a sovereign state, upon the conditions in the compact. Green *v.* Biddle, 8 Wheat. 1; 5 Cond. Rep. 369.

The compact is not invalid upon the ground of its surrendering rights of sovereignty, which are inalienable. *Ibid.*

To bring a case within the protection of the seventh article in the compact between Virginia and Kentucky, it must be shown that the title to the land asserted, is derived from the laws of Virginia, prior to the separation of the two states. Lessee of Fisher *v.* Cockerell, 5 Peters, 247.

The construction of a compact between the states of Virginia and Pennsylvania, is not to be settled by the laws or decisions of either of those states, but by the compact itself. Marlatt *v.* Silk et al., 11 Peters, 1.

The decision of a question of the construction of such a compact, is not to be attested from the decisions of either state, but is one of an international character. *Ibid.*

It is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries

agreeing upon and settling the jurisdiction and territorial limits of the two states, have executed certain articles, which are contained in the words following, viz:

---

between the respective limits; and the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated, to all intents and purposes, as the real boundaries. This right is expressly recognised to exist in the states of the Union, by the constitution of the United States; and is guarded in its exercise by a single limitation or restriction, only, requiring the consent of Congress. *Ibid.*

The compact between New Jersey and Pennsylvania, recognises the right of fishery in riparian owners on the Delaware. Bennet *v.* Boggs, Baldwin's C. C. R. 60.

The plaintiffs, in the circuit court of West Tennessee, instituted an ejectment for a tract of land held under a Virginia military land warrant, situate south of a line called Mathews' line, and south of Walker's line; the latter being the established boundaries between the states of Kentucky and Tennessee, as fixed by a compact between those states, made in 1820; by which compact, although the jurisdiction over the territory to the south of Walker's line, was acknowledged to belong to Tennessee, the titles to lands held under Virginia military land warrants, &c.; and grants from Kentucky, as far south as "Mathews' line," were declared to be confirmed: the state of Kentucky having, before the compact, claimed the right to the soil, as well as the jurisdiction over the territory, and having granted lands in the same. The compact of 1820 was confirmed by Congress. The defendants in the ejectment claimed the lands under titles emanating from the state of North Carolina, in 1786, 1794, 1795; before the formation of the state of Tennessee; and grants from the state of Tennessee, in 1809, 1811, 1812, 1814, in which the lands claimed by the defendants were situated, according to the boundary of the state of Tennessee, declared and established at a time when the state of Tennessee became one of the states of the United States. The circuit court instructed the jury that the state of Tennessee, by sanctioning the compact, admitted, in the most solemn form, that the lands in dispute were not within her jurisdiction, nor within the jurisdiction of North Carolina, at the time they were granted; and that, consequently, the titles are subject to the compact: Held, by the Supreme Court, that the instructions of the circuit court were entirely correct. Poole *v.* Fleeger, 11 Peters, 185.

The seventh article of the compact between Virginia and Kentucky declares "all private rights and interests of lands within the

Agreement made and entered into by and between Benjamin F. Butler, Peter Augustus Jay and Henry

---

said district (Kentucky,) derived from the laws of Virginia, prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state (Virginia)." Whatever course of legislation, by Kentucky, would be sanctioned by the principles and practice of Virginia, should be regarded as an unaffected compliance with the compact. Such are all reasonable quieting statutes. Hawkins *v.* Barney's Lessee, 5 Peters, 457.

From as early a date as the year 1705, Virginia has never been without an act of limitation; and no class of laws is more universally sanctioned by the practice of nations, and the consent of mankind, than those laws which give peace and confidence to the actual possessor and tiller of the soil. Such laws have frequently passed in review before the Supreme Court; and occasions have occurred in which they have been particularly noticed, as laws not to be impeached on the ground of violating private rights. It is impossible to take any reasonable exception to the course of legislation pursued by Kentucky on this subject. She has in fact literally complied with the compact in its most rigid construction. For she adopted the very statute of Virginia in the first instance, and literally gave her citizens the full benefit of twenty years to prosecute their suits, before she enacted the law now under consideration. As to the exceptions and provisoes, and savings in such statutes, they must necessarily be left, in all cases, to the wisdom or discretion of the legislative power. *Ibid.*

It is not to be questioned, that laws limiting the time of bringing suits constitute a part of the lex fori of every country; the laws for administering justice, one of the most sacred and important of sovereign rights and duties, and a restriction upon which must materially affect both legislative and judicial independence. It can scarcely be supposed that Kentucky would have consented to accept a limited and crippled sovereignty; nor is it doing justice to Virginia to believe that she would have wished to reduce Kentucky to a state of vassalage. Yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing the limitation act were adopted, to assign her a position higher than that of a dependent on Virginia. *Ibid.*

The limitation act of the state of Kentucky, commonly known by the epithet of "the seven years law," does not violate the compact between the state of Virginia and the state of Kentucky. *Ibid.*

Seymour, commissioners duly appointed on the part and behalf of the state of New York, in pursuance of an act of the legislature of the said state, entitled "An act concerning the territorial limits and jurisdiction of the state of New York and the state of New Jersey, passed January 18th, 1833, of the one part; and Theodore Frelinghuysen, James Parker, and Lucius Q. C. Elmer, commissioners duly appointed on the part and behalf of the state of New Jersey, in pursuance of an act of the legislature of the said state, entitled "An act for the settlement of the territorial limits and jurisdiction between the states of New Jersey and New York," passed February 6th, 1833, of the other part.

ARTICLE FIRST. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned.

ARTICLE SECOND. The state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state.

ARTICLE THIRD. The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson river lying west of Manhattan Island and to the south of the mouth of Spuytenduyvel creek; and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the state of New Jersey, that is to say:

1. The state of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey.

2. The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state; and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York, which now exist or which may hereafter be passed.

3. The state of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of the said waters, *Provided*, That the navigation be not obstructed or hindered.

ARTICLE FOURTH. The state of New York shall have exclusive jurisdiction of and over the waters of the Kill Van Kull between Staten Island and New Jersey to the westernmost end of Shooter's Island in respect to such quarantine laws, and laws relating to passengers, as now exist or may hereafter be passed under the authority of that state, and for executing the same; and the said state shall also have exclusive jurisdiction, for the like purposes of and over the waters of the sound from the westernmost end of Schooter's Island to Woodbridge creek, as to all vessels bound to any port in the said state of New York.

ARTICLE FIFTH. The state of New Jersey shall have and enjoy exclusive jurisdiction of and over all the waters of the sound between Staten Island and New Jersey lying south of Woodbridge creek, and of and over all the waters of Raritan bay lying westward of a line drawn from the

lighthouse at Prince's bay to the mouth of Mattavan creek; subject to the following rights of property and of jurisdiction of the state of New York, that is to say:

1. The state of New York shall have the exclusive right of property in and to the land under water lying between the middle of the said waters and Staten Island.

2. The state of New York shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of Staten Island, and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the state of New Jersey, which now exist or which may hereafter be passed.

3. The state of New York shall have the exclusive right of regulating the fisheries between the shore of Staten Island and the middle of the said waters: *Provided*, That the navigation of the said waters be not obstructed or hindered.

ARTICLE SIXTH. Criminal process, issued under the authority of the state of New Jersey, against any person accused of an offence committed within that state; or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid; or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the third article; and also civil process issued under the authority of the state of New Jersey against any person domiciled in that state, or against property taken out of that state to evade the laws thereof; may be served upon any of the said waters within the exclusive jurisdiction of the state of New York, unless such person or property shall be on board a vessel aground upon, or fastened to, the shore of

the state of New York, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New York.

ARTICLE SEVENTH. Criminal process issued under the authority of the state of New York against any person accused of an offence committed within that state, or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid, or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the fifth article; and also civil process issued under the authority of the state of New York against any person domiciled in that state, or against property taken out of that state, to evade the laws thereof, may be served upon any of the said waters within the exclusive jurisdiction of the state of New Jersey, unless such person or property shall be on board a vessel aground upon or fastened to the shore of the state of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New Jersey.

ARTICLE EIGHTH. This agreement shall become binding on the two states when confirmed by the legislatures thereof, respectively, and when approved by the Congress of the United States.

Done in four parts (two of which are retained by the commissioners of New York, to be delivered to the governor of that state, and the other two of which are retained by the commissioners of New Jersey, to be delivered to the governor of that state,) at the city of New York this sixteenth day of September, in the year of our Lord one thousand eight hundred and thirty-three

and of the independence of the United States the fifty-eighth.

B. F. BUTLER,
PETER AUGUSTUS JAY,
HENRY SEYMOUR,
THEO. FRELINGHUYSEN,
JAMES PARKER,
LUCIUS Q. C. ELMER.

And whereas the said agreement has been confirmed by the legislatures of the said states of New York and New Jersey, respectively,—therefore,

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the consent of the Congress of the United States is hereby given to the said agreement, and to each and every part and article thereof, *Provided*, That nothing therein contained shall be construed to impair or in any manner effect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

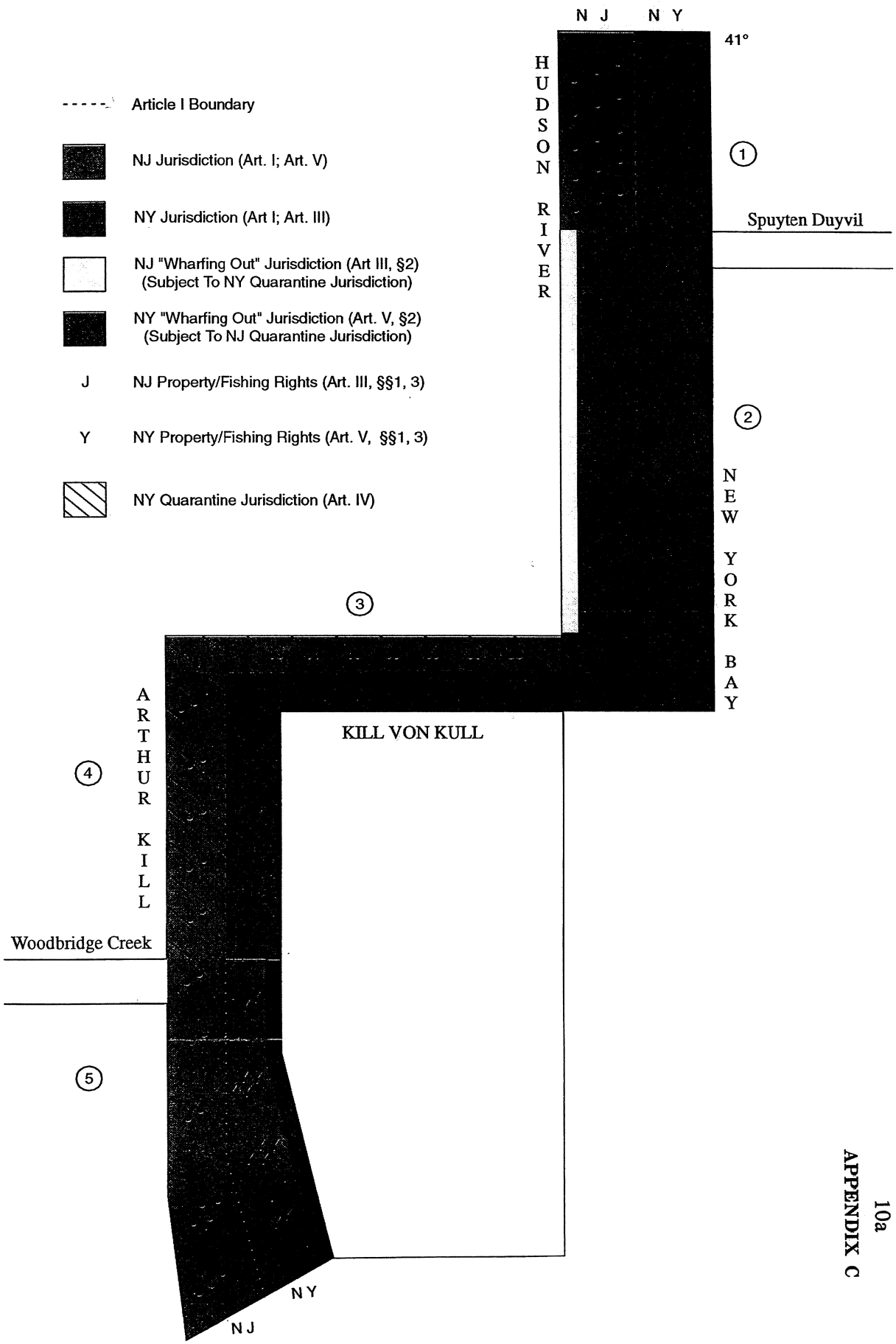
APPROVED, June 28, 1834.

N

REGION

LIBERTY ISLAND / ELLIS ISLAND
STATUE OF LIBERTY NATIONAL MONUMENT
NEW YORK / NEW JERSEY

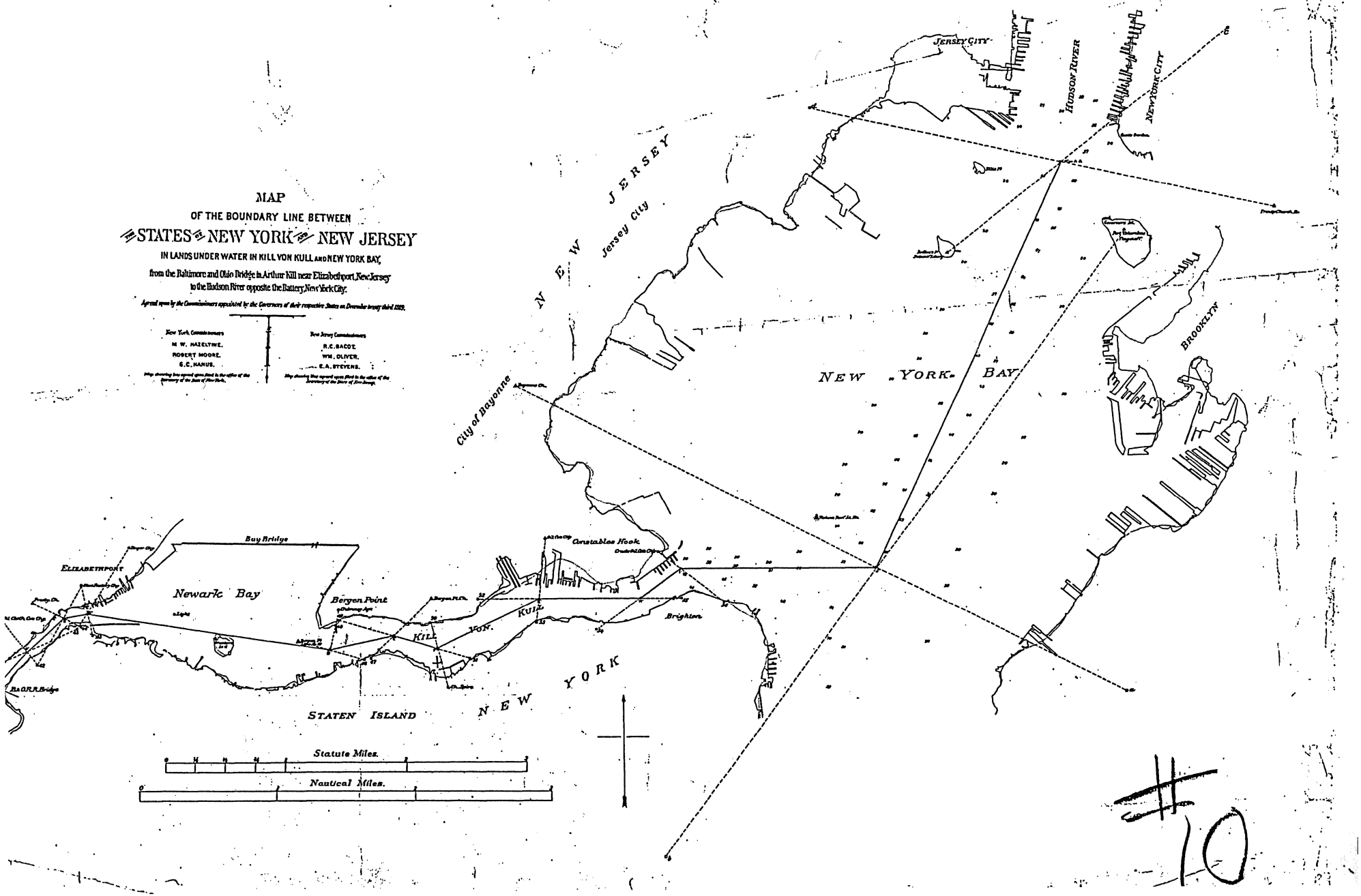
The Five (5) Meanings of Boundary



APPENDIX C

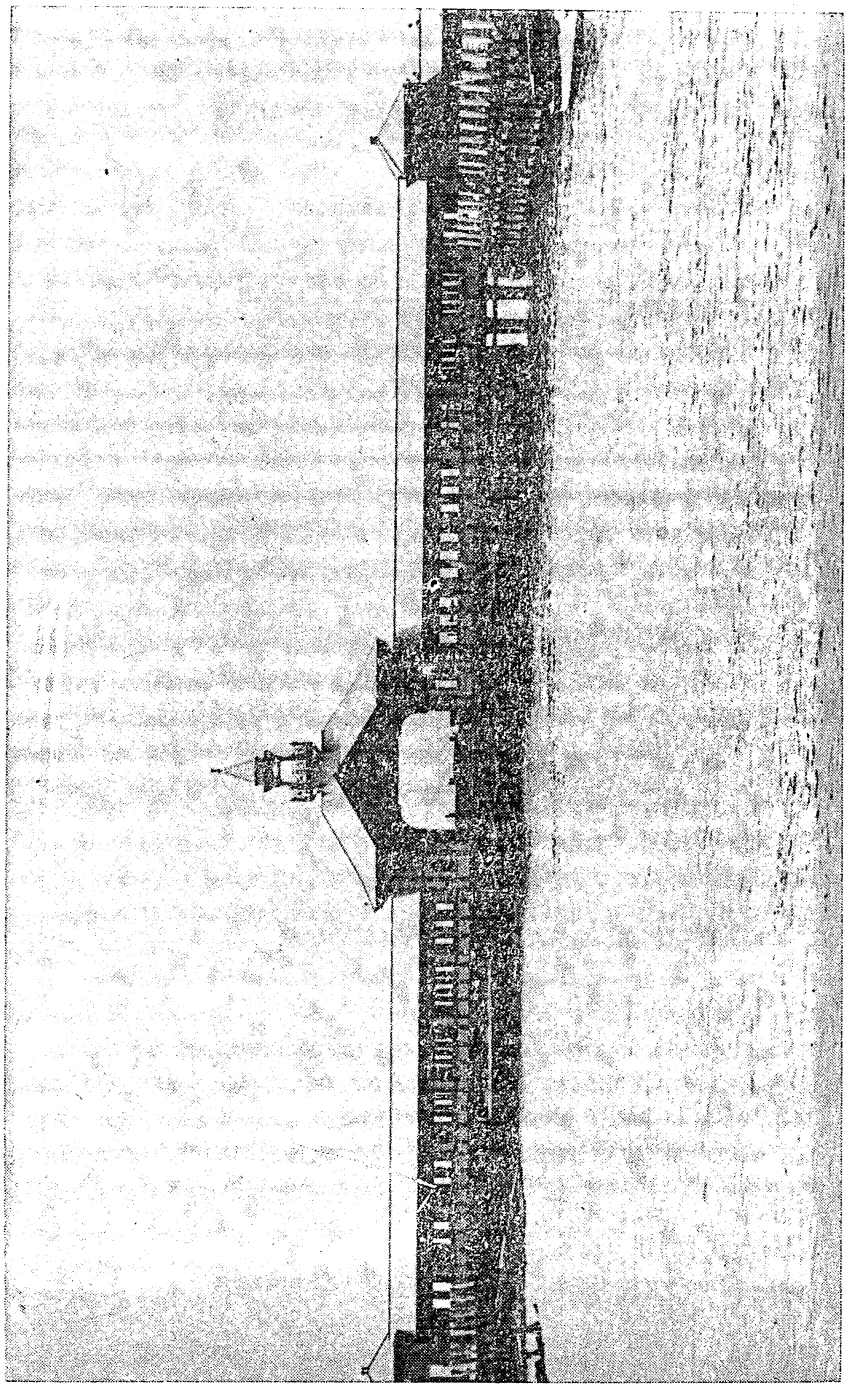
APPENDIX D

40-11

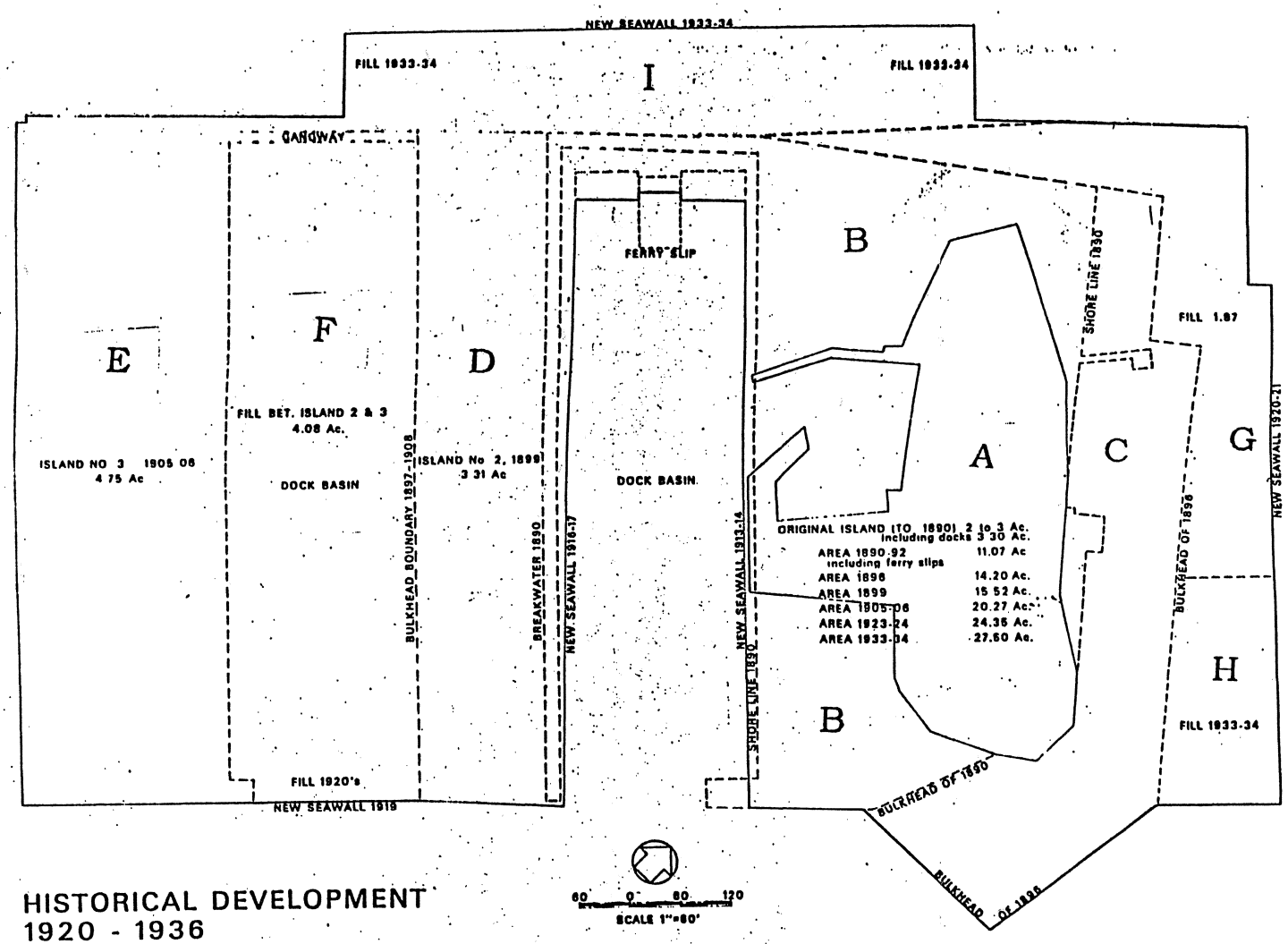


#10

APPENDIX E



APPENDIX F

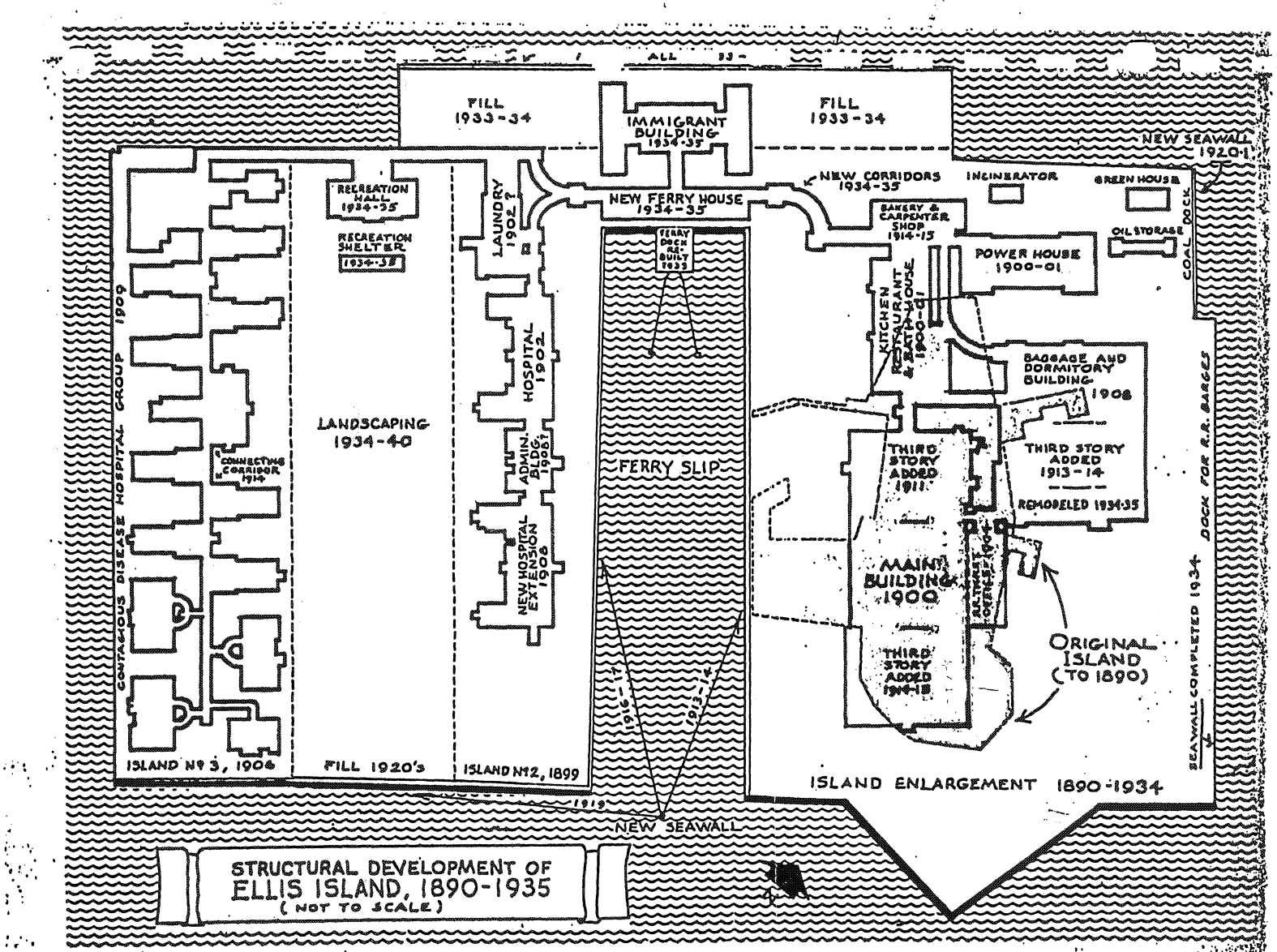


HISTORICAL DEVELOPMENT
1920 - 1936
ELLIS ISLAND
STATUE OF LIBERTY NATIONAL MONUMENT
NEW YORK / NEW JERSEY

UNITED STATES DEPARTMENT OF THE INTERIOR / NATIONAL PARK SERVICE

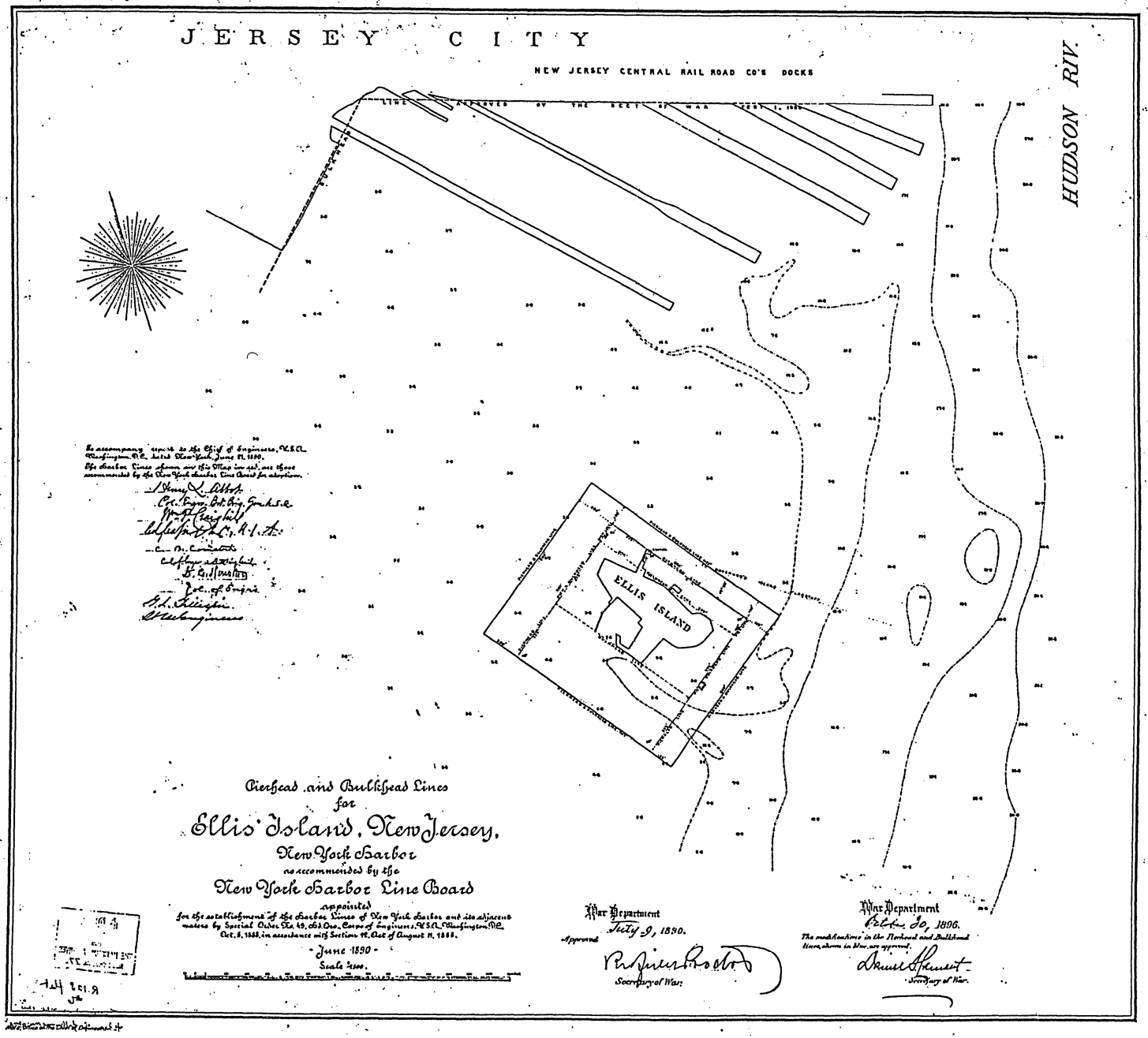
356 | 20,021
MARCH 60 | DSC

15a



ON MICROFILM

HISTORIC BASE MAP


JERSEY CITY
NEW JERSEY CENTRAL RAIL ROAD CO'S DOCKS
LINE APPROVED BY THE SECY OF WAR JULY 1, 1890
HUDSON RIV.
ELLIS ISLAND
The accompanying report to the Chief of Engineers, U.S.A. Washington, D.C. dated New York, June 11, 1890.
The Harbor Lines shown on this Map are not, nor those recommended by the New York Harbor Line Board for adoption.
Pierhead and Bulkhead Lines
for
Ellis Island, New Jersey,
New York Harbor
as recommended by the
New York Harbor Line Board
appointed
for the establishment of the Harbor Lines of New York Harbor and its adjacent waters by Special Order No 49, 1851 Dep. Corps of Engineers, U.S.A. Washington, D.C. Oct. 6, 1888, in accordance with Section 11, Act of August 11, 1888.
- June 1890 -
Scale 1200.
War Department
July 9, 1890.
Approved
Secretary of War.
War Department
October 30, 1896.
The modifications in the Pierhead and Bulkhead lines shown in blue, are approved.
Secretary of War.

APPENDIX H

MEMORANDUM OF UNDERSTANDING

IN REGARD TO ESTABLISHING A BI-STATE PUBLIC CORPORATION TO BE KNOWN AS THE STATUE OF LIBERTY TRUST FUND

ARTICLE I

Liberty and Ellis Islands are national treasures symbolizing our nation as a land of hope for people yearning for freedom, justice, equality of opportunity and a better life.

The Statue of Liberty was the first sight of thousands of immigrants to the United States. The view of the Statue standing in the harbor symbolized the start of a new life with greater opportunities and challenges in this country. Ellis Island was the soil on which these immigrants first stepped in their new world.

There is now pending a lawsuit that seeks to determine the respective sovereignty and jurisdiction of the States of New Jersey and New York over Liberty and Ellis Islands. In view of the special subject matter involved, it is fitting that such conflicts be avoided by dedicating the economic benefits of sovereignty and jurisdiction over the Islands to a regional purpose related to the symbolic meaning of the Statue of Liberty and Ellis Island. However, since these Islands have long been under effective federal title, they can truly be said to belong to all of the people of the United States.

Today, the homeless population of the States of New York and New Jersey is a reminder that there are still many in this region for whom hopes of a better life remain unfulfilled. It is appropriate, in this centennial year of the Statue of Liberty, that Ellis and Liberty Islands, the

nation's monuments to the vast numbers of people who came from other countries seeking a better life, be rededicated to the assistance of our homeless population.

Homelessness is a regional problem that demands regional solutions. Because of the ease of access to interstate transportation and the very nature of their transient existence, the homeless now travel back and forth across state borders quickly and easily. It is therefore appropriate that the States of New Jersey and New York work cooperatively to develop and promote programs to assist homeless men, women and children in both states in obtaining decent and affordable shelter.

ARTICLE II

The Governors of the States of New York and New Jersey hereby agree to use their best efforts to secure enactment of identical legislation in their respective states which shall establish a bi-state public corporation to be known as the "Statue of Liberty Trust Fund" (hereinafter "the Fund").

The Fund shall be managed by an eleven member board of directors, five to be appointed by the Governor of the State of New York and five to be appointed by the Governor of the State of New Jersey, and one director, who shall be designated the chairperson of the board, to be appointed by the Governors jointly. All board members shall serve without compensation, but shall be entitled to reimbursement of their actual and necessary expenses incurred in the performance of their duties. The term of office of each member shall be five years and each member shall hold office until his successor shall have been appointed.

No action of the board of directors of the Fund shall be binding unless taken at a meeting at which at least three of the members from each state are present and vote

in favor thereof. The board of directors of the Fund shall annually submit a plan for the expenditure of the resources of the Fund which shall only become effective upon the approval of both Governors.

ARTICLE III

The purpose of the Fund shall be to provide aid to homeless persons within the States of New Jersey and New York. The Fund shall accomplish this objective primarily by entering into contracts with or making grants to local social services districts or to other public or private entities in each state which aid homeless persons, pursuant to such criteria as each state shall provide. For the purposes of this agreement, "homeless persons" shall mean undomiciled persons who are unable to secure adequate, permanent and stable housing in the States of New York and New Jersey without special assistance. The Fund shall coordinate with social service organizations of both states to ensure that resources are provided to the most cost-effective programs for the homeless and are used to address the most pressing needs in this regard. Resources of the Fund shall be provided to appropriate agencies and other organizations from each state on an equal basis.

ARTICLE IV

The Governors of New York and New Jersey agree that it is appropriate that the States of New York and New Jersey each appropriate annually to the Fund upon its establishment, through the states' respective budgets, the amounts described in this article to effectuate the intent of this agreement.

Such annual appropriation by each state shall be in an amount equal to the amount, as determined in the manner hereafter described, set forth in the certificate of

its tax administrator as the total of a) all state and local tax revenues collected by that state and its localities, after deducting administrative costs, from the taxes hereafter set forth during the prior calendar year which are attributable directly to Ellis and Liberty Islands and b) the amount collected by that state and its localities, and one-half of the amount collected by joint agencies thereof, from the fees hereafter described during the same period. Such state and local taxes which shall be taken into account for the purpose of such annual appropriation are the following taxes presently or hereafter imposed by the respective states and their localities: franchise, or business privilege or like taxes on the doing of business; taxes imposed on the earnings or income of business entities (including corporations) or individuals; and sales and compensating use taxes. The fees which shall be taken into account for the purpose of such appropriation are those fees now or hereafter collected by either state or its localities, and one-half of the amount collected by joint agencies thereof, for the provision of public access to or from Ellis or Liberty Islands. The tax administrator of each state shall, for the purpose of fixing the required amount of the annual appropriation to the Fund, certify to the legislature of his state and the Fund a) his estimate of the amount, less costs of administration, of the state and local revenues collected during the prior calendar year from the aforestated taxes which are attributable directly to the Islands, and b) the appropriate amount of such fees collected during such period, and the appropriations to be made by each state shall be equal to the total set forth in such certification of its tax administrator. The two states shall prescribe uniform procedures and methods to be employed by the tax administrators in making the estimation of such state and local tax revenues required to be included in such certification and such other uniform procedures as may be necessary to effectuate the terms of this agreement.

For the purpose of determining revenue attribution of the above enumerated state and local taxes to Ellis or Liberty Islands the following shall apply:

1. Traditional revenue attribution. For the purposes of determining revenue attribution, if any, of any particular such state or local tax to Ellis or Liberty Island, the same method or concept with respect to allocation or attribution which is used for the purpose of determining allocation to the state or locality with respect to that particular tax as administered by the state (or locality) imposing such tax shall be applied in making the determination with respect to the Islands. In the case of sales and compensating use taxes, if the tax is occasioned by an event occurring on the Islands, the tax revenues derived therefrom shall be allocable to the Islands.

2. Other Revenue Attribution. In addition to the foregoing attribution of such state and local taxes by the method set forth in paragraph 1 above, to the extent not already included under such paragraph, the revenues collected from the following such taxes, to the extent presently or hereafter imposed by the states and their localities, shall, for the purposes of this article, be attributable directly to the Islands:

a) State and local sales and compensating use taxes imposed with respect to (1) the provision of water, sewerage, gas, electricity, telephone or like utilities or utility services where such utilities or utility services are used or consumed on Ellis or Liberty Islands, irrespective of the facts that the delivery of such utilities or utiilty service occurs off the Islands, (2) the building of or the provision of access to or from Ellis or Liberty Islands, (3) the provision of sightseeing tours to, of or around Ellis and/or Liberty Islands or transportation to or from the Islands, irrespective

of the fact that such tour or transportation was purchased off the Islands, (4) sales of food and beverage and other tangible personal property by providers of such sightseeing tours to their patrons or by the providers of such transportation to their passengers, (5) fuel and all other tangible personal property purchased by providers of such tours or transportation and used directly in connection with the provision of such tours or transportation. Where such sightseeing tour or transportation includes other sites or destinations, such taxes shall be apportioned;

b) State and local sales tax imposed by either state or its localities with respect to the purchase of tangible personal property, services or other items which are used or consumed on Ellis or Liberty Islands by persons residing thereon or in connection with a trade or business conducted thereon if with respect to such use or consumption there is due and owing state and local compensating use tax;

c) State and local franchise, or business privilege or like taxes on the doing of business or taxes imposed on the earnings or income of business entities (including corporations), in the case of business activities conducted in either state which consists of (1) providing water, sewerage, gas, electricity, telephone or like utilities or utility services where such utilities or such utility services are used or consumed on Ellis or Liberty Islands, (2) the building of or the provision of access to or from Ellis or Liberty Islands, (3) conducting tours to, of or around Ellis and/or Liberty Islands or providing transportation to or from the Islands. The portion of such state and local taxes derived from such business activities

shall be attributable directly to Ellis and Liberty Islands;

d) (1) Personal income taxes imposed by the states and their localities on other than persons residing on Ellis and Liberty Islands (i) personal income taxes imposed by the State of New York and its localities with respect to residents of the State of New York and its localities and (ii) personal income taxes imposed by the State of New Jersey and its localities with respect to residents of the State of New Jersey and its localities, in the case of income or wages from employment or earnings from self-employment of such residents derived from employment or self-employment (A) on Ellis or Liberty Islands, and (B) with respect to the building of or the provision of access to or from such Islands or the conducting of tours to, of or around Ellis and/or Liberty Islands or the provision of transportation to or from such Islands, the portion of such state and local taxes derived from such income or wages or earnings shall be attributable directly to Ellis and Liberty Islands and (2) nonresident personal income and earnings taxes imposed by either state and its localities with respect to persons residing on Ellis and Liberty Islands, in the case of such persons paying such taxes to either state and its localities, the taxes so paid by such persons shall be attributable directly to Ellis and Liberty Islands.

/s/ Mario M. Cuomo
MARIO M. CUOMO
Governor
State of New York

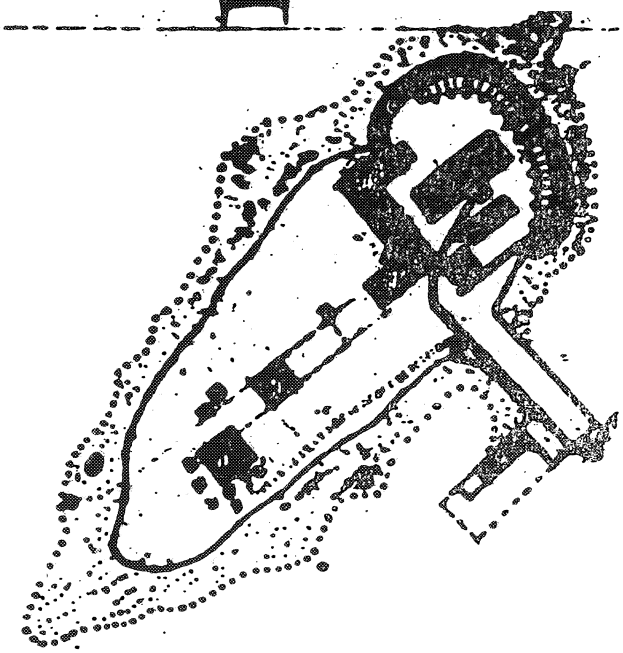
Date: *June 23, 1986*

/s/ Thomas H. Kean
THOMAS H. KEAN
Governor
State of New Jersey

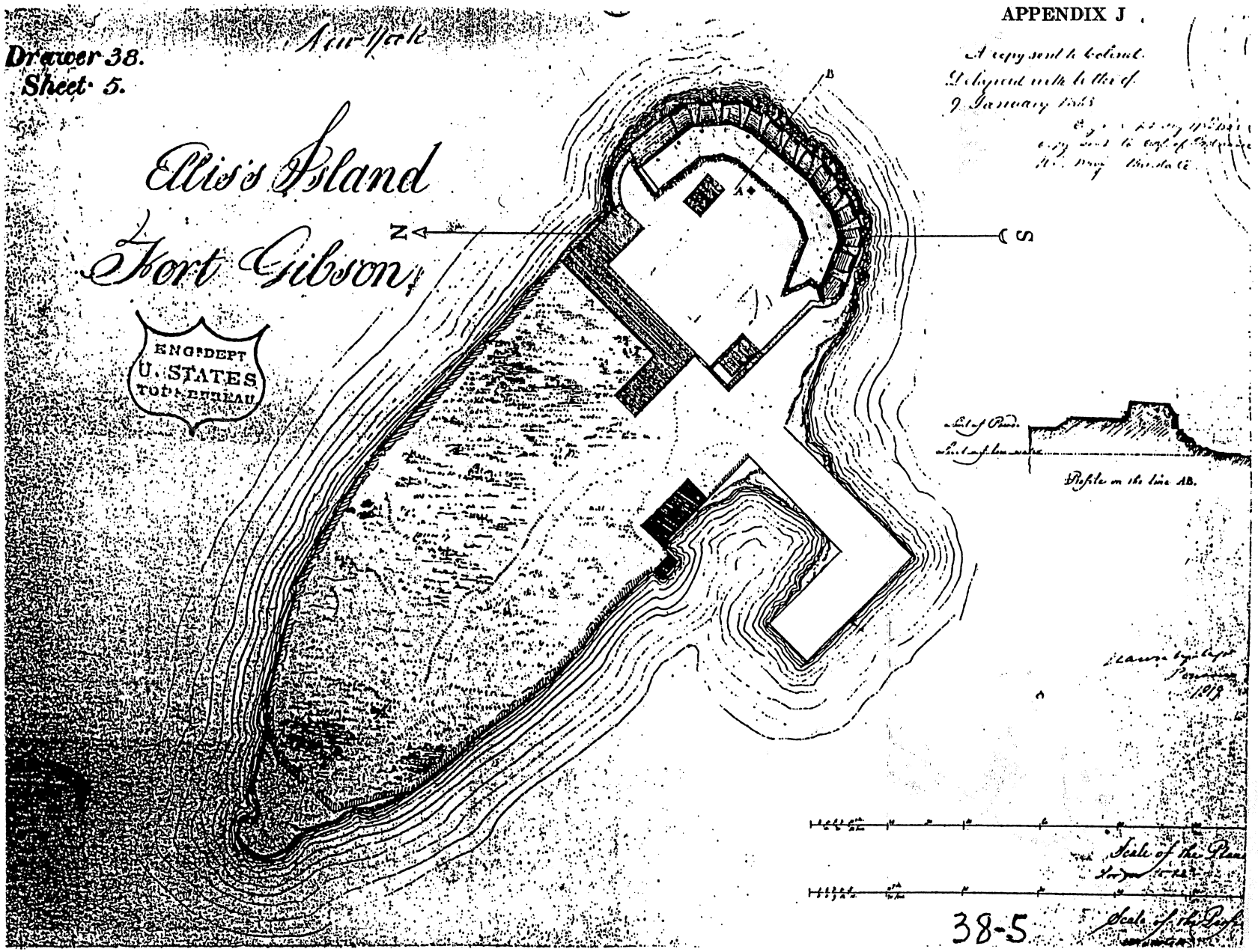
Date: *June 23, 1986*

APPENDIX I

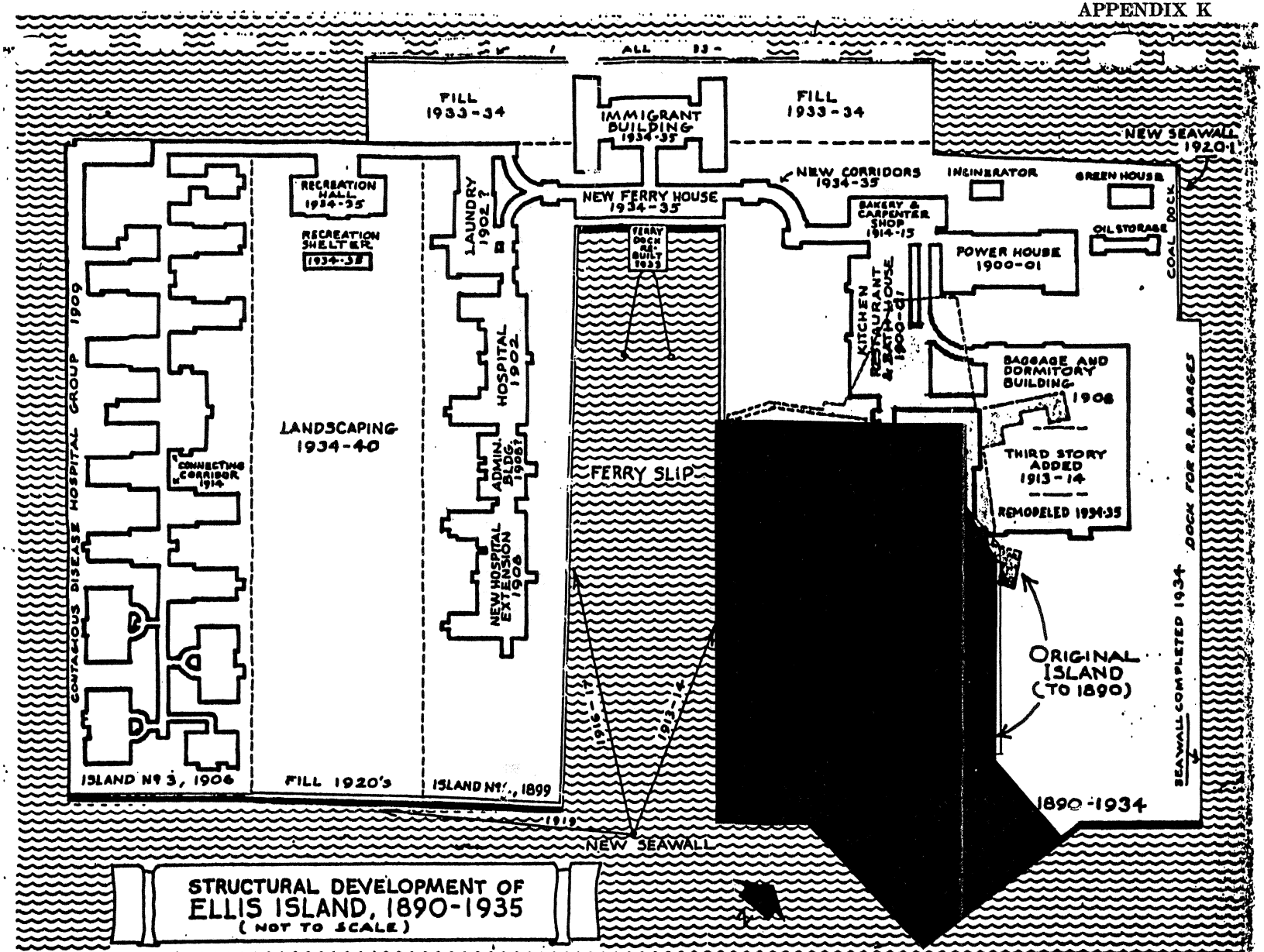
Ellis Island



APPENDIX J


Drawer 38.
Sheet 5.
New York
Ellis's Island
Fort Gibson
ENG'R DEPT
U. STATES
TOPL BUREAU
A
B
N
S
A copy sent to Colonel
Delivered with letter of
9 January 1815
Profile on the line AB.
Scale of the Plan
38-5
Scale of the Profile

APPENDIX K



ON MICROFILM

HISTORIC BASE MAP

356/20.001

MP-ELIS-2