A Boundary Dispute’s Effect on Siting an LNG Terminal

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In 1682, William Penn obtained what is now the state of Delaware by deed from the Duke of York. For Penn, the grant meant that the year-old colony of Pennsylvania would have access to the ocean (denied when Charles II’s grant establishing the colony excluded a twelve-mile circle centered at what is now New Castle, Delaware—the very circle that gives Delaware’s northern border its unique shape). For the Duke of York, the grant was a chance to express his gratitude for the many kindnesses shown the royal family by Penn’s father. See John A. Munroe, History of Delaware (4th ed. 2001) at 34-36.

It is doubtful that either Penn or the Duke of York ever thought that, more than three hundred years later, a centuries-long dispute over the extent and consequences of the duke’s grant would play a central role in implementing national energy policy. Yet the long-simmering dispute between Delaware and New Jersey is now at the center of a Supreme Court fight to determine whether a subsidiary of oil giant BP can build a terminal on the New Jersey shore and pier jutting into the Delaware River (owned by Delaware) to unload tankers carrying liquefied natural gas (LNG) that will feed growing customer demand in the Northeast. New Jersey wants the terminal, and believes that a 1905 interstate compact between New Jersey and Delaware gives New Jersey the right to build the terminal and pier as part of “riparian rights” reserved under the compact. Delaware opposes the terminal, and believes that a 1934 Supreme Court decision setting Delaware’s state line, Penn instructed his commissioners conducting boundary negotiations with New Jersey in 1683 thusly: “Instruct upon my Title to ye River, Soy and Islands thereof according to Grant ... Whatever bee ye Argument, they are bounded Westward by the River Delaware, yn they cannot go beyond low water mark for land. They have ye Liberty of ye River, but not ye Propriety.” New Jersey v. Delaware, 291 U.S. 361, 374 (1934). Although Penn firmly believed in his claim, others did not, claiming the Crown held some interest. However, “[n]ot even the petitions of jealous rivals, egging the Crown on, were of avail to wake it into action.” Id. at 370.

After the Revolutionary War, New Jersey and Delaware disputed the location of their common boundary “almost from the beginning of statehood,” id. at 376, with Delaware claiming sovereignty to the low water mark on the New Jersey side of the river gives Delaware sovereign power over the submerged lands on which the pier must rest. The Supreme Court has appointed a special master to conduct proceedings before the Court itself resolves the dispute.

While Delaware and New Jersey prepare to slog through over two hundred years of history concerning interstate dealings, compacts, actions, and reactions to authority over the Delaware River, the ultimate issue in the case may rest on a simple principle of law. For the riparian rights New Jersey seeks to assert are, at common law, subject to the public trust doctrine—that is, riparian rights must give way when the public interest in the waterway requires it. Most times, the sovereign granting the riparian right and exercising the public trust are the same, and so harmonizing these interests is easy. But what happens if (as is the case here), the sovereign granting the riparian right is different from the one exercising the public interest in the waterway? A Supreme Court ruling—and the Northeast’s ability to access a plentiful (and local) source of natural gas—rides on the answer to that question.

The duke’s 1682 grant gave Penn “all that Tract of Land lying within the Compass or Circle of Twelve Miles ... and the said River and Soy thereof lying North of the Southernmost part of the said Circle of Twelve Miles. . . .” Penn was very adamant about securing the river for Delaware. As recounted by the Supreme Court in its 1934 decision setting the Delaware state line, Penn instructed his commissioners conducting boundary negotiations with New Jersey in 1683 thusly: “Instruct upon my Title to ye River, Soy and Islands thereof according to Grant ... Whatever bee ye Argument, they are bounded Westward by the River Delaware, yn they cannot go beyond low water mark for land. They have ye Liberty of ye River, but not ye Propriety.” New Jersey v. Delaware, 291 U.S. 361, 374 (1934). Although Penn firmly believed in his claim, others did not, claiming the Crown held some interest. However, “[n]ot even the petitions of jealous rivals, egging the Crown on, were of avail to wake it into action.” Id. at 370.

Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.

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A 1925 dispute over ownership of an oyster bed in the Delaware Bay south of the Twelve-Mile Circle led New Jersey to file another action in the Supreme Court to resolve the border once and for all. In 1934, Justice Cardozo, writing for the Court, ruled that Delaware held title to all land within the Twelve-Mile Circle, including the submerged lands of the river. 291 U.S. at 378. The final decree in the action, entered by the Court on June 3, 1935, specifically stated that, within the circle “the Delaware river and the subaqueous soils thereof up to the mean low-water line on the easterly or New Jersey side is adjudged to belong to the State of Delaware, and the true boundary line between the states is adjudged to be” that mean low-water mark. New Jersey v. Delaware, 295 U.S. 694 (1935). The decree enjoins both states, their officers, agents, representatives, citizens, and all other persons from disputing the sovereignty over the territory adjudged to be parts of the respective states. Id. at 699. The decree also states: “This decree is made without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states.” Id. This decree seemed to resolve matters for seventy-one years (despite some minor disputes), until BP came knocking with a proposal to bring clean natural gas (and large amounts of tax revenues) to New Jersey.

**Background on the Current Dispute:**

**The Growing Need for LNG**

Natural gas has long been touted as a clean-burning fuel, emitting almost no particulates, sulfur dioxide, and small amounts of nitrogen oxides. When burned, oil emits about 50 percent more greenhouse gases and coal emits about 100 percent more than natural gas. According to the Federal Energy Regulatory Commission’s (FERC’s) A Guide to LNG, available at http://ferc.gov/for-citizens/citizen-guides/citz-guide-lng.pdf, natural gas supplies approximately one-fourth of U.S. energy needs. As a result of the environmental benefits and what had been low prices, natural gas demand has accelerated over the past several years in the United States, and is projected to increase by 38 percent over the next twenty years. As demand has grown, prices have soared and domestic production has peaked, and thus foreign sources will likely need to play a bigger role in meeting domestic demand. According to FERC, Indonesia, Algeria, Malaysia, Qatar, and Trinidad are the leading exporters of LNG. Id. at 2.

As U.S. demand for natural gas increases and domestic supplies level off or shrink, LNG is estimated to account for 21 percent of total natural gas supply by 2025.

Safety has been the primary concern raised about LNG. LNG is inherently volatile and, if given the chance to vaporize back to gaseous form, can be explosive. In 1944, an explosion at the nation’s first LNG facility in Cleveland, Ohio, killed 128 people. A 2004 accident at a LNG terminal in Algeria killed one hundred more. For many (including the Sierra Club, which the author represents in the proceedings before FERC on the BP proposal), the events of September 11 mean...
that the safety issue now includes the consequences of a potential terrorist attack. A 975-foot tanker, carrying a large quantity of LNG, could pose an inviting target for terrorists. Sandia National Laboratories, in a December 2004 report, estimated that an intentional breach of an LNG tanker (say, from a terrorist attack) could (in the worst case) result in a hole as large as 12 meters (39 feet) wide, causing LNG to "pool" on the water surface and form a vapor cloud that could grow as large as 1,600 meters (1 mile), and if ignited, could cause major structural damage as much as 600 meters (1,950 feet) away, and skin burns as much as 2,118 meters (6,883 feet, or about 1.3 miles) away. Industry supporters respond that terrorists have never attacked a tanker or LNG terminal, the most likely risks are lower, and that risks can be managed through security measures such as exclusion zones around tankers and terminals.

The BP Proposal

In 2004, BP began the process of seeking regulatory approval for an LNG terminal on the Delaware River based in Logan Township, New Jersey. The terminal would handle two to three LNG tankers per week, docking at a pier that would jut approximately two thousand feet into the river from the New Jersey shore, and off-loading to a tank farm and regasification facility on 80 acres of New Jersey land. To build the pier, BP would have to dredge approximately 1.2 million cubic yards of submerged soils in the Delaware River. The terminal would be located almost on top of two main natural gas pipelines servicing Pennsylvania and the Northeast, thus making it convenient for BP to send its finished gas into the market. The terminal would be located several miles up the river from the Delaware Bay, thus requiring tankers to travel under the Delaware Memorial Bridge (I-295) and past the Delaware cities of Wilmington and Claymont. One estimate puts three hundred thousand people within the 1.3 mile burn radius identified in the Sandia Report for the BP terminal and a second terminal further up the Delaware River in Philadelphia.

One regulatory approval BP sought was a ruling that a pier for the terminal would be exempt under Delaware's Coastal Zone Act, 7 DEL. CODE §§ 7001 et seq. The CZA, passed in 1971, prohibits the construction of heavy industry and "bulk product transfer facilities" within the "coastal zone" of Delaware. BP claimed that it is exempt from the CZA's prohibitions because it was a "manufacturing facility" under the Act. The Secretary of Delaware's Department of Natural Resources and Environmental Control ruled that the pier was part of a prohibited bulk product transfer facility and therefore could not be permitted under the CZA. Delaware's Coastal Zone Industrial Board upheld that decision after BP appealed. Thus, under Delaware law, the pier necessary for the terminal could not be built. BP therefore abandoned its attempt to obtain Delaware regulatory approval, and instead turned to New Jersey, where the potential for approximately $10 million in annual new tax revenue may have created a more sympathetic regulatory environment.

Although early filings by New Jersey in the FERC proceedings on BP's application raised environmental and other concerns about BP's proposal, New Jersey changed its tune after Delaware's rejection of the project under the CZA. New Jersey began to argue that Delaware had no right to prohibit the pier because the 1905 compact gave New Jersey riparian rights that include the right to "wharf out" into a waterway. Delaware disagreed with New Jersey's interpretation of the 1905 compact as well as New Jersey's claim that its riparian rights could exclude Delaware's involvement in the decision-making process. New Jersey then petitioned the United States Supreme Court to reopen the 1934 case or allow New Jersey to file a new original action against Delaware to establish New Jersey's rights under the compact. While the Supreme Court denied New Jersey's request to reopen the old case, it allowed a new case to be filed, and in January 2006, appointed a special master to hear the dispute before the full Court decides the issue.

The Supreme Court has made it clear that a state cannot give up its control of submerged lands because of the nature of the public trust involved.

The Riparian Rights at the Center of the Dispute

The central issue of this latest dispute between New Jersey and Delaware is the nature and extent of New Jersey's riparian rights. New Jersey focuses much of its briefing before the Supreme Court on establishing that it has riparian rights under the 1905 compact. The argument is straightforward: The 1905 compact recognized that each state could "on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature." The 1934 decision setting Delaware's boundary at the low water mark on the New Jersey side of the river, as well as the 1935 decree enforcing that judgment, were made "without prejudice to" the rights of either state under the 1905 compact. To New Jersey, this means that it can exercise its riparian rights and Delaware is bound by the compact and the Supreme Court's ruling to allow the
exercise of such rights. Assuming that New Jersey is right about the interplay of the compact and the 1934 decision, does its riparian rights include the ability to build the dock for BP’s terminal in the Delaware River over Delaware’s objection? Put another way, can New Jersey authorize a project that will excavate 1.2 million cubic yards of land located in and owned by the state of Delaware without Delaware being able to stop it?

Riparian rights include the right to build a pier (or “wharf out”) to access the waterway from the shore. As the Supreme Court put it in the 1934 decision, “[b]y the law of waters of many of our states . . . riparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers, and this though the title to the foreshore or the bed may have been vested in the state.” 291 U.S. at 375. Thus, New Jersey is correct that, if it enjoys riparian rights by virtue of the 1905 compact, then those rights should include the right to build a pier extending into the Delaware River. The problem, however, is that the existence of the right is only half the story.

The right to wharf out has never been recognized as absolute. Precisely because most wharves are constructed in navigable waters, the right to wharf out has been subject to several limitations. These include: the common law protection of public rights of navigation, the sovereign’s interest in the underlying bed, environmental regulation of the use of beds of navigable waters, and the public trust. A. Dan Tarlock, Law of Water Rights and Resources at § 3.74 (2005). Of particular interest are the limitations imposed by the “sovereign’s interest in the underlying bed” and the “public trust” because in this unique case the sovereign that owns the underlying bed of the river (Delaware) is different from the sovereign sponsoring the riparian right to wharf out (New Jersey). As the Supreme Court stated more than a century ago, the title to submerged lands held by a state is “different in character from that which the State holds in lands intended for sale . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein free from the obstruction or interference of private parties.” Illinois Central R.R. v. Illinois, 146 U.S. 387, 452 (1892). When confronted with a riparian right to wharf out that conflicts with the public trust, courts tend to side with the public trust. See, e.g., Great Cove Boat Club v. Bureau of Public Lands, 672 A.2d 91, 95 (Maine 1996) (rejecting argument of absolute right to wharf out; while riparian land owner has right to wharf out, that right is “subject to reasonable regulation by the State in the exercise of its public trust rights”); Lemley v. Stevenson, 661 N.E.2d 237, 245 (Ohio App.), appeal not allowed, 655 N.E.2d 738 (Ohio 1995) (owner of property adjoining navigable water has right to wharf out “provided the exercise of this right does not interfere with the public rights”). Thus, Delaware holds title to the submerged lands of the Delaware River in public trust for the people of Delaware. The CZA, declaring bulk product transfer facilities on the river to be “against public policy,” 7 Del. Code § 7001, is an expression of the public interest that informs the “public trust” applicable to the river beds. If the riparian right to wharf out is “limited” by the public trust, then it appears that the common law would require New Jersey’s riparian right to give way to the public trust expressed in the CZA’s prohibition.

New Jersey could argue that Delaware “waived” or ceded its right as sovereign when it agreed to recognize New Jersey’s riparian rights in the 1905 compact, but the argument has problems. New Jersey’s riparian rights are limited by the sovereign’s interest. Merely recognizing a limited right does not automatically mean that the limit on the right is waived—something more would seem to be needed to indicate that Delaware was giving up its right to exercise its limiting interest. Even if the 1905 compact can be read as such an express waiver, the Supreme Court has made it clear that a state cannot give up its control of submerged lands because of the nature of the public trust involved:

The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace . . . so with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State. Illinois Central R.R., 146 U.S. at 453–54.

The Illinois Central case provides an interesting example of this concept. An Illinois statute gave the railroad title to the bed of Lake Michigan up to a mile out from the shore. About four years later, the legislature revoked the grant by another statute, and the railroad sued to keep title. The Supreme Court found that the first statute was not a valid exercise of legislative power because of the public trust doctrine and the inability of the state to “abdicate” the trust. If Illinois could not give away its control of the submerged lands by a statute directly granting a deed to those lands, it seems impossible to claim that a mere recognition of riparian rights in the 1905 compact could have done anything to remove Delaware’s control over the submerged lands of the Delaware River. The Supreme Court will ultimately answer the question.

New Jersey and Delaware are about to commence the next round in the three hundred-year-old border dispute before the special master and the Supreme Court. Significant discovery of historical practices of the states in connection with the river will take place. Yet it seems very possible that New Jersey might win the battle to get its riparian right recognized but lose the war over Delaware’s ability to control the river bed. William Penn might have been surprised at the battle, but would be pleased with that result.