No. 9, Original

In the Supreme Court of the United States

OCTOBER TERM 1975

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, ET AL.,
Defendants.

OBJECTIONS BY STATE OF LOUISIANA TO ACCOUNTINGS AND PAYMENTS BY THE UNITED STATES UNDER THE SUPPLEMENTAL DECREE OF JUNE 16, 1975 AND BRIEF IN SUPPORT THEREOF

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Part I

ACCOUNTING FOR UNIMPOUNDED FUNDS UNDER JUNE 16, 1975 SUPPLEMENTAL DECREE

Paragraph 6(b) of the Supplemental Decree rendered by this honorable Court on June 16, 1975 (herein called the 1975 Decree) provides:

> "(b) The United States shall render to the State of Louisiana and file with the Court a true, full, accurate and appropriate account of any and all other sums of money derived by the United States either by sale, leasing, licensing, exploitation or otherwise from or on account of the lands, minerals or resources described in paragraph 3 hereof;"

Paragraph 6(c) of the 1975 Decree provides:

> "(c) Within 60 days after receiving the account provided for by paragraph 6(a) or 6(b) hereof, a party may serve on the other and file with the Court its objections thereto."

Paragraph 6(c) of the 1975 Decree further provides:

> "If objections are filed but any undisputed net balance is shown which will be due from one party to the other party . . . regardless of what may be the ultimate ruling on the objections, the party so shown to be under any such obligation shall forthwith pay each such undisputed balance to the other party . . . so shown to be entitled thereto."

UNDISPUTED NET BALANCE

The State of Louisiana has no objection to the accounting by the United States on leases wholly within the jurisdictional limits of Louisiana as reported in the August 1975 accounting for unimpounded funds. A tabulation of these leases and the amount reported as "within three geographical miles seaward of Louisiana coast line" is contained in Exhibit A, attached hereto. The undisputed amount owed the State of Louisiana by the United States is $2,829,239.38.

Paragraph 2 of Louisiana's accounting for unimpounded funds pursuant to the 1975 Decree states that Louisiana has derived $1,509,367.26 revenue from mineral leases lying wholly within the jurisdictional area of the United States, as determined by the 1975 Decree, and had previously accounted for $430,-

549.76 in 1966, pursuant to the Supplemental Decree rendered December 13, 1965. Therefore, the net amount derived by the state from wholly owned federal leases is $1,078,817.50. If the United States has no objection to the amount reported by Louisiana, there remains an undisputed net balance on wholly owned leases in the amount of $1,750,421.88 owed by the United States to the State of Louisiana, which should be paid forthwith in accordance with paragraph 6(c) of the Decree.

OBJECTIONS

The State of Louisiana, through its Attorney General, files the following objections to the accounting filed by the United States for unimpounded funds pursuant to paragraph 6 (c) of the 1975 Decree, to wit:

1. LOUISIANA OBJECTS TO THE METHOD OF ACCOUNTING FOR SPLIT LEASES

The basic objection of the state to the account filed by the United States for unimpounded funds from split leases[1] is that the method used for the accounting is improper because of the inclusion of such items as impounded funds, dual payments, and the insufficient disclosure of information upon which the allocation to the state is made. As a result of the improper method of accounting, the parties cannot begin to determine to what extent they will be able to arrive at an undis-

[1] The term "split leases" refers to leases covering areas partly landward and partly seaward of the three-mile projection of the Louisiana coastline.

puted net balance that is required by paragraph 6(c) before payment can be made. Therefore, the accounting for split leases should be amended in accordance with the objections hereinafter set forth so that it will fully disclose a "true, full, accurate and appropriate account" as required by paragraph 6(b) of the 1975 Decree.

2. LOUISIANA OBJECTS TO THE IMPROPER INCLUSION OF IMPOUNDED FUNDS IN ACCOUNTING FOR UNIMPOUNDED FUNDS

Louisiana objects to the inclusion of certain impounded funds in the accounting for unimpounded funds. Paragraph 6(b) of the 1975 Decree requires that the United States file an account of all sums derived from the area within the three-mile seaward extension of the coastline that have not been impounded pursuant to the Interim Agreement of October 12, 1956.[2] The account filed by the United States includes certain impounded funds along with unimpounded funds to be offset against the unimpounded funds owed by the State. This conflicts with paragraph 14 of the Interim Agreement which specifically prohibits any offset of impounded funds against unimpounded funds. Furthermore, the United States did not include these impounded funds in the payment required for impounded funds by paragraph 5(b) of the 1975 Decree.

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[2] Agreement Between United States of America and State of Louisiana Pursuant to Section 7 of the Outer Continental Shelf Lands Act and Act 38 of the Louisiana Legislature of 1956.

A tabulation of the impounded funds improperly included in the accounting of the United States for unimpounded funds is set forth on Exhibit B attached hereto.

Therefore, the accounting filed by the United States for unimpounded funds should be corrected and amended by the elimination of all impounded funds therefrom, and the United States should forthwith pay the State of Louisiana for such impounded funds improperly included in the unimpounded fund accounting.

3. LOUISIANA OBJECTS TO THE IMPROPER INCLUSION OF DUAL PAYMENTS

The United States has included in its method of accounting certain dual payments of rentals and royalties that were made by lessees to both the United States and the State of Louisiana so as to maintain the leases in effect as to both parties. The obligation on Louisiana to return that portion of the dual payment that may be allocated to the area decreed to be under federal jurisdiction is entirely a legal matter between the State and its lessee and has no place in an accounting between the United States and the State. There may be valid legal questions concerning the return of the payment by the State to its lessee in a particular case which in no way involves the rights of the United States and certainly cannot be adjudicated by the United States in its accounting to the State.

The inclusion of dual payments in this account makes it impossible to determine how much the United

States owes to the State and thereby prevents the parties from striking a net balance as required by paragraph 6(c) of the 1975 Decree.

Therefore, the account should be corrected and amended to eliminate the dual payments and the amount owed by the United States to the State of Louisiana should be recalculated.

4. LOUISIANA OBJECTS TO THE INSUFFICIENT DISCLOSURE OF INFORMATION IN MAKING THE ALLOCATION TO THE STATE ON SPLIT LEASES

The account filed by the United States in explanation of the allocation of funds to the State from split leases states:

> "8—The amount computed of (1) rental on an acreage basis or (2) royalty if well is producing on well location or (3) shut-in on well location."

But the account does not identify the wells included in its calculation of royalty, nor give any information as to the location of the wells or what is meant by "if well *is producing* on well location." Without additional information, there is no way that the State can verify the correctness of the allocation, and the account should be amended to make the necessary disclosures.

5. LOUISIANA OBJECTS TO THE ATTEMPT TO OFFSET ROYALTIES FROM S.L. 1367 (OCS 0370) AS PREMATURE

The State of Louisiana objects to the apparent offset unilaterally determined by the United States on

S.L. 1367 (OCS 0370). It appears that royalties received by the State have been subtracted from royalties received by the federal government on this lease. No offset should be made before either party knows what is due the other. The obligation of the United States is to report on all revenues received from the lease within the area described in paragraph 3 of the 1975 Decree. By reason of this premature offset, the United States has not rendered a "true, full, accurate and appropriate account," as required by paragraph 6(b) of the 1975 Decree, and the account should be corrected and amended to comply with the Decree.

6. LOUISIANA OBJECTS TO THE METHOD FOR ACCOUNTING FOR PIPELINE RIGHT-OF-WAY RENTALS AS IMPROPER AND INCOMPLETE

From the information available at this time, it does not appear that all cash pipeline revenues have been reported, and the account does not disclose sufficient information so as to enable the State to make a proper audit. Nor has the United States reported the value of the benefits and considerations received by it in the form of enhanced bonus, royalty, and other lease revenue from OCS lands enjoyed as a consequence of the granting of oil and gas pipeline rights-of-way for less than their fair market value.

Therefore, the United States should amend its accounting for pipeline right-of-way revenues so that the State will have sufficient information to make a proper audit.

7. LOUISIANA OBJECTS TO THE FAILURE OF THE UNITED STATES TO ACCOUNT FOR INTEREST OR VALUE OF THE USE OF IMPOUNDED FUNDS

The accounting for the unimpounded funds is insufficient on the grounds, first, it fails to include the interest chargeable against the United States as trustee of the impounded funds, for appropriating the trust funds to its own use instead of investing the money as required by law, and second, in the alternative, for the failure to include the value of the use of the State's share of the impounded funds in order to prevent the unjust enrichment of the United States at the expense of the State of Louisiana.

The funds for which the United States has failed to account were derived from, or on account of, lands, minerals, or resources described in paragraph 3 of the 1975 Decree and, although arising out of the impounded funds, are unimpounded and required to be accounted for under paragraph 6(b) of the 1975 Decree.

This is not an ordinary claim for interest on a past due debt or judgment against the United States, which traditionally requires its consent by Act of Congress.

This is an objection to the insufficiency of the accounting in that it does not respond to the obligations of the United States, as trustee of the impounded funds, and seeks to invoke the principles of equity to require an accounting for the unjust enrichment resulting to the United States for use of the State's money.

In the Memorandum Brief attached hereto, argument and authorities are submitted to establish that the United States occupies the position of trustee of the impounded funds and cannot traffic in the trust funds for its own use, but should have invested the money as required by both federal statute and common law. Failure to comply with the obligations of a trustee renders the United States liable to account to the State of Louisiana for interest or the value of the use of the impounded funds. Furthermore, and in the alternative, it is urged that equity will impress a constructive trust on the earnings or savings derived from the use of the escrowed funds and require restitution to prevent the unjust enrichment of the United States at the expense of the State of Louisiana.

The amount of restitution required will depend upon the facts concerning the nature of the use of the funds. From the information available at this time, it is evident that the United States has used the impounded funds for its own purposes, and the exact nature of the use and the benefits gained thereby should be further disclosed.

The accounting should also include the interest or value derived from the use of that portion of the money distributed to the State pursuant to the First Supplemental Decree of December 13, 1965.

In the First Supplemental Decree the Court held:

> "The Court retains jurisdiction to entertain such further proceedings, enter such orders and issue such writs as may from time to time be

deemed necessary or advisable to give proper force and effect to . . . further adjustments of the accounting between the parties with respect to the lands, minerals and resources described in paragraph 1 and paragraph 3 of this decree."

The argument in support of this objection is equally applicable to the accounting and money distribution made in 1966 pursuant to the First Supplemental Decree.

Part II.

ACCOUNTING FOR IMPOUNDED FUNDS UNDER JUNE 16, 1975 SUPPLEMENTAL DECREE

Paragraph 5(b) of the 1975 Decree provides:

"(b) The United States shall pay to the State of Louisiana . . . under the Interim Agreement, as amended, all sums, if any, now held impounded by the United States under said Agreement, derived from or attributable to the lands, minerals or resources described in paragraph 3 hereof;"

Paragraph 5(c) of the 1975 Decree provides:

"(c) Failure of either party to agree on correctness of the sums due the other shall in no way be reason to retard payment of sums which are admittedly due by the paying party's own calculations."

Additionally, paragraph 7 of the 1975 Decree provides:

"7. All sums heretofore impounded pursuant to the Interim Agreement of 1956, as amended, shall be fully accounted for and paid within the

90 days provided in paragraph 5, except as to split leases that accounting and payment may be deferred on royalty revenue from (a) non-unitized wells with completion points at unidentified locations or locations controverted by the parties; and (b) units partially shoreward of the three-mile boundary as to which there is no present agreement that participation is on a surface acreage basis.

"Funds from split leases not accounted for and paid pursuant to the preceding sentence shall be the subject of the accounting to follow the next decree of this Court in this case, unless the parties agree on a prior distribution.

"Except as provided above for accountings and payment, pending further order of the Court, leases of land lying partly within three miles of the line described in paragraph 9 hereof shall be in no way affected by anything contained in this Decree."

On September 15, 1975 the United States filed an accounting pursuant to the 1975 Decree and paid the State of Louisiana $136,296,015.43, representing revenue received by the United States, derived from Louisiana territory as described in paragraph 3 of the 1975 Decree, and classified as impounded funds.

OBJECTIONS

The State of Louisiana, through its Attorney General, makes the following objections to the accounting for impounded funds filed by the United States pursuant to paragraph 5(b) of the 1975 Decree, to wit:

1. LOUISIANA OBJECTS TO THE FAILURE TO INCLUDE PAYMENT FOR THE SPLIT LEASES THAT WERE ACCOUNTED FOR IN THE UNIMPOUNDED FUND ACCOUNTING

In the accounting for unimpounded funds, the United States accounted for certain split leases described in Exhibit B herein. Paragraph 7 of the 1975 Decree clearly states that payment of impounded funds must be made within 90 days of July 15, 1975, except as to two types of royalty revenue specifically enumerated therein. However, the United States did not pay for the leases described in Exhibit B herein within the 90-day period. The United States should forthwith pay to the State of Louisiana the amount impounded under these leases as required by paragraph 5(b) of the 1975 Decree.

2. LOUISIANA OBJECTS TO THE IMPOUNDED FUND ACCOUNTING FOR INSUFFICIENCY OF INFORMATION ON ALLOCATION

The accounting filed by the United States with the distribution of the impounded funds does not contain sufficient information with respect to the allocation of funds from split leases so as to enable the State to properly audit the amount of its share. Therefore, the accounting should be amended to disclose the information necessary for the State to determine the correctness of its share of the impounded funds.

3. LOUISIANA OBJECTS TO THE IMPOUNDED FUND ACCOUNTING FOR FAILURE TO DISCLOSE THE REASON FOR EXCLUDING SOME LEASES

Not all leases have been accounted for by the United States. Paragraph 7 of the 1975 Decree exempted from distribution funds from certain split leases until a further decree of the Court, unless the parties agree on a prior distribution. The account filed with the distribution of impounded funds does not disclose the leases that were excluded or the reasons therefor. The United States should file an amended or supplemental account so that the State may determine whether impounded funds have been improperly omitted from this accounting.

4. LOUISIANA OBJECTS TO THE FAILURE TO ACCOUNT FOR INTEREST OR VALUE OF THE USE OF ESCROWED FUNDS AS AN INCREMENT THEREOF

Insofar as the interest or value of the use of the escrowed funds constitutes an increment to the fund, the State of Louisiana objects to the failure to include the increment in the accounting for impounded funds for the same reasons set forth in objections on unimpounded funds, and the attached Memorandum Brief in support thereof.

CONCLUSION

This Court, in its Per Curiam opinion of March 17, 1975 (95 S. Ct. 1180), decreed:

> "If the parties cannot agree upon the form of the decree, then they shall refer any remaining disputes to the Special Master for his recommendations. In the event of such a referral, the Special Master is authorized to hold such hearings, take such evidence, and conduct such proceedings as he may deem appropriate and, in due course, to report his recommendations to this Court."

In the Joint Motion of the United States of America and the State of Louisiana for Entry of a Supplemental Decree, which resulted in the 1975 Decree, it is stated:

> "The problems existing between the parties cannot be totally resolved by a decree simply fixing the baseline. That is why prior partial decrees have employed three-mile projection technical descriptions, required judicial accountings, allotted time for technical or administrative work to proceed for such matters to be amicably resolved, or made certain exceptions, *e.g.*, as to leases lying partly landward and partly seaward of the three-mile projection of the baseline, herein called split leases. The proposed decree fixing the baseline will facilitate a three-mile projection agreement and enable partial accountings and payment of funds while continuing the Interim Agreement of October 12, 1956, as amended, in effect pending further technical work and negotiations on the more complex split lease problems and other technically difficult questions. The parties are hopeful that these remaining questions can be resolved in advance of submitting a final decree for consideration next Term; or, in the event of disagreement, they will be presented to the Special Master,

pursuant to the Court's opinion of March 17, 1975."

The 1975 Decree then provided in paragraph 8:

"It is understood that the parties may be unable to agree on whether offsets are permitted or whether interest may be due on funds impounded pursuant to the Interim Agreement of October 12, 1956, or upon calculations or audits, and these issues, as well as others not expressly treated herein, shall in no way be affected by this Decree."

The Court then went on to state in paragraph 11 of the 1975 Decree:

"The parties are directed to prepare a final decree for entry by this Court in the near future resolving that additional issues required to be dealt with that this litigation may be terminated, to include, but not necessarily be limited to, matters related to unresolved issues, if any, concerning accountings and payments, offset claims, payments to others, ambulatory boundary complexities or administrative problems."

By order entered May 19, 1969 (395 U.S. 901), it was decreed:

"Pursuant to the opinion of this Court of March 3, 1969, 394 U.S. 11, it is ordered that Walter P. Armstrong, Jr., Esquire, of Memphis, Tennessee, be, and he is hereby, appointed as Special Master in this cause to make a preliminary determination consistent with the opinion of this Court. The Special Master shall have authority to fix the time and conditions of hearings which he may order and is authorized to summon wit-

nesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate."

In accordance with the direction of this Court in the above decrees, Louisiana will urge its objections before the Special Master so that additional discovery may be undertaken after necessary additional pleading and presentation of evidence so that the Special Master will be able to report back to this Court on all remaining unresolved issues in this case, thereby enabling the Court to render a final decree on all accounting matters and to fix the seaward extent of the rights acquired by Louisiana under the Submerged Lands Act.

WHEREFORE, the State of Louisiana requests that the accountings heretofore filed by the United States pursuant to the 1975 Decree be corrected and amended for the reasons heretofore set forth and that the Special Master should proceed to resolve the issues raised by the foregoing objections and make his recommendation to the Court for a final decree.

Respectfully submitted,

/s/ William J. Guste, Jr.

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October, 1975

EXHIBIT A

Wholly Owned State Leases

OCS LEASE NO.	STATE LEASE NO.	AMOUNT
	SL 784	$ 21,675.00
	SL 783	9,764.26
	SL 194	68,211.58
	SL 1572	44,709.50
	SL 1571	43,339.10
	SL 1120	888.83
	SL 1570	6,167.00
	SL 1569	5,260.00
	SL 1122	35,000.00
	SL 1170	55,000.00
	SL 1377	102,260.25
	SL 852	9,161.30
	SL 1577	6,235.60
	SL 1081	8,418.06
	SL 861	8,390.02
	SL 1519	171,702.46
	SL 1520	77,775.00
	SL 1021	71,688.75
	SL 1022	36,746.25
	SL 1483	10,550.00
(0368)	SL 795	20,900.00*
(0354)	SL 796	24,200.00*
(0151)	SL 1071	11,625.00
	SL 987	20,460.00
	SL 988	50,467.83
	SL 998	262,443.63
(0349)	SL 1007	35,556.25**
(0350)	SL 1008	280,990.32
(0383)	SL 1354	87,992.91*
	SL 1786	3,660.00
	SL 1353	39,750.00
(0371)	SL 1277	1,014,037.99***
	SL 1355	187,786.65
	SL 1357	127,200.00

SL 1359	15,000.00
SL 1344	22,875.00
SUB-TOTAL	$2,997,888.54
Less amounts payable to lessee	168,649.16
TOTAL owed State	$2,829,239.38

** The State of Louisiana agrees that this is a wholly owned State lease, but maintains that the amount shown is owed to the lessee since it is a dual payment.*

*** The amount indicates rentals due the lessee, not the State.*

**** State records show that this is a split lease, although all revenues belong to the State of Louisiana.*

EXHIBIT B

IMPOUNDED FUNDS INCLUDED IN ACCOUNTING FOR UNIMPOUNDED FUNDS

Lease Number (OCS) State	Lessee	Area	Impounded Funds Reported on August 25	Impounded Funds Within Three Miles Seaward of Louisiana Coastline	Impounded Funds Reported on Sept. 15
(0295) 862	Amoco Production Company	Vermilion bl 15	$ 2,406.76	$ 1,454.93	0.00
(0297) 872	Union Oil Company of California	Vermilion bl 26	227,525.00	$ 6,839.55	0.00
(057) 763	Mobil Oil Corp.	Ship Shoal bl 63	17,500.00	$ 360.55	0.00
(058) 764	Mobil Oil Corp.	Ship Shoal bl 64, W ½	6,250.00	$ 1,119.00	0.00
(0149) 986	Continental Oil Company	West Delta bl 81	3,487.50	$ 768.18	0.00
			$257,169.26	$10,542.21	$0.00

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MEMORANDUM BRIEF IN SUPPORT OF OBJECTIONS

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SUMMARY ARGUMENT

The following Memorandum Brief contains arguments in support of four of the objections designated Objections 2, 3 and 7 in Part I, and Objection 4 in Part II, of the preceding pleading. The other objections in the pleading are either self-explanatory or require further information in order to analyze the accounting and prepare such supporting memorandum brief as may be necessary. Therefore, objections raised in the pleading, but not argued in the following Memorandum Brief, are not waived, and any further brief-

ing that may be needed in support thereof is hereby reserved. The arguments are:

OBJECTION *to the improper inclusion of impounded funds in accounting for unimpounded funds.* Paragraph 6(b) of the 1975 Decree requires that the United States file an accounting of all sums derived from the area three miles seaward from the coastline that have not been impounded pursuant to the Interim Agreement. The accounting filed by the United States includes impounded funds with unimpounded funds to be offset against the unimpounded funds owed by the State, but the United States did not include these impounded funds in the payment required by paragraph 5(b) of the 1975 Decree. This conflicts with paragraph 14 of the Interim Agreement which prohibits any offset of impounded funds against unimpounded funds.

OBJECTION *to the improper inclusion of dual payments in accounting for unimpounded funds.* The return of dual payments of royalties and rentals made by lessees to both the United States and the State of Louisiana so as to maintain the leases in effect as to both parties is the separate obligation of each party to its respective lessee and should not be included in an accounting to strike a net balance between the United States and the State. The inclusion of dual payments in this account makes it impossible to determine how much the United States should pay to the State.

OBJECTION *to the failure to account for interest or value of use of impounded funds.*

1. From the events leading up to the Interim Agreement between the United States and the State of Louisiana, and the provisions of the Agreement, the intent is clear that the impounded funds from the disputed area are to be held intact in a separate escrow account until the determination of the boundary dispute.

2. From the information available at this time, it is evident that the United States used the escrow funds for its own purposes in violation of the Interim Agreement, but the exact nature of the use and the benefits gained thereby should be further disclosed.

3. It is well established by federal cases and in common law that money held in escrow is held in trust, and the United States is trustee of the escrowed funds under an express trust implied in fact from the Interim Agreement.

4. Federal statute requires that all funds held in trust by the United States, and the annual interest accruing thereon, shall be invested at a rate of interest of not less than 5%, and the failure of the United States to so invest the trust funds established by the Interim Agreement obligates it to account to the State for the compound interest that should have been recovered under the statute.

5. Regardless of the federal statute, under the well-established principle of common law, it is the duty of the United States, as trustee, to invest trust funds, and if it fails to do so for an unreasonable length of time, it is liable for interest at the legal rate.

6. The United States, as trustee, is liable to the State of Louisiana for interest if it used the trust funds for its own general governmental purposes, regardless of whether any profit was made by the unauthorized use of the funds.

7. Aside from the obligations of the United States as trustee under an express trust implied in fact from the Interim Agreement, equity will impress a constructive trust on the earnings or savings derived from the use of the escrow funds and require restitution to prevent the unjust enrichment of the United States at the expense of the State of Louisiana.

8. Equity will require payment of interest as restitution for value derived from the use by the United States of the escrow funds in the absence of any other proof of value.

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ARGUMENT AND AUTHORITIES

I. OBJECTION TO THE IMPROPER INCLUSION OF IMPOUNDED FUNDS IN ACCOUNTING FOR UNIMPOUNDED FUNDS

In the August 25, 1975 accounting for unimpounded funds, the United States included an accounting for leases which were "split" or divided by the old Zone 1 line as set forth in the Interim Agreement.

That agreement provides in paragraph 7(a):

> "(a) Subject to the exclusions of subparagraph (d) hereof, the United States agrees to impound in a separate fund in the Treasury of the United States a sum equal to all bonuses, rentals, royalties and other payments heretofore or hereafter paid to it for and on account of each lease, or part thereof, in Zones 2 and 3, being the disputed area, ..."

Because of this agreement, leases lying partly

within the disputed Zones 2 and 3 were subject to the impoundment agreement to the extent that any part of them lay in a disputed zone. Thus, some of the revenues from these leases were impounded and some were not.

The United States accounted for these leases[1] in its accounting for unimpounded funds, even though some of the funds were in fact impounded. However, it did not account for these leases in the September 15, 1975, accounting for impounded funds. The results of this erroneous accounting was that the United States failed to fully pay to the State of Louisiana all sums "held impounded by the United States under said Agreement, derived from or attributable to the lands, minerals or resources described in paragraph 3" of the 1975 Decree as directed by paragraph 5(b) of that Decree.

The amount impounded from these split leases is ascertainable since the United States did account for it, and it does not fall into the exception of paragraph 7 of the 1975 Decree, which would allow the United States to defer payment to a later time. Therefore, the federal government has no right to withhold payment of these impounded funds which are admittedly due from these leases.

Furthermore, if these impounded funds remain included in the unimpounded fund accounting, they will be used as an offset to the unimpounded funds

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[1] The leases referred to in this objection are listed in Exhibit B attached to the preceding pleading.

owed by the State to the United States in the calculation of a net balance for unimpounded funds. This is directly prohibited by paragraph 14 of the Interim Agreement, which provides:

> "Any sums required to be impounded by either party hereto, or to be paid over or released to the other party by any party hereto, shall be impounded, paid or released without reference to, limitation by, or offset against any claim against or liability or obligation of the other party, but nothing herein contained shall limit such right as either party may have to assert separately any other claim which it may have against the other party, or any third party."

Therefore, the accounting should be amended to exclude all impounded funds and these funds should be paid to the State.

II. OBJECTION TO THE IMPROPER INCLUSION OF DUAL PAYMENTS IN ACCOUNTING FOR UNIMPOUNDED FUNDS

Dual payments of royalties and rentals, including payments based on shut-in wells, were authorized by paragraph 7(c) of the Interim Agreement. The payments were heretofore made by lessees to both the United States and the State of Louisiana so as to maintain split leases in effect as to both parties. These payments created obligations between the respective parties and third party lessees *only*, and do not represent any sums due by either party to the other. Therefore, they cannot be used to determine the net balance as provided by paragraph 6(c) of the 1975 Decree.

However, in the accounting for unimpounded

funds, the United States accounted for some split leases by indicating the total amount of revenue it received for a lease *including dual payments*, indicating the specific amount Louisiana received for the same lease as a dual payment, and purporting to strike a net balance between the two. This is a completely inappropriate and misleading method of accounting because it ignores the obligations owed by both the State and the United States to the lessee oil companies. The result of this error is that the "balance" indicated in Column 10, Part I of the accounting bears no relation to the "undisputed net balance" which the parties are directed to strike after the accountings are made. In fact, the Column 10 "balance" is entirely fictitious and indicates nothing.

By including the dual payments received by both parties, the United States accounting appears to provide for an adjustment of accounts, as between the United States and the State of Louisiana, without regard to the separate obligations of each party to its lessees. It would appear that this method of accounting erroneously assumes that the State of Louisiana would return to its lessees the total of all dual payments it received without regard to the amount which it is entitled to retain,[2] and that it would in some manner be compensated therefor by a gratuitous payment from the United States.

The balance shown in Column 10 does not reflect the amount that the United States admits to owe to the State of Louisiana but, presumably, is a computation of

[2] Column (9) *Known Dual Payments to Louisiana by Lessees* shows the entire dual payment received.

the amount owed to the State, minus the amount that the United States calculates should be paid by the State to its lessees. However, the United States has nothing to do with the obligation the State may have to its own lessee; therefore, the United States has no right to subtract the dual payments received by Louisiana from the amount owed by the United States to the State. If the State accepted this confused method of accounting for dual payments and returned the entire amount of the dual payments to its lessees, there would be no guarantee that the United States would reimburse the State for any amount erroneously returned.

Therefore, before a net balance can be calculated, an amended accounting must be made by the United States to clarify what is owed by the United States to the State of Louisiana. This amended accounting should respect the obligations and the rights of the parties by not including irrelevant information concerning third persons.

III. OBJECTION TO THE FAILURE TO ACCOUNT FOR INTEREST OR VALUE OF USE OF IMPOUNDED FUNDS

1. STATEMENT OF FACTS

A. *Events leading to the Interim Agreement caused deposit in escrow with the United States*

Commencing as far back as 1928, Louisiana had peaceably leased its offshore waters without protest by the United States until the proclamation by President Truman in 1946 declaring that all of the conti-

nental shelf was subject to federal jurisdiction and control. This started the federal leasing in the same offshore waters where there was already an established offshore oil and gas industry under state jurisdiction.

This multiple leasing, further augmented by the first *Louisiana* case in 1950, holding that the federal government was possessed of "paramount rights" offshore Louisiana for 27 marine miles, and complicated by the unresolved boundary questions created by the Submerged Lands Act in 1953, resulted in chaos and confusion.

As a result, on the petition of the federal government, this Court, on July 11, 1956, enjoined all further leasing and drilling operations, except by agreement of the parties or by Court order, in all of the disputed area, part of which has now been declared to belong to Louisiana.

This injunction forced the Interim Agreement of October 12, 1956, under which the federal government, through the pressure of its injunction, obtained the right to hold all of the mineral revenues from the whole area of dispute. But the State did exact the important agreement that the funds were to be impounded "in a separate fund in the Treasury of the United States" and "held intact" until the boundary dispute was settled, thereby creating an escrow arrangement that imposed upon the federal government the obligation of a trustee.

The pressures on the State and its intention that the impoundment of funds shall constitute an escrow

arrangement is reflected in Act 38 of 1956, whereby the Louisiana legislature gave authority to enter into an agreement with respect to operations under mineral leases in the disputed area and for "the deposit in escrow or impounding" of the revenues therefrom.

Act 38 of 1956 provides in part:

"Whereas the Supreme Court of the United States has issued an order enjoining the United States and the State of Louisiana from further leasing or drilling on the submerged lands in dispute except by agreement . . .

"Whereas an immediate cessation of drilling operations . . . would create unemployment, the cancellation of drilling contracts and related operations to the great loss of the contracting parties, and would furthermore jeopardize the continuance of existing lease agreements to the great detriment and injury of the State of Louisiana, to the oil and gas industry, laborers, contractors, and others dependent upon the continued development of said submerged lands;

"Be it enacted by the Legislature of Louisiana:

"Section 1. . . . The State Mineral Board is authorized, with the concurrence of the Attorney General of Louisiana to negotiate and enter into agreements . . . respecting operations under any mineral lease on such lands for the *deposit in escrow* or impounding in whole or in part of bonuses, rents, royalties, and other sums payable thereunder pending the settlement or adjudication of the controversy. . . . Upon the final settlement or adjudication of such controversy, all sums

so impounded shall be paid to the parties entitled thereto." (Emphasis added.)

B. *Interim Agreement established escrow account*

On October 12, 1956, the United States and Louisiana executed the Interim Agreement whereby four zones were created. Zone 1, extending three miles from the Chapman Line, was recognized to be under State jurisdiction, and Zone 4, being the most seaward zone, was recognized to be federal area. Each government was to have jurisdiction and control over its own respective area and receive the revenues therefrom.

Zones 2 and 3 were disputed areas and the mineral revenues from those two zones were the subject of the impounded escrow fund.

The preliminary "whereas" clause in the Interim Agreement recited the authority of the State Mineral Board, with the concurrence of the Attorney General of Louisiana, under Act 38 of the Louisiana Legislature of 1956, quoted above, "to negotiate and enter into agreements or stipulations for and on behalf of the State with the United States, respecting . . . the *deposit in escrow* or impounding of bonuses, rents, royalties and other sums payable thereunder pending settlement or adjudication of the controversy . . . ," thus giving notice of the authority of the negotiators for the State. (Emphasis added.)

The escrow or impounded fund involved here is set up in paragraph 7(a):

"(a) . . . The United States agrees to impound in a separate fund in the Treasury of the United

> States a sum equal to all bonuses, rentals, royalties and other payments heretofore or hereafter paid to it for and on account of each lease, or part thereof, in Zones 2 and 3, being the disputed area. . . . "

Paragraph 7(e) then provides that such payments be made to the Oil and Gas Supervisor, United States Geological Survey, New Orleans, Louisiana, or the official or agency then designated by the United States to receive such payments "for impoundment in a separate fund in the Treasury of the United States."

Paragraph 8 requires that the holder of the funds render a monthly statement which shall reflect the amount received from each lease and the nature and source of the funds.

Paragraph 9 provides that the impounded funds shall be "*held intact* in a separate account" until the title to the disputed area is determined, as follows:

> "9. . . . The impounded funds provided for herein shall be held intact, in a separate account for each lease or portion thereof affected, by each party until title of the area affected is determined."

Paragraph 9(b) provides that the funds shall be "taken from" the separate and impounded fund and paid to the State.

C. *The federal government used escrow funds for its own purposes*

The only information that the State of Louisiana has been able to obtain at this time concerning the use of the escrowed funds by the federal government is disclosed by certain meager correspondence from officials in the Treasury Department. This correspondence contains admissions that make it clear that the revenues paid to the federal government from the disputed zones were not in fact impounded in a separate fund in the Treasury of the United States and held intact until the title controversy is determined as required by the Interim Agreement, but rather, the oil and gas revenues from the disputed zone were paid to the Supervisor of the United States Geological Survey and, by him, deposited in a deposit fund with the Federal Reserve Bank in New Orleans, Louisiana in the name of the Bureau of Land Management, bearing Treasury Symbol No. 14 X 6709, and were available for general governmental use.

The general governmental uses for which the funds were available included (1) the purchase of goods and services to be used by the federal government, (2) payment of interest on the federal debt, and (3) the increase of the Treasury's cash balance of the Federal Reserve Bank and thereby, the reduction of the need for borrowing in the open market.

The information available discloses that the funds received by the federal government from the lease of tidelands before 1956 had been deposited in the general account (checking account) of the United States Treasury. On July 31, 1956, the Comptroller General approved the transfer of funds from a receipts account

to a liability account. The account entry had no effect on the availability of the cash to the Treasury. Thus, the accounting change in 1956 simply represented a change in the terminology describing the source of the funds from a receipt (equity) to a deposit (liability) account. The United States Treasury has had free and unrestricted use of the cash, but no records are available to indicate the source of the cash which was expended.

Nothwithstanding that one of the letters from the Treasury Department stated that no expenditures have been charged to the liability account, another letter admits that the federal government withdrew approximately $184.3 million of impounded funds at the time of the accounting for the December 13, 1965 Decree. Efforts to get further information by correspondence have been unavailing.

Further information is needed to ascertain whether the impounded funds were used to acquire additional revenues, or to retire government bonds and other obligations in lieu of borrowing the funds in the open market, or for payment of general expenses.

The federal government should be required to disclose this information in order to render to the State "a true, full, accurate and appropriate account," as required by paragraph 6(b) of the 1975 Decree.

In *Hinckley v. Gilman*, 100 U.S. 591 (1879), the Supreme Court of the United States said:

> "Appellant was dealing with a trust fund. It was his duty to keep this money separate from his own.

> . . . It was also his unquestionable duty, when called on in a proper case for accounting, as this was, to give all the information he had on the subject. His refusal to answer proper questions is wholly unjustifiable, and leaves his conduct open to criticism as to his motive."

2. INTERIM AGREEMENT MANIFESTS INTENT TO HOLD IMPOUNDED FUNDS IN TRUST

A. *Intent of Interim Agreement is to hold impounded funds in escrow*

As revealed by the statement of facts set forth above, the Interim Agreement manifests a clear intent that the bonus, rentals and royalties from the disputed zones specified therein shall be held by the federal government in escrow in a separate fund for safe-keeping pending the final settlement or adjudication of the title controversy.

There is absolutely nothing whatsoever in the Interim Agreement to support the inference that the State's share of the impounded funds was loaned to the federal government, interest free, to be used as it pleased, with only the obligation of a debtor to repay the loan without any special Act of Congress when the title controversy was finally concluded.

The distinction between a debt and a trust is stated in 1 A. Scott, Law of Trusts §12.2 at 108 (2d ed. 1956):

> "The question in each case is whether it was intended that the person receiving the money should hold it for the benefit of another, or whether it

> was intended that he might use it as his own, being under a merely personal liability to pay a similar amount of money. In the latter case a debt and not a trust is created."

Everywhere, throughout the Interim Agreement, the intent is clear that "impoundment" means "escrow," and that "impound in a separate fund" means "deposit in an escrow account," and that "impounded funds" means "escrowed funds."

As noted above, the "whereas" clause of the Interim Agreement refers to Act 38 of the Louisiana Legislature of 1956 giving the Mineral Board and Attorney General of the State of Louisiana the authority to negotiate an agreement for the "deposit in escrow or impounding" of the oil and gas revenues from the disputed zones. The words "deposit in escrow" and "impounding" are used synonymously.

The state officials had no authority to lend the State's money to the federal government for its own use, interest free, and they certainly did not intend to do so. Their only authority was to negotiate for the deposit of the oil and gas revenues in escrow for safe keeping.

In the interpretation of the Interim Agreement, it cannot be presumed, in the absence of explicit and unequivocal language, that the state officials intended to violate their authority, known to both parties. 17 AM. JUR. 2d *Contracts* §254 at 647.

Furthermore, it has been admitted by the federal government in pleadings heretofore filed in this case

that the impounded funds are to be held in escrow.

In No. 15, Original, *United States v. Louisiana*, during the month of June, 1956, there was filed with this Court a "Memorandum for the United States on Maintenance of Status Quo" which contained the following admissions on behalf of the federal government:

> "Responding to the invitation of the Court for an expression of views, the United States submits that it is most important that the development of the submerged coastal lands continue without interruption during the period of litigation in this Court, under an agreement of the parties to *escrow* receipts, if possible, but that it continue in any event.
>
> ***
>
> "The United States stands ready and willing to enter into an agreement with Louisiana to hold all proceeds of leasing in the disputed area in *escrow* pending a determination of the case on its merits." (Emphasis added.)

As noted above, the escrow fund is established in paragraph 7 of the Interim Agreement by the provision that "the United States agrees *to impound in a separate fund in the Treasury of the United States*" the mineral revenues from the disputed zones, and it is particularly significant that paragraph 9 provides:

> ". . . The impounded funds provided for herein shall be *held intact*, in a separate account for each lease or portion thereof affected, by each party

> until title to the area affected is determined." (Emphasis added.)

and that paragraph 9(b) provides:

> "Any funds derived from an area finally determined to be owned by the State of Louisiana . . . *shall be taken from the separate and impounded fund* in the Treasury of the United States provided for herein . . . and paid to the state." (Emphasis added.)

That type of language is never the language used for the creation of a debt. It is clearly the language used for the creation of an escrow agreement.

The only reasonable and logical interpretation that can be made of the Interim Agreement is that the parties intended to hold the impounded funds in escrow.

B. *Money held in escrow is held in trust*

It is well established by federal cases and in common law that money held in escrow is held in trust. *Gulf Petroleum S. A. v. Collazo*, 316 F. 2d 257 (1963); *Scully v. Pacific States Savings & Loan Co.*, 88 F. 2d 384 (1937); *Parker State Bank v. Pennington*, 9 F. 2d 966 (1925); *Buchanan v. Brentwood Federal Savings & Loan Association*, 320 A. 2d 117 (1974); *Hill v. Severn*, 258 N.Y.S. 2d 857 (1965); *Squire v. Branciforti*, 2 N.E. 2d 878 (1936). *Farago v. Burke* 186 N.E. 683 (1933).

Trusts are generally classified into three groups: (1) express trusts, which includes trusts implied in fact from the intention of the parties, (2) resulting

trusts, and (3) constructive trusts. The latter two classifications are created by operation of law, regardless of the express or implied intent of the parties. G. Bogert, Bogert on the Law of Trusts, §451 at 498 *et seq.* (4th ed. 1963).

On the establishment of an express trust implied in fact, it is said:

> "No particular form of words or conduct is necessary for the manifestation of intention to create a trust. It is possible to create a trust without using the word 'trust' or 'trustee.'" 1 A. Scott, Law of Trusts, §24, at 192 (3d ed. 1967).

See same statement in Restatement of Trusts (Second) Vol. 1, §24.

Perry treats a trust that is created by the intention of the parties, but not expressly declared in terms as an "implied trust." This is a trust implied in fact, not implied by operation of law. In G. Perry, Trusts §112 at 144 (7th ed. 1929), it is said:

> "Implied Trusts are those that arise when trusts are not directly or expressly declared in terms, but the courts, from the whole transaction and the words used, imply or infer that it was the intention of the parties to create a trust. Courts seek for the intention of the parties, however informal or obscure the language may be; and if a trust can fairly be implied from the language used as the intention of the parties, the intention will be executed through the medium of a trustee."

The trust created by the Interim Agreement is a

trust implied in fact from the manifest intent of the parties to deposit the funds in escrow to be held intact until the final determination of the title controversy.

In *Gulf Petroleum S.A. v. Collazo,* the Court held that where the purchaser of a tract of land deposits part of the purchase money with the seller "in escrow" until certain conditions are met, the escrowed funds are held in trust. This case also settles the principle that a person may create a trust in which he himself is a beneficiary of the trust, and it is not necessary to have a third party to establish a trust by deposit in escrow. 2 A. Scott, Law of Trusts, §114 (3d ed. 1967).

Directly in point is the recent case of *Buchanan v. Brentwood, Federal Savings & Loan Association.* In that case, a group of mortgagors brought a class action against a number of lending institutions to require the mortgagees to account for the profits derived from their investment of monthly tax and insurance payments that were held by the mortgagees in escrow accounts.

The Court held that the allegations that the monthly payments were held in escrow stated a cause of action sufficient to put at issue the creation of a trust requiring the trustee to account for the profits derived from the escrowed funds.

The Court said at 123:

> "This Court in Vosburgh's Estate, 279 Pa. 329, 123 A. 813 (1924), provided specific guidance for the resolution of the question whether the

parties intended to create a trust. There we held that

'[a] trust is a relation between two persons, by virtue of which one of them as trustee holds property for the benefit of the other. The term "trust" is a very broad and comprehensive one. Every deposit is a trust, except possibly general bank deposits; every person who receives money to be paid to another or to be applied to a particular purpose is a trustee. . . .' Accord, *In re Interborough Consol. Corp.*, 288 F. 334, 347 (2d Cir.), cert. denied, 262 U.S. 752, 43 S.Ct. 700, 67 L.Ed. 1215 (1923); *Andrew v. Union Savings Bank & Trust Co.*, 229 Iowa 712, 715, 263 N.W. 495, 497 (1935); *Carpenter v. Suffolk Franklin Savings Bank*,—Mass.—, 291 N.E.2d 609 (1973). See 1A. Scott, Law of Trusts §24, at 192 (3d ed. 1967)."

3. OBLIGATIONS OF UNITED STATES AS TRUSTEE

A. *Federal law requires that all funds held in trust by the United States, and the annual interest accruing thereon, shall be invested at not less than 5% per annum*

In 1841, Congress passed an act requiring that *all* funds held in trust by the United States, together with annual interest thereon, be invested in interest-bearing securities.

31 U.S.C. §547(a) provides:

"*All* funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in

> stocks of the United States, bearing a rate of interest not less than 5 per centum per annum." (Emphasis added.)

This statute is not limited to trust funds created by Act of Congress or specified or identified by any federal statute or governmental department or agency. Nor is it limited to trusts for any specific purpose.

This statute refers to "all" funds held in trust by the United States which include the funds held in escrow under the Interim Agreement, which are trust funds created by that agreement and not by an Act of Congress.

Therefore, the federal authorities were required by their own law to invest the funds in the escrow account in interest-bearing securities at a rate of not less than 5% per annum.

Failure to invest the trust funds as required by law is a breach of the fiduciary duty of the trustee and makes the United States chargeable to the State of Louisiana to account for the compound interest that should have been recovered under the statute.

B. *Under common law, United States, as trustee, is liable for interest for failure to invest crow funds*

Regardless of any federal statute, it is a well established principle of common law that it is the duty of a trustee to invest trust funds, absent express directions to the contrary, and if he fails to do so for an unreasonable length of time, he is liable for interest at the legal rate.

In Restatement of Trusts (Second) §181 at 391, it is said:

> "c. Money. In the case of money, it is normally the duty of the trustee to invest it so that it will produce an income. The trustee is liable if he fails to invest trust funds which it is his duty to invest for a period which is under all the circumstances unreasonably long. If, however, the delay is not unreasonable, he is not liable."

In the same vein, it is stated in 45 AM. JUR. 2d *Interest* §72, at 65:

> "Generally although not invariably, interest against a fiduciary who fails to invest funds is chargeable at the legal rate."

Certainly, no one can deny that the failure to invest trust funds for nineteen years is an unreasonably long time.

The federal government, as trustee of the tidelands escrow funds, should disclose the amount that was not invested and account to the state for interest on such amount prevailing during the period of time that the trust funds were not properly invested.

C. *United States, as trustee, is liable for interest where escrow funds are appropriated to its own use, regardless of profit*

It is elementary in the law of trusts that a trustee cannot use the trust funds for his own use, and if he does so, he is liable for interest, regardless of whether or not he made any profit by the unauthorized use of the funds.

In 90 C.J.S. *Trusts* §341(a) at 588 the general rule is stated:

> "A trustee who uses trust funds in violation of his duty, applies them to his own use, or appropriates trust property to himself, is liable for interest."

The text further states:

> "A trustee is liable for interest if he uses trust funds in violation of his duty, *or applies trust funds to his own use or profit*, as where he makes investments and takes title to himself individually; and this is true although he received no return from his investment." (Emphasis added.)

Also, in 76 AM. JUR. 2d *Trusts* §511 at 731, it is stated that the trustee may even be liable for compound interest where he applies trust funds to his own use:

> "He (trustee) must also account for interest on trust property or funds that he has wrongfully converted and *where a trustee has applied trust funds to his own use*, it has been held that he may be charged with compound interest although cases considering the liability of fiduciaries for compound interest are not harmonious . . . ." (Emphasis added.)

It is quite obvious, from the information now available to the State, as noted above, that some, if not all, of the State's share of the tidelands money has been used by the federal government for general governmental expenditures, contrary to the fundamental duty of a trustee.

The nature and amount of these disbursements and expenditures should be disclosed and the United States, as trustee of this escrow account, should account to the State for interest at the legal rate on the trust funds so used for federal governmental purposes.

4. EQUITY REQUIRES RESTITUTION OF EARNINGS OR SAVINGS OR THE VALUE DERIVED BY USE OF THE ESCROW FUNDS TO PREVENT UNJUST ENRICHMENT

Aside from the obligations of the federal government as trustee of escrowed funds implied from the intent of the Interim Agreement, equity will impress a constructive trust on the earnings or savings, or the value derived from the use of the state's share of the impounded funds and will require restitution to prevent unjust enrichment.

A. *Constructive trust is equitable remedy to prevent unjust enrichment by United States from use of escrow funds*

The generally accepted definition of a constructive trust is stated in 89 C.J.S. *Trusts* §15 at 726:

> "The term 'constructive trust' is broadly defined as a trust raised by construction of law, or arising by operation of law, as distinguished from an express trust; but in a more restricted sense and contradistinguished from a resulting trust, it is defined as a trust not created by any words, either expressly or impliedly evincing a direct intention to create a trust, but by the construction of equity in order to satisfy the demands of justice."

In 76 AM. JUR. 2d *Trusts* §221 at 447, it is said:

> "A constructive trust is substantially an appropriate remedy against unjust enrichment."

and again at 448 in 76 AM. JUR. *Trusts* §233 states:

> "The forms and varieties of constructive trusts are practically without limit."

A good discussion of the concept of constructive trust is found in Volume 71 of the Law Quarterly Review, January, 1955, p. 39, by the eminent authority on trusts, Austin Wakefield Scott. The author defines a constructive trust:

> "As to the concept of a constructive trust, I think that the best that we can do is to give a rough working description of it.
>
> This we attempt to do in the Restatement of Restitution which was promulgated by the American Law Institute in 1936. It is there stated (§160):
>
> > 'Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.'
>
> "Certainly this is a pretty broad statement. It is not, perhaps, as broad as that which Judge Cardozo made when sitting on the Court of Appeals of New York, who said: 'A constructive trust is the formula through which the conscience of equity finds expression.' "

Furthermore, it is particularly significant that

the Court in *Buchanan v. Brentwood Federal Savings & Loan Association*, pointed out that: "Although the existence of fraud may be sufficient justification for finding a constructive trust, it is by no means necessary." 320 A. 2d at 126, n. 15, *citing* 5 A. Scott, Law of Trusts §462 at 465-73 (3d Ed. 1967); Restatement of Restitution §160 at 163-171 (1937); *Dubin Paper Company v. Insurance Company of North America*, 63 A. 2d 85 at 94-95 (1949).

It has been held that a constructive trust may be established against anyone who is unjustly enriched, even though he has been guilty of no act of wrongdoing. *Reiff v. Hall*, 35 D. & C. 2d 661 at 664 (Lehigh 1964). Also it has been held that a constructive trust may be established on the grounds of public policy, independent of the existence of actual fraud. *Proctor v. Sagamore Big Game Club*, 265 F. 2d 196 (1959); and *Dubin Paper Co. v. Insurance Company of North America.*

Professor Litvinoff of Louisiana State University Law School, in his Louisiana Civil Law Treatise on Obligations in §71 at 101-102, notes that the obligation to make restitution for unjust enrichment is a remedial concept of the civil law, as well as the common law, and has the following to say on what constitutes unjust enrichment:

> "According to Restatement of the Law of Restitution a person is enriched whenever he receives a benefit. 'He is unjustly enriched if the retention of the benefit would be unjust. Benefit is said to mean any form of advantage; not merely add-

ing to the assets of the other but also saving the other from loss or expense.' "

It is self-evident that the federal government has been unjustly enriched if it has earned interest or made a profit by the use of the State's share of the tidelands funds. But also, the federal government has been unjustly enriched by using the tidelands funds to liquidate debts, just the same as if it had earned interest on the funds, for it has saved the interest it would have had to pay if the money had to be borrowed. As Benjamin Franklin once said: "A penny saved is a penny earned."

B. *Constructive trust will be impressed on earnings or savings derived from use of impounded funds*

The plaintiffs in the *Buchanan* case, as an alternative ground for the recovery of the profits derived from the tax and insurance escrow fund held by the mortgage companies, relied upon a constructive trust. They contended that if an express trust was not created by the intent of the agreements, then the earnings should be impressed with a constructive trust.

The trial Court sustained the demurrer of the lending institutions because the plaintiffs had failed to allege fraud in the transaction, but the Court held that the petition stated a cause of action for a constructive trust on the ground of unjust enrichment, and concluded:

"Appellants are to be given the chance to offer evidence that would convince 'the conscience of equity' that the retention by the mortgage lend-

ing institutions of the profits earned on the monthly payments would result in unjust enrichment."

The principle that equity will require the restitution of the profit derived from the use of funds belonging to another to prevent unjust enrichment has been held by the United States Supreme Court to apply to the United States government as against a claim of immunity from interest without an Act of Congress.

In *Henkels v. Sutherland*, 271 U.S. 298 (1926), a citizen of the United States brought suit in the Federal District Court for the Southern District of New York under the Trading with the Enemy Act to recover the proceeds of stock mistakenly seized and sold as enemy property. After the stock had been sold, the proceeds were commingled with other alien enemy funds and invested in interest-bearing securities of the United States.

The Treasurer paid the principal amount to plaintiff, which was accepted.

Subsequently, plaintiff filed an application for the appointment of a master to determine the amount of interest, which was denied on the ground that plaintiff had accepted the principal and executed a release.

On appeal, the Circuit Court held that the United States was not liable for income resulting from the investment of the funds in its own securities.

On appeal, the United States Supreme Court held that plaintiff is entitled to an accounting for the interest derived from the investment of the proceeds

of the sale of plaintiff's stock, as well as the principal.

This Court said:

"The Government cannot be sued without its consent; and, accordingly, it cannot be sued for interest unless it consents to be liable therefor. But the claim here is not for interest to be paid by the United States in the sense of the rule. It is for income, derived from an investment of Henkels' which income has been actually received by the Treasury and is in its possession to be held, as the proceeds themselves are held, for the account of the alien property custodian.

***

"Whether the Government shall pay interest upon its obligations depends upon congressional assent; but it cannot confiscate the actual increment of property belonging to a citizen, or the increment of the proceeds into which such property has been converted, any more than it can confiscate the property or its proceeds, without coming into conflict with the constitution.

"The Government contends that *Angarica v. Bayard*, 127 U.S. 251, is to the contrary, and the court below so held. In that case, the suit was for interest or income realized upon the amount of an award in favor of Angarica paid by the Spanish Government to the United States. This court, in denying the right of recovery, applied the general rule of immunity from interest, saying that the claim is not different in character from what it would have been if, instead of being a claim for increment or income actually received by the United States, it were a claim for interest gen-

erally, or for increment or income which the United States would or might have received by the exercise of proper care in the investment of the money. Without challenging the correctness of this view as applied to the precise facts of that case, it cannot be accepted as a rule of general application. Especially it cannot be accepted as applicable here, where the property of a citizen has been mistakenly seized and by executive authority, after conversion into money, has been invested in government securities. We cannot bring ourselves to agree that a direction to invest such money in securities of the United States, rather than in other securities, may be utilized to enable the Government unjustly to enrich itself at the expense of its citizens, by appropriating income actually earned and received which morally and equitably belongs to them as plainly as though they had themselves made the investment."

C. *Equity requires payment of interest as restitution for value derived from use of State's share of impounded funds*

To the extent that the impounded money was used by the federal government for general governmental purposes, as inferred by the government disclosures set forth in the foregoing statement of facts, equity will require restitution for the value of such use in order to prevent the unjust enrichment of the federal government at the expense of the State of Louisiana.

It was so held by the United States Circuit Court for the 5th Circuit in *Phillips Petroleum Company v. Adams*, 513 F. 2d 355 (1975), which involved money held in suspense by the oil company pending the de-

termination of an F.P.C. rate case on the price of gas.

Phillips purchased gas from another lessee in the Panhandle Field in Texas in excess of the ceiling price for gas set by the Federal Power Commission and applied for an increase in the rate. Pending the hearing on the application for rate increase, Phillips paid on the ceiling price and held the excess in suspense and used the money for its own business purposes. When the rate increase was finally approved, Phillips paid the principal of the excess it had been holding in suspense, but did not pay interest.

The Circuit Court held that Phillips was obligated to pay interest for its use of the suspense money:

> "We also conclude that Phillips must pay interest on the principal sum of the suspense money, and we accordingly reverse the judgment of district court on this point. . . . To exonerate Phillips from its interest obligation here would be to give the pipeline company an extracontractual lagniappe, for it is incontrovertible that Phillips has derived a very considerable benefit from the unrestricted use of the Adams family's money. Phillips may say that its possession and utilization of funds to which it had no pretense of claim was reasonable, or even that its actions were necessary, but Phillips cannot be heard to say that it is fair and equitable that it should enjoy such a financial advantage for so long, and pay not a cent for it."

5. ADDITIONAL ACCOUNTING IS REQUIRED

For the foregoing reasons, it is submitted that the United States should account to the State of Louisiana

for the profit or savings derived, or value received, from the use of the State's share of the funds impounded in a separate fund in the Treasury of the United States under the Interim Agreement from date of first deposit until distribution.

For the failure to invest the trust funds as required by federal statute, the United States, as trustee of the escrowed funds, should account to the State for the compound interest that it should have recovered, if it had complied with the law.

Insofar as interest has been collected on the escrowed funds, the federal government should account to the State for its share of the amount actually received, regardless of the legal rate of interest.

Insofar as the escrowed funds have been used to retire indebtedness, or in lieu of money on which the federal government would have had to pay interest, the federal government should account to the State for its share of the amount saved, or if the amount is not ascertainable, for the legal rate of interest on the funds so used.

Insofar as the escrowed funds have been used by the federal government for general governmental purposes, an accounting should be made to the state for the legal rate of interest on the State's share of the amount so used.

Such accounting should be made with respect to the amount distributed pursuant to the Supplemental Decree of December 13, 1965 in this case, from date of first deposit in 1956 to date of distribution in 1965.

Such accounting should also be made with respect to the amount distributed pursuant to the 1975 Decree, when finally audited and approved, from date of first deposit to date of distribution.

CONCLUSION

Under the authority set forth in the Objections, Louisiana will urge to the Special Master its objections to the accounting, including the claim against the United States for interest or value of the use of the escrowed funds and any other unresolved issues, so that the Special Master may report to the Court on these matters, thereby enabling the Court to render a final decree on the accounting.

Respectfully submitted,

/s/ William J. Guste, Jr.

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October 1975

PROOF OF SERVICE

I, the Attorney General of the State of Louisiana, certify that copies of the foregoing Objections by the State of Louisiana to Accountings and Payments by the United States under the Supplemental Decree of June 16, 1975, and Memorandum Brief in support thereof, have been properly served on the 22nd day of October, 1975, by personal service, to the Solicitor General and to the Attorney General of the United States, Department of Justice, Washington, D. C. 20530.

/s/ William J. Guste, Jr.

October 1975