No. 9, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, ET AL.,
Defendants.

EXCEPTIONS OF THE STATE OF LOUISIANA TO THE FIRST ISSUE IN THE SUPPLEMENTAL REPORT OF THE SPECIAL MASTER FILED AUGUST 27, 1979 WITH BRIEF IN SUPPORT OF EXCEPTIONS AND MOTION FOR ORAL ARGUMENT

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GLOSSARY

1. "Exh." number and "LPI" number:

Louisiana introduced into evidence fourteen exhibits, identified as "La. Exh." (number). Each exhibit, except numbers 13 and 14, contained numerous documents identified by an "LPI" number, meaning "Louisiana Preliminary Identification" number. Hence, for example, a particular document will be identified as "La. Exh. 1-LPI 19."

2. "Tr." Number:

The page number of the transcript at which any quotations from the transcript are made will be identified by "Tr." followed by the page number, except as to the deposition of federal witness, George S. Swarth, which will be referred to for identification as "Dep. Tr." followed by the page number.

3. "Tidelands money":

The term "Tidelands money" will be used to mean the oil and gas revenues derived from the properties offshore Louisiana that are in dispute in this litigation and have been subject to impoundment pursuant to the Interim Agreement of October 12, 1956.

4. "Louisiana's money":

The term "Louisiana's money" will be used to mean Louisiana's share of the "Tidelands money" as shown by the accountings by the United States filed pursuant to the Supplemental Decrees of this Court rendered on December 13, 1965 and on June 16, 1975 and the various pretrial orders of the Special Master.

5. "A." Number:

The Appendix is referred to by the letter A, followed by the item number and the page number on which the item appears, for example, A. 7 p. 3.

6. "Interim Agreement";

The "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," executed on October 12, 1956, as amended, is herein called the "Interim Agreement."

7. "Report":

The Special Master's Supplemental Report of August 27, 1979, is herein referred to as "Report."

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EXCEPTIONS

Pursuant to Order entered by this Court on October 1, 1979, receiving the Supplemental Report of August 27, 1979 by the Special Master in this cause and granting the parties 45 days within which to file exceptions, if any, the State of Louisiana, through its Attorney General, herewith files four exceptions to the determination made by the Special Master on the First Issue considered in his Supplemental Report.

All of the exceptions relate only to the First Issue which is entitled:

> "*First Issue* - Is the United States obligated to account for and pay to the State of Louisiana either the value of the use of Louisiana's share of the impounded funds or interest upon that portion of those funds?"

Louisiana accepts and urges the approval of the Supplemental Report insofar as it relates to the other two issues discussed therein, which are entitled:

> "*Second Issue* - Does Louisiana have the obligation to account for revenues received by it from mineral leases on areas lying within Zone 1?"

> "*Third Issue* - Does Louisiana have the obligation to account for unimpounded funds and to pay to the United States money collected by it as severance taxes on minerals removed from areas subsequently determined to belong to the United States?"

Louisiana's exceptions to the First Issue in the Report are as follows:

1. The State of Louisiana excepts to the failure of the Special Master to conclude that the Interim Agreement imposed upon the United States the fiduciary duty of a trustee in the handling of the Tidelands money.

2. The State of Louisiana excepts to the failure of the Special Master to conclude that the United States used Louisiana's money for its own purposes without compensation to Louisiana and without any authority under the Interim Agreement.

3. The State of Louisiana excepts to the failure of the Special Master to conclude that the United States had the duty to invest the Tidelands money for the benefit of both parties.

4. The State of Louisiana excepts to the conclusion of the Special Master that the equitable remedies to prevent the unjust enrichment of the United States at the expense of Louisiana are inappropriate to the situation here presented.

WHEREFORE, the State of Louisiana moves the Court to modify the Supplemental Report of the Special Master filed on August 27, 1979 as to the First Issue therein in accordance with the foregoing Exceptions, and refer this issue back to the Special Master for his determination and recommendation to this Court of the amount for which the United States should account and pay to Louisiana for the value of the use of Louisiana's money or for interest thereon, and the State of Louisiana moves the Court to approve the Supplemental Report as to the Second Issue and the Third Issue therein.

The State of Louisiana, through its Attorney General, further moves the Court, in view of the importance of this litigation to Louisiana, that this case be set for oral argument after all briefs have been filed.

In further response to said Order of October 1, 1979, Louisiana concurrently herewith files its brief and appendix thereto in support of the foregoing exceptions.

Respectfully submitted,

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BRIEF IN SUPPORT OF EXCEPTIONS OF THE STATE OF LOUISIANA TO THE FIRST ISSUE IN THE SUPPLEMENTAL REPORT OF THE SPECIAL MASTER FILED AUGUST 27, 1979

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SUMMARY OF ARGUMENT

1. The argument in support of Exception 1 sets forth the pertinent evidence and law which conclusively establishes that the impoundment provisions of the Interim Agreement implied a trust which imposed upon the United States the fiduciary duty of a trustee in the handling of the Tidelands money. The principal basis for the trust is that it is implied from the impoundment provisions of the Interim Agreement which established an escrow arrangement, and it is well-settled law that money held in escrow is money held in trust. However, there are additional grounds for the establishment of the trust, independent of the escrow, which are based upon admissions of federal officials and documentary evidence, as well as the conduct and relationship of the parties. The Special Master erred in that he did not give consideration to the decisive evidence and law, and to his own findings in his Order on Louisiana's Motion for additional findings of facts, which proved the fiduciary relationship.

2. The argument in support of Exception 2 sets forth the admissions and evidence which establishes that the United States used Louisiana's money for its own purposes without compensation to Louisiana and without any authority under the Interim Agreement. It is admitted that the Tidelands money was deposited in the Federal Reserve Bank to the General Account of the Treasurer of the United States, where it was immediately available to meet any cash needs of the federal gov-

ernment whatsoever. It is also admitted that when the cash was deposited to the General Account of the Treasurer, a bookkeeping entry of an equal amount was made on a *deposit fund account* in the Treasury Department which is only a liability account. No cash was deposited in that account. In addition, an expert witness testified that Louisiana's money was actually used by the United States and documented the basis for his conclusion. The evidence also shows that there is no authority in the Interim Agreement for the United States to use Louisiana's money for its own purposes without compensation. The Report gives no valid reason for failing to conclude that the United States used Louisiana's money for its own purposes without authority. The Report misinterprets the provision in the Interim Agreement requiring the impounded funds to be "held intact in a separate account" in that it mistakenly assumes that a liability account is all that is required. The argument also points out that the assumption that Louisiana representatives accepted the procedure used in the California case for the handling of the money is not supported by the record.

3. The argument in support of Exception 3 presents the reasons why the Special Master should have concluded that the United States had the duty to invest the Tidelands money for the benefit of both parties. For the breach of this duty the United States is required to account to Louisiana for the amount of interest that would have accrued to the impounded fund if proper investment had been made. There are several

grounds upon which the obligation to invest is based and the Special Master erred in not giving predominance to any of them. The argument sets forth each of the several grounds upon which the duty to invest is based and discusses the response in the Report with respect to each ground. In addition, the argument points out that the June 16, 1975 Decree does not limit or adjudicate what need be accounted for, but it is to be determined by the Interim Agreement and applicable law.

4. The argument in support of Exception 4 deals with Louisiana's contention that the United States has been unjustly enriched by the use of Louisiana's money. The basis for the unjust enrichment is clearly shown by the evidence. Authorities are cited to show that the United States should be required to account for the value of the use of Louisiana's money under a constructive trust as an increment to the impounded fund, or by way of quasi contract, as an unimpounded personal obligation. The Report does not address the merits of this issue and cites no authorities to justify the denial of equitable relief. The Report simply states that the United States has not breached the terms of the Interim Agreement, which is not the issue.

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ARGUMENT IN SUPPORT OF EXCEPTIONS

INTRODUCTORY STATEMENT

Back in 1956, and for some time prior thereto, the United States had been holding lease sales and issuing oil and gas leases covering the area claimed by Louisiana. In order to try to stop this activity, Louisiana filed suit in the state court to enjoin a federal lease sale set for May of 1956. Whereupon the United States filed a motion in No.15, Original to enjoin the State of Louisiana from proceeding with its efforts to stop the proposed federal lease sale in the disputed area offshore Louisiana. Tr. 33, 34, 35, 36, 66, A. 1, 2, 3, 4, 5, 6, 7 pp. 1, 2, 3. As a result of the motion filed by the United States, this Court issued an order on June 11, 1956 which provided:

> "It is further ordered that the State of Louisiana and the United States of America are enjoined from leasing or beginning the drilling of new wells in the disputed Tidelands area pending further order of this Court unless by agreement of the parties filed here." La. Exh. 1-LPI 1; Tr. 23 A. 6 p. 2.

This led to the execution of the Interim Agreement of October 12, 1956. Tr. 36. The virtual shutdown of oil and gas operations offshore Louisiana by this injunction caused economic chaos in southern Louisiana and put great pressure on the Louisiana negotiators to enter into an agreement to lift the injunction. La. Exh. 1-LPI 13, Tr. 108-112, A. 8, 9, p. 4. Request No. 8 in Louisiana's Motion for Additional Findings of Fact stated:

> "8. Enjoining the drilling and leasing for oil and gas off the coast of Louisiana had a severe economic impact on the coastal parishes of Louisiana. Under these circumstances, the Interim Agreement of October 12, 1956 was entered into to permit the United States and Louisiana to resume the drilling and leasing for oil and gas in the Gulf of Mexico off the coast of Louisiana. (See preamble to La. Act 38 of 1956, La. Exh. I-LPI No. 3; Tr. 108-112; Tr. 158; Tr. 112-117)"

In denying this request as immaterial, the Special Master stated:

"Request No. 8 correctly states the facts . . ."

As a consequence of the Interim Agreement, the Tidelands money was delivered to the Treasury of the United States to hold under the impoundment provisions of the agreement. The relevant impoundment provisions are as follows:

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

> ". . .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 . . ." (Emphasis added.) A. 10, 11, 13, pp. 6, 9.

Paragraph 7(a) of the Interim Agreement provides:

> "[T]he 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 the disputed area.

Paragraph 7(e) provides that the Oil and Gas Supervisor, United States Geological Survey, New Orleans, Louisiana, or the official or agency designated by the United States shall 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:

> ". . .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." (Emphasis added.)

Paragraph 9(b) provides that 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" and paid to Louisiana.

The Report at the outset states that "indisputably the Interim Agreement does not specifically provide for the payment of interest . . ." and then sets forth Louisiana's position to be as follows:

> "The State of Louisiana argues, however, that the term 'impounded' necessarily implies an obligation of the part of the holder of the funds to pay interest thereon." Report 5.

But that is not what Louisiana contends. The Special Master has apparently misconstrued Louisiana's position to be that the word "impounded" implies an intention to let the United States hold the money with the right to do with it as it pleases, provided that it pays interest to Louisiana in addition to the principal amount ultimately determined to be due. But that assumes that Louisiana agrees that the impoundment provisions of the Interim Agreement are tantamount to a loan of money and would constitute a debt and Louisiana's claim is only for interest. In the interpretation of the Interim Agreement, there is a big difference between the obligation to pay interest on the impounded fund as a debt, and the obligation of a trustee to invest the trust funds and account to the beneficiary for the proceeds of the investment. 1 A. Scott, Law of Trusts §12.2 at 108 (2d ed. 1956), A. 12 p. 6. This misconception of Louisiana's position permeates the Report and is a basic fallacy in the conclusion.

Louisiana contends that for the failure to comply with its fiduciary duty, the trustee must account to the beneficiary for the amount of interest that would have accrued under proper investment. In that sense only, does Louisiana claim interest. Louisiana has never contended that it loaned its money to the United States and seeks interest on a debt. The Louisiana negotiators had no authority to loan the state's money and certainly did not intend to do so.

Louisiana's true position is based on two alternative grounds. The first ground deals with the duty of the United States, as a trustee, to invest the Tidelands money and for the failure to do so, to account to Louisiana for its share of the amount that would have accrued to the impounded fund if proper investment had been made. This is implied from all of the impoundment provisions of the Interim Agreement, not just the word "impound," and from the application of the law. The breach of the fiduciary duty of the United States in its refusal to honor Louisiana's request to invest the Tidelands money, and the failure to follow a federal statute requiring investment are also within the scope of this ground.

The second ground deals with the unjust enrichment of the United States at the expense of Louisiana by the use of Louisiana's money for federal governmental purposes without compensation to Louisiana. In order to prevent this unjust enrichment, the United States is obligated to account to Louisiana, as a matter of law, independent of the Interim Agreement, either upon the basis of a constructive trust or quasi contract, for the amount of the value to the United States of its use of Louisiana's money.

EXCEPTION 1

Louisiana excepts to the failure of the Special Master to find that the Interim Agreement imposed upon the United States the fiduciary duty of a trustee in the handling of the Tidelands money.

The impoundment provisions of the Interim Agreement implied a trust which imposed upon the United States the fiduciary duty of a trustee in the handling of the Tidelands money. The trust which established the fiduciary relationship is implied in fact from the intent of the Interim Agreement.

All text writers agree that no particular form of words is necessary for the manifestation of the intention to create a trust. A trust can be created without using the word "trust" or "trustee." Implied trusts arise when the whole transaction and the words used imply or infer that it was the intention to create a trust. 1 A. Scott, Law of Trusts, §24, at 192 (3rd. ed. 1967); Restatement (Second) of Trusts, Vol. 1, §24 (1959); 1 J. Perry, Trusts §112 at 144 (7th ed. 1929).

The impoundment provisions of the Interim Agreement evidence the intent that the Tidelands money is to be held in escrow. Paragraphs 7(a) and 9 of the Interim Agreement, when read together, provide that the Tidelands money shall be impounded in a separate fund in the Treasury of the United States and held intact in separate account for each lease or portion thereof affected. These provisions, along with the other impoundment provisions, and the attached Exhibits, manifest the intent to establish an escrow.

The Report concludes that there is an ambiguity as to the meaning of the term "impounded" as used in the Interim Agreement. Report 6. If this means that the term "impoundment" does not mean escrow, we disagree. It is permissible to offer extrinsic evidence in the interpretation of contracts, even when the contract is free from ambiguity. This "concedes the supremacy of the writing and merely seeks to illuminate its meaning." McCormick on Law of Evidence, Ch. 24, p. 442; Corbin on Contracts, Vol. 3 §539.

Accordingly, Louisiana introduced testimony to show that the terms "impoundment" and "escrow" were used interchangeably throughout the negotiations. Tr. 40, 49, 128, 161, A. 14, p. 9. This was not objected to by the federal negotiators, nor is it now denied.

But even if the term "impoundment" is ambiguous, the intent that the Tidelands money was to be held in escrow is established by the repeated representations and admissions of the escrow relationship made by the federal negotiators and officials, before the commencement of the negotiations, during the course of the negotiations, and continuously after the execution of the Interim Agreement up to the trial of this case. La. Exh. I-LPI 40, LPI 39, LPI 38, Tr. 49-54, 162; La. Exh. I-LPI 21, LPI 22, Tr. 206; La. Exh. I-LPI 19, LPI 20, LPI 45, LPI 23, Tr. 198, 208, 210, 444, 463-464.

The Report states that "both parties used the term 'escrow' rather freely and loosely." Report 7. But the record is clear that the parties understood and meant what they said when they used the term "escrow." For example, in June of 1956, before the commencement of the negotiations for the Interim Agreement, there was filed in No. 15, Original (the proceedings leading to the Interim Agreement) a Memorandum for the United States on Maintenance of Status Quo which contained the following representation:

> "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.) Tr. 49-50, A. 15 p. 9.

As further proof that the parties intended an escrow arrangement, the record shows that at the first meeting with the federal negotiators on July 2-3, 1956, Louisiana proposed a "Stipulation" providing for a third party escrow agent. Tr. 40-46, 158-159, La. Exh. I-LPI 5, A. 16 p. 10. But that proposal was rejected by the federal negotiators and they, in turn, proposed that the money be held by the United States in a "single escrow fund." La. Exh. I-LPI 6; Tr. 121-123; A. 17, 18, pp. 10, 11. Louisiana acceded to the demands of the United States to act as escrow holder because of the enormous political pressures, but with the understanding that the obligations of an escrow holder would be the same for the United States as with a third party escrow agent, and there would only be a change of depository. Tr. 47-48, 162-163. The Louisiana witness testified:

"Q. Is it a fact, Mr. Carmouche, that one of the reasons that you agreed to the change of the proposal that the money be held by a third party escrow agent to the United States was due to the fact that you thought there would only be a change of depository?

"A. Yes, We were assured of that." Tr. 48, A. 19, 20 pp. 11, 12.

This testimony was not contradicted. But the Report states that if the funds were to be handled identically in either case there would seem to be little point in the insistence that the United States act as escrow agent, and furthermore, the federal negotiators had no specific authority to enter into a third party escrow agreement. Report 7. The United States offered no testimony on this point. Whatever may have been their motive, this evidence shows that the federal negotiators assured Louisiana that the obligations of the United States would be the same as a third party escrow agent, and no question of authority was ever raised.

Subsequent to the execution of the Interim Agreement, the interpretation that the impoundment provisions of the Interim Agreement meant escrow was repeatedly confirmed by federal officials. A. 21, 22, 23 pp. 13-17.

Having determined that the term "impounded" was ambiguous, the Report shows that the Special Master only considered facts at the time the agreement was entered into to determine the meaning of the agreement. Report 6. He should also have considered how the parties had subsequently interpreted the agreement. *Godfrey v. Unit-*

ed States Casualty Company, 167 F. Supp. 783 (1958) citing Wigmore on Evidence, Vol. IX, §2470, p. 227; *Moreau v. Otis Elevator Co.*, 531 F. 2d 311 (1976).

It is well-established law that money held in escrow is money held in trust. There is no question about this. Exhibit No. 105, introduced by the United States, at p. 17 states:

> "The duties and responsibilities of a trustee are imposed upon an escrow agent."

Cited as authority for that statement is *Farago v. Burke*, 237 App. Div. 351 (N.Y. 1933). The same case on appeal is at 186 N.E. 683 (1933). Other cases establishing the same rule are: *Hill v. Severn*, 258 N.Y.S. 2d 857 (1965); *Squire v. Branciforti*, 2 N.E. 2d 878 (1936); *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 Ass'n.*, 320 A. 2d 117 (Pa. 1974).

In addition to the escrow arrangement as the basis for the trust, the only federal negotiator to testify admitted that the Treasury had a fiduciary responsibility in holding the funds to be impounded under the Interim Agreement. Dep. Tr. 9, A. 24 p. 17.

Further, documents from California, introduced by Louisiana in this case, disclose that the United States Treasury officials represented that the use of the identical deposit fund account subsequently used in this case as the "escrow account" creates a fiduciary relationship in the nature of a trust, although not officially designated as a trust. La. Exh. 9-LPI 155, Dep. Tr. 39, La. Exh. 9-LPI 161, U.S. Exh. 47, A. 25 p. 17.

The facts as set forth above showing that the impoundment provisions of the Interim Agreement implied a trust are either admitted to be correct or not denied by the Special Master in his Order on Louisiana's motion for additional findings of fact.

Louisiana in its motion for additional findings of fact included as Request 9 the offer by the United States "to hold all proceeds of leasing in the disputed area in escrow," made in the Memorandum on the Maintenance of Status Quo quoted above. This request was denied on the ground that the memorandum was filed in a case not before the Special Master. But No. 15, Original, in which the memorandum was filed, was the proceeding that led to the execution of the Interim Agreement, so that the offer to hold the money in escrow is particularly significant as it referred to an agreement that ultimately became the Interim Agreement.

The Motion for additional findings of fact included:

> "10. During the negotiations for the Interim Agreement, the Federal negotiators represented to Louisiana that the money from the disputed area would be held in escrow. (La. Exh. I-LPI 38, 39, and 40; Tr. 50-54)"
>
> "11. Subsequent to the execution of the Interim Agreement, the interpretation that the impoundment provisions of the Interim Agreement meant escrow was repeatedly con-

firmed by Federal officials. (La. Exh. 1-LPI 20, 21, 22, 13 and 45; Tr. 206, 208, 210)."

In ruling on these requests, the Special Master stated:

> ". . . This appears to be correct; however, this fact does not alter the term of the agreement itself. . ."

Since the Special Master had already concluded that the term impoundment was ambiguous, this fact could not alter the terms of the agreement, but only interpret it.

The Motion for additional findings of fact included:

> "6. Mr. George S. Swarth, an attorney, the only federal negotiator to testify, admitted that the holding of the impounded fund by the Treasury was a fiduciary responsibility. (Dep. Tr. 9)"
>
> ***
>
> "12. Mr. Arnold Petty, Assistant Director of Administration for the Bureau of Land Management, agreed with the characterization of the Interim Agreement as 'in effect our escrow agreement.' (Tr. 444)
>
> "13. Dr. John Haslem, expert witness for the United States, gave his opinion that the Federal Government treated the account under the impoundment provisions of the Interim Agreement in the same manner as a bank would treat an escrow account. (Tr. 836)"

In ruling on these requests (along with 17 and 28) the Special Master said:

> ". . .The summary of the testimony as given in the requests appears to be correct . . ."

The conduct of the parties in the administration of the offshore oil and gas properties confirmed the fiduciary relationship in the sense that it was in the nature of the conduct of joint venturers, which constitutes a fiduciary relationship. Tr. 116-117; 128-129; *DeWitt v. Sorenson*, 288 F. 2d 455 (5th Cir. 1961); *Walls v. Gribble*, 124 P. 2d 713 (Ore. 1942); *Selwyn & Co. v. Waller* 106 N.E. 321 (N.Y. 1914); *Fitz-Gerald v. Hull*, 237 S.W. 2d 256 (Tex. 1951); *O. K. Boiler & Welding Co. v. Minnetonka Lumber Co.*, 229 P. 1045 (Okla. 1924); *May v. Hellrick Bros. Co.*, 167 N.Y.S. 966 (1917); *Nelson v. Abraham*, 177 P. 2d 931 (Cal. 1947); *Stein v. George B. Searin, Inc.*, 184 A. 436 (N.J. 1936), A. 26 p. 19.

Therefore, Louisiana submits that the Special Master did not give consideration to the evidence and law which conclusively established that the impoundment provisions of the Interim Agreement implied a trust and imposed upon the United States the fiduciary duty of a trustee in the handling of the Tidelands money.

EXCEPTION 2

The State of Louisiana excepts to the failure of the Special Master to conclude that the United States used Louisiana's money for its own purposes and without any authority under the Interim Agreement.

The manner in which the Tidelands money was handled is undisputed. Report 11, A. 27 p. 21. The Tidelands money was deposited in the Federal Reserve Bank to the General Account of the Treasurer of the United States, where it was immediately available to meet any cash needs of the federal government whatsoever. Dr. Donald Woodland, who is presently Dean of the College of Business Administration at Louisiana State University, formerly employed as a financial economist for the Federal Reserve Bank, qualified as an expert witness in banking and finance and explained what happened to the money. He introduced a Flow Chart of Escrow Funds (La. Exh. 1-LPI 41, A. 28 p. 22) to show its progress into the General Account of the Treasurer. Dean Woodland concluded:

> "From examination of the records, they indicate that the Federal Government had complete use of the moneys that were deposited in the Federal Reserve Banks. The funds were available for general use of the Treasury." Tr. 187

When the cash was deposited to the General Account of the Treasurer, a bookkeeping entry of an equal amount was made on a deposit fund account, designated 14X6709 in the Treasury Department. The deposit fund account is a liability account. There was no cash deposited to that account. Tr. 188-189, 397-399, A. 29 p. 22. Then when partial distribution was made pursuant to Court Decree, the money came from the General Account of the Treasurer without regard to source. Tr. 190-191.

The deposit fund account has frequently been referred to by federal officials as the Tidelands Escrow Account. These facts have all been admitted.

This is clearly evidenced by the United States' response to Interrogatory No. 8 of the First Set of Interrogatories propounded by Louisiana on July 23, 1976:

> "The statement is correct insofar as revenues from disputed lands were placed in the general account of the Treasurer (which is to be distinguished from the general fund of the Treasury) where they became immediately available to meet any cash needs of the Government whatsoever, and a bookkeeping entry was utilized to indicate the deposit fund liability of the United States with respect to such funds. The January 19, 1972 letter and the December 11, 1971 memorandum referred to in the Answer to Interrogatory No. 7 are incorporated herein as a more complete explanation." Tr. 200-202.

The letter and memorandum referred to (La. Exh. I-LPI 22, 20, and other letters of similar import from federal officials to Louisiana Senators (La. Exh. I-LPI 21, 19, A. 30 p. 24) confirm these facts and show that the United States used Louisiana's money. A high federal official, in his letter to Senator Long of December 13, 1971, stated:

"The effect of this is to make funds paid into the general account unrestricted (except for general rules of law) as to the purpose for which the moneys can be spent, in the same manner in this respect as if there were no escrow account." La. Exh. I-LPI 19, Tr. 198.

In addition, Dean Woodland gave four reasons to prove that Louisiana's money was used. A. 31 p. 28.

First, is the admission in the letter of December 22, 1971, from the Commissioner of Accounts of the Treasury Department, to the office of the General Counsel of the Treasury Department, that deposit fund receipts *are used* to finance general expenditures. La. Exh. I-LPI 20.

Second, Dean Woodland testified that since 1956, the federal government has run a deficit in that they have spent more money than they have taken in, and the only way the deficit was corrected was by borrowing. Therefore, he said, since the federal government spent more than they took in, the expenditures had to include Louisiana's money. La. Exh. I-LPI 42, 48, Tr. 213-216, 217-218.

Third, Dean Woodland testified that the velocity concept, as applied to this case, confirms the conclusion that the federal government had to have used Louisiana's money. He testified that the average turnover of all Treasury receipts was at the rate of about 113 times a year. This establishes that Louisiana's money must have been included in the expenditures. La. Exh. 11-LPI 182, 183, Tr. 904-909.

Fourth, The Summary of Fiscal Operations prepared by the United States Treasury shows, on its face, that money which was subject to Deposit Fund Liability was used to pay off the public debt. La. Exh. 11-LPI 184, Tr. 908-914.

As Dean Woodland concluded: "The money was used." Tr. 921.

There is no provision in the Interim Agreement that authorizes the United States to use the Tidelands money for its own purposes without compensation to Louisiana. The Louisiana negotiators testified that there was no understanding or agreement that United States could have free use of the money. Tr. 55, 129, 136, 163, 173, 175, A. 32 p. 33.

We submit that under the evidence and formal admissions of the United States, there is no valid reason for failing to conclude that the United States used Louisiana's money for its own purposes without authority.

The Report states that the amount of money on deposit in the General Account of the Treasurer was at all times adequate to pay in full any award to Louisiana and at no time was the ability of the United States to perform its obligation under the Interim Agreement impaired. Report 12, 14. But that fact does not disprove the evidence that the money was used. The evidence does not indicate that the maintenance of a cash balance was any limitation on the expenditures. Dean Woodland testified that the maintenance of a cash balance had no relevancy to expenditures or to the use of Louisiana's money. Tr. 904, 921. In fact, the use of Louisiana's money to maintain a cash balance would itself constitute a use of Louisiana's money for federal governmental purposes.

The Report further states that the United States did not have unrestricted use of the money because the amount of the liability recorded on the deposit fund account was not available for appropriation. Report 12. But the conclusion is contrary to the admissions of the United States and its fiscal officers.

As to the authority of the United States to use the Tidelands money, the Report in effect concludes that even though the money is deposited to the general account of the Treasurer, the maintenance of a liability deposit fund account is all that is necessary to satisfy the requirement in the Interim Agreement that the impounded funds be *held intact in a separate account*. Report 12-14. But this is contrary to the testimony of Louisiana's expert witnesses. Mr. Jerry Walker, partner in the international accounting firm of Arthur Andersen & Co., who qualified as an expert witness in accounting and finance, summed it up on cross-examination:

> "A. The Deposit Fund Account is not an account of the nature which would comply with the Interim Agreement.
>
> "Q. Is it not a separate account?
>
> "A. It is a separate liability account.

> "Q. And the agreement requires something other than a separate account?
>
> "A. It requires an account in which you can repose assets, cash or securities, or whatever it might be.
>
> "Impounding, as I mentioned before, in defining impound, impound speaks of cash or other assets as it's said in the definition. And you cannot hold intact in a liability account cash or other assets. It is a contradiction in terms." Tr. 311.

Both Dean Woodland and Mr. Walker were repeatedly asked whether the deposit fund account was a separate account sufficient to comply with the requirements of the Interim Agreement. They both repeatedly replied that the deposit fund account was a separate *liability* account and that was not sufficient to comply with the contract. Mr. Walker further testified:

> "Well, again, I keep coming back to this particular point. The Deposit Fund Account is a bookkeeping account. It simply keeps track of the amount of funds that have been received to date and how much are due by the Federal Government. You cannot impound funds in such an account." Tr. 311-312.

Finally, the Report states that the money was handled in the same manner as in the California case and the representatives of Louisiana were fully aware of this fact and accepted this method as proper under the Interim Agreement. But the evidence is conclusive that the Louisiana negotiators were *not* aware of the manner in which the money in the California case was handled and that there is no *evidence* that they accepted that method as sufficient. Tr. 93, 94, A. 33 p. 35.

EXCEPTION 3

The State of Louisiana excepts to the failure of the Special Master to conclude that the United States had the duty to invest the Tidelands money for the benefit of both parties.

The Special Master should have concluded that the United States had the duty to invest the Tidelands money for the benefit of both parties. There are several grounds upon which the obligation to invest is based and the Special Master erred in not giving predominance to any of them. It is just a question of when the duty to invest commenced. For the breach of this duty, the United States is required to account to Louisiana for the amount of interest that would have accrued to the impounded fund if proper investment had been made.

(a) The duty of the United States to invest the Tidelands money for the benefit of both parties is implied from the express provisions of the Interim Agreement that "the impounded *funds* provided for herein shall be *held intact* in a separate account for each lease or portion thereof affected."

The evidence shows that the United States set up the procedure for handling the Tidelands money in complete disregard of the Interim Agreement and acted only in accordance with Treasury policies. Two months before the Interim Agreement was executed, the federal Treasury set up the deposit fund account involved here pursuant to a decision from the Comptroller General (La. Exh. I-LPI 27, A. 34 p. 37) authorizing a change in the accounting from a receipts account to a liability account, or deposit fund account. This was simply a bookkeeping entry on the liability side of the balance sheet and had no effect whatsoever on the use of the money by the Treasury. Tr. 191-192. Then when the Interim Agreement was executed on October 12, 1956, absolutely nothing happened and there was no change at all in the manner in which the money was being handled. The federal witness admitted that the deposit fund account was set up pursuant to Treasury Department policies and not by the requirements of the Interim Agreement. Tr. 405-406, A. 35 p. 38.

The Report states that "although this account was established in accordance with accepted government procedures prior to the execution of the Interim Agreement, this appears to be immaterial if it in fact conformed to the requirements of that agreement." Report 12. The Report then takes the position that the Interim Agreement only requires that the "fund itself," meaning the bookkeeping accounts, be held intact, and not the Tidelands money. Report 14.

But Mr. Walker testified that this is a misconstruction that would render meaningless the provision in the Interim Agreement that the "impounded funds" be held intact. He said:

> "A. But what did happen, of course, when the Interim Agreement was signed, in fact, was nothing. They continued to use the Deposit Fund Account as a bookkeeping or scorekeeping function to determine how much accumulated funds had been received from the Tidelands. And to believe that no additional

> obligation was imposed through the Interim Agreement would be to believe that the words 'impoundment' or 'to be held intact', 'impounded in a separate account' would be meaningless." Tr. 295.

A Dictionary for Accountants by Eric L. Kohler defines "impound" to mean "to seize and hold in protective custody . . . cash or other assets." Tr. 281, A. 36 p. 38.

Mr. Walker testified that the requirement that the "impounded *funds*" must be *held intact* created an obligation on the United States to invest the Tidelands money, for the benefit of both parties. Tr. 296-297, 347-348, 389-394, 890-892, 900-901, A. 37, 38 pp. 38, 39. Mr. Walker testified that the investment of the funds was an implicit requirement of the terms of the Interim Agreement:

> "Q. Would the Treasury have to have invested the funds in order to meet the requirements of the Interim Agreement?
>
> "A. In my opinion, yes. At some point in time they would have had to begin to invest." Tr. 308-309.

He gave his opinion as to what should have been done to satisfy the requirements of the Interim Agreement. He testified that the Tidelands money should have been held in a restricted account and after the lapse of a reasonable time, the money should have been invested in short term government securities and the proceeds credited to the impounded fund as an increment thereto, and then the process be continually repeated until distribution. What period of time is regarded as reasonable is a matter for the determination of the

United States Treasury, as depository, giving consideration to all of the facts and circumstances existing at the time. Mr. Walker suggested six months to a year, or year and a half, at the most. An exhibit and transcript of Mr. Walker's testimony explaining this procedure is included in the Appendix. La. Exh. I-LPI 49, Tr. 260-267, A. 39 p. 40.

In this way the United States could have used Louisiana's money in compliance with the Interim Agreement. What they did do was to use Louisiana's money in violation of the Interim Agreement.

Mr. Walker said:

> "A. As I stated before, the Interim Agreement states that the funds were to be impounded in a separate account and that they were to be held intact."
>
> "In my opinion that was not the case. The funds were not impounded, nor were they held intact." Tr. 256-257.

(b) Even if the Interim Agreement did not contain express provisions which imply the obligation to invest the Tidelands money for the benefit of both parties, such an obligation is imposed upon the United States, as a trustee, as a matter of law. It is well settled that a trustee has the duty to prudently invest the trust funds, absent express directions to the contrary, and if he fails to do so for an unreasonable length of time, he is chargeable with the amount of income which normally accrues from proper trust investment.

Sec. 181 of the Restatement of Trusts provides:

> "The trustee is under a duty to the be-

> neficiary to use reasonable care and skill to make the trust property productive.
>
> "Comment: . . . 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.
>
> "If the trustee commits a breach of trust in neglecting within a reasonable time to invest the money, he is chargeable with the amount of income which normally would accrue from proper trust investments. See §207."

See also Restatement of Trusts, §180, Comment d; *Langford v. Shamburger*, 392 F. 2d 939 (5th Cir. 1968); *Blankenship v. Boyle*, 329 F. Supp. 1089 (D.C. 1971); *Bartlett and Company, Grain v. Commodity Credit Corp.*, 307 F. 2d 401 (8th Cir. 1962). A. 40 p. 47.

The Report cites no authorities to the contrary. The Report, however, rejects this contention by concluding that "the deliberate omission of a provision for the payment of interest from the Interim Agreement amounts to an understanding that it would not be paid." This conclusion is said to be based on the testimony of two of Louisiana's negotiators who stated that the reason the question of interest was never discussed was that "they knew that the United States would not enter into the agreement if a provision for the payment of interest was incorporated in it." Report 8.

But we submit that this misconstrues the full context of the relevant testimony of these witnesses which is set forth in the Appendix. A. 41, 42 pp. 52, 54. Three of the original negotiators for Louisiana testified at the trial and one federal negotiator gave his deposition. The negotiators testified that the subject of interest was never discussed, and that the subject of the investment of the money was never discussed. The full context of the testimony of the Louisiana's negotiators referred to in the Report indicates that they were referring to the rejection of Louisiana's proposal that the Louisiana banks act as third party escrow agents. The Louisiana negotiators testified that there was no understanding or agreement that the United States could have free use of Louisiana's money and one said that Louisiana would never have entered into such an agreement. This testimony amounts to a denial of any understanding that interest would not be paid. Therefore, it is unreasonable to assume such an understanding by silence. Since the subject of interest was never discussed, any statements with respect to what the parties might or might not do (other than the discussion of the Louisiana escrow proposal) would be a subjective mental reservation. It is well settled that in the interpretation of contracts, consideration will not be given to undisclosed mental reservations of the parties. 17A C.J.S. Contracts §295 at 66-67; Corbin on Contracts §538 at 506-509; *First National Bank in Dallas v. Rozelle*, 493 F. 2d 1196 (1974); *Bach v. Friden Calculating Mach. Co.*, 155 F. 2d 361 (1964); *United States Nav. Co. v. Black Diamond Lines*, 147 F. 2d 958 (1945).

Corbin, *supra* at 508, had this to say:

> "The court is not searching for an unexpressed mental state; instead, it is searching for the meanings that each party intended to convey by his words and acts, and for the meanings that those words and acts conveyed to the other party."

But, in any event, there is one fact that was discussed that should settle this matter. The record is undisputed that both parties thought that the Interim Agreement would be of short duration. One Louisiana negotiator said:

> "and we discussed this on many occasions in the negotiations between the Federal Government and the State of Louisiana--we thought it would take about a year. You thought it would take six months." Tr. 69.

During the negotiations, the federal negotiators proposed that the agreement be limited to a period of six months and Louisiana proposed one year. La. Exh. I-LPI 6, Tr. 125-126, A. 43 p. 56. In view of the expressed belief by both parties that the contract would be of short duration the most unfavorable construction that could be put on the testimony of the Louisiana negotiators would be to infer a temporary acquiescence of not more than a year or a year and a half. The United States would then be required to invest the Tidelands money under the implied obligation of the Interim Agreement or under the law. It would be entirely unreasonable to infer an understanding by the silence of the Louisiana negoiators that the United States could have free use of Louisiana's money for over twenty-three years.

Therefore, the United States had the duty to invest the Tidelands money (whether required by the implied obligation of the Interim Agreement, or by the fiduciary obligation of a trustee, as a matter of law) within the reasonable time of a year and a half after the execution of the agreement of October 12, 1956.

(c) The refusal of the United States to honor Louisiana's request to take such steps as are necessary to invest the Tidelands money and accrue the profit as an increment to the impounded fund constituted a breach of the fiduciary relationship.

On June 6, 1967, the Louisiana legislature adopted Concurrent Resolution No. 251 which requested:

> "Be it Further Resolved that the Legislature of Louisiana does hereby respectfully request and urge the above named officials to take such steps as are necessary to effect a prudent and effective investment of the funds now and hereafter so impounded, with a view to increasing the increment deriving both to the Federal Government and to the State of Louisiana." A.44 p. 57.

But, instead of complying with this request, Mr. John Carlock, Fiscal Assistant Secretary for the United States Treasury, wrote a letter on June 14, 1967, to the Governor of Louisiana, in which he stated:

> "In response to the request that the funds be invested by the United States, I must inform you that the Treasury Department is not able to make investments in the absence of statutory authority." La. Exh. 13-LPI 180.

This response was made on behalf of the Treasury Department of the United States, the Secretary of the Interior, the Attorney General and the Solicitor General to whom copies of the Resolution had been sent. A. 45 p. 58.

But certain documents discovered shortly before the trial of this case and introduced into evidence, reveal that the United States, by its own representations, did have authority to agree to the investment of the impounded funds under the Outer Continental Shelf Lands Act.

Prior to the passage of the Outer Continental Shelf Lands Act on August 7, 1953, the then-Fiscal Assistant Secretary for the United States Treasury, in his letter to the California Comptroller, stated that money held in custody by the Treasurer of the United States could not be invested unless specifically authorized by law. La. Exh. 9-LPI 155, A. 46 p. 58.

Then, after the passage of the Outer Continental Shelf Lands Act, Mr. J. Lee Rankin, Assistant Attorney General of the United States, sent to California a proposed stipulation which contained the following provision:

> "The United States may invest and reinvest any of the funds covered by this paragraph in obligations of the United States Government, and all interest received, as well as any increase or decrease in the value of the investments, shall accrue to or be charged against said fund as the case may be." La. Exh. 9-LPI 166.

This was followed by a letter referring to the proposed stipulation in which Mr. Rankin said:

> "This draft contained authority for the United States to invest the funds held by it."

Thus it appears that the demand by the Louisiana Legislature was refused by Mr. Carlock's letter, notwithstanding the fact that there was statutory authority in the Outer Continental Shelf Lands Act after August 7, 1953, as interpreted by agents and officials of the United States.

This conclusion was admitted by the federal negotiator when Mr. Rankin's letter and the proposed stipulation were presented to him on cross-examination at his deposition. Dep. Tr. 44-45.

Therefore, at the very latest point in time, the United States should have commenced investing the impounded funds and accrued the proceeds for the interests of both parties, upon receipt of this Resolution.

In *Blankenship v. Boyle, supra,* it is said:

> "The beneficiaries were in no way assisted by these cash accumulations, while the Union and Bank profited; and in view of the fiduciary obligation to maximize the trust income by prudent investment, *the burden of justifying the conduct is clearly on the trustee.*" (Emphasis added.)

Louisiana has met the burden of establishing the fiduciary obligation to invest the Tidelands money and maximize the trust income by prudent investment. It was up to the United States to justify the refusal to do so on valid grounds. The refusal based upon the mistaken legal opinion that the Treasury had no statutory authority to make an investment, which had been refuted by the United States' own legal counsel, could not constitute a justifiable excuse.

These facts were the subject of Louisiana's motion for additional findings of fact, No. 2. In overruling the request, the Special Master said:

> "...The quotations from these documents given in the requests appear to be correct, as well as the statements regarding their preparation, delivery and receipt; ..."

The Report states that the language of the request was precatory and not demanding. Report 9. But the request was by formal Resolution of the Louisiana Legislature and was couched in the formal verbiage customary for demands by public bodies. The Report also finds that Louisiana "accepted this explanation, as it made no protest." Report 10. But the refusal was adamant. The law does not require a vain and useless protest. *Lex neminem cogit ad vana seu inutilia peragenda.* Furthermore, it has been held that where a trustee has benefitted by his actions, there is no question of acquiescence unless he had made a complete disclosure. *Langford v. Shamburger, supra.* The United States made no disclosure of the facts. The Report further concludes that in the absence of an amendment to the Interim Agreement, there was no obligation to invest. Report 10. But as a trustee, the United States should have complied with Louisiana's request, even if it required an amendment to the Interim Agreement in order to satisfy the federal accounting procedures.

(d) The 1841 Act of Congress requires that all funds held in trust by the United States, together with annual interest thereon, be invested in interest-bearing securities at not less than 5 percent per annum. 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 percent per annum." A. 47 p. 63.

The Report says that this statute does not apply to the present situation, (Report 8) but no reasons or authorities are given. This statute is not limited to trust funds created by special 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 purposes. This statute refers to "all" funds held in trust by the United States. If it means what it says, it applies to the Tidelands money held by the United States under a trust implied for the express language of the Interim Agreement.

This statute applies to implied trusts as well as expess trusts. The Outer Continental Shelf Lands Act authorized the parties to enter into an agreement for the impounding of the disputed money under such terms as they could agree upon. The act authorized an agreement to invest the impounded money if the parties should so provide. The parties did so provide. First, they agreed upon express language in the impoundment provisions of the Interim Agreement from which the obligation to invest is implied. Second, they agreed upon the creation of an escrow arrangement which constituted a fiduciary relationship from which the law required investment. Therefore, the obligation to invest the trust funds already existed and was further implemented by this statute.

The Report states that this statute does not authorize the payment of interest. Report 8. But, if the trustee invested the trust funds and made a profit, his fiduciary duty would require that he account to the beneficiary for its share, absent express authority to the contrary. 90 C.J.S. Trusts §341(a) at 599, A. 48 p. 64.

Therefore, it is submitted that the failure to comply with this statute makes the United States chargeable to account to Louisiana for compound interest at the rate of 5 per centum per annum that should have been recovered from investment under the mandate of the statute, commencing within a reasonable time after the execution of the Interim Agreement on October 12, 1956.

(e) The Report states that the Supplemental Decree of June 16, 1975 does not order any payment of an amount, either by way of interest or payment for the use of Louisiana's money. Report 14. But the 1975 Decree does not purport to limit or adjudicate the scope of the accountings. What is to be accounted for depends upon the provisions of the Interim Agreement and the applicable law. This is evident by paragraphs 8 and 11 of the Decree.

Paragraph 8 provides:

> "It is understood that the parties may be unable to agree on whether offsets are permit-

ted 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 parties have construed the word "affected" to mean "prejudiced." In the joint motion by the parties upon the submittal of this Decree, it was stated:

> "Additionally, paragraph 8 provides that present or future differences between the parties not expressly treated by the decree, are not *prejudiced* by the decree." (Emphasis ours.)

Paragraph 11 provides:

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

EXCEPTION 4

The State of Louisiana excepts to the conclusion of the Special Master that the equitable remedies to prevent the unjust enrichment of the United States at the expense of Louisiana are inappropriate to the situation here presented.

The United States has been unjustly enriched by the use of Louisiana's money for its own benefit without compensation to Louisiana. The evidence establishes: (1) The United States used Louisiana's money for its own governmental purposes, and thereby profited by the reduction in borrowing. (2) Louisiana suffered a loss by not receiving any benefit from the use of its money. (3) The enrichment is unjustified and inequitable and therefore constitutes unjust enrichment. The United States should be required to account for the value of the use of Louisiana's money under a constructive trust as an increment to the impounded fund, or by way of quasi contract as an unimpounded personal obligation. The Report does not address the merits of this issue and cites no authorities to justify the denial of equitable relief. The Report simply states that the United States has not breached the terms of the Interim Agreement. Report 11.

But the breach of contract is not the issue. The Special Master in effect found that the Interim Agreement only required the keeping of bookkeeping entries to record the amount of the Tidelands money deposited to the general account of the Treasurer and the ultimate payment to Louisiana of its share. Assuming that this interpretation is correct, which we deny, it may follow that the United States did not breach the contract by the use of the money, but it does not follow that the United States had *free* use of the money. The contract is silent on whether the United States must pay for the value of the use of Louisiana's money or pay interest for its use. It is sufficient that the Interim Agreement does not expressly authorize the use of Louisiana's money without compensation.

The prevention of unjust enrichment is a cardinal principle of equity. It appears as Sec. 1 of Restatement of the Law of Restitution:

> "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."

For a discussion of unjust enrichment, see *Unjust Enrichment: A Comparative Analysis* by John P. Dawson.

The equitable remedy of constructive trust should be impressed upon the amount of money saved by the United States from the use of Louisiana's money and would be an increment to the impounded fund. It would be subject to the impounded fund accounting. For the definition of a constructive trust, see: 89 C.J.S. Trusts §15 at 726; 76 Am. Jur. 2d Trusts §221 at 446; 76 Am. Jur. 2d Trusts §223, at 448; 71 Law Quarterly Review 39 (1955); *Buchanan v. Brentwood Federal Savings & Loan Association, supra.* Volume 5 of Scott on Trusts at §462, quotes Judge Cardozo, who, when sitting on the Court of Appeals of New York, said:

> "A constructive trust is the formula through which the conscience of equity finds expression."

Fraud is not necessary for a constructive trust. *Proctor v. Sagamore Big Game Club*, 265 F. 2d 196 (1959); *Dubin Paper Co. v. Insurance Company of North America*, 63 A. 2d 85, 94-95 (1949); 5 A. Scott, Law of Trusts §462 at 3102; *Springer v. Springer*, 125 A. 162, 168 (1924); *Franks v. Lockwood*, 150 A. 2d 215 (Conn. 1959); *Hill v. Waxberg*, 237 F.2d 936 (9th Cir. 1956).

Constructive trust is commonly applied to prevent unjust enrichment resulting from the breach of a fiduciary relationship. 71 Law Quarterly Review 47; 5 A. Scott, Law of Trusts §462 at 3102; 89 C.J.S. Trusts §151 at 1063; *McDonald v. Miller*, 16 N.W. 2d 270 (N.D. 1944).

The amount of money *saved* by the United States by the use of Louisiana's money in reducing its borrowing needs can constitute the *trust res* of a constructive trust. 71 Law Quarterly Review at 48; 5 A. Scott, Law of Trusts, §462.1 at 3106; S. Litvinoff, *Obligations* §71 at 101-102, 6 *Louisiana Civil Law Treatise*; 5 A. Scott, Law of Trusts §462.3 at 3107. Comment (b) to Sec. 1 of Restatement of Restitution states:

"b) He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss."

The evidence in this case shows that the United States used Louisiana's money to reduce its borrowing needs. The United States thereby saved the amount it would have otherwise had to pay as interest. The amount is ascertainable, and in fact, has been ascertained. While the amount for which the United States must account for the use of

Louisiana's money was not an issue at the hearings before the Special Master at this time, nevertheless, it is relevant that the amount is ascertainable with reasonable certainty. To establish this fact, calculations were made under simulated conditions which show that the United States saved approximately one billion and seventeen million dollars in interest by the use of the entirety of the Tidelands money, of which Louisiana's share as of June 16, 1975, would be about $88 million. Tr. 306-307, 308, A. 49 p. 65.

As an alternative, the equitable remedy of quasi contract should be imposed as an unimpounded personal obligation to prevent the unjust enrichment of the United States by the use of Louisiana's money. The amount of money saved by the United States would be subject to the unimpounded fund accounting. As with the constructive trust, the quasi-contractual obligation is imposed as a matter of law, and is not dependent upon agreement of the parties. For the definition of a quasi contract see: F. Woodward, *Law of Quasi Contracts*, §3 at 4-5; 21 Yale Law Journal 551; F. Woodward, *Law of Quasi Contracts*, §4 at 6 where it is stated:

> "He is bound, not because he has promised to make restitution--it may be that he has explicitly refused to promise--but because he has received a benefit the retention of which would be inequitable."

See also W. Keener, *A Treatise on The Law of Quasi Contracts* at 19; *Rice v. Wheeling Dollar Savings & Trust Co.*, 99 N.E. 2d 301 (Ohio 1951); *Herrmann v. Gleason*, 126 F. 2d 936 (1942); *Matarese v. Moore-McCormack Lines*, 158 F. 2d 631 (2nd Cir. 1946).

In *Phillips Petroleum Co. v. Adams*, 513 F. 2d 355 (5th Cir. 1975) there was no breach of contract, but the court gave equitable relief to prevent unjust enrichment. This case involved money held "in suspense" pending the final determination of an application for a rate increase before the Federal Power Commission. The court said:

> ". . . Phillips placed the suspense money in its general account and used it, presumably, in the manner most advantageous to the corporate fisc. Such a course was certainly sound business practice, and in no way repugnant either to the federal regulatory scheme or to Phillip's contractual relations with its suppliers. But that is not to say that Phillips may enrich itself with the income from the Adams family's suspense money in the absence of any contractual sanction."

The court concluded:

> "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 financial advantage for so long, and not pay a cent for it." A. 50a p. 66, 67.

In *Buchanan v. Brentwood Federal Savings & Loan Ass'n., supra*, there was no breach of contract, but the court held that equitable relief would be proper to prevent unjust enrichment once it is established. That case involved a claim by mortgagors that the profits earned from the tax and insurance escrow account of the lending institutions should be shared with the mortgagors. The court said:

> "The question whether a constructive trust is to be imposed on the profits earned by the investment of mortgage lending institutions of appellants' monthly tax payments can be resolved only by answering the more fundamental question whether 'the conscience of equity' would conclude that the mortgagees would be unjustly enriched were they permitted to keep the funds." A. 50b p. 69.

Equitable relief to prevent unjust enrichment has been applied against the United States notwithstanding a claim of immunity from interest. *Henkels v. Sutherland*, 271 U.S. 298 (1926) involved a claim under the Trading with the Enemy Act to recover the profit earned from the investment of the proceeds of stock mistakenly seized and sold as an enemy property. The United States Supreme Court said:

> "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." A. 51 p. 73.

Further, it is a well established principle that when a sovereign comes into court as a plaintiff, it loses its sovereign immunity, not only as to the right to be sued, but also as to any defense that may be based on immunity. When a sovereign comes into court as a plaintiff, it becomes subject to the same rules of law and equity that apply to private suitors. *United States v. National City Bank of New York*, 83 F. 2d 236 (1936); *The Gloria*, 286 F. 188 (1923); *Mountain Copper Co. v. United States*, 142 F. 625 (1906); *Walker v. United States*, 139 F. 409 (1905); *United States v. Barber Lumber Co.*, 169 F. 184 (1908).

The rule is concisely stated in *United States v. National City Bank of New York, supra*:

> "When a soverign sues, it may not expect a preferred status, for its suit is determined according to the rules applicable to private suitors in like cases."

From the above, it appears that under the common law the word "unjust" in the term "unjust enrichment" means unfair or inequitable. The enormous disparity in the value of the administrative services rendered by Louisiana for the gratuitous benefit of the United States, as compared to the pittance contributed by the federal agencies, makes the free use of Louisiana's money by the United States clearly inequitable.

Mr. Thomas M. Winfiele, long time Chief Engineer for the Louisiana Conservation Department, described in detail many valuable administrative services rendered by Louisiana resulting in benefit to the United States, at the cost to Louisiana of up to 39 percent the total annual Conservation Commission budget. La. Exh. 10-LPI 173 series, Tr. 928-939; La. Exh. 10-LPI 174 Series, La. Exh. 10-LPI 175 Series and LPI 176 Series, Tr. 939-946, 947-948, La. Exh. 10-LPI 172, Tr. 848-949.

Mr. Winfiele also testified about the program of secondary operations sponsored, encouraged and supervised by the Louisiana Conservation Department which was conducted on an area decreed by the court to be wholly federally owned, which resulted in great benefit to the United States. Tr. 951-956. The sum total of the estimated increase in ultimate recovery of oil due to these operations is 343, 384, 081 barrels. (La. Exh. 10-LPI 177). At the price of $5.59 per barrel prevailing at the time of the trial before the Special Master, the total value of the additional oil recoverable through secondary recovery operations should be about $2 billion dollars from which the United States would receive its royalty. Tr. 956-958 A. 52 p. 75.

There is nothing in the record to show that the United States did anything except hold a few drainage lease sales with the assistance of Louisiana in accordance with Interim Agreement, and act as depository for the money.

Under these circumstances, it would be unconscionable for the United States to also receive free use of Louisiana's money.

CONCLUSION

WHEREFORE the State of Louisiana requests that the Supplemental Report of the Special Master filed August 27, 1979 be modified as to the First Issue in accordance with the foregoing Exceptions and that the Supplemental Report be accepted and approved as to the Second Issue and the Third Issue and that the Special Master be ordered to proceed to make his recommendation to the Court as to the amount for which the United States should account and pay to the State of Louisiana for the value of the use of the escrowed funds or for interest on the funds.

Respectfully submitted,

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PROOF OF SERVICE

I, the Attorney General of the State of Louisiana, certify that copies of the foregoing Exceptions of Louisiana to the First Issue in the Supplemental Report of the Special Master filed August 27, 1979, with brief in support thereof, and appendix thereto and Motion for Oral Argument have been properly served on the 15th day of November, 1979, by mailing copies, sufficient postage prepaid, 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.
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November, 1979