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.

APPENDIX TO THE 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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INTRODUCTION

Background of Interim Agreement

1. The United States moved for leave to file suit in the United States Supreme Court against the State of Louisiana to quiet title to the submerged lands off the coast of Louisiana on December 19, 1955. A copy of the complaint accompanied the motion. *Motion of the United States for Leave to File Complaint, Complaint and Brief in Support of Complaint*, No. 15 Original.

2. On March 26, 1956, the motion was granted, 350 U.S. 990, and the proceeding by the United States against Louisiana for ownership of the submerged lands off the coast of Louisiana was commenced as No. 15 Original.

3. Mr. Edward W. Carmouche "filed in State Court, the Fourteenth Judicial District, . . . a case entitled *State of Louisiana vs. Anderson Pritchard, et al., and the United States Government* [which] led to an injunction being granted . . . to enjoin the sale and any trespassing being committed by the oil companies and the Federal Government in the disputed area." Testimony of Edward W. Carmouche, Tr. 33.

4. "The Federal Government and the oil companies sought to remove the case to the Federal Court, and they were successful in getting it removed to the Western District before Judge Hunter presiding. And Judge Hunter also granted the State of Louisiana an injunction." Testimony of Edward W. Carmouche, Tr. 35.

5. The Federal Government then filed a motion in *United States v. Louisiana*, No. 15, Original, in the United States Supreme Court to stay the injunction that had been granted in the *Anderson Pritchard* case. Testimony of Edward W. Carmouche, Tr. 35.

6. As a result of that motion, the Supreme Court of the United States issued an order on June 11, 1956 which provided:

> "No. 15, Original. UNITED STATES v. LOUISIANA.
>
> Upon consideration of the motion of the United States for an injunction or other interlocutory relief in cases involving the controversy pending before this Court in the case of *United States of America v. State of Louisiana*,
>
> IT IS ORDERED that the Attorney General of the State of Louisiana and others named and others acting with them are enjoined from further prosecuting or taking any proceedings in a certain cause now pending in the Fourteenth Judicial District Court in and for the Parish of Calcasieu, State of Louisiana, entitled *State of Louisiana v. Anderson-Prichard Oil Corporation et al.*, Number 38780 on the docket of said court, and from prosecuting any other case or cases involving the controversy before this Court until further order of the Court, and
>
> 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." *United States v. Louisiana*, 351 U.S. 978 (1956)

7. That motion of the Court's order resulting therefrom is part of the present case [Tr. 35-36]:

"Q. That motion filed by the Federal Government was in Number 15 Original?

"A. Yes, sir.

"Q. In the United States Supreme Court?

"A. Yes, sir. There was some confusion. Some of the papers were filed, Original Number 9; and some of them were Number 15. But the Anderson Prichard case was, generally speaking, entitled Original Number 15.

"Q. Now, the motion filed by the Federal Government in Original Number 15, that is this case?

"A. That is correct.

"Q. And the number has changed over the years by various terms of the Court?

"A. Yes.

"Q. But it is still the litigation which is now pending before —

"A. That is a correct statement.

"Q. (Continuing) — the Special Master?

"A. Right.

"Q. Then, the United States Supreme Court then issued, as a result of the Federal Government filing a motion to enjoin the actions which had been commenced by Louisiana, the Federal Government then issued the injunction of June 11, 1956, as recited in the Whereas provision of the Interim Agreement, is that correct?

"A. That is correct.

"Q. So that thereby the Interim Agreement was born?

"A. Yes, sir. That led to the Interim Agreement."

8. The effect of the June 11, 1956 injunction shutting down operations in the disputed area was described as "almost catastrophic" by Mr. C. J. Bonnecarrere, Secretary of the Louisiana State Mineral Board. Testimony of C. J. Bonnecarrere, Tr. 109.

9. Pressure to reach an agreement for the continuation of operations pending litigation was great as indicated by the July 23, 1956 letter from the Offshore Operators Committee signed by quite a number of oil and gas operators in the offshore area and addressed to Hon. Fred A. Seaton, Secretary of the Interior; Hon. Herbert Brownell, Jr., Attorney General of the United States; Hon. William G. Hellis, Jr., Chairman of the State Mineral Board; and Hon. Jack P. F. Gremillion, Attorney General of Louisiana:

"While the sweeping injunction had not been anticipated, the oil and gas industry immediately foresaw the harsh and irreparable damage that would be suffered if an agreement were not reached between Louisiana and the United States before a complete shutdown of drilling operations occurred in the disputed tidelands area. Accordingly, during this six-weeks period we have attempted diligently to maintain full employment in spite of our inability to begin the drilling of new wells. In some instances, we used expensive rigs and equipment on reworking operations that should have been moved to new locations for the drilling of exploratory or development wells; and in isolated cases, we have moved rigs into the area that is not in dispute. However, even this good-faith effort has not prevented a partial shutdown and cannot under any circumstances prevent a complete shutdown unless the injunction against future drilling is removed.

***

"To avoid the serious dislocation and financial loss which will inevitably occur by the continuance in effect of the injunction, we urge you to enter into a stipulation which will grant immediate relief to the industry and the public in this situation. We respectfully submit that this can be satisfactorily accomplished by the filing at this time of a stipulation covering two points on which apparently no controversy exists between the United States and the State of Louisiana. These points are:

1. That the injunction be modified to permit the resumption of drilling under existing leases;

> 2. That all future payments accruing under these leases be despoited in escrow pending the final settlement or adjudication of the controversy between the United States and the State of Louisiana."
>
> La. Exh. 1 - LPI No. 13; Testimony of C. J. Bonnecarrere, Tr. 108 - 112; Testimony of Marc Dupuy, Jr., Tr. 158.

10. In order to lift the injunction, the Legislature of the State of Louisiana enacted Act 38 of 1956 which authorized the State Mineral Board with the concurrence of the Attorney General to enter into agreements or stipulations with the United States as provided for in the injunction order of the United States Supreme Court. Act 38 specifically granted authority to enter into agreements "respecting . . . the deposit in escrow or impounding in whole or in part of bonuses, rents, royalties, and other sums payable thereunder pending the settlement or adjudicating of the controversy." La. Act 38 of 1956, La. Ex. 1 - LPI No. 3.

11. The authority of the United States to enter into agreements with the State of Louisiana "respecting operations under existing mineral leases and payment and impounding of rents, royalties, and other sums payable thereunder" was provided by Section 7 of the Outer Continental Shelf Lands Act, August 7, 1953, 67 Stat. 467, 43 U.S.C. 1336.

12. 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."

EXCEPTION 1

The Interim Agreement imposed upon the United States the Fiduciary Duty of a Trustee.

13. Louisiana negotiators had authority to enter into agreements with the United States to provide for the deposit in escrow or impounding of revenues from the disputed area. La. Act. 38 of 1956, June 17, 1956; La. Exh. 1-LPI No. 3.

14. Louisiana negotiators testified that the words "impoundment" and "escrow" were used interchangeably throughout the negotiations by federal and state negotiators. Testimony of Edward W. Carmouche, Tr. 40, 49; testimony of Marc Dupuy, Jr., Tr. 161; testimony of C. J. Bonnecarrere, Tr. 128.

15. In June, 1956, the United States filed a *Memorandum for the United States on Maintenance of the Status Quo* in *United States v. Louisiana*, No. 15 Original, in response to the invitation of the United States Supreme Court for the parties to the dispute to express their views. 351 U.S. 946 (1956). The United States made the following representation to the Court:

> "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.)

16. Louisiana's first proposal to the United States for a "Stipulation" to be entered into pending the final settlement or adjudication of the controversy contained a provision in paragraph 4 for a separate, independent escrow agent. La. Exh. 1-LPI No. 5. Testimony of Edward W. Carmouche, Tr. 43 - 46.

17. Contemporaneous notes of Mr. C. J. Bonnecarrere made at the time of the negotiations between officials of the United States and Louisiana on July 2-3, 1956 recorded the initial response of the federal officials to Louisiana's proposed Stipulation:

> "It should be noted here, or at least I got the impression, that when the U.S. Government Delegation returned to the Conference Room the atmosphere had changed completely. I mean that the friendly and jovial bantering ceased and there was a feeling of tenseness on their part.
>
> "The discussion again reverted to Zone II, involving an impounding of revenues. Mr. Armstrong stated that the U.S. Government would be willing to take the monies received, much of which was being held in suspense, and place same, with the consent of the respective Company or Companies involved, in a single escrow fund."

La. Exh. 1 - LPI No. 6. Testimony of C. J. Bonnecarrere, Tr. 121-123.

18. The United States further responded to Louisiana's proposed Stipulation by submitting a new draft of an agreement in which the word "escrow" was replaced with the words "impound" and "held intact". La. Exh. 1 - LPI No. 7. Testimony of Edward W. Carmouche, Tr. 45-47.

19. The change in the terminology from "escrow" to "impound" and "held intact" did not change the intent of the negotiators as Mr. Carmouche testified [Tr. 47 - 49]:

> "Q. Now, why did you agree to the change from separate independent escrow agent to the provision that the United States should act as escrow agent?
>
> "A. It appeared that the United States was adamant on this point, and we were under enormous political pressures at home.
>
> "Thousands of people had been put out of work as a result of this Act. And there were tremendous pressures by the oil companies, by the employees who had been paid off by the Federal Government; and we had to move. We had to get the best agreement we could get out of it.
>
> "Q. Did you intend at that time, or did you understand at that time, that the obligations of the escrow holder, whoever it would be, would be any different if the United States was the escrow agent as a third party?

"A. It was never discussed that the United States would act as anything other than a regular fiduciary escrow holder of funds than we would do in our private contract.

"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 the depository?

"A. Yes. We were assured of that.

"Q. What was your understanding at that time of the meaning of the words 'impound' and 'hold intact?'

"A. We used the words 'impound' and 'escrow' interchangeably. We felt that the escrow holder or the holder of the impounded funds had the regular duties of an ordinary fiduciary as established under any private contract.

"Q. Did you have any reason to believe that the Federal negotiators also interpreted the language of 'impound' 'hold intact' in the same manner in which Louisiana was interpreting the terms?

"A. It was our belief that they looked upon this in the same manner as the officials of the State of Louisiana looked upon it; and that is, that it would be escrowed or impounded in a separate fund and kept intact. In fact, we were reassured on numerous instances."

20. 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. Testimony of Edward W. Carmouche, Tr. 50-54.

a. In a letter dated July 30, 1956, from Mr. Carmouche to Mr. Gremillion, the then-Attorney General for Louisiana, and to Mr. Helis, the then-Chairman of the State Mineral Board, it is stated:

> "Armstrong [Reuel Armstrong, the principal federal negotiator] assured us that the Federal government would *escrow* all back monies . . . ." (Emphasis added.) La. Exh. 1-LPI No. 40.

b. On July 30, 1956, Mr. Carmouche wrote a report of a conference which he had with Mr. Reuel Armstrong on July 19, 1956, wherein it was stated:

> "The Federal government would agree to *escrow* the back monies." (Emphasis added.) La. Exh. 1-LPI No. 39.

21. 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. Testimony of Dr. Donald Woodland, Tr. 198, 206, 208, 210.

a. The letter of December 13, 1971 from Mr. Laurence N. Woodworth, Chief of Staff, Joint Committee on Internal Revenue Taxation, Congress of the United States, to

Senator Long, contains the following statements:

> "You and Senator Ellender have inquired of me the manner in which *escrow accounts* are handled by the Federal Government.
>
> "Specifically, the *escrow account* which I understand you have reference to is the account relating to the Tidelands dispute by the State of Louisiana and the United States.
>
> ***
>
> "At the time the cash is paid into this account an equal amount is credited to the *escrow or deposit account.*
>
> ***
>
> "To summarize, while amounts held in *escrow* by the United States are not classified as budgetary receipts they are available for expenditure for general Governmental purposes." (Emphasis added.) La. Exh. 1-LPI No. 19.

b. In the letter from David Mosso, Commissioner of Accounts of the United States Treasury Department, to Mrs. Lloyd of the Office of the General Counsel of the Treasury Department dated December 22, 1971, reference is made to a request for a statement of the fiscal significance of the transfer to Louisiana of money from the "*escrow*

account." (Emphasis added.) La. Exh. 1-LPI No. 20.

c. Letters from David Mosso to Senators Ellender and Long dated January 10, 1972 and January 19, 1972, respectively, contain the following statements:

> "The *escrow account* with which you are concerned is that bearing the Treasury symbol 14X6709, entitled 'Deposits, Outer Continental Shelf Lands Act, Agreement October 12, 1956, Louisiana'; the account is classified as a Department of the Interior deposit fund account. A brief statement concerning that account may be helpful.
>
> ***
>
> "The collections relating to the *Louisiana Tidelands escrow funds* in question are deposited by the Department of the Interior into a Federal Reserve bank and become part of the cash comprising the general account of the Treasurer, U.S.
>
> ***
>
> "However, at the time of the deposit of the *Tidelands escrow fund* collections by the Department of the Interior, ...'" (Emphasis added.) La. Exh. 1-LPI Nos. 21 and 22.

d. Mr. Warren W. Scott, Analyst in Mineral Economics, Natural Resources Section of the Library of Congress, in an interdepart-

ment report dated October 21, 1964, made the following representation:

> "At the present time, the U.S. Department of the Interior *is holding about $700 million in escrow* from oil and gas and other natural resources leases in the offshore areas in dispute which are somewhere between the uncertain 3 and 10.5 geographical mile limits." [See p. 3 of report.] (Emphasis added.) La. Exh. 1-LPI No. 23.

e. An excerpt from a financial statement of the Bureau of Land Management as of the fiscal year 1975 shows the following footnote:

> "This includes $1,084,852,312 *held in escrow* pending final Court Decision as to its disposition among the United States Treasury and the States of Louisiana, Texas . . . ." (Emphasis added.) La. Exh. I-LPI No. 45.

22. 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." Testimony of Mr. Arnold Petty, Tr. 444.

23. 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 es-

crow account. Testimony of Dr. John Haslem, Tr. 836.

24. The only federal negotiator to testify, George S. Swarth, admitted that there was a fiduciary relationship between the United States and Louisiana with regard to the impounded funds [Dep. Tr. 9]:

> "Q. Did the Federal representatives make any representations that they were accepting a fiduciary relationship in impounding these funds, the responsibilities of a fiduciary?
>
> "A. Well, the Treasury was to hold this as an impounded fund under an obligation to pay it as the case should ultimately be decided. That was I take it a fiduciary responsibility."

25. United States' officials represented to California that the identical deposit fund account used subsequently in this case was in the nature of a trust. La. Exh. 9-LPI Nos. 152, 153, 154, and 155.

a. Everett W. Mattoon, Assistant Attorney General of California, wrote to Thomas H. Kuchel, California State Controller, on March 13, 1951 in which he quotes *verbatim* the following portions of a telegram which had been received from the Fiscal Assistant Secretary for the United States Treasury:

> " 'Reference to my letter February 23rd to State Controller and your telephone conversation with Mr. Heffelfinger of my office March 12. The Special Deposit Account held by Paul D. Banning, Chief Dis-

bursing Officer, *14F5709* Oil and Gas Deposits Submerged Lands Department of Interior, will contain funds deposited by the State of California *which funds so held will be in the nature of trust funds* and will only be available for use by the Secretary of the Interior in accordance with the terms of the stipulations.' "

In his letter, Mr. Mattoon states:

"Mr. Heffelfinger explained that the reason the 'Special Deposit Account' was not designated as a 'trust fund' was that certain Federal restrictions made this unfeasible if not impossible."

And, the letter continues:

"It will be noted in the telegram that it is stated that the 'funds deposited by the State of California' in the special deposit account 'will be in the nature of trust funds and will only be available for use by the Secretary of the Interior in accordance with the Stipulations.' " La. Exh. 9 - LPI No. 155. (Emphasis added.)

b. Mr. George Swarth, witness for United States, when asked whether Account 14F5709 would be considered as a trust fund, replied [Dep. Tr. 39]:

"A. Yes, it was a trust fund."

c. Special Deposit Account 14F5709 and Deposit Fund Account 14X6709 (used in this

Louisiana case) are identical. Thus, on June 17, 1953 the Assistant Attorney General of California requested the Secretary of the Interior to return California's money which had been placed in "a special trustee account fund, designed *14X6709 - Oil and Gas Deposits Submerged Lands, Bureau of Land Management.*" (Emphasis added.) La. Exh. 9 - LPI No. 161; U.S. Exh. 47.

d. The accounting report from the United States in returning to California the money received under the August 21, 1950 Stipulation, recites:

> "Statement of Tide and Submerged Land Mineral Lease Royalties Impounded Under Stipulation (U.S. vs. California) of August 21, 1950, by Depository - October 1, 1950 through May 22, 1953.
>
> "(a) ON DEPOSIT WITH THE UNITED STATES GOVERNMENT
>
> Depository Account: *14X6709* - Oil and Gas Deposits, Submerged Lands, Bureau Land Management" (Emphasis added.) U. S. Exh. 47.

26. The pressure placed on Louisiana negotiators to reach agreement in order to lift the injunction, increased the reliance placed by them upon the representations of federal officials, as Mr. C. J. Bonnecarrere testified. [Tr. 116-117; 128-129]:

> "Q. Did they indicate or put any pressure upon Louisiana to place trust and confidence in the United States Government that they would

not in the normal arm's length dealings?

"A. I would think that we would place implicit trust in the negotiators and those representing the Federal Government as we would with our own. I think it was — I think it would indicate to me, sir, if I may use that term, it would indicate to me a sort of joint venture if you will."

***

"Q. Did you place trust in and confidence in the Federal Government?

"A. Yes, to the greatest extent, and still do.

"Q. Did you expect that if they profited by the use of your money that you would get your share?

"A. Yes sir. And still do."

EXCEPTION 2

The United States used Louisiana's money for its own purposes and without any authority under the Interim Agreement.

27. The United States admitted that Louisiana's money was available for unrestricted use by the Federal Government in formal admissions filed in response to Louisiana's First Request for Admissions:

a. "The United States admits that the cash representing revenues from disputed lands, received by the United States pursuant to the Interim Agreement of October 12, 1956 (1) was deposited in the Federal Reserve Bank, New Orleans, a number of other banks designated as Federal depositories for the United States Treasury, and the office of the United States Treasury, Wàshington, D.C. and (2) became part of the general account of the Treasury [sic] of the United States." Response by the United States to Louisiana's Request No. 1, January 26, 1977. *See also* United States' Response to Interrogatory No. 8. Brief in Support of Exceptions p. 30.

b. "The United States admits that the actual cash representing revenues from disputed lands, when deposited in the general account of the Treasury of the United States, was immediately available to meet any authorized cash needs of the Government whatsoever." Response by the United States to Louisiana's Request No. 2, January 26, 1977.

c. "The United States admits that the actual cash deposited in the general account of the Treasury of the United States, including cash representing revenues from disputed lands, is subject to disbursement by checks drawn on the United States Treasury by Government disbursing officers in order to make payment of Government obligations as authorized by law." Response by the United States to Louisiana's Request No. 3, January 26, 1977.

28. Dr. Donald Woodland introduced the chart shown on page 23 entitled "Flow of Escrow Funds" to demonstrate what happened to the Tidelands money.

29. Mr. John Carlock, Fiscal Assistant Secretary for the United States Treasury, testified on cross-examination that no cash was deposited to the Deposit Fund Account Number 14X6709 [Tr. 397-399]:

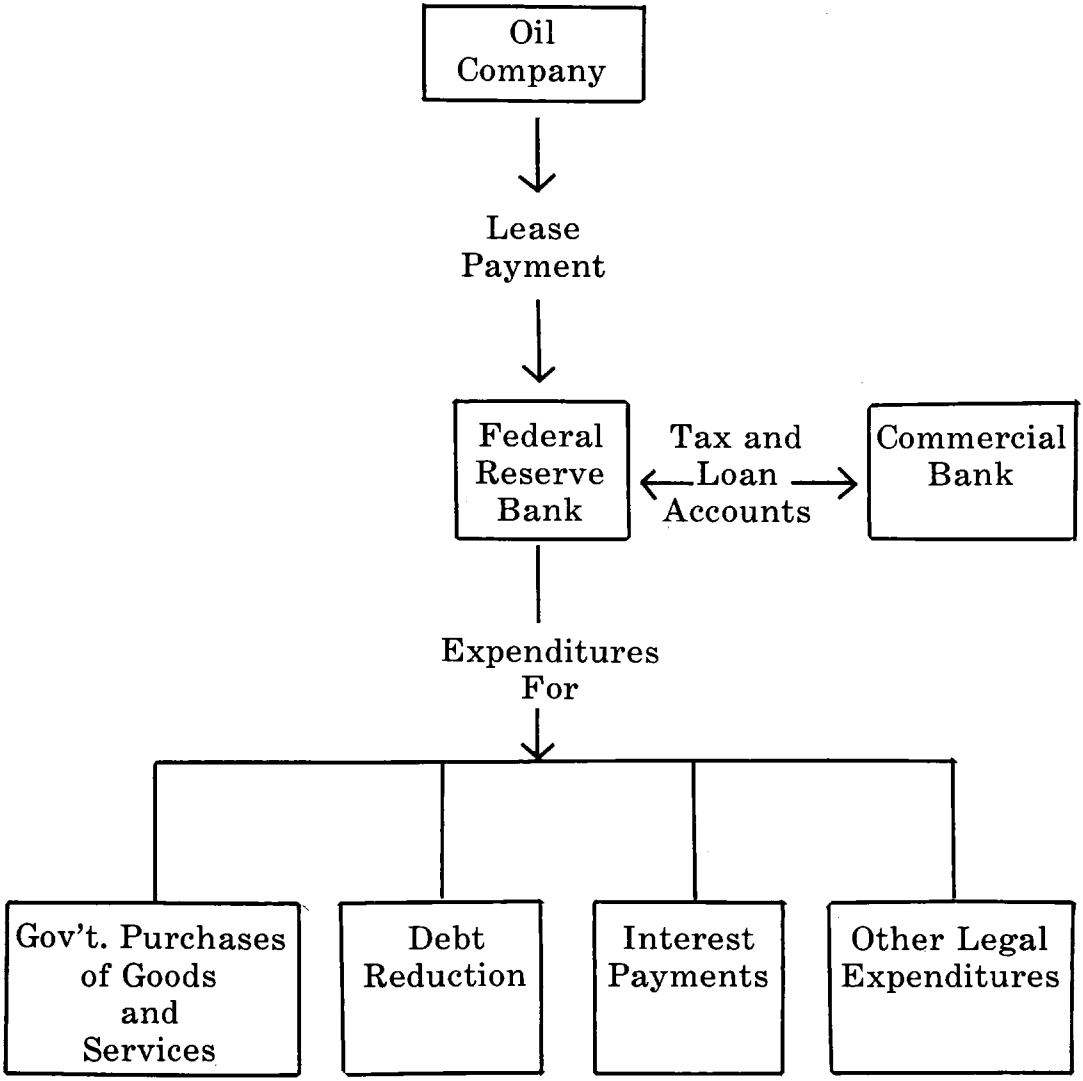
"Q. Mr. Carlock, I believe that you stated on one or two occasions that the funds from the Tidelands Account or the money from the Tidelands Disputed Area or the funds from the Tidelands Disputed Area are deposited in the Deposit Fund Account Number 14X6709.

"A. Yes, sir.

"Q. In making that statement you were not inferring, were you, that the actual revenues were deposited in that account?

"A. The actual cash went into the General Account of the Treasurer.

FLOW OF ESCROW FUNDS



La. Exh. 1-LPI No. 41.

"Q. You agree, then, with the Admissions made in the testimony which you have previously heard, that the actual cash revenues, the monies, go into the General Account of the Treasurer?

"A. Right.

***

"Q. Now as to this deposit fund account that you referred to, you agree, I take it, with the previous testimony that has been presented, that that is a liability account?

"A. Yes.

"A. And there is not a dollar bill that goes through that account?

"A. No."

30. Letters of officials of the United States establish that Louisiana's money was used by the United States:

a. The letter of January 19, 1972 from Mr. David Mosso, Commissioner of Accounts, Treasury Department to Senator Long, which letter was referred to by the United States in response to Louisiana's Interrogatory No. 8, states:

> "The escrow account with which you are concerned is that bearing the Treasury symbol 14X6709, entitled 'Deposits, Outer Continental Shelf Lands Act, Agreement October 12, 1956, Louisiana'; the account

is classified as a Department of the Interior deposit fund account. A brief statement concerning that account may be helpful.

***

"In the case here in question, the cash was placed in the general account of the Treasurer of the United States where it was immediately available to meet any cash needs of the government whatsoever.

***

"The collections relating to the Louisiana Tidelands escrow funds in question are deposited by the Department of the Interior into a Federal Reserve bank and become part of the cash comprising the general account of the Treasurer, U.S. The cash deposited in accounts in the name of the Treasurer of the United States is subject to checks drawn on the Treasurer of the United States by Government disbursing officers to make payments of the Government's obligations as authorized by law.

***

"However, at the time of the deposit of the Tidelands escrow fund collections by the Department of the Interior, the agency makes an entry in its accounts for the deposit fund liability of the Government, documented by a certificate of deposit similar to the attached . . . . Each month the agency reports to the Treasury's

Bureau of Accounts the total amount deposited to account 14X6709 for entry into the Department of the Treasury's central summary accounts. Thus, the end result of these deposits is an increase in the Government's cash and an offsetting increase in deposit fund liabilities of the Government." (*See also* Tr. 197.) La. Exh. 1 - LPI No. 22.

b. The letter dated December 22, 1971 from Mr. David Mosso, Commissioner of Accounts, Treasury Department, to Mrs. Lloyd of the Office of the General Counsel, Department of the Treasury, which letter was referred to by the United States in response to Louisiana's Interrogatory No. 8, states:

"The account of the Treasurer, U.S. is credited with general fund receipts (e.g., taxes), special fund receipts, deposit fund receipts, etc. *and these receipts are used to finance general fund expenditures and all other legal payments authorized by law.* To the extent that such receipts are insufficient to finance all legal payments, the Treasury borrows additional amounts through the sale of public debt securities and those proceeds are also credited to the Treasurer's account. As checks come in for payment, they are charged to the Government's bank account regardless of whether they are classified for accounting purposes as general fund expenditures, special fund expenditures, deposit fund expenditures, repayments of public

debt principal or whatever." (Emphasis added.) La. Exh. 1-LPI No. 20.

c. The letter of January 10, 1972 from Mr. David Mosso to Senator Ellender which is La. Exh. 1-LPI No. 21, is identical to the letter to Senator Long quoted in paragraph (a) *supra* and identified as La. Exh. 1-LPI No. 22.

d. The letter of December 13, 1971 from Mr. Lawrence N. Woodworth, Chief of Staff, Joint Committee on Internal Revenue Taxation, Congress of the United States to Senator Long states:

> "You and Senator Ellender have inquired of me the manner in which *escrow accounts* are handled by the Federal Government.
>
> "Specifically, the *escrow account* which I understand you have reference to is the account relating to the Tidelands dispute by the State of Louisiana and the United States. This account is administered by the United States under the agreement reached by the parties. This means that the cash received from the oil leases in the disputed Tidelands area are covered into the general account of the Treasurer of the United States.
>
> "At the time the cash is paid into this account an equal amount is credited to the *escrow or deposit account*. This constitutes a liability of the Federal Govern-

> ment. Cash paid into the general account is available for expenditure for any proper governmental purpose. *The effect of this is to make funds paid into the general account unrestricted* (except for general rules of law) *as to the purposes for which the moneys can be spent, in the same manner in this respect as if there were no escrow account.* (Emphasis added.)
>
> ***
>
> "To summarize, while amounts held in *escrow* by the United States are not classified as budgetary receipts, they are available for expenditure for general Governmental purposes." La. Exh. 1-LPI No. 19. See also Tr. 198.

31. The testimony of Dr. Donald Woodland, Dean of the College of Business Administration at Louisiana State University, who was qualified as an expert witness in banking and finance, showed, by an analysis of United States Treasury documents that the Tidelands funds including Louisiana's money was actually used by the United States:

a. La. Exh. 1-LPI No. 42, an exhibit showing the daily change in the cash balance of the United States Treasury by deposits and withdrawals for a specific period of time deemed to be typical of the period from 1956 to the present, was described by Dean Woodland as follows [Tr. 213-216]:

"Q. Just as an example, each day, over the years over the, perhaps, past 20 years or more, there has been more withdrawals than actual money taken in; there has been more money spent than taken in, is that correct, by the Federal Government?

"A. That is right. The Federal Government has run a deficit for this period, so I think by definition, they have spent more money than they have taken in.

"Q. The only way that deficit can be corrected is by borrowing money, is that right?

"A. That is right.

"Q. Would you say that this particular exhibit, particular period of time shown on this exhibit is typical?

"A. Yes, sir, I would say it is typical.

"Q. Of how the Federal Government has been operating in red all this time as far as money is concerned?

"A. Well, I say it would be typical of the Treasury's daily activities in and out of its account at the Federal Reserve Bank, yes, sir.

"Q. Now, that being the case, does that indicate to you that since they spent all the money they had, that it had, of necessity, to include Louisiana's share of the Tidelands funds?

"A. Yes, sir."

b. La. Exh. 1-LPI No. 48, an exhibit showing an increase in the public debt every year since 1956 except two years, was explained by Dean Woodland as follows [Tr. 217-218]:

> "Q. When you take into account Exhibits 42 and 48, at what conclusion do you arrive?
>
> "A. This would indicate that the Treasury used all the money that it had available to it and borrowed additional amounts.
>
> "Q. If the United States Treasurer, as indicated by your study, as reflected on these exhibits, did, in fact, use all of the money which came from the disputed Tidelands area, and if they did, in fact, use Louisiana's share and had to borrow more money instead, is it your opinion that by using Louisiana's money, that they saved the necessity of borrowing more money?
>
> "A. Yes, sir.
>
> "Q. It reduced the borrowing needs?
>
> "A. It reduced the borrowing needs."

c. La. Exh. 11-LPI Nos. 182 and 183, an exhibit showing the velocity or average rate of monthly turnover of funds in the Treasury, was further evidence indicating to Dean Woodland that Louisiana's money was in fact used [Tr. 906-908]:

"A. 182 is a tabulation for the average monthly balance of the United States Treasury at the Federal Reserve Bank computed on an average daily basis taken from the daily statements of the Treasury and also the total monthly expenditures of the U.S. Treasury as taken from the Treasury bulletin.

"For example, it indicates that in February for '76 the Treasury had an average daily balance of 10 billion, 732 million.

"They spent that month 90 billion, 667 million.

***

"Q. Have you calculated the rate of turnover or the rate of velocity?

"A. (By the Witness) You can compute the average turnover several ways using total monthly expenditures or doing it on a monthly basis.

"I did it on a monthly basis and the turnover would average on a monthly basis, annualized about 113 times per year.

***

"Q. May I ask this: Is the year 1976 typical as to other years since 1956 with a variation, perhaps, in numbers of turnovers?

"A. I would say it would be typical. Of

course, there would be considerable variations in rates of turnover.

"But the Treasury does do a very efficient job in maintaining its cash balance, so you would have a high turnover, naturally.

"Q. Well, now, in the amount of turnover, the rate of turnover would vary from year to year, but would it always be substantial?

"A. Yes, sir."

d. La. Exh. 11-LPI No. 184, is a copy of the U.S. Treasury Bulletin issued December 1976, showing a summary of fiscal operations for the years 1968 through 1976. Dean Woodland explained this exhibit as describing the way in which the public debt was amassed and financed. Tr. 908-914. Dean Woodland pointed out that footnote 9 to Column 13 included deposit funds as indicating the reference source from which cash was used to finance the public debt. After describing the exhibit in detail, Dean Woodland concluded [Tr. 913-914]:

"Q. What is your conclusion, then, Dr. Woodland, from the examination of this document with respect to whether or not the United States did, in fact, use the Tidelands' money?

"A. My conclusion would be that the

> funds were in fact, deposited in the general account of the U.S. Treasury and were part of the funds that were used to balance the budgetary receipts and outlays."

32. The Louisiana negotiators testified that there was no agreement that the United States could have the use of Louisiana's money:

a. Mr. Edward Carmouche testified [Tr. 55]:

> "Q. Specifically, was anything ever said; was any agreement ever entered into or any understanding ever had to the effect that the United States could commingle the funds with its own money?
>
> "A. They could not. They were prohibited from doing so under this Agreement.
>
> "Q. Was there anything ever said to indicate as to whether they need not invest the money?
>
> "A. In the entire period from 1956 to 1962 in which I actively participated in the Tidelands litigation and the Interim Agreement, nothing was said.
>
> "Q. Then, during those negotiations leading up to October 12, 1956, were you ever told that the United States could not invest the money?
>
> "A. Never.
>
> "Q. Was there any understanding or

agreement as to whether the United States could have free use of the money which was held in escrow?

"A. No sir, there was no such agreement."

b. Mr. C. J. Bonnecarrere testified [Tr. 129]:

"Q. Did you expect that if they profited by the use of your money, that you would get your share?

"A. Yes, sir. And still do."

On cross-examination, Mr. Bonnecarrere said [Tr. 136, 138]:

"Now, it certainly was not, and I must say this in all good conscience, that it certainly was not in my opinion nor any [sic] anyone else's, I should think at that table, that anybody would have any free use of monies, though."

***

"I would put it this way, that if someone benefited financially because of the use of monies which actually were later determined to belong to me, I would think that I should be entitled to my fair share of those returns. That is all I can say. As a matter of equity."

c. Mr. Marc Depuy testified [Tr. 163]:

"Q. (Interposing) The Federal Govern-

ment never asked Louisiana's consent to use the money in the manner which they did?

"Let me put it this way. I guess you may not be familiar with the manner in which they used it.

"A. There was no agreement that Louisiana made that would allow the United States to use the money."

On cross examination, Mr. Dupuy said [Tr. 173, 175]:

"A. . . . But I think that whatever the obligations of the United States were, were the same as the obligations of an escrow holder. And we did not agree, at any point in time, ever, that the United States should use the money for its sole and exclusive benefit."

***

"Q. Mr. Dupuy, did anybody from the Federal side of the table during the negotiations ever explain to the Louisiana negotiators how they were using the money or intended to use the money?

"A. No, they did not."

33. Louisiana negotiators were not familiar with the manner in which the funds were handled in the California case as indicated by the following testimony of Mr. Edward W. Carmouche [Tr. 93-94]:

"Q. Were you familiar with a similar stipulation which had been reached with the state of California?

"A. I am not sure.

"Q. The stipulation to impound funds derived from disputed areas.

"A. I am not sure that had been done at that time.

"Q. So, you were not familiar, or if you were, you don't recall?

"A. I not only don't recall, I don't think it had happened at that point in time.

"Q. The original stipulation with California was in 1947. It was amended several times.

"A. I am not aware of it."

EXCEPTION 3

The United States had the duty to invest the Tidelands money for the benefit of both parties.

34. The procedure for handling the Tidelands money was set up prior to the confection of the Interim Agreement for the purpose of adhering to General Accounting Office procedures, not for the purpose of complying with the agreement as is pointed out by the following excerpt of the decision of the Comptroller General of the United States issued on July 31, 1956, in response to a request by the Secretary of the Interior:

> "Reference is made to letter dated July 12, 1956, from the Administrative Assistant Secretary of the Interior, requesting authorization for withdrawal from the General-Account Receipt accounts. '141711 Rent on Outer Continental Shelf Lands' and '142114 Royalties on Outer Continental Shelf Lands,' in the Treasury of the sum of 59,923,728.28 and its redeposit in the Treasury to the Special Deposit Account '14X6709 Oil and Gas Deposits, Submerged Lands, Interior' (symbol '1446709' cited in letter). The sum involved includes all bonuses, rentals, and royalties received on account of oil and gas leases issued by your Department pursuant to section 8 of the Outer Continental Shelf Lands Act, 67 Stat. 468, and the leases are for locations situated wholly or partly within a tidelands area over which there is a dispute between the State of Louisiana and the United States as to ownership. The request to withdraw the funds and redeposit them to a special deposit account is made for the reason

that, because of the dispute which existed at all times, the funds should not have been deposited in General Account Receipts.

***

"Accordingly, authority is granted for the withdrawal from the General Account receipt accounts '141711' and '142114' of that portion of the amounts received from leases of locations in the area in dispute." La. Exh. 1 - LPI No. 27.

35. Mr. John Carlock, Fiscal Assistant Secretary for the United States Treasury, testified that the deposit fund account was set up pursuant to Treasury Department policies and not by requirements of the Interim Agreement [Tr. 405-406]:

"Q. Inasmuch as the arrangement for your deposit fund account was set up about two months before the Interim Agreement was entered into, that must have been set up pursuant to the policies of the Treasury Department and not the requirements of the agreement.

You agree with that, don't you?

"A. Right."

36. *A Dictionary for Accountants* by Eric L. Kohler defines "impound" to mean "to seize and hold in protective custody . . . cash and other assets." Testimony of Jerry E. Walker, Tr. 281.

37. The deposit fund account 14X6709 was neither set up as a result of the Interim Agreement

nor satisfied the requirements of the Interim Agreement as stated in the following testimony of Jerry E. Walker, a certified public accountant and an expert witness in Accounting and Finance [Tr. 296-297]:

> "Q. My question to you Mr. Walker, is, first of all, when the Deposit Fund Account was set up two months before the Interim Agreement was executed, it would be quite a mathematical certainty that they could not have taken into consideration the Agreement, the Interim Agreement, is that correct?
>
> "A. I would presume so. Of course, it could have been drafted and processed. But the Interim Agreement had nothing to do with the decision to change to a Deposit Fund Account. As I understand it, it was the GAO which initiated that.
>
> "Q. Very well. And if the Interim Agreement required, as one of the duties of the escrow agent, that the money be held intact, is it your opinion that that requirement was satisfied by the manner in which the Federal Government held the money?
>
> "A. I believe it did not satisfy the requirement. The use of the term 'intact' and 'impoundment in a separate fund' means to me something is being done with physical assets, whether it be cash or securities. That is restricted and that was not done."

38. The testimony indicated that the combination of the words "impounded," "held intact" and "separate account" require a prudent investment

and administration of the fund [Tr. 900-901, La. Exh 1-LPI No. 6]:

> "Q. Special Master: But those mean income producing, by inference?
>
> "A. The combination of those, I believe, produces a situation where special responsibilities are bestowed on the holder of those funds, that they have an obligation then to do something for those funds.
>
> "Again, I hate to be repetitive, but the fact that those words are meaningless if they don't have some kind of special meaning, that a new responsibility is held by the United States Government."

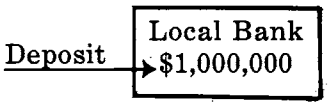
39. The Tidelands money could have easily been invested in accordance with the Interim Agreement as explained by Mr. Walker in his explanation of Louisiana Exhibit 1 - LPI No. 49, a chart he devised showing "what should have happened" to the Tidelands money [Tr. 260-267]:

> "Q. Now, Mr. Walker, will you please state what this document is?
>
> "A. First of all, this is obviously a different document than the one that is in evidence, but it is a faithful reproduction of what you have as LPI No. 49.
>
> "Q. This is an exact enlargement of LPI No. 49?
>
> "A. Right.
>
> "Q. That was prepared by you or under your direction and control?

EXAMPLE 1
What Should Have Happened

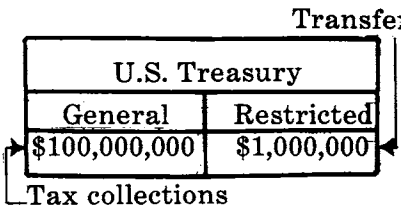
Step 1

Payments were made by the oil companies into local banks.



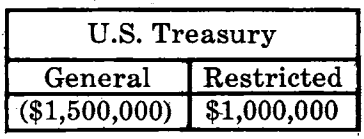
Step 2

The monies were transferred by the U.S. Government to the U.S. Treasury where they *should* have been deposited to a separate restricted account (similar to a lawyer's escrow account).



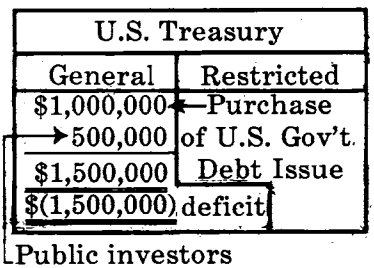
Step 3

Assume that the U.S. Government paid its bills (payroll, purchases, etc.) at a cost which exceeded the monies on hand (from tax collections and the like) by $1,500,000.



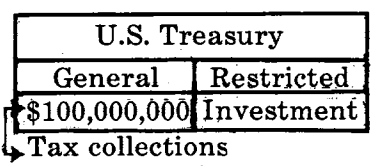
Step 4

In order to cover the expenditures, the U.S. Government would have to issue debt to borrow the additional monies. The restricted account would then have been made productive by using those monies to purchase a portion of the U.S. Government debt issue.



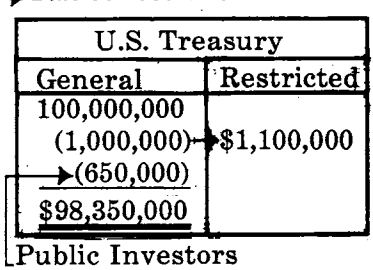
Step 5

The U.S. Government would receive additional tax and other collections.



Step 6

The U.S. Government would repay its borrowings (with the agreed upon interest).



Step 7

The U.S. Government would pay its bills at a cost which exceeded the monies on hand and the borrowing cycle would begin again.

La. Exh. 1-LPI No. 49.

"A. That is correct.

"Q. Will you please state in general what it shows and then describe the various steps that you have indicated?

"A. In general, for example, one is intended to show how a method by which the Interim Agreement could have been complied with and the funds could have been impounded and held intact and still those funds could have been made productive through investment.

"Now, admittedly, the example uses hypothetical numbers. There is no relationship to any actual transactions whatsoever. And the magnitude of the numbers are far different than we would be dealing with than the General Fund of the Treasury itself.

"If you will bear with me, I think it will illustrate my point.

"Step 1 at the top is simply an indication of the initiative step of the transaction, that is, that the payments were made by the oil companies into the Depository and eventually into the Federal Reserve Bank. And in this case, for illustration purposes, we have assumed a deposit of ten million dollars made by the oil companies.

"In Step 2, we introduce a box on the right, and by 'the box,' I mean the entire box here indicating the United States Treasury. We have broken it down into two areas, the General Funds of the Treasury and what I have referred to as Restricted Funds of the Treasury where I believe the moneys from the Tidelands should have actually been residing.

"Now, at this point the funds are held idle and we are looking at this as an initial transaction.

"So, to further describe Step 2, that is the step at which the moneys are transferred from the Depositories where they were initially deposited into the Accounts of the U.S. Treasury and they are recorded on those accounts.

"As I have said in the notes to the side, that I look upon this as similar to a lawyer's escrow account, or the escrow account of the type we were talking about and heard discussed yesterday.

"At the same time, in Step 2, we show a collection of a lump sum amount, and for illustration purposes, we have assumed one hundred million dollars coming in from other sources into the unrestricted general funds of the Treasury. And that would be by tax collections, as an illustration. It could be from proceeds from borrowings; it could be other revenue sources of the Government.

"Step 3 we do not have a box by because Step 3 is intended to illustrate a decision point that is constantly going on throughout the fiscal process or fiscal management processes of the Government, and that is the cash planning, a need for borrowing for the future.

"That step simply indicates that at some point the Government must determine that they have so many obligations to pay and they have so much cash on hand or resources available to generate cash to satisfy these obligations when they come due.

"For this illustration purposes again I overly simplified, but we have assumed that the Gov-

ernment looks at their future obligations and what they have to satisfy those, and we come up with a fifteen million dollar short fall. And the way they satisfy those obligations is by going out into the market and borrowing through the issuance of securities.

"SPECIAL MASTER: Excuse me.

"THE WITNESS: Yes, sir.

"SPECIAL MASTER: And you refer there to an excess of obligations over moneys on hand from taxes collected and the like. I take it that is in your box there and would be general funds.

"THE WITNESS: That is correct. That is the General Fund of the Treasury.

"SPECIAL MASTER: Not including the restricted funds?

"THE WITNESS: That is correct.

"So, at this point, the Government having made the decision that they need to borrow fifteen million dollars, goes out into the market, offers the securities to the general public. And at the same time this gives them the opportunity for the restricted funds to be made productive. And we are assuming that this is at the point when the prudent agent charged with the custody of those restricted funds decided that they should be made productive. With the Government issuing securities at this time, they take advantage, in my illustration, of purchasing ten of that fifteen million dollars worth of securities. And the cash that belongs in the fund, in effect, is exchanged for a security which would be interest-bearing.

"And also at the same time, the remaining five million dollars is offered to the general public as investors to bring it up to the total of fifteen million dollars.

"So, at the end of Step 4, we find ourselves in the position where the Treasury has at that point at least satisfied their needs for cash to fulfill the retirement of their obligations and also the restricted funds have now been put to productive use.

"And step 5 is just a regular step that we would expect to find, and that is additional collections by the U.S. Government of a routine nature. That is, they collect from tax sources or other sources one hundred million dollars more in my example here.

"So, we find the Treasury replenished with cash and we find the restricted fund continuing to hold the interest-bearing security.

"In Step 6, it comes to the point at which the obligations, or rather, the security that is held by the restricted funds, comes due and at that point the general funds of the Treasury must be brought into use to satisfy the retirement of that security and also pay the interest for the earnings on the security.

"And for our example here, we have assumed that five per cent was earned on it without regard for what period it was held. But for illustration purposes here, we assume that five hundred thousand dollars was earned on that ten million dollar investment. Therefore, the U.S. Treasury would be responsible for retiring that security, to replenish the restricted funds with the amount of principal and five

hundred thousand dollars worth of interest, while at the same time retiring the other obligations of a similar nature that were issued to the general public of five million dollars plus two hundred fifty thousand dollars worth of interest.

"So, that ends the cycle, except Step 7 indicates that the cycle would be expected to continue in this same kind of arrangement over and over again, and becoming more complicated, obviously, as more money was involved and more securities.

"SPECIAL MASTER: What you are saying, in effect, is that they could either use the money and pay interest or not use it and not pay interest, but they couldn't use the money and not pay interest?

"THE WITNESS: That is right. As I said, for a reasonable period of time they could hold the funds.

"SPECIAL MASTER: And avoid interest, but that they should be restricted?

"THE WITNESS: That is right.

"Q. (By Mr. Kellough) Referring to Paragraph 6, for example, when the securities mature, the money is returned to the restricted account and the interest paid on that security then becomes part of and an increment to the restricted account, is that correct?

"A. That is correct.

"As I show in the example, the restricted fund now, instead of the original ten million dollars,

has had added to it the five hundred thousand dollars worth of earnings.

"SPECIAL MASTER: And thereafter, if they withdrew it again on an interest-bearing basis, they would pay interest on the interest that had previously been collected?

"THE WITNESS: That is correct.

"SPECIAL MASTER: As well as the principal amount?

"THE WITNESS: That is correct.

"Q. (By Mr. Kellough) And the security is to be extended and repaid so long as whatever interest is credited would eventually get back in this restricted fund?

"A. That is correct.

"Q. So that at the date of distribution when a determination is made as to who owns the lands and how the restricted funds should be disbursed, the disbursement would include increments which have been accumulated over the years by the procedure you described?

"A. That is correct."

40. The law requires a trustee to prudently invest trust funds and he is chargeable with the amount of income which normally accrues from proper trust investment if he fails to do so:

a. In a comment to §180 of the Restatement of Trusts, the obligation to invest trust funds is noted:

> "d. Excessive deposits. Although a trustee can properly deposit trust funds in a bank for the purpose of making the funds available from time to time for the payment of expenses or pending investment or distribution, he may incur a liability where he leaves an excessive amount of money on deposit for an unreasonably long time, instead of withdrawing and investing it. In such a case, if the deposit is not at interest and justifiable as an investment, the trustee is liable for interest lost by the failure to invest. *See* §§207, 211."

b. A case squarely in point on the legal duty of the trustee to invest trust funds is *Langford v. Shamburger*, 392 F. 2d 939 (5th Cir. 1968). One of the issues in that case involved the failure of trustees to put trust funds out at interest. It had been established that a large amount of cash — apparently more than $100,000 — was deposited in a trust checking account and left idle for seven years. In holding that the failure to invest these funds constituted a breach of trust, the court said (quoting from the Texas Court of Civil Appeals in a companion case-417 S.W. 2d at 444-445):

> "It is also incumbent upon the trustee to put funds to productive use and the failure to do so within a reasonable period of time can render the trustee personally chargeable with interest."

The court went on to say:

> "The trustee's failure to remove $100,000 from a checking account to a savings account is in the nature of an intentional omission which cannot be excused by a clause limiting his liability to matters of gross negligence. Accordingly, we hold that as a matter of law the trustee's estate is chargeable with interest computed at three per cent on trust funds left in a checking account for seven years unless it be determined on remand that the beneficiaries acquiesced." 392 F. 2d at 948.

c. Another case squarely on point on the issue of the trustee's duty to invest is *Blankenship v. Boyle*, 329 F. Supp. 1089 (D.C. 1971). That was a derivative class action brought on behalf of coal miners with present or future rights in a welfare fund managed by trustees of an irrevocable trust established by the Labor Management Relations Act. The court held that it was a breach of fiduciary obligation to permit large accumulations of cash to remain uninvested. The court pointed out:

> "The precise duties and obligations of the trustees are not specified in any of the operative documents creating the Fund and are only suggested by the designation of the Fund as an 'irrevocable trust.' " 329 F. Supp. at 1094.

But then the court said:

> "The congressional scheme was thus designed not to alter, but to reinforce 'the most fundamental duty owed by the trustee': the duty of undivided loyalty to the beneficiaries. 2 Scott on Trusts §170 (3d ed. 1967). This is the duty to which defendant trustees in this case must be held." 329 F. Supp. at 1095.

As to the obligation to invest the trust funds, the court said:

> "The major breach of trust of which plaintiffs complain is the Fund's accumulation of excessive amounts of cash. A basic duty of trustees is to invest trust funds so that they will be productive of income. [citations] It is contended that the trustees failed to invest cash that was available to generate income for the beneficiaries and in total disregard of their duty allowed large sums to remain in checking accounts at the Bank without interest."
>
> ***
>
> "The beneficiaries were in no way assisted by these cash accumulations, while the Union and the 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." [citations] 329 F. Supp. at 1095-1096.

The court then rejected the explanations to justify the failure to invest the trust funds and concluded:

"The trustees well knew that cash deposits at the Bank were unjustified. It was a continuous and serious violation of the trustees' fiduciary obligation for them to permit these accumulations of cash to remain uninvested." 329 F. Supp. at 1098-1099.

d. *Bartlett and Company, Grain v. Commodity Credit Corp.* 307 F. 2d 401 (8th Cir. 1962) involved funds held by a warehouseman and derived from flood damage insurance pending a determination of the interests of various parties in the money. The agreement provided, among other things, that the warehouseman would hold the funds as trustee in a special account and went on to provide that the funds "will be maintained in a separate account." In January 1958, the warehouseman received uninvested cash which was immediately commingled with the warehouseman's general funds. At all times, the warehouseman recognized that Commodity was entitled to at least $179,351.47 and carried that amount as a liability on its books.

The court held that Commodity's share of the insurance proceeds constituted a trust fund, and that it was entitled to recover interest from the date of the commingling in lieu of accounting for the actual increments and profits. The court said:

> "In making its decision the District Court applied the principle, recognized in Missouri as elsewhere, that where a trustee wrongfully commingles trust funds with his own property, and where there is no evidence as to the profits earned by the use of the funds after the commingling, the Court, in its discretion, may, in lieu of ordering an accounting, simply charge the trustee with interest on the trust funds at the legal rate, the trustee being permitted to retain the profits, if any, and being required to bear the loss, if any, resulting from the use of the funds. See *Buder v. Fiske*, 8 Cir., 174 F. 2d 260, and authorities there cited." 307 F. 2d at 408-409.

During a period of time when the profit was ascertainable, the court held that the trustee should account for the actual profit made. On this point, the court said:

> "The amount of the actual yield of the bills is known, and the claim of Commodity for the period now in question should be limited to its pro rata share of the yield." 307 F. 2d 409.

41. The subject of payment of interest on the impounded fund was never discussed during the negotiations:

a. Mr. Carmouche, a negotiator for Louisiana, testified as follows [Tr. 70-71]:

> "SPECIAL MASTER: Was the question of interest ever discussed pro and con?

"THE WITNESS: (Mr. Carmouche) Yes, sir. We were going to put it at interest in our banks, and the Federal Government wouldn't allow it.

"SPECIAL MASTER: I mean, interest, under the Agreement which provided that the Federal Government would be custodian.

"THE WITNESS: No, sir. Because at the first oral meeting that we had with the Department of Interior, they let us know that was not possible.

"SPECIAL MASTER: They said they weren't going to pay interest on it?

"THE WITNESS: No, they said they weren't going to escrow it in any Louisiana banks; and we might as well forget that, that they would handle the escrow.

"SPECIAL MASTER: None of you said, 'Well, if you are going to be custodian of it, you are going to owe us interest'?

"THE WITNESS: No, sir.

"SPECIAL MASTER: And, obviously, they didn't inject that; because it never was brought up.

"THE WITNESS: That is correct."

b. Mr. Swarth, a negotiator for the United States, testified as follows [Dep. Tr. 7-8]:

"Q. Do you recall whether the payment of interest on impounded funds was discussed at the meetings which led to the 1956 Agreement?

"A. So far as I can recall, it was not.

"Q. Do you remember whether investment of the impoundment fund was ever discussed?

"A. No., I do not recall that it was."

42. Louisiana negotiators testified that there was no understanding or agreement that the United States could have free use of Louisiana's money:

a. Had the United States insisted that it could use the money, Louisiana would not have agreed to it. [Tr. 163-164]:

"Q. Now let me ask you this. Counsel likes to keep asking whether or not there was any agreement between the parties that the Federal Government would have to pay interest.

He likes to ask whether or not we asked the Federal Government how they were going to use the money.

Let me ask you this, Mr. Dupuy. Did anybody in the Federal Government ask Louisiana if it would be all right for them to use Louisiana's money?

"A. Certainly not. As your Honor observed this morning, 'had Louisiana said and insisted that interest be paid in the Interim Agreement, the United States would not have agreed to it.' And by like token, had the United States insisted that it could use the money, Louisiana would not have agreed to it. So, both parties, in trust with each other —

"Q. (interposing) The Federal Government never asked Louisiana's consent to use the money in the manner which they did?

Let me put it this way. I guess you may not be familiar with the manner in which they used it.

"A. There was no agreement that Louisiana made that would allow the United States to use the money.

***

"Q. Mr. Dupuy, did anybody from the Federal side of the table during the negotiations ever explain to the Louisiana negotiators how they were using the money or intended to use the money?

"A. No, they did not."

b. The details of the escrow were in fact never discussed in the negotiations either with regard to interest or with regard to the use of the Tidelands funds [Tr. 102-103]:

"SPECIAL MASTER: What you are saying, if I understand you, is you recognized that if you put a requirement for the payment of interest in the Agreement, the United States would not have agreed to it?

"THE WITNESS: Yes, sir.

"SPECIAL MASTER: Therefore, you omitted that, got them to agree to it with the tacit understanding that there was a legal obligation.

"THE WITNESS: With the hope on our part that equity would be followed, and that the general obligation of a fiduciary or trustee would be met.

"SPECIAL MASTER: So, you might say, 'Mr. Reed, why didn't your people insist on a provision in there that interest would not be paid?'

"THE WITNESS: That is correct. There was no such provision."

c. Further testimony by Louisiana negotiators that there was no agreement that the Tidelands money could be used by the United States is excerpted *supra*, this Appendix, at pp. 33-35.

43. Contemporaneous notes by Mr. C. J. Bonnecarrere, one of the negotiators for Louisiana, made at the time of the negotiation meeting on July 2-3, 1956, demonstrate that all the negotiators

thought the Interim Agreement would be of short duration:

> "I neglected further to add that, in the discussion connected with a time interval for the proposed interim agreement, a period of possibly six (6) months to one (1) year was proposed, with the Louisiana delegation favoring one (1) year. In addition, it was stated that there might be a provision for review every six (6) months by Representatives of both parties." La. Exh. 1-LPI No. 6 at p. 11.

44. The Louisiana Legislature passed Concurrent Resolution No. 251 on June 6, 1967 providing in part as follows:

> ". . . WHEREAS, the said revenues and royalties have for a number of years been impounded by the Federal Government and are presently being held in an 'escrow' fund, and
>
> "WHEREAS, the Federal Government has not invested the said revenues and royalties and has refused to invest the said funds even though the State of Louisiana has made official request that the funds be invested and
>
> ***
>
> "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.
>
> ***

"Be It Further Resolved that copies of this resolution shall be transmitted to the Treasurer of the United States, the Secretary of the Interior of the United States, the Attorney General of the United States and the Solicitor General of the United States and to each member of the Louisiana Delegation in Congress." La. Exh. 12-LPI No. 179.

45. The answer to this resolution was made by Mr. John Carlock, Fiscal Assistant Secretary of the Treasury, in his letter to the Governor of Louisiana dated July 14, 1967 wherein 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.

***

"This response is being made after consultation with the Departments of Justice and Interior and on behalf of those Departments as well as the Treasury Department. I am sending copies of this response to the appropriate officials in the other Departments." La. Exh. 13-LPI No. 180.

46. Agents and officials of the United States had interpreted the Outer Continental Shelf Lands Act as providing authority for the United States to invest funds in the California case notwithstanding the denial of this fact to Louisiana authorities.

a. Prior to the passage of the Outer Continental Shelf Lands Act, the United States Assistant Attorney General wrote to the Comptroller of California explaining the United States' position that the California funds could not be invested. The letter is dated March 13, 1951 and refers to an explanation of Treasury Department policy given by Mr. Heffelfinger of the Fiscal Service, Treasury Department.

> "Mr. Heffelfinger explained that the reason the 'Special Deposit Account' was not designated as a 'trust fund' was that certain Federal restrictions made this unfeasible if not impossible. The designation 'trust fund' placed upon moneys in the United States Treasury cannot be appropriated or used except upon authority of an Act of Congress. It will be noted in the telegram that it is stated that the 'funds deposited by the State of California' in the special deposit account 'will be in the nature of trust funds and will only be available for use by the Secretary of the Interior in accordance with the Stipulations . . . .' " La. Exh. 9-LPI No. 155.

b. Regarding the stipulation proposed by the United States after passage of the Outer Continental Shelf Lands Act and subsequent correspondence between the United States and California, Mr. J. Lee Rankin wrote a letter to the Deputy Attorney General of California on February 11, 1954, in which he made the following representations:

"Last September you left with me a draft of a renewal of the stipulation between us. I understood at that time that California believed it desirable to continue the stipulations in view of the attacks on the validity of the Submerged Lands Act which were then contemplated. In view of the number of amendments which had been made to the original stipulation, we prepared a revision to incorporate all of the surviving provisions in one document. *This draft contained authority for the United States to invest the funds held by it.* We forwarded this draft to you on October 1. As your files will show, there was further correspondence with you on January 8 and January 12 of this year with respect to the investment of the funds. Now your letter of January 21 appears to indicate that the State Lands Commission does not believe it necessary to renew the stipulation, but that you are willing to amend the existing stipulation with respect to the investment of funds by the United States, if we so desire.

"It is my thought that the draft of the stipulation which we forwarded to you on October 1 would take care of the matter of investing the funds, and also would protect the situation pending the outcome of the litigation involving the constitutionality of the Submerged Lands Act." (Emphasis added.) La. Exh. 9-LPI No. 167.

c. Mr. John Carlock admitted on cross-examination that the Outer Continental Shelf Lands Act permits the United States

to enter an agreement to invest the Tidelands funds [Tr. 403-404]:

> "Q. The Outer Continental Shelf Lands Act authorizes the United States to enter into an agreement with the State of Louisiana for the settlement of the Tidelands controversy in general language and to impound monies from the disputed area.
>
> "Is there any language in the Outer Continental Shelf Lands Act that would prohibit the United States from investing the money or paying interest?
>
> "A. No, not at all.
>
> "Q. Well, then, isn't the authority from which the Interim Agreement is executed derived from the Outer Continental Shelf Lands Act?
>
> "A. Exactly.
>
> "Q. So if the proper interpretation of the Outer Continental Shelf Lands Act requires that the money be invested, the interest be paid, then you would have your authority, would you not, sir?
>
> "A. You would if the proper interpretation were set up that required it."

d. That the California correspondence amounted to a recognition by the United States that the Outer Continental Shelf Lands Act provided the necessary authority for the investment of the Tidelands

funds was admitted to on cross-examination by Mr. George Swarth, the only federal negotiator to testify [Dep. Tr. 44-45]:

"Q. And you recall that Mr. Bartelt, I believe in his letter and statement of the witnesses heretofore have stated that the Federal Government could not invest funds unless there was an agreement? [Note: Reference is made to a letter from the Fiscal Assistant Secretary of the Treasury to the Comptroller of California dated February 23, 1951, before the passage of the Outer Continental Shelf Lands Act. U.S. Exh. 49 and 85.]

"A. Yes.

"Q. Or unless there was a statute authorizing the agreement?

"A. Yes. The statute did not have to authorize the investment specifically. It simply had to authorize agreement.

"Q. And that came after the Outer Continental Shelf Lands Act in this document here (indicating)? This document is dated February 11, 1954. [Note: the Rankin letter].

"A. Yes, that is after the Outer Continental Shelf Lands Act.

"Q. So the Outer Continental Shelf Lands Act would constitute the authority for this agreement? [Note: the proposed California Stipulation].

"A. Oh, yes." (Notation ours).

47. The United States was required by 31 U.S.C. Section 547 (a) to invest the impounded funds. The original 1841 Act which has now been enacted as Section 547 (a) provided in full as follows:

"Statute I.
September 11, 1841.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the sixth section of an act entitled, 'An act to provide for the support of the Military Academy of the United States for the year eighteen hundred and thirty-eight, and for other purposes,' as requires the Secretary of the Treasury to invest the annual interest accruing on the investment of the money arising from the bequest of the late James Smithson, of London, in the stocks of States, be, and the same is hereby, repealed. And the Secretary of the Treasury shall, until Congress shall approximate said accruing interest to the purposes prescribed by the testator for the increase and diffusion of knowledge among men, invest said accruing interest in any stock of the United States bearing a rate of interest not less than five per centum per annum.

Sec. 2. *And be it further enacted,* That all other funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall in like manner be invested in stocks of the United States, bearing a like rate of interest.

Sec. 3. *And be it further enacted,* That the three clerks, authorized by the act of June

twenty-third, eighteen hundred and thirty-six, 'to regulate the deposits of the public money,' be, and hereby are, directed to be retained and employed in the Treasury Department, as provided in said act, until the state of the public business becomes such that their services can conveniently be dispensed with.

Approved, September 11, 1841."

48. The law requires a trustee to account to the beneficiary for his share of the profits made. In 90 C.J.S. *Trusts* §341 (a) at 599 the general rule is stated:

"A trustee who uses trust funds in violation of his duty, applied 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.)

EXCEPTION 4

Equitable remedies to prevent the unjust enrichment of the United States at the expense of Louisiana are appropriate to the case at bar.

49. The amount the United States saved by the use of Louisiana's money is ascertainable with reasonable certainty as the following testimony demonstrates [Tr. 306-307, 308]:

> "Q. Is the amount of money saved by the Federal Government from its use of Louisiana's share of the Tidelands funds ascertainable?
>
> "A. Yes, it is.
>
> "Q. Have you, in fact, ascertained that amount?
>
> "A. Yes. We have made a calculation which is based on what we believe to be reasonable assumptions as to what kind of use the funds could have been made during the whole period of the Interim Agreement.
>
> "As I mentioned before, we believe that the investment in short-term Government securities would have been the most prudent kind of investment for a person acting in an escrow capacity to make. The reason for that being that throughout the period of the Interim Agreement, the possibility always existed that there could be a settlement on a short-term basis, therefore, short-term securities would seem to be the proper investment in order to make the fund liquid in as short a time as possible.

"But the calculation that we made was on the assumption that these investments, similar to what we show on Example 1, would have been made in 90-day Treasury bills, and that the investment would have been turned over repeatedly, including the principal and proceeds or earnings on the respective funds.

"And this calculation, over the twenty some odd year period, resulted in the total amount of funds that would have been present at June 30, 1975 to some one billion, sixteen million dollars, of which Louisiana's portion would have been approximately eighty-eight million dollars."

***

"SPECIAL MASTER: How did you determine the interest rate during that period?

"THE WITNESS: Well, we actually made the calculations by going back to the receipt of the Tidelands funds and allowing a reasonable period for the actual investment transaction to take place, I think ten days or something like that — I have forgotten specifically — but at that point in time on that specific day and at the interest rate at which those securities were being offered on that date, then that investment would have been made.

"SPECIAL MASTER: And you did the same with consequent payments into the account?

"THE WITNESS: That is correct."

50. Equitable relief may be imposed by law to prevent unjust enrichment even if there has been no breach of contract:

a. *Phillips Petroleum Company v. Adams*, 513 F. 2d 355 (5th Cir. 1975), involved money held in suspense by the pipeline company pending the determination by the Federal Power Commission of an application for an increase in the price of gas.

The practice, approved by Congress, was that when a pipeline company applied to the F.P.C. for a rate increase, it could charge its purchasers the increased price, subject to the duty to refund the increase if it was not approved within five months.

In this case, Phillips filed for a rate increase and charged its customers the higher price, subject to refund. One of the Phillips suppliers of gas (the Adams family) was another lessee in the Panhandle Field in Texas from whom Phillips purchased under a contract requiring payment on whatever Phillips received in the resale of the gas. Pending the approval of the rate increase, Phillips paid the Adams family on the basis of the old rate, or lower rate, and held "in suspense" the increase in the price it received from the consumers, pending the approval of the rate increase by the F.P.C. When the rate increase was finally approved, Phillips turned over the suspense money to the Adams family, but they claimed interest for the time the rate in-

crease was held in suspense. The circuit court held that Phillips was obligated to pay interest for its use of the suspense money. The court said:

> "The effect of this regulatory scheme is that the pipeline company collects the increased prices for years and years, using the funds thus collected as it pleases, although it will ordinarily characterize this 'suspense money' as a liability for accounting purposes." 513 F. 2d at 360.

The court further said:

> "Instead, burdened with the knowledge that it might have to refund some or all of the funds to its customers at seven percent interest, 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 Phillips'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." 513 F.2d at 366-367.

The court concluded:

> "We also conclude that Phillips must pay interest on the principal sum of the sus-

pense money, and we accordingly reverse the judgment of district court on this point. Texas courts do not insist on statutory rigidity in the allowance of interest, for they realize that the right to interest is a marketplace concept, and that the use of money is a mercantile privilege which should not go uncompensated, absent countervailing considerations. 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 pay not a cent for it." 513 F.2d at 370.

b. In *Buchanan v. Brentwood Federal Savings & Loan Association*, 320 A. 2d 117 (Pa. 1974), 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 the monthly tax and insurance payments that were held by the mortgagees in escrow accounts.

The contentions of the mortgagors is stated by the court as follows:

"First, the agreement between the parties manifests a clear intent to create a trust, with the mortgage lending institutions holding appellants' monthly tax payments in trust solely for the specific purpose of paying appellants' taxes, assessments, fire and casualty insurance. The relief sought is to require the mortgage lending institutions to account to appellants for any profits derived from their investment on the monthly payments. Alternatively, a constructive trust should be imposed on the earnings produced by the use of appellants' monies." 320 A. 2d at 120.

The Pennsylvania Supreme 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 which would require the mortgage companies, as trustee, to account for the profits derived from the use of the escrowed funds.

In discussing the elements of a trust, implied in fact, the court said:

"It is well settled that no particular form of words or conduct is necessary to create a trust. [citations] Neither the presence nor the absence of the words 'trust,' 'trustee,' or 'beneficiary' is determinative of an intention to create a trust. [citations] The question is whether the agreements taken as a whole evidence an

> intent by appellants to impose . . . upon a transferee of the property equitable duties to deal with the property for the benefit of another person. [citations] To determine whether there is a trust we are to look, not at the title given, but at the powers and duties conferred. [citations]
>
> "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 . . . .' " [citations] 320 A. 2d at 122-123.

An alternative argument was also advanced by the mortgagors to justify the contention that the profits earned from the tax and insurance escrow account of the lending institutions should rightfully be returned to the mortgagors. It was contended that if an express trust was not created, then the earnings should be impressed with a constructive trust. In an unanimous holding that the allegations for this alternative relief were sufficient to withstand a demurrer, the court said:

> "A constructive trust, it has often been said, is not really a trust at all but rather an equitable remedy. Like all remedies in equity, it is flexible and adaptable. Changing times and circumstances create different problems for society and present new questions to the courts. And equity has never been reluctant to right injustices or to correct societal ills." 320 A. 2d at 126.

The court then concluded:

> "The question whether a constructive trust is to be imposed on the profits earned by the investment by the 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." 320 A. 2d at 127.

It is significant to note that the trial court in the *Buchanan* case had sustained the demurrer on the ground that the petition failed to allege fraud. In reversing this decision, the Supreme Court of Pennsylvania (by way of footnote) said:

> "15. Although the existence of fraud may be sufficient justification for finding a constructive trust, it is by no means necessary. 5 A. Scott, Law of Trusts §§462, 465-73 (3d ed. 1967); Restatement of Restitution §§160, 163-71 (1937); *Dubin*

Paper Co. v. Insurance Co. of North America, 361 Pa. 68, 85-88, 63 A. 2d 85, 94-95 (1949)." 320 A. 2d at 126.

51. Equitable relief to prevent unjust enrichment has been applied against the United States notwithstanding a claim of immunity from interest:

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's 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 *United States ex rel. Angarica v. Bayard*, 127 U.S. 251, 32 L. ed. 159, 8 Sup. Ct. Rep. 1156, 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 (pp. 259-260) 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 generally, 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.*" (Emphasis added.) 271 U. S. at 301-302.

52. While the United States was using Louisiana's money, Louisiana was performing services in connection with leases on wholly federally-owned submerged lands for which the United States received a great benefit as the testimony demonstrates [Tr. 956-958]:

"Q. By the cooperation of the Louisiana Conservation Department and by their supervision and by their encouragement they have assisted in generating an additional 350 million barrels of oil for the federal government?

"A. Approximately that amount.

"Q. Now, at the lowered price of five dollars and what, 59 cents a barrel, approximately how

many dollars would that be?

"A. That is just about $2 billion.

"Q. So the Conservation Department, then, in Louisiana made about $2 billion for the United States by this type of supervision?

"A. Well, there are $2 billion worth of oil here, yes. That is minimum, now.

"Q. And it is minimum?

"A. The reason I say that is minimum is because today's prices are, say, at $5.59.

"This oil is going to be produced as the last barrels are produced from these reservoirs because this is extra oil.

"At that point the price of oil is going to be more than it is today, we know that. So that figure will be enhanced by the difference in the price then and now.

"SPECIAL MASTER: Those figures are in barrels?

"THE WITNESS: The 343 million barrels is barrels of oil.

"SPECIAL MASTER: On which the United States and the State of Louisiana will ultimately receive royalties?

"THE WITNESS: Not Louisiana. This is totally federal.

"SPECIAL MASTER: Strictly federal?

"THE WITNESS: This is strictly federal.

"Q. (By Mr. Kellough) And the United States, then, will receive royalties based on an eighth or a sixth or whatever it may be in their lease?

"THE WITNESS: Your Honor, this is of the projects that were produced by the State of Louisiana, the Department of Conservation, which is now federally owned waters which were then disputed, between '56 and '72.

"This does not include any of what is now Louisiana production. This is totally federal.

"SPECIAL MASTER: Has the federal government paid any of the costs of that project?

"THE WITNESS: Not to my knowledge."