ORIGINAL

In the

Supreme Court of the United States

UNITED STATES OF AMERICA)
)
PLAINTIFF,)
)
V.)
) No.9 Original
STATE OF LOUISIANA, ET AL.,)
)
DEFENDANTS.)
)

Washington, D. C.
March 18, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF LOUISIANA, ET AL., Defendants.	No. 9 Original

Washington, D. C.,

Tuesday, March 18, 1980.

The above-entitled matter came on for oral argument at 2:09 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

LOUIS F. CLAIBORNE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Plaintiff

WILLIAM J. GUSTE, JR., ESQ., Attorney General of Louisiana, State Capitol Building, Baton Rouge, Louisiana 70804; on behalf of the Defendants

FREDERICK W. ELLIS, ESQ., Special Assistant Attorney General, State of Louisiana, Baton Rouge, Louisiana 70804; on behalf of the Defendants

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in United States v. Louisiana.

Mr. Claiborne, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF THE PLAINTIFF

MR. CLAIBORNE: Mr. Chief Justice, and may it please the Court:

This is part -- I wish I could say the last part -- of the final chapter in the dispute between the United States and the State of Louisiana over the mineral resources of the Continental Shelf off the coast of that state, a controversy which has been before this Court since 1948.

At the end of the day, Louisiana's more extravagant claims to parts of that Continental Shelf were rejected and its was settled that Louisiana was entitled only to a three-mile belt measured from its coast in the usual way.

Finally, in 1975, the Lousiana coastline, that is to say the base line from which that three-mile belt is measured was fixed by decree entered by this Court on June 16th. That decree was jointly submitted by the parties and entered by consent.

I immediately stress that that decree, in defining the areas that were federal and those which were state, expressly provided that the coastline defined in it was to be taken as the past and present coastline for all relevant times and purposes. That is to say that true or not, as a matter of law, the coastline was treated as having been unchanged and the portions attributable to the federal and state government unchanged since June 5, 1950, the accounting date, the earliest relevant date, with only three exceptions which fortunately do not concern us here. In three areas, the Court approved the Master's finding that for some periods islands or extensions of the mainland had existed whereas for others they have not.

The relevance of this is that all the accountings in this case have been based on that premise, that is that the coastline has not changed in thirty years.

Now, although the three-mile line extending from the coastline has not formally been entered by decree here, the parties within a month of the Court's last decision, the decree of June 16, 1975, agreed to that line simply as a matter of mathematical projection, and that description has been submitted to the Special Master and is before the Court and there is no dispute about it.

QUESTION: There is no what?

MR. CLAIBORNE: There is no dispute between the parties with respect to it. What remains are purely accounting issues, not boundary questions. We are done with geography. We are now quarreling about money, that is to say the monetary consequences of the boundary determinations.

We had hoped that no such issue would remain for this Court and indeed it did not appear that there was any disagreement between the parties until 1975 when for the first time Louisiana made the claims which this Court referred to its Special Master on which he wrote a report and which are now before this Court on exceptions to that report.

So far as this Court is concerned if it accepts our acquiesence in one of the rulings of the Special Master adverse to the United States with respect to severance tax, which we do not press here, that leaves two issues.

The first issue is simply put whether Louisiana must pay over to the United States subject to appropriate offsets the oil and gas revenues which it collected from lessees since June 1950 and which are attributable to federal areas of the Continental Shelf, just as the United States must pay, for the most part has paid to Louisiana the receipts from the same date attributable

to state lands.

QUESTION: Do you know how much is involved in that, Mr. Claiborne?

MR. CLAIBORNE: Approximately $19 million. Louisiana says --

QUESTION: This involves Zone 1, so-called?

MR. CLAIBORNE: Well, so we thought. In fact, it involves portions, monies from Zone 2 as well, approximately --

QUESTION: On the other side, it involves Zone 4, right?

MR. CLAIBORNE: There is no issue with respect to Zone 4 because --

QUESTION: No, but --

MR. CLAIBORNE: There would have been had Louisiana been --

QUESTION: It is what you call extravagant claims, it would have binvolved Zone 4.

MR. CLAIBORNE: Indeed, though they would have been more extravagant than Louisiana ever put forward because Zone 4 was defined as that area which Louisiana did not by its most extravagant claims assert.

QUESTION: Otherwise it would have been two or three.

MR. CLAIBORNE: Indeed. Now, Louisiana says it

will keep all of this money attributable to federal lands since 1950, and the Special Master agreed with the state. We have accordingly filed an exception here.

The second issue is whether the United States must pay interest or some like sum in respect of the monies attributable to state lands which were "impounded" in the federal Treasury until they were paid over to Louisiana in mid-1975.

QUESTION: And were they paid over without interest at that time?

MR. CLAIBORNE: They were paid over without interest. There is no complaint that we did not dislodge all of the monies actually received from state lands, with some exceptions which involve complex accounting problems for split leases which the decree permitted to be deferred. There is no --

QUESTION: How much interest is involved?

MR. CLAIBORNE: We had paid over to Louisiana to date $141 million.

QUESTION: What is the interest on that?

MR. CLAIBORNE: The interest on that by one computation put by Louisiana would be approximately $88 million.

QUESTION: And the Master held that you owed no interest or its equivalent and also held that you were not

entitled to get the rents erroneously or royalties erroneously paid to Louisiana?

MR. CLAIBORNE: Exactly so, Mr. Justice Stewart.

QUESTION: Did I get it correct or incorrect?

MR. CLAIBORNE: The Master --

QUESTION: Did you say I was correct or incorrect? I know I am getting old, but it seems to me that I am getting deaf because I don't hear you very well.

MR. CLAIBORNE: I'm sorry. It is exactly as you said, Mr. Justice Stewart. The Master held with Louisiana on its claim to retain what we call the federal monies from Zone 1 and partially Zone 2. He held with the United States in that he rejected Louisiana's claim to interest on the impounded funds which we for the most part have long since paid over.

Now, I shall address both issues but, being the except all with respect to the federal monies Louisiana retains, I shall concentrate my argument there. As I have indicated, some $19 million are involved. It has been called the Zone 1 issue and so it seemed at first, but later -- and I may say after the accountings filed in in this Court and in the proceedings before the Special Master and in some cases only in the last two or three years, reference having been five years ago, Louisiana has changed its position somewhat and is now resisting,

as we understand them -- the Attorney General can correct correct me -- resisting paying any of the monies collected by the state from federal submerged lands in any zone for any period, including the last five years, and indeed including until such time as this Court enters a further decree.

Now, it is unfortunately necessary to explain what Zone 1 is. By 1956, both the United States and the state were granting leases, conflicting leases in the area which Louisiana claimed to be its submerged land under the act passed three years earlier. Louisiana sought injunctions and obtained injunctions in its own state courts. We had by this time filed a motion for leave to renew the case in this Court which had been granted and accordingly we applied here.

This Court, on the application of the United States, enjoined both parties from granting any new leases and their lessees from drilling any further wells. That situation produced the so-called interim agreement of 1956. That agreement divided the Continental Shelf into the four zones. Zone 1, with which we are primarily concerned, is the area three miles wide and nearest the Louisiana coast. It was fixed on a rough -- and I emphasize rough -- approximation of the area which the United States then believed under then principles, since

changed, had been granted by the Submerged Lands Act to Louisiana.

QUESTION: Mr. Claiborne, I take it that if the interim agreement had not come into existence, this issue would not be here?

MR. CLAIBORNE: Well, Mr. Justice Blackmun, so it seemed, but Louisiana now makes a wholly different argument nonetheleast dependent on the interim agreement which is that though they received the money they never really leased our lands because the lease descriptions were such that impliedly they were telling the lessee you drill or occupy federal lands at your own risk, an argument with which I will deal but which is the latest of Louisiana positions.

Now, this Court has already clearly held that neither party was bound by the Zone 1 line and indeed it is because of that holding that the major part of the present controversy arises, because the United States was adjudicated to be the true owner of lands within Zone 1. On the other hand, the state was entitled under this Court's decision to the lands seaward of that zone. So the Zone 1 line and the true boundary line do not coincide.

One more word about the interim agreement at this point. That agreement did provide Louisiana's

primary reliance on this fact, that Louisiana would have exclusive administrative control in that zone, and it was not provided that the revenues derived from its leases there need be impounded; whereas, in Zones 2 and 3 in practice administered by the United States, those revenues must be impounded against the day when the true ownership was decided.

In Zone 4, as I have already indicated beyond any Louisiana claim, the United States was free to grant leases and had no obligation to impound.

QUESTION: What was the practical reason for that distinction in treatment?

MR. CLAIBORNE: Because, Mr. Justice Blackmun, it was recognized and largely correctly that most of Zone 1 would in any event go to Louisiana even though it was known then that the boundary was not accurate. Louisiana asked and the United States agreed to allow it to enjoy some of the revenues from this area and therefore since most of those revenues would in any event remain with Louisiana, it seemed right and fair to permit Louisiana to enjoy those revenues without a duty to impound.

It would, however, have been nonsense and most improvident for the United States to have agreed to waive all its claims to revenue there without waiving its claim

to title. And this Court has made it clear that there was no way for a title, indeed title has been adjudicated there, because, after all, this case was primarily one about mineral revenues, not about abstract title.

It would have permitted, as Louisiana says it did permit, Louisiana largely to drain the area and to return to us twenty years later or perhaps twenty-five years later an empty title, the oil and gas drained from it. That is precisely what Louisiana says we agreed to. Why we should have done so is hard to fathom.

Now, I have indicated that Louisiana's resistance to our claim is in respect to Zone 1 monies between the date of the agreement, October 1956, and the date on which it ended for this purpose, June 1975. But they are not satisfied to resist only those claims, they also resist the claim for some $3.3 million derived from Zone 2 which is in no way committed to them by the agreement.

They also resist a claim to an additional $500,000 derived before the agreement was entered into from Zone 1, and they also resist a claim to any amounts since this Court's degree fixing the boundary, in June 1975.

Now, the basic question is why shouldn't Louisiana be required to pay over the monies derived from federal lands, just as the United States is required to

do likewise with respect to state lands.

Ever since 1950, the rule of the case has been that the owner of the lands is entitled to the revenues, regardless of who first received them. That obligation has been deferred over and over again but it has never been varied.

The Special Master himself said this would certainly be the case in the absence of any adjudication or agreement between the parties to the contrary, and we entirely endorse that statement. So we look to see whether there was a ruling by this Court which authorizes the exception from what had otherwise been the law of the case, and we find everything to the contrary.

In 1950, this Court established the basic rule. Each party must account since June 5, 1950, the date on which this Court's decision in the Louisiana case was entered. That was forgiven for the first three miles by the Submerged Lands Act. But in 1960, this Court made clear that that was the extent of the waiver. In 1960, seven years afer the Submerged Lands Act, and four years after the '56 agreement, and yet Louisiana consented to the entry of a decree which explicitly requires it to account and pay over eventually all sums derived from federal lands with no exception for Zone 1.

In 1965, a supplemental decree followed the same

formula and, most importantly, in the most recent decree, in 1975, the Court entered by consent a decree expressly requiring Louisiana to account for unimpounded monies since June 1950 derived from federal lands. Louisiana admits that that is the money we are talking about, but they say the accounting is for information only. Why it should have undertaken or the Court should have burdened it with the not inconsiderable task of computing receipts for thirty years if nothing were to turn on it escapes us.

There is paragraph 13 of the decree which says that the interim agreement remains in effect to the extent not inconsistent with the decree, but it would be inconsistent with the provision of the decree requiring accounting and payment if the interim agreement provided otherwise. It does not. It was not then understood to do so.

When that decree was entered, it must be clear that all parties believed the accounting obligation had finally come to fruition. Now, when we look at the agreement itself, we derive no different conclusion. Of course, the agreement can't possibly excuse the failure to pay monies in Zone 2 or monies derived before the agreement was ever entered into, even though those were resisted presumably on other grounds.

But as to the '56 and '75 monies, the text of

the agreement is very clear that there is no waiver of any rights. It is a working agreement. It is a modus vivendi. It was deliberately tailored so as to avoid either parties giving up anything permanently. Louisiana could administer, Louisiana could enjoy for the time being revenues and nothing more.

As I have already indicated, it would not have made sense for us to retain our claim to title in this area and waive our right to revenues in the area at the same time. That would have been nothing more than an incentive for delay. Nor did either party so understand the agreement as Louisiana now maintains if we look at how they behaved afterwards.

Louisiana repeatedly consented to the entry of decrees which strictly speaking foreclosed its argument today. Indeed, in 1966 when it filed an account, in 1975 when it filed an account, it admitted an obligation to pay some of these revenues which it now denies.

Now, the Master stressed a quite different point which was a provision of the Outer Continental Shelf Act; that provision is to the effect that when payments are made pursuant to an agreement with the state, the payments by the lessee to the state shall be taken as compliance with what would otherwise be the requirement of payments to the Secretary. It seems to us perfectly plain on the

face of the statute that what that means is no more than that the lessee is not in default while he is paying, as the United States has agreed with Louisiana, he may pay the state. It in no way excuses the state from refunding that money when it is determined that the area was a federal one.

Finally, Louisiana makes the novel argument that they didn't really lease our lands, and they give you a diagram which suggests that in most instances a little sliver turned out to be federal, but most of the lease was really state lands. That is very deceptive.

First of all, there are many cases in which 90 percent, 50 percent or a larger portion of the lease was federal. There are indeed 145 leases in which the entire area described in the lease turned out to be federal lands. In those circumstances, to say that the monies are not attributable to the federal area is an argument that I don't suppose Louisiana would advance. And yet can the result turn on whether it is 10 percent of the lease area or 50 percent or 100 percent, or can it turn on whether there was actual drilling, because Louisiana concedes that the lion's share of the money we are talking about, some $12 million, derives from royalties directly received from the portion of the lease that is federally

owned. In that case, it can hardly be said that the money does not derive, in the words of the decree, from the federal lands.

QUESTION: None of Area 4 turned out to be Louisiana's?

MR. CLAIBORNE: It is not surprising, Mr. Justice White, since it was indeed beyond any argument that Louisiana had been able to --

QUESTION: No bargaining power?

MR. CLAIBORNE: No. There was, of course, a surface symmetry to Louisiana's conceding what they weren't claiming, but it hardly seems a quid pro quo.

One word on the interest issue. Here, of course, the Master ruled with the United States and we entirely endorse the reasoning of his report. He addressed both of Louisiana's arguments, somewhat inconsistent but never mind. T

The first was that the United States had a duty to invest these funds and, having failed to do so, it must in equity be held to the consequence if it had done what it was obliged to do. As to that, the Master said, in our view entirely correctly, that indisputably -- these are his words -- the interim agreement does not specifically provide for the payment of interest upon any part of the funds impounded pursuant to it. And indeed Louisiana,

for all present purposes, I think concedes that that is so.

But, say they, there was a tacit understanding that the United States would some time or other invest the funds, to which the Master answers, the evidence in this case clearly negatives any such understanding upon the part of the parties to the interim agreement.

QUESTION: Well, it wouldn't make any difference to your submission, would it, Mr. Solicitor General, if the United States had invested it.

MR. CLAIBORNE: If we had invested it not pursuant to the agreement but for our own purposes, which would have served no interest of the United States, taking from one pocket and putting it in the other, but it wouldn't have made any difference, I quite agree.

Now, Louisiana further says we unjustly enriched ourselves because we didn't do what the agreement required which was to segregate the funds. The Master said, incontrovertibly, it seems to us, the Treasury does not keep money or cash in an office safe, obviously the cash is going to be freely used in the same way that a bank uses the depositor's money. It must keep a strict account, it must put it down as potential liability, so when the day comes that money will be available without a congressional appropriation. Those are important reasons for treating it as different from ordinary money of the Treasury. The

cash, of course, is to be freely used.

If I may, I reserve the remaining few moments for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Attorney General.

ORAL ARGUMENT OF WILLIAM J. GUSTE, JR., ESQ.,

ON BEHALF OF THE DEFENDANTS

MR. GUSTE: Mr. Chief Justice, and may it please the Court:

You have come to the end almost of a long, long day and we in Louisiana are trying to come to the end of a long, long lawsuit. And if I may for just a moment, I would like to bring you back to the story that happened because you must know the facts to have a feel for it, you can't feel for it by the academic expressions that are contained in these briefs.

In 1956, the United States of America filed suit in this Court to stop all leasing out in the Gulf off Louisiana's coast. Now, between 1947 and 1956, an industry had begun to build, and fellows who were fishermen became skippers on boats bringing people out to the rigs, and we brought in people from Texas and Alabama and Mississippi who went to work in the shipyards building rigs for the Outer Continental Shelf development, and this industry was beginning to burgeon in 1956 when the United States

government comes to this Court and says let's stop all this leasing because Louisiana is actually leasing on some land that belongs to us.

This Court issued an injunction and that injunction literally brought the economy of south Louisiana to a standstill. People couldn't go to work. They stopped building the rigs. They didn't know what they were going to do. The economy was faced with a possible discretion, so Louisiana runs up to the Department of the Interior and says, look, we've got to do something to get this business going again, you're throwing people out of work, you're depriving us of income, it's going to hurt a lot of good people.

So the government says, well, I will tell you what we'll do. The then Secretary of the Interior took a pencile and he figured out what was the most shoreward line that could possibly be the coast of Louisiana and he drew that line and it is called the Chapman line. And after he drew that line, he said I will tell you what we will do, the Submerged Lands Act gives you three miles out from the Chapman line by law and we will let you administer what the law gives you, and you can hold those proceeds.

Then they said from that three miles to the next three miles, and three miles beyond that, we are

going to keep the money.

Do you think Louisiana could argue about it? Do you think this is an arm's length agreement where two parties are sitting down like in a free discussion? Louisiana was forced to accept. They said, okay, you keep the money that you derive from that area, and when you find out whose money it is, we want you to give it back. And then the United States says and we believe everything beyond that nine miles, which they call Zone 4, is ours, so we won't impound that, we will hold it.

So everybody to those discussions called that agreement an escrow agreement, and they wrote in the agreement that the government would impound and hold intact those funds until it was decided who they really belonged to and then pay out from those impounded funds the money that belonged to Louisiana.

Now, what Louisiana's position is, that that contract itself is pure and simply a trust agreement. Not once is the word "trust" used in the contract, but that is the simple reason that the law that authorized the writing of that contract used the word "impound" so the government, in its carefulness, traced the law and used the word "impound."

But for nineteen years the United States government has held money that belongs to the State of Louisiana,

and it turns out that for nineteen years it used that money and it saved the cost of borrowing for nineteen years, and instead of impounding and holding it intact like an ordinary escrow agent is obliged to do under law, they used the money. Instead of --

QUESTION: The United States is not an ordinary escrow agent though, wouldn't you agree?

MR. GUSTE: No, I don't agree, Mr. Chief Justice Burger. The United States government in this case is the plaintiff, and when it comes in as a plaintiff it loses its sovereignty. It comes in as any other suiter and is subject to all of the laws and agreements of any other suiter.

Now, all through the case, Your Honor, and even in his introductory statement today, learned counsel for the government says this is an interest claim, and he did that so that he could lead the Master into those line of cases which refer to cases in the Court of Claims that the government simply cannot pay interest unless it is provided for by specific statute or by contract. And sure enough, the Master followed that line of thought, but that is not what the case is. We are not in the Court of Claims.

This is the United States Supreme Court in a case between two sovereigns, not an individual citizen

trying to make a claim in the Court of Claims. We are claiming that for the use and benefit of our own money they owed us the obligation to invest that money as a prudent escrow agent would do for the benefit of the ultimate beneficiary that we were; otherwise Louisiana negotiators would be giving away something they had no right to give away.

QUESTION: Well, it is an interest claim, where interest is an equivalent, isn't it?

MR. GUSTE: No. Please, it is not merely semantics. We are claiming the value of the use of that money by the United States. Now, often the courts have used --

QUESTION: It is interest. Another way of saying that is interest.

MR. GUSTE: Wait, please. Often the courts have used interest as a measure of value of the use of money, but there is a difference and we are claiming the value of the use of that money, albeit this Court in its wisdom may choose to value it at the interest that the United States saved by using Louisiana's money.

QUESTION: How would you value it?

MR. GUSTE: I think I would value it the same way. But the basic legal distinction is different. We are not suing for interest on a debt. We are suing for

interest on our own money.

QUESTION: When you hire money, what you pay is interest.

MR. GUSTE: That's correct. We don't agree, however, that that is what this suit is about. In ordinary parlance, when you borrow money -- but we didn't lend the government our money on which they should pay us interest. They in effect confiscated our money and said unless you let us confiscate it, we are not going to let you drill, and that is the point that I want to get across. That is more of a confiscation for which they owe us just compensation.

All right. Now, a sovereign state is not the same.

QUESTION: What if the United States had held your money in a separate fund, never used it, just deposited it in some bank somewhere and there it sat and drew no interest whatsoever.

MR. GUSTE: That is the tin can theory. They would be so derelict in all law that relates to trust obligations that they would owe us damages for failing to invest it, and that is the law and there is a line of cases cited in our brief to --

QUESTION: And damges would be the interest that the money would have earned?

MR. GUSTE: If you wish to measure them in that way. You may see fit to find some other way.

QUESTION: What is the legal rate when they are over in the Court of Claims?

MR. GUSTE: Well, you know we rely in our brief on an 1841 statute that says that the government shall invest trust funds and government securities at 5 percent. Now, over the years rates have varied from time to time and our calculation for the -- this amounts to $88 million, according to Louisiana's calculation which was based on buying short-term securities, because we never knew when this case might come to an end, and at the end of each short-term security maturity the money would be reinvested and then compounded in that way, and that is the manner in which we arrived. You may not see fit to arrive at it that way. The government does in the brief. But some manner of computing the value of the use by the government of Louisiana's money ought to be determined, and we don't feel that immunity is a defense.

Now, the Master gives only two factual points in support of his conclusion that the agrement itself doesn't impliedly require investment at interest for the benefit of Louisiana. And those two reasons are, one, he says the subject was never discussed, and that is true. It wasn't discussed whether the United States would pay

interest and it wasn't discussed whether they would not pay interest; neither side brought it up. So that is not conclusive as to what the parties to the agreement thought.

Then he brings out the second point but, do you know, he says the Louisiana witnesses who negotiated this contract admitted that the reason they didn't bring it up was because they knew the United States wouldn't agree to pay it, so he says that solves it.

Well, first of all, that is a subjective consideration. But he doesn't report to this Court the rest of what they thought. They didn't bring it up, their testimony shows, because they felt it was contained implicitly in the words of the contract, that this was an escrow agreement and that the escrow agent, to wit, the United States, was obliged to pay that interest when it finally made the distribution. That is why they didn't bring it up. So if you want to take what they had in their minds when --

QUESTION: That is a rather remarkable argument, if I understand you correctly. You are saying that they secretly knew the United States would not accept a condition which they thought was implicit in the understanding.

MR. GUSTE: That's right, they --

QUESTION: In other words, they horn swoggled the United States.

MR. GUSTE: Oh, no. No, no, no, because the United States didn't bring it up either. There is testimony in the record by the same witnesses that the United States didn't bring it up because they knew Louisiana wouldn't agree to it. Neither party brought it up.

QUESTION: You mean the Louisiana witnesses so testified?

MR. GUSTE: What's that?

QUESTION: You are saying the Louisiana witnesses testified as to the reason why the United States representatives didn't bring it up?

MR. GUSTE: That's why they thought --

QUESTION: Well, how did they know that?

MR. GUSTE: Well, they wouldn't know that, Your Honor, but if you are going to take -- of course they wouldn't know it, but they presumed that the reason the United States didn't bring it up was the same reason that they wouldn't bring it up. But that is neither here nor there. If you are going to take --

QUESTION: Well, their presumption as to what the United States negotiators may have thought surely has no probative value whatsoever, does it?

MR. GUSTE: And their presumption about what they had in their minds has only probative value if you take the entire context of what they had in their minds,

and what they had in their minds was these words that have been written down and handed to us by the United States that imply that that escrow agent has to pay interest to us.

QUESTION: Well, if that was so clearly in their minds, I find it remarkable that they wouldn't discuss the rate of interest.

MR. GUSTE: Listen, I always learned if you've got your case, one, you shut up.

QUESTION: Well, apparently you didn't have the case, one, at least at the Master's level.

MR. GUSTE: But we thought so at the table of negotiation, so that was the intention of our people at that time. And the fact of the matter is once you demolish these subjective thoughts, you come to the real evidence and the real evidence -- and it is stated to be factually correct in the report of the Master -- is, one, the negotiators for Louisiana and the United States, both refer to this agreement as an escrow agreement, before and after the agreement was confected.

Now, it is argued in the brief and it was alluded to --

QUESTION: Let's go back a step. Do you think the United States understood, when they signed this agreement and called it an escrow agreement, that they were

going to pay interest?

MR. GUSTE: If they knew the law of escrow and the responsibility of trustees, certainly the knew it.

QUESTION: But you just said, I take it, that subjectively the Louisiana negotiators knew that the United States had no intention of paying interest.

MR. GUSTE: They thought that.

QUESTION: Well, you can't have it both ways. I mean you can't say that the United States signed an escrow agreement and they must have intended to pay interest and yet they didn't.

MR. GUSTE: They felt that what would govern would be the words of that contract, and I have to tell you --

QUESTION: Well, Louisiana did --

MR. GUSTE: Yes.

QUESTION: -- but what about the United States, not intending to pay interest?

MR. GUSTE: I don't know what they thought. But I have to say this, everybody thought -- and this is uncontradicted evidence in the record -- everybody thought that this agreement was short-lived. There is testimony that they thought it might be six months, maybe a year, a year at the most that it would last. And I think that has some bearing. I want to --

QUESTION: Which way do you run it, that they would or that they should or shouldn't pay interest?

MR. GUSTE: No, I would run that to the effect that, no matter what they thought, interest would have to begin at the end of the longest period of time, a year and six months, because that is all they were thinking about, all of the parties at that table. Instead, the thing goes on for nineteen years.

QUESTION: Why wasn't any of the principle ever paid over, by the way?

MR. GUSTE: All right. Some of it was. In 1965, this Court had made an interim determination that some bays belonged to Louisiana, and a distribution was made at that time of $37 million.

QUESTION: With interest or without?

MR. GUSTE: No, just a check for the principle, no interest.

QUESTION: Well, wouldn't your claim for interest have been good then?

MR. GUSTE: No, and I will tell you why. At that time, this Court specifically retained jurisdiction to settle all accounting matters relating to this case with the final decree, so there was no reason to bring it up then when that determination would be made after the final decree and we did not bring it up.

QUESTION: Except that I suppose you are certainly claiming interest on that amount that was paid over to you?

MR. GUSTE: Yes, certainly we are.

QUESTION: Well, I would have thought somebody would have stopped interest on that amount by paying interest.

MR. GUSTE: Well, I wish they had. They didn't and we didn't ask for it and they claim that is --

QUESTION: And not a murmur about interest at that time?

MR. GUSTE: Not a murmur. Now --

QUESTION: Did it even cross your mind at that time?

MR. GUSTE: I only became Attorney General --

QUESTION: Well, you are speaking for the United States and you ought to be able to speak --

MR. GUSTE: Well, there is nothing in the record and I really don't know those things.

I see my time is up. Let me just end by saying that we also argue that equity requires it. They unjustly enriched themselves at the expense of Louisiana and the law of condemnation requires it because they acquired our property against our will in effect and used it and benefitted.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Ellis.

ORAL ARGUMENT OF FREDERICK W. ELLIS, ESQ.,

ON BEHALF OF THE DEFENDANTS

MR. ELLIS: Mr. Chief Justice, and may it please the Court:

I was on the case at that time, Your Honor, in further response to the question raised, our Attorney General was not, and there was a demand, a formal resolution of the Louisiana legislature enacted, I believe in 1967 -- it is in the record of the case, it has been argued in brief -- whereby the Louisiana legislature formally requested, noting the passage of time that these funds remaining in the controversy then be invested. It was a reaction not merely by an Attorney General but all the representatives of the people of Louisiana who were incensed at the treatment at that time and resulted in --

QUESTION: Let's back up a second -- and interest paid over?

MR. ELLIS: There was not interest paid over, no, sir.

QUESTION: I know, but the resolution should have said invested and interest paid.

MR. ELLIS: Well, investments may be by dividends

also, such as Gulf State Utilities Company, et cetera. We would not have minded if the return had been in the form of dividends rather than merely interest.

QUESTION: I know, but you say investing it, you say that automatically implies that any return comes to you?

MR. ELLIS: To the winner, for the benefit of the ultimate winner of the contested funds.

QUESTION: That is a unilateral wish that the legislature expressed. You say the United States or any other adversary party is bound by the unilateral wishes of one of the parties?

MR. ELLIS: It was communicated to the United States as a request pursuant to what was construed as a duty of the United States under the agreement, Your Honor.

QUESTION: Communicated, that doesn't make an agreement, does it?

MR. ELLIS: That's correct, that was not, no.

QUESTION: Was there any response from the United States?

MR. ELLIS: There was. The United States did not agree with the request and it --

QUESTION: It formally said no, there is no such understanding?

MR. ELLIS: They denied understanding and

authority to make investments. We had requested that they be invested in banks. Now, turning to --

QUESTION: Mr. Ellis, before you leave that, did I correctly understand you to say you would not have objected if they had invested in companies that produced dividends like Gulf State Utilities?

MR. ELLIS: Yes, sir, interest is not the only thing --

QUESTION: Equity securities would have been --

MR. ELLIS: Yes.

QUESTION: And who would have borne the risk of loss?

MR. ELLIS: Of course, the trustee would have had prudent responsibilities to invest soundly.

QUESTION: But all of this is implied, that where the risk of loss is and what the rate of return would be and all the rest of it?

MR. ELLIS: Yes, Your Honor.

Turning to the Zone 1 issue and I --

QUESTION: You said the United States refused to acknowledge that request of the legislature? Was that a formal document of any kind?

MR. ELLIS: There was a letter in response to it. It is referred to in --

QUESTION: Is it in the record?

MR. ELLIS: I believe it is in the record, yes.

QUESTION: From whom is it?

MR. ELLIS: I do not recall the name of the official offhand. I believe it was a Mr. Carlock.

QUESTION: Who is Mr. Carlock?

MR. ELLIS: I believe he was Fiscal Assistant Secretary for the Department of the Treasury.

QUESTION: He must have cited some authority for it, an Assistant Secretary.

MR. ELLIS: Yes.

QUESTION: Fiscal Officer of What?

MR. ELLIS: The Department of the Treasury, which was the entity holding the funds.

Turning to the Zone 1 issue -- and I respectfully submit, Your Honors, that it is indeed only a Zone 1 issue -- I could not have been more shocked if the United States had stood before this Court and posed the issue as to how many times do I beat my wife. There were assumptions implicit in the United States statement of the issues that are just simply incorrect and grossly inaccurate.

For example, the statement that we have not paid or credited funds in Zones 2 or 3, we have. Our accounting show this. Our defenses are solely made in our pleadings as to Zone 1; 145 leases are referred to

in Zone 2, we have made credits in our accounting. I don't know how the United States got this.

Additionally, the United States in stating the issue as it has has built an assumption on an important factual issue that the Master found contrary of the assumption. Let me read this: "The United States respectfully excepts to the report of the Special Master insofar as he recommends overruling its objections to the accountings" -- and it goes on and refers to the funds -- "as derived from or attributable to submerged lands adjudicated to be within the exclusive domain of the United States." The assumption is explicit.

As in a question related to wife beating, there is no question but what the funds are derived from or attributable to the United States, and quite to the contrary of this assumption, the Master upon the consideration of 118 lease documents and approximately another 80-something documents that were in the lease files related to them, 200-plus documents altogether, the testimony of numerous witnesses about the custom in the industry, understanding what these phrases in these mineral documents meant, the Master found as a fact at the bottom of page 18 of his report -- and the language was inserted in all of them -- that it was leasing the right to extract minerals only -- and we were paid only

for it -- from those parts of the described areas belonging to the state of Louisiana, and I quote that as language from the granting language of the mineral lease, or such as were "owned by the state of Louisiana." We have an appendix to our brief, Appendix 1, which details at length the language of these various leases, and the rents, the bonuses, the rentals were computed on the basis of what was owned by Louisiana. Indeed, we doubtlessly got smaller bids because there were some areas in controversy.

There was only one area where a bay was one by the United States, and that was Caillou Bay, and this involved two leases, leases granted before 1950 and the revenues from the time before 1950 we were not obliged to account for.

Every other one under the language of the Court's decree in 1975, which tracks back to the history of the language in 1950, every other one of those leases contain language such as the Maser had used there. And as the Master found, these rentals were not derived from.

That is the first of two major points we make, is that the monies claimed by the United States were simply not derived from the areas of Zone 1 --

QUESTION: Mr. Ellis, can I just ask you one question about that. I understand the language of the

lease to refer to the area belonging to the State of Louisiana --

MR. ELLIS: Yes.

QUESTION: -- but is there a finding by the Master that in fact no revenues were derived from the ares that were ultimately adjudged to belong to the United States?

MR. ELLIS: Yes, that language I just read.

QUESTION: Well, I don't read that language to say that. Maybe I missed something.

MR. ELLIS: Well, the --

QUESTION: Would that language, would you suggest, cover a lease that just happened to turn out to be covered only land that actually belonged to the United States?

MR. ELLIS: In that event there would be --

QUESTION: Well, there were some, weren't there?

MR. ELLIS: I believe there was one or two out of the 118 --

QUESTION: Well, what do you say about those?

MR. ELLIS: I say that --

QUESTION: Louisiana keeps that money, too?

MR. ELLIS: Of course, we have a name for it in the civil law, the sale of the hoke. It is like the sale of the cast of a fisherman's net. If you have any right

there or if anything materialized from it, it is covered. If it does not materialize, if the fish are not in the net, it does not win the lawsuit.

QUESTION: The language in the lease, in my example the language in the lease wouldn't require them to pay any money to you.

MR. ELLIS: That's correct.

QUESTION: Then it was paid by mistake to you.

MR. ELLIS: Not necessarily. Your Honor --

QUESTION: Well, it turns out that they were paying money on land that was not owned by Louisiana but by the United States.

MR. ELLIS: Not on land but on the right that might or might not exist. There was, Your Honor, additionally payments to the United States. There were dual payments, in many instances, by oil companies and we reached agreement, the United States and Louisiana, that in the instance of dual payments we would not object to the accountings; where we got paid and they got paid back in the early fifties, some of this was going on in that instance.

Now, in an instance where both governments were paid -- and I believe that happened in many instances --

QUESTION: Mr. Ellis, let me just be sure I understand. Do you take the position that there is no

extraction of minerals in area subject to the jurisdiction of the United States where the payment was made to Louisiana?

MR. ELLIS: That there was no extraction of minerals in areas won by the United States?

QUESTION: As I understand the case, the United States claims that there is a certain area over which they had jurisdiction --

MR. ELLIS: Yes.

QUESTION: -- which was leased out by Louisiana from which Louisiana derived revenue, and that revenue was generated by oil under the jurisdiction of the United States. Do you disagree with that?

MR. ELLIS: Yes, I disagree with that because the leases described and leased only --

QUESTION: I understand what the leases say. I am talking about the physical facts, that there may have been some money paid by an oil company to Louisiana because they took some oil out of the area subject to the jurisdiction of the United States. You say that didn't happen?

MR. ELLIS: I don't believe that happened, Your Honor. Incidentally --

QUESTION: Tell me this, then: Did the Master find that it did not happen?

MR. ELLIS: I do not recall that there was an explicit negation of that happening, Your Honor. There were so-called unit agreements which are pooling agreements which it was agreed would be revised under an amendment to the interim agreement of 1956, which it was agreed would be revised after the interim agreement -- pardon me, after the final degree in the case to revise the participation.

Incidentally, let me turn to some of the language of that interim agreement to make the point that apart from the question of what was derived from and even conceding arguendo only for the moment that we were to lose, still there would be the position of Louisiana, based upon the fact that the interim agreement, rights under which were reserved in paragraph 13 of the Court's decree of 1975, conferred upon Louisiana the right to lease and the right to retain the revenues from that leasing.

Incidentally, on that problem, Your Honor, the Master did explicitly make a finding, a fact finding upon the hearing of the testimony of the witnesses, upon the reading of the documents and the cross-interpretation of it, that there was an intent for both the United States as to Zone 4 -- and the deal was the same as to both governments -- and Louisiana as to Zone 1 to not only

grant leases but to receive and retain the revenues under that leasing arrangement.

For example, as language in the interim agreement that explicitly relates to the retention of payments, also this agreement as between -- I refer to page 18a of the government's brief, the last sentence of subparagraph (c) of paragraph 14 of the interim agreement: "Also, this agreement as between the United States and the State of Louisiana, shall continue in effect as to the payments made with respect to such lease." It was contemplated that payments would be made under the lease, and even after the decree the agreement would continue to be effective, to have sort of legalized and authorized those payments that have been made to the party authorized for them to be made under the agreement.

Additionally, in the language of the interim agreement, this stipulation and agreement shall terminate as to any area -- this is in paragraph 14, the second paragraph thereof -- shall terminate as to any area upon the final settlement or determination of the aforesaid controversy with respect to such area, and the word "thereafter" then appears -- and thereafter the successful party shall have exclusive jurisdiction and control over the area so determined.

We received a contract right, Your Honor, of

exclusive jurisdiction and control over Zone 1, and that is all we are claiming here, Your Honor. It has been incorrectly represented that our position relates to Zone 2 and Zone 3. This is all we are claiming here, is a right in Zone 1 in this connection, under this provision.

I would like to point out too that if there is broad language of the decree, indeed there is, that sums derived -- and this is the position of the United States -- that all sums derived from mineral leasing or from mineral resources from property belonging to the other government should be paid to the other government, then, Your Honors, I submit that the very reasoning of the United States on the Zone 1 claim sustains the claim of Louisiana to the sums of money derived from the natural resources of Louisiana through financial benefits enjoyed by the United States through the use of the mineral leasing revenue of Louisiana, and that this Court has already adjudicated that issue.

Thank you.

MR. CHIEF JUSTICE BURGER: You have about four minutes remaining, Mr. Claiborne.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,
ON BEHALF OF THE PLAINTIFF -- REBUTTAL

MR. CLAIBORNE: Mr. Chief Justice, and may it please the Court:

I think I can be very brief and use less than that allotted time.

One, two answers to questions asked by the Court with respect to the interest issue: It should be known that Louisiana received monthly reports from 1956 to date indicating precisely how much money was impounded in the Treasury. Those reports very clearly reflected during all that period that no interest or other increment was being added to the fund, therefore no question of surprise.

Secondly, in 1960, four years after the agreement had been in effect, Louisiana's congressional delegation, both Senate and all members of the House, the Attorney General of Louisiana and the legislature of Louisiana concurred in requesting not that the funds be invested, not that interest be paid, but that the monies in the Treasury be transferred to Louisiana banks so that they could enjoy the free use of that money. That request was denied on the ground that it would set an unfortunate precedent.

Then Louisiana received its $34 million in 1966, no complaint about the failure to add interest. In 1967, the Louisiana legislature, as represented, did memorialize federal officials to hence forward -- not for the past -- please respectfully request is their language, invest these funds. No claim that there was a duty to invest,

no claim that they had a right to interest for the sums they had just been paid, but simply a request to change the agreement for the future, in effect.

The Fiscal Assistant Secretary of the Treasury responded that Treasury regulations forbad him from making any such investment in the absence of statutory authority. It may be that the '56 agreement could have been amended to so provide. Louisiana did not suggest it. They didn't take the matter further. They never said another thing about it until 1975.

Now, they could have asked for an amendment of the agreement. Or if the duty already arose under the '56 agreement, obviously they could have come to this Court and said we will not accept the response by federal officials.

QUESTION: What if you had invested it? Suppose there had been statutory authority available to the fiscal officer to invest the money and he went out and invested it and interest was earned on it.

MR. CLAIBORNE: I think, Mr. Justice White, that if the agreement had accordingly been amended --

QUESTION: Well, I am talking about this agreement. This agreement didn't call for investing or interest, but you nevertheless invest it.

MR. CLAIBORNE: That might properly be viewed

as an implied amendment of the agreement done at the request of Louisiana, the acquiesence of the United States with respect to monies held under the agreement. One could say that had varied the agreement and --

QUESTION: Well, what if you had invested it from the outset?

MR. CLAIBORNE: Well, in those circumstances I don't think we would owe interest because the agreement doesn't provide for it, but there would be an equitable claim that we should have some of the benefit of it. As far as the --

QUESTION: Then why isn't there an equitable claim that they should have the benefit of your use of the money? I mean you have used it for your benefit.

MR. CLAIBORNE: The equities are no stronger against our use of the money than they are with respect to Louisiana's use of our money for thirty years on which we claim no interest and have no right to claim any interest. It was part of the bargain that Louisiana would enjoy these revenues until such time as they lost the land, if that day should come. It was also part of the bargain that the United States would hold and use the funds in escrow in the Treasury. That bargain was made, it was never varied, and both parties had agreed to it.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 3:09 o'clock p.m., the case in the above-entitled matter was submitted.)

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