No. 11-____

IN THE

Supreme Court of the United States

SID-MAR'S RESTAURANT & LOUNGE, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

BARRY W. ASHE
KATHRYN M. KNIGHT
STONE PIGMAN WALTHER WITTMANN LLC
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

LISA S. BLATT
Counsel of Record
ANTHONY J. FRANZE
DIRK C. PHILLIPS
NANCY L. PERKINS
R. REEVES ANDERSON
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Hurricane Katrina devastated southeastern Louisiana and destroyed Sid-Mar's Restaurant & Lounge, a family-owned restaurant that for forty years had been located on a property adjacent to the 17th Street Canal just outside New Orleans. In the aftermath of the storm, the State of Louisiana commandeered the restaurant site, and petitioner filed an action in state court seeking compensation for this taking by the State. Three years later, while the state court action was pending, the United States filed an eminent domain action in federal court seeking to take a portion of the same property. Two weeks before the state action was scheduled to begin trial, the federal court granted the United States' *ex parte* motion to enjoin the state court proceedings.

In an acknowledged conflict with other courts of appeals, a divided Fifth Circuit upheld the federal injunction of petitioner's first-filed state court action. Both the majority and dissent recognized this Court's longstanding "prior exclusive jurisdiction" rule that "the court first assuming jurisdiction over [a] property may maintain and exercise that jurisdiction to the exclusion of the other." *Penn Gen. Cas. Co. v. Pennsylvania*, 294 U.S. 189, 195 (1935); *accord, e.g.*, *Marshall v. Marshall*, 547 U.S. 293, 311 (2006). The panel was divided, however, over whether an exception to the rule applies where, as here, the United States seeks the injunction.

The question presented is whether an exception to the prior exclusive jurisdiction rule exists where the United States brings a later-filed federal action seeking title to property already within the jurisdiction of a state court.

RULE 29.6 STATEMENT

Sid-Mar's Restaurant & Lounge, Inc., has no parent corporation, and no publicly held company owns 10% or more of the corporation's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 11-____

SID-MAR'S RESTAURANT & LOUNGE, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is reported at 644 F.3d 270. App. 1a-53a. The order denying rehearing, but supplementing the majority and dissenting opinions, is reported at 654 F.3d 521. App. 54a-64a. The order of the United States District Court for the Eastern District of Louisiana enjoining the state court proceeding is available at 2009 WL 2176067, App. 65a-68a, and the minute order declining to lift the injunction is unreported, App. 69a.

JURISDICTION

The court of appeals entered judgment on June 17, 2011. App. 1a. Petitioner timely filed a petition for rehearing on June 30, 2011, which the court of appeals denied on August 29, 2011. App. 54a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

None. This case involves a longstanding jurisdictional rule applied by this Court.

STATEMENT

A. Hurricane Katrina and the State of Louisiana's Taking of Sid-Mar's Restaurant & Lounge

On August 29, 2005, Hurricane Katrina devastated southeastern Louisiana, killing 1,833 people and causing $108 billion in property damage across the Gulf region. Nat'l Hurricane Center, *Tropical Cyclone Report: Hurricane Katrina, 23-30 August 2005* 11, 13 (updated Sept. 14, 2011). Sid-Mar's Restaurant & Lounge—a popular, family-owned seafood restaurant and "fixture" in Jefferson Parish for four decades—was among the properties destroyed by the storm and subsequent flooding. App. 75a ¶ 12.

After Katrina, the restaurant's owners took initial steps to rebuild at the same location in the historic "Bucktown" area of Jefferson Parish. *Id*. ¶ 13. On February 10, 2006, however, Louisiana's then-governor issued Executive Order No. KBB 2006-6 to "commandeer[] the use of certain property," including the Sid-Mar's site, "for work that will include levee and floodwall construction and repair." App. 98a §§ 1, 2. The State immediately took possession of

the Sid-Mar's site and deprived its owners of all access to and use of the property. *Id*. at 76a ¶ 15. One month later, the U.S. Army Corps of Engineers began construction on the property pursuant to a right of entry granted by the State in a series of cooperation agreements. *Id*. at 2a; U.S. C.A. Record Excerpts tabs 3, 4 (excerpts of agreements). The Corps has occupied the property ever since.

The State commandeered the Sid-Mar's site pursuant to the Louisiana Homeland Security and Emergency Assistance and Disaster Act, La. Rev. Stat. § 29:271 et seq. App. 99a-100a § 3. That Act and the Louisiana Constitution require the State to compensate Sid-Mar's "to the full extent of [its] loss." La. Const. art. 1, § 4(B)(5); La. Rev. Stat. §§ 29:274(D)(4), 29:730(G). The State's compensation regime was consciously designed to be more generous than the federal government's, and includes recovery of lost profits, interest accruing from the date of expropriation, expert fees, and attorneys' fees. *See* Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. Rev. 283, 362 (1991) ("The Louisiana Constitution of 1974, and the opinions interpreting it, afford property owners in Louisiana greater protection than they would receive virtually anywhere else in the United States.").

B. The State Court Action Against Louisiana

In June 2006, Sid-Mar's and its owners, Sidney Kent Burgess and Marion Burgess, filed an inverse condemnation action in Louisiana state court, seeking compensation from the State for the taking. *Sid-Mar's Rest. & Lounge, Inc. v. State of Louisiana*, No. 632-032 (24th Jud. Dist. Ct., Parish of Jefferson),

App. 70a-79a. The action aimed to resolve questions of ownership of the commandeered property and the amount the State owed to Sid-Mar's and the Burgesses for the taking.

Sid-Mar's and the State litigated the state court action for nearly three years, and trial was set for August 3, 2009. App. 13a. Two months before trial, the State sought leave to file a third-party complaint against the U.S. Army Corps of Engineers seeking subrogation from the United States for any liability the State incurred by commandeering the Sid-Mar's property. *Id*. The United States immediately removed the action to federal court, but the case was remanded because the state court had not yet decided the State's motion to allow third-party claims against the United States. *Id*. The state court set the State's motion for argument on July 21, 2009, along with a motion by Sid-Mar's seeking partial summary judgment that the Burgesses and Sid-Mar's were the rightful owners of the commandeered property. *Id*. at 3a.

C. The United States' Subsequent Federal Court Action and *Ex Parte* Injunction

In June 2009, three years after Sid-Mar's filed its state court lawsuit, the United States filed two federal actions (later consolidated) seeking to take a portion of the Sid-Mar's site that was the subject of the state court action. App. 3a; *id*. at 80a-95a (federal complaints). The United States simultaneously filed a Declaration of Taking and an estimated sum of "just compensation" that, together, purported to vest title of the property in the United States. *Id*. at 3a.

On July 20, 2009—the day before oral argument in the state court action regarding the motion by Sid-Mar's for partial summary judgment—the United States moved the federal court *ex parte* to enjoin the state proceeding "to forestall the threatened injury to the national interest and to protect and aid the jurisdiction of [the federal court] over the instant condemnation proceeding." U.S. Mot. at 11; *see also* App. 3a. The United States has acknowledged that "[a]ll of the property that forms the basis for the federal proceeding is also at issue in the state-court suit filed by Sid-Mar's, and common questions are presented." U.S. C.A. Br. at 2-3.

D. The Decisions Below

1. The federal district court granted the United States' *ex parte* motion and enjoined the state court proceeding just minutes before oral argument in the state court. The district court found that the case was "sufficiently analogous" to this Court's decision in *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957), to warrant a stay. App. 66a. In *Leiter Minerals*, this Court recognized the longstanding rule that the first court to exercise jurisdiction over a property has jurisdiction to the exclusion of all other courts, and that this rule applies to the United States. 352 U.S. at 226-27 (discussing *United States v. Bank of New York & Trust Co*., 296 U.S. 463 (1936)). *Leiter Minerals* held, however, that when the United States brings a *defensive* action to protect its pre-existing title to property that is being challenged in a first-filed state court action, the prior exclusive jurisdiction rule does not apply. *Id*. at 227-28.

Although the United States' posture in the *Sid-Mar's* federal eminent domain action was offensive, not defensive, the district court nevertheless held that an injunction was warranted because a "state court order declaring [Sid-Mar's] the rightful owners of property currently at issue in this federal matter" would "undermine[] [the federal court's] ability to determine to whom compensation should be paid as part of the federal takings procedure." App. 67a.

Sid-Mar's later moved to lift the *ex parte* injunction. The district court denied the motion in a Minute Order on September 2, 2009. *Id*. at 69a.

2. A divided panel of the Fifth Circuit upheld the injunction. The majority acknowledged the "longstanding principle" that "the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other." *Id*. at 9a-10a (quotation source omitted). Citing *Bank of New York*, the majority further recognized that this "prior exclusive jurisdiction" rule generally applies when the United States is a party to the litigation. *Id*. at 7a, 11a. Like the district court, however, the majority found that the federal court could enjoin state proceedings not only where the United States is acting defensively to protect preexisting title to property, but also when the United States asserts "a claim of right or interest in the property that precedes the state court litigation." *Id*. at 10a.

The court of appeals explained that the United States may have gained an interest in the Sid-Mar's site as early as March 2006, thereby predating the state court action. *Id*. at 11a. At the same time, however, the majority observed that "the precise interest gained either by Louisiana or the United

States by the act of commandeering is unclear." *Id*. at 11a-12a. Despite this ambiguity, the majority determined that the federal government's "*possible* . . . claim to the land that preceded the commencement of the state court lawsuit" or its potential "future interest in that property" was sufficient to enjoin the state court proceedings. *Id*. at 17a-18a (emphasis added). "At the very least," the majority concluded, "the uncertainty surrounding the ownership of this property and the extent of the United States' interest militates in favor of enjoining the state court litigation." *Id*. at 18a.

The majority acknowledged that in *United States v. Certified Industries, Inc.*, 361 F.2d 857 (2d Cir. 1966), the Second Circuit reversed a similar injunction obtained by the United States that stayed a state court action involving the same property. The *Sid-Mar's* majority distinguished *Certified Industries* on the ground that, in that case, the United States lacked "possession of the property at issue in the state court suit when that suit was filed." App. 11a.

Judge Dennis dissented. He criticized the majority's "sweeping[] abrogat[ion]" of the prior exclusive jurisdiction doctrine through its "misappli[cation]" of *Leiter Minerals* "by broad, rough analogy." *Id*. at 20a (Dennis, J., dissenting). Because *Leiter Minerals* involved a *defensive* suit by the United States to quiet its pre-existing title to property, Judge Dennis explained that the "very narrow exception" of *Leiter Minerals* has no application where, as here, the "United States brings suit *offensively* in federal court to condemn private property." *Id*. (emphasis added).

Judge Dennis further observed that, "[a]lthough the United States has no direct interest at stake in the state court suit and it will suffer no impairment of any pre-existing property right or its right to choose its forum in which to establish such rights, the majority allows federal courts to stay state court proceedings and potentially circumvent the state courts in the name of a federal interest." *Id*. at 48a. That "serious error," Judge Dennis wrote, "creates undesirable precedent, rests on faulty factual and legal support, and splits us from the Second Circuit." *Id*. at 30a (referring to *Certified Industries*).

3. Sid-Mar's petitioned for rehearing, which the court of appeals denied on August 29, 2011. *Id*. at 54a. The majority, however, supplemented its opinion to clarify that its application of the *Leiter Minerals* exception was not based solely on the United States' "possible future interest" in the property, but also on the fact that the United States "had the right to possess the land" before the state court suit was filed. *Id*. at 55a.

Judge Dennis again dissented. He criticized the majority for "never specif[ying] what exactly the government's interest was prior to its filing of the present condemnation suit." *Id*. at 58a. The dissent also criticized the government's possession-based test as conflicting with decisions from the Seventh and Ninth Circuits. *Id*. at 59a-60a. "[T]he government's mere right to enter the land—or, as the majority would have it, the government's right to possess the land as a result of commandeering and its stated intent to acquire title—is no more of a legal interest than it might have in *any property in the nation*." *Id*. at 59a (emphasis added and quotation marks omitted). "In effect, the [majority's] argument is that

the prior exclusive jurisdiction principle does not apply to the United States as a litigant, which simply flies in the face of a compendium of authorities including Supreme Court cases to the contrary." *Id*. at 63a-64a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit distorted a bedrock principle of federalism, split with several sister circuits, and needlessly delayed compensation to victims of Hurricane Katrina by several years—all at the United States' request. This Court should grant the petition to resolve an acknowledged and significant circuit conflict exacerbated by the decision below.

Thousands of cases arise each year in which state and federal courts can have competing claims to jurisdiction over the same property. For decades, this Court's "prior exclusive jurisdiction" doctrine has provided lower courts a straightforward rule to resolve such disputes: the first court to exercise jurisdiction over the property has jurisdiction to the exclusion of all other courts. Yet, the courts of appeals are intractably divided on the extent to which this rule applies when the United States seeks to enjoin a state court that first assumed jurisdiction over disputed property.

As the dissent recognized, the decision below permits federal courts to enjoin virtually any first-filed state court proceeding whenever the United States simply asserts that it had a right to enter the property and "might" have had an unspecified future interest in the land at the time the state suit was filed. That decision places the Fifth Circuit in conflict with the Second, Seventh, Ninth, and Eleventh Circuits, which would not have permitted

the injunction of the state court proceeding here. This case presents an ideal vehicle to resolve the circuit conflict, clarify the jurisdictional rule, and prevent future tension in our dual system.

I. THE COURTS OF APPEALS ARE INTRACTABLY DIVIDED OVER WHETHER THE PRIOR EXCLUSIVE JURISDICTION RULE APPLIES WHEN THE UNITED STATES IS A PARTY

A. The Prior Exclusive Jurisdiction Rule Has Long Controlled Competing State and Federal Actions Involving the Same Property

Our judicial system is one of dual authority. The efficiency of that system thus depends on clear rules to resolve conflicts when the jurisdictional boundaries of federal and state courts overlap. One such rule, long recognized by this Court, is "the principle, applicable to both federal and state courts, . . . that the court first assuming jurisdiction over [a] property may maintain and exercise that jurisdiction to the exclusion of the other." *Penn Gen. Cas. Co. v. Pennsylvania*, 294 U.S. 189, 195 (1935); *accord, e.g.*, *Marshall v. Marshall*, 547 U.S. 293, 311 (2006) ("[W]hen one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*.").[1]

---

[1] *E.g.*, *Palmer v. Texas*, 212 U.S. 118, 125 (1909) ("If a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority . . . ."); *Hagan v. Lucas*, 35 U.S. (10 Pet.) 400, 403 (1836) ("[P]roperty could not be subject to two

This rule—known as the "prior exclusive jurisdiction" or "first assuming jurisdiction" doctrine—"predates our dual federal-state court system." 13F Charles A. Wright et al., *Federal Practice & Procedure* § 3631, pp. 278-79 (3d ed. 2009) [hereinafter Wright & Miller]. As a leading treatise describes the rule:

> [A]n abundance of federal decisional law, including an impressive array of Supreme Court decisions, makes it clear that in all cases involving a specific piece of property, real or personal (including various forms of intangible property), the federal court's jurisdiction is qualified by the ancient and oft-repeated rule . . . that when a state or federal court of competent jurisdiction has obtained possession, custody, or control of particular property, that authority and power over the property may not be disturbed by any other court.

Id. § 3631, pp. 271-72 (footnotes omitted); *accord* Erwin Chemerinsky, *Federal Jurisdiction* § 14.2, p. 870 (5th ed. 2007) ("[T]here is a clear rule preventing duplicative proceedings in cases involving real property: the court that acquires jurisdiction first decides the matter.").

Thus, "[i]t is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction . . . . The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the

---

jurisdictions at the same time. The first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other.").

federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction." *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229 (1922).

Grounded in federalism, the doctrine aims to "avoid unseemly and disastrous conflicts in the administration of our dual judicial system" and "to protect the judicial processes of the court first assuming jurisdiction." *Penn Gen.*, 294 U.S. at 195. It also serves "reasons of wise judicial administration," such as avoiding piecemeal litigation. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976).

B. The Doctrine Applies to Cases Involving the United States

Given the paramount interests of federalism and judicial efficiency served by the prior exclusive jurisdiction rule, this Court has recognized that it applies "even where the [United States] Government" is one of the litigants in parallel lawsuits. *Colorado River*, 424 U.S. at 818; *accord* Wright & Miller, *supra*, § 3631, pp. 276-77 (same). In *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936), for instance, this Court held that "[t]he fact that the complainant in these suits is the United States does not justify a departure from" the prior exclusive jurisdiction rule. *Id.* at 479. There, the United States brought a federal lawsuit asserting claims relating to its purported interest in funds from several dissolved insurance companies. *Id.* at 470. The United States sought to enjoin previously-filed corporate liquidation proceedings in state court involving competing claims to the same funds. *Id.* This Court upheld the denial of the requested injunction and the dismissal of the Government's federal

action under the prior exclusive jurisdiction rule. *Id*. at 470-71, 481. The Court concluded that "[t]he principle, applicable to both federal and state courts, that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other" barred the United States' suit. *Id*. at 477.

The Court has since recognized only one narrow exception to the rule's applicability in cases involving the United States. In *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957), the Court held that a federal district court properly granted the United States' motion to enjoin previously-filed state court proceedings involving claims to government land that were the subject of both lawsuits. The plaintiff in *Leiter Minerals* filed a state court action claiming ownership of mineral interests in land owned by the United States. *Id*. at 221. Thereafter, the United States sued in federal court to "quiet title" to its mineral rights and to enjoin the state suit. *Id*. at 222-23.

This Court upheld the injunction, carving out an exception to the general rule in *Bank of New York*:

> [T]he *Bank of New York* case presented the more unusual situation where the United States, like any private claimant, made a claim against funds that it never possessed . . . . In this case, a private party is seeking by a state proceeding to obtain property currently in the hands of persons holding under the United States; the United States is seeking to protect that possession and quiet title by a federal court proceeding. Therefore, *since the position of the United States is essentially a defensive one*, we think that it should be permitted to choose the forum in this

> case, even though the state litigation has the elements of an action characterized as quasi in rem.

Leiter Minerals, 352 U.S. at 227-28 (emphasis added).

Since *Leiter Minerals*, this Court, the lower courts, and leading commentators have recognized that—absent the circumstances in *Leiter Minerals*—the prior exclusive jurisdiction rule applies to the United States. *See Colorado River*, 424 U.S. at 818 (noting the general rule that "the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts" applies to the United States with a "*but cf.*" cite to *Leiter Minerals*); *accord* Wright & Miller, *supra*, § 3631, p. 277 n.20 (similar).

C. The Courts of Appeals Are in Conflict Over When the *Leiter Minerals* Exception Applies

The lower courts are intractably divided over when the *Leiter Minerals* exception applies to exempt the United States from the prior exclusive jurisdiction rule.

1. The Fifth Circuit below held that the *Leiter Minerals* exception applies not only to the circumstances presented in *Leiter Minerals*—*i.e.*, where the United States brings a *defensive* suit to quiet its preexisting title to property—but also where, as here, the "United States brings suit *offensively* in federal court to condemn private property." App. 20a (Dennis, J., dissenting) (emphasis added). Rejecting the offensive/defensive distinction, the Fifth Circuit fashioned a new test based on the United States' "prior possession" and possible "future interest" in

the property. *Id*. at 46a, 61a. The majority held that the United States' "possession of this property and its stated intent to acquire title to that property predated the Sid-Mar's state court lawsuit" and thus justified the federal court's injunction. *Id*. at 55a.

2. The Fifth Circuit's approach is in conflict with decisions from the Second, Seventh, Ninth, and Eleventh Circuits. As an initial matter, the decision "splits . . . from the Second Circuit." *Id*. at 30a, 47a (Dennis, J., dissenting). In *United States v. Certified Industries, Inc.*, 361 F.2d 857 (2d Cir. 1966), the Second Circuit held that the *Leiter Minerals* exception applies only where the United States' lawsuit is "defensive"—where the United States seeks to protect its pre-existing ownership in the property as opposed to offensively seeking to acquire title from third parties. *See* App. 50a-52a (Dennis, J., dissenting) (describing Second Circuit's test). There, the plaintiff sued in state court to foreclose a lien on funds owed to it by a contractor. The United States moved to enjoin the state court suit on the ground that it was entitled to have a "trust" imposed on those same funds. *Certified Indus.*, 361 F.2d at 859.

The district court enjoined the state court suit, and the Second Circuit reversed. Drawing on *Bank of New York*, the Second Circuit held that *Leiter Minerals* only "indicates that where the position asserted by the United States is defensive, it may be allowed to choose its forum . . . . The position of the United States in this action is not, however, a defensive one." *Id.* at 860 n.2; *see also Interworks Sys. Inc. v. Merchant Fin. Corp.*, 604 F.3d 692, 701 n.7 (2d Cir. 2010) (positively citing to *Certified Industries*).

Other circuits, including the Seventh, Ninth, and Eleventh Circuits, have adhered to the Second Circuit's offensive/defensive approach. These courts have held that later-filed federal actions brought by the United States offensively seeking forfeiture of property are subject to the prior exclusive jurisdiction rule. *See United States v. $79,123.49 in U.S. Cash & Currency*, 830 F.2d 94, 99 (7th Cir. 1987) (vacating judgment granted in favor of the United States in federal forfeiture action because there was a first-filed state court forfeiture action concerning the same property); *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1146 (9th Cir. 1989) (similar); *United States v. $270,000.00 in U.S. Currency, Plus Interest*, 1 F.3d 1146, 1149 (11th Cir. 1993) (per curiam) (similar).

In contrast to the decision below, the Seventh and Ninth Circuits in these cases explicitly rejected the United States' argument that its "possession" of the property rendered the prior exclusive jurisdiction doctrine inapplicable. "To hold otherwise would substitute a rule of force for the principle of mutual respect embodied in the prior exclusive jurisdiction doctrine." *$79,123.49 in U.S. Cash*, 830 F.2d at 98; *see One 1985 Cadillac*, 866 F.2d at 1146 ("[W]e reject, as did the Seventh Circuit, the argument that the fact of federal possession of the res takes jurisdiction from the state court and bestows it upon the district court."); App. 59a-60a (Dennis, J., dissenting) (acknowledging conflict). These circuits thus would not permit the injunction here simply based on Louisiana's agreement to grant the United States access to the Sid-Mar's site.

3. The decision below also conflicts with the Tenth Circuit's approach to the *Leiter Minerals* exception.

The Tenth Circuit applies the exception when the government is acting in its sovereign capacity, rather than acting like a private litigant. In *United States v. Akin*, 504 F.2d 115 (10th Cir. 1974), the court of appeals reversed the district court's dismissal of a federal action involving water rights that were also at issue in a parallel state proceeding. The court reasoned, in part, that the state court action did not preclude the federal suit because the United States was not acting like a "private claimant" (as it was in *Bank of New York*), but instead was "seeking to establish rights which have a national and sovereign character." *Id*. at 122 & n.5.[2]

II. THE DECISION BELOW IS WRONG

As the dissent below explained, the Fifth Circuit's "prior possession"/"future interest" test distorts the *Leiter Minerals* exception beyond recognition and creates an exception that effectively swallows the rule.

First, the power of a court does not turn on disputes over when a *party* obtained "possession" of the property at issue; rather, it is determined by when a *court* first exercises jurisdiction over the property. "[W]here the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction." *Kline*, 260 U.S. at 229; *accord Harkin v. Brundage*, 276 U.S. 36, 43 (1928) ("[T]he court which first obtains jurisdiction

---

[2] This Court in *Colorado River* later reversed the Tenth Circuit on other grounds and did not address the *Leiter Minerals* exception. *Colorado River*, 424 U.S. at 816 n.23 ("Our reasons for finding abstention inappropriate in this case make it unnecessary to consider when, if at all, abstention would be appropriate where the Federal Government seeks to invoke federal jurisdiction. *Cf. Leiter Minerals, Inc. v. United States*.").

and constructive possession of property by filing the bill is entitled to retain it without interference and cannot be deprived of its right to do so, because it may not have obtained prior physical possession."). A court's jurisdiction over property attaches when a complaint is filed and "process subsequently issues in due course." *Penn Gen.*, 294 U.S. at 196. Indeed, the virtue of the first-filed rule is that it provides clear and easily administrable guidance and avoids unseemly conflicts between state and federal courts. *See id.*; *see also Dailey v. Nat'l Hockey League*, 987 F.2d 172, 176 (3d Cir. 1993) (to be effective, prior exclusive jurisdiction doctrine must be a "mechanical rule").

Under the "possession test," by contrast, an "injurious conflict of jurisdiction" could occur if "final process of the one [court] could be levied on property which has been taken by the process of the other." *$79,123.49 in U.S. Cash*, 830 F.2d at 96-97 (quoting *Hagan*, 35 U.S. at 403). Although "'possession is nine-tenths of the law,' we prefer to apply the remaining one-tenth and decline to substitute a rule of force for the principle of mutual respect embodied in the prior exclusive jurisdiction doctrine." *One 1985 Cadillac*, 866 F.2d at 1146 (quotation source omitted); *accord United States v. One 1979 Chevrolet C-20 Van*, 924 F.2d 120, 123 (7th Cir. 1991) ("The fact that the federal authorities muscled in on the van and began an administrative forfeiture proceeding before the state court action was filed did not confer jurisdiction on the federal court.").

Second, the dissent below rightly pointed out that the majority's "future interest" test is so expansive that it essentially renders the prior exclusive jurisdiction doctrine inapplicable whenever the United States seeks a stay. As Judge Dennis explained, "the

government's mere right to enter the land—or, as the majority would have it, the government's right to possess the land as a result of commandeering and its stated intent to acquire title—is no more of a legal interest than it might have in *any property in the nation*." App. 59a (Dennis, J., dissenting) (emphasis added and quotation marks omitted). In other words, the exception, under the majority's test, effectively swallows the rule.

Finally, the majority's determination that "the uncertainty surrounding the ownership of this property and the extent of the United States' interest militates in favor of enjoining the state court litigation," App. 18a, is at odds with the fundamental jurisdictional principle that the party asserting jurisdiction bears the burden of establishing it. *See Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1194 (2010). And it ignores this Court's recognition last Term that our dual system demands "respect for state courts," and "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2375 (2011) (quotation source omitted).

III. THE QUESTION PRESENTED IS RECURRING AND OF WIDESPREAD IMPORTANCE WARRANTING THIS COURT'S REVIEW

A. The sheer volume of *in rem* and *quasi in rem* cases filed each year—and the inevitable competing federal and state actions relating to the property in these cases—underscores the recurring importance of the issue presented for review. From April 1, 2000 to March 31, 2011, for instance, the United States

commenced 4,188 condemnation cases, 17,405 foreclosure cases, and 13,560 drug-related civil forfeiture cases. Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics Tables*, Table C-2 (2001-2011), http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx.

Not surprisingly, courts often rely on the prior exclusive jurisdiction doctrine to resolve jurisdictional disputes in these and other types of cases involving property rights. The doctrine has been applied to disputes over the ownership of funds, *Bank of New York*, 296 U.S. at 477, foreclosure proceedings, *Farmers' Loan & Trust Co. v. Lake St. Elevated R.R. Co.,* 177 U.S. 51 (1900),[3] probate proceedings, *Marshall v. Marshall*, 547 U.S. 293 (2006), and water rights disputes, *State Eng'r of Nevada v. South Fork Band of Te-Moak Tribe*, 339 F.3d 804 (9th Cir. 2003). *See generally* Wright & Miller, *supra*, § 3631 (describing cases applying rule in variety of contexts).

Courts also routinely are called upon to determine whether a state or federal court has jurisdiction over competing civil forfeiture claims brought by both federal and state governments. In that context, the rule is similarly well-settled: "the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other." David B. Smith, *Prosecution and Defense of*

---

[3] *See also, e.g.*, *United States v. Comer*, No. 95-CV-76358, 2000 WL 1358677, at *2 (E.D. Mich. July 5, 2000) (federal court has exclusive jurisdiction over later-filed state court foreclosure action).

Forfeiture Cases § 9.01[7] (Matthew Bender & Co. 2011).[4]

B. The paramount importance of the federalism issues at stake compels the need for review in this case. These interests are deemed so significant that, even though state courts ordinarily are "completely without power to restrain federal-court proceedings," *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964), a lone exception to that bar exists where a state court seeks to enjoin a federal court pursuant to the prior exclusive jurisdiction doctrine. *See Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 465-67 (1939); *accord* Wright & Miller*, supra*, § 3631, pp. 288-90.

Indeed, federal courts have expressed the need for restraint when the United States has asked federal courts to exercise jurisdiction over property already under the jurisdiction of a state court. *See United*

---

[4] *See, e.g.*, *United States v. $506,231 in U.S. Currency*, 125 F.3d 442, 450-51 (7th Cir. 1997) (vacating forfeiture judgment for lack of jurisdiction because of a prior state forfeiture action); *$270,000.00 in U.S. Currency*, 1 F.3d at 1149 (similar); *One 1985 Cadillac Seville*, 866 F.2d at 1146 (similar); *$79,123.49 in U.S. Cash,* 830 F.2d at 99 (similar); *accord United States v. $99,000 U.S. Currency*, No. 1:10-cv-138, 2011 WL 2470665, at *4 (S.D. Ind. June 17, 2011) (denying claimant's motion to dismiss federal forfeiture action because the state court did not have jurisdiction over the *res*); *United States v. $3,251.00 in U.S. Currency*, No. 2:10cv24, 2010 WL 1541490, at *2 (S.D. Miss. Apr. 16, 2010) (similar); *United States v. $236,130.00 in U.S. Currency*, No. 6:08-cv-2062-Orl-31, 2009 WL 528606, at *1-2 (M.D. Fla. Mar. 2, 2009) (dismissing federal court action because "the state court never relinquished jurisdiction over the *res* at issue in this case"); *United States v. $43,029 U.S. Currency*, No. 06-07421, 2008 WL 131669, at *3-4 (N.D. Cal. Jan. 11, 2008) (federal jurisdiction was proper because the state court never had *in rem* jurisdiction).

States v. $506,231 in U.S. Currency, 125 F.3d 442, 450-51 (7th Cir. 1997) ("The [federal] government may not simply assert jurisdiction over the *res* because it is concerned with losing money or having money disbursed. These concerns do not give either the government or the district court the right to improperly assert jurisdiction over property which is under state court jurisdiction or to circumvent the law of jurisdiction."); *$270,000.00 in U.S. Currency*, 1 F.3d at 1149 ("The federal district court's premature exercise of in rem jurisdiction impaired the state court's jurisdiction and violated the spirit of comity that must underlie federal and state court relations.").

The rule is deemed so important to the administration of our dual system it is "mandatory" and "no mere discretionary abstention rule." *Chapman v. Deutsche Bank Nat'l Trust Co.*, 651 F.3d 1039, 1043 (9th Cir. 2011) (quotation source omitted).

C. This Court's resolution of the circuit conflict is needed, moreover, so that lower courts have a clear and straightforward rule to determine whether they have jurisdiction to hear a case. *See Hertz Corp.,* 130 S. Ct. at 1193 ("[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case."). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Id*. Complex rules "produce appeals and reversals, encourage gamesmanship," and place "[j]udicial resources . . . at stake." *Id*.

Those problems are well illustrated in this case. It has been *five years* since the State of Louisiana commandeered the Sid-Mar's property, and these victims of Hurricane Katrina have yet to have the merits of their takings claim heard by any court. The United States sat on the sidelines for years monitoring the state court proceedings, yet waited until the eve of a state court's hearing on the merits of a summary judgment motion to invoke the jurisdiction of a federal court in an attempt to strip the state court of its power to hear the case. *See* Sid-Mar's C.A. Br. 37; U.S. C.A. Br. 8. As a result, owners of property taken by the government have yet to receive any compensation. Notwithstanding years of litigation in state court, they are being forced to start proceedings anew in federal court, where the United States seeks a more restrictive "just compensation" standard than available under State law.

D. Finally, this case presents an ideal vehicle to resolve the deep and abiding conflict over the *Leiter Minerals* exception to the prior exclusive jurisdiction rule. The only issue on appeal is the legality of the federal court's injunction of the state court proceeding. Because the United States' posture in the federal action was offensive, the injunction would not have issued in the Second, Seventh, Ninth, and Eleventh Circuits. Moreover, the Seventh and Ninth Circuits have rejected the "possession" test adopted by the Fifth Circuit. The majority and dissenting opinions below put in stark relief the need for this Court's immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BARRY W. ASHE
KATHRYN M. KNIGHT
STONE PIGMAN WALTHER WITTMANN LLC
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

LISA S. BLATT
Counsel of Record
ANTHONY J. FRANZE
DIRK C. PHILLIPS
NANCY L. PERKINS
R. REEVES ANDERSON
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Petitioner

NOVEMBER 23, 2011

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed June 17, 2011]

No. 09-30869

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

SID-MARS RESTAURANT & LOUNGE, INC.,
Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana

Before DENNIS, OWEN, and SOUTHWICK, *Circuit Judges.*

LESLIE H. SOUTHWICK, *Circuit Judge*:

Sid-Mar's Restaurant filed suit in state court demanding compensation from the State of Louisiana for the commandeering of its real property following Hurricane Katrina. While the state court litigation was pending, the United States initiated condemnation proceedings involving part of the same property in the United States District Court for the Eastern District of Louisiana. To avoid potentially conflicting judgments, the United States sought a stay of the state court proceeding. The district court entered a stay, and Sid-Mar's appealed.

We AFFIRM.

BACKGROUND

From 1967 until destroyed by Hurricane Katrina on August 29, 2005, Sid-Mar's Restaurant & Lounge in Metairie, Louisiana was owned and operated by the Burgess family. Sid-Mar's was adjacent to the 17th Street Canal and just outside of the Lake Pontchartrain Hurricane Protection Levee System. After Hurricane Katrina, the Burgesses desired to rebuild in the same location.

In the aftermath of Katrina, the Department of the Army and the Orleans Levee District entered into a Cooperation Agreement. Among other terms, the state agreed to provide the federal government with a right of entry to all lands deemed necessary for various rehabilitation projects. On January 27, 2006, a supplement to the Cooperation Agreement was executed. It provided for the construction of "interim gated closure structures and integrated pumping capacity near the confluence of Lake Pontchartrain with the 17th Street Outfall Canal." This was followed on February 10, 2006, by then-Governor Kathleen Blanco's executive order commandeering the use of specific real property for the project. Among the real property commandeered was the land on which Sid-Mar's formerly stood. The federal government first entered the commandeered property in March 2006 to begin the construction project. It has occupied the property since this time.

On June 2, 2006, the Burgesses and Sid-Mar's (collectively referred to as "Sid-Mar's") filed a lawsuit in state court against the State of Louisiana seeking just compensation for the taking of its real property. The United States was not named as a defendant.

On June 3, 2009, three years and one day after the state suit was filed and while it was still pending, the United States filed two Complaints in Condemnation in federal district court. One was on a .088 acre tract, the other on a .166 acre tract. Those suits were later consolidated. The entities said to have interests in the property were Sid-Mar's, the Sheriff as ex-officio Tax Collector for Jefferson Parish, the State of Louisiana, and certain unknown owners. These parcels were among those subject to Sid-Mar's state court action. The United States simultaneously filed a Declaration of Taking and deposited in the registry of the court the sum it estimated to be just compensation. The declaration and the deposit vested title in the United States to the real property it sought to condemn. *See* 40 U.S.C. § 3114(b).

Two days after the federal condemnation proceedings began, Sid-Mar's filed for a partial summary judgment in state court. Sid-Mar's argued it had acquired title by adverse possession and was the sole owner when the State of Louisiana commandeered the property in 2006. The State responded in part by arguing that Sid-Mar's title was unclear. A hearing was set for July 21, 2009.

The day before the scheduled hearing, the United States filed a motion in the condemnation suit to stay the state court proceedings. It argued that a stay was necessary to aid and protect the federal court's jurisdiction. The district court agreed and on July 21 enjoined the defendants from prosecuting the state court suit until authorized by a later order of the federal court. Sid-Mar's timely filed an interlocutory appeal. *See* 28 U.S.C. § 1292(a)(1).

DISCUSSION

Sid-Mar's makes two claims on appeal: the Anti-Injunction Act precluded the issuance of this stay, and even if not prohibited, the issuance of a stay was not proper on the facts of this case. We will consider both arguments.

A. Applicability of Anti-Injunction Act

The Anti-Injunction Act prohibits federal courts from enjoining state court proceedings. 28 U.S.C. § 2283. Congress enacted the prohibition in 1793, in part "to work out lines of demarcation between" the independent court systems of the national government and of each state. *Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970).

There are three statutory exceptions that permit the issuance of an injunction. *See* 28 U.S.C. § 2283. None of them apply here. The Supreme Court has interpreted the Anti-Injunction Act to allow the United States to obtain a stay even when it cannot meet any of the exceptions. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 225-26 (1957). The Court held that Congress did not intend the Anti-Injunction Act to apply "when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest." *Id.* An injunction is not automatically proper, though, merely because the United States seeks it. We will discuss this point in the last section of our opinion.

The district court issued a stay in reliance on *Leiter Minerals*. It concluded that the federal suit was the only one that "can finally determine the basic issue in the litigation," which was the amount and recipients of compensation. The court also noted that the

summary judgment motion pending in the state court sought to have Sid-Mar's found to be the owner of the property. Were that finding made, it would "undermine[] this Court's ability to determine to whom compensation should be paid as part of the federal takings procedure." Consequently, a stay was proper.

Sid-Mar's argues that the district court erred by holding that the *Leiter Minerals* doctrine applies when the United States is the party seeking a stay. Instead, Sid-Mar's asserts that for *Leiter Minerals* to apply, there must be a federal interest that predates the state court litigation and requires protection from irreparable injury. The federal interest, Sid-Mar's argues, did not exist until the United States brought its condemnation suit three years after the state court litigation. We will explain why we place an earlier date on the federal interest. Sid-Mar's also argues *Leiter Minerals* does not control because state interests predominate over federal ones; the federal government's title to property is not at issue in the state suit; there is no risk of inconsistent judgments in the two suits; the state litigation was pending for three years before the federal condemnation action was commenced; and the relevant flood-control project combines local, state, and federal interests.

Sid-Mar's identifies distinctions that can be made between the facts of the present case and those in *Leiter Minerals*. We consider Sid-Mar's arguments regarding the reasons *Leiter Minerals* should not apply at all as relevant to the question of whether the district court erred in concluding that the circumstances of this case justified the stay.

B. Propriety of Stay in These Circumstances

The Supreme Court in *Leiter Minerals* acknowledged that even when the United States is the party who has obtained a stay of state court proceedings, it still must be decided whether "an injunction was proper in the circumstances of this case." *Id*. at 226. Sid-Mar's articulates the issue slightly differently. It argues that even if the Anti-Injunction Act does not apply, the court "must also assess whether principles of comity and federalism counsel restraint." *Regions Banks of La. v. Rivet*, 224 F.3d 483, 495 (5th Cir. 2000) (citations omitted). We have stated that when a district court rules on whether to enjoin state court proceedings, we review that determination for an abuse of discretion. *United States v. Billingsley*, 615 F.3d 404, 408-09 (5th Cir. 2010). Regardless of the precise articulation of our appellate task, we must answer whether the stay was proper considering the facts of the particular case.

We review the circumstances that justified a stay in *Leiter Minerals*. In 1949, the United States granted leases on mineral rights it allegedly owned in Louisiana. *Leiter Minerals, Inc. v. United States,* 224 F.2d 381, 383 (5th Cir. 1955), *modified and affirmed*, *Leiter Minerals*, 352 U.S. at 230. In 1953, Leiter Minerals brought suit in state court against the mineral lessees, *i.e.*, it did not join the United States as a defendant. *Leiter Minerals*, 352 U.S. at 221. It sought a declaration that it owned the mineral rights, and the United States had by operation of state law never acquired title. *Id.* After the state court suit was filed, the United States brought suit in federal district court to quiet title to the mineral rights. *Id.* at 222-23. The Supreme Court held that only the federal suit could "finally determine the basic issue"

of whether title was in the United States because "title to land in possession of the United States under a claim of interest cannot be tried as against the United States by a suit against persons holding under the authority of the United States." *Id.* at 226 (citing *United States v. Lee*, 106 U.S. 196 (1882)). Further, even if the state court sought to avoid as much conflict with the federal court as possible, its judgment could result in confusion because the basic issue of title could not be resolved by the state court. *Id.* at 226-27. Finally, the United States was seeking to protect the possession of the persons to whom it granted leases by quieting title in federal court. *Id.* at 227-28. The action was largely defensive, and the court held that the government should be allowed to choose its forum. *Id*. at 228.

Leiter Minerals also presented an alternative reason there should be no stay. It moved to dismiss the United States' complaint in federal court "on the ground that the state court had already assumed jurisdiction over the property in question . . . ." *Id.* at 223. Leiter Minerals relied on a case where the Supreme Court would not allow the United States to enjoin an ongoing state court proceeding in federal court because "the state court had obtained jurisdiction over the [property] first and . . . the litigation should be resolved in that court." *Id.* at 227 (citing *United States v. Bank of N.Y. & Trust Co.*, 296 U.S. 463 (1936)). The United States, in *Bank of New York*, attempted to recover funds over which it claimed ownership that were subject to a state court liquidation. *Bank of N.Y. & Trust Co.*, 296 U.S. at 470. The basis of the government's claim was that the property at issue in the state suit had been assigned to it before the liquidation occurred. *Id.* The Court would not enjoin the proceeding because the state court

asserted its control over the property first. *Id.* at 475-76.

The Court in *Leiter Minerals* was unswayed by this argument, finding the situation different than what was before the Court in *Bank of New York*. *See Leiter Minerals*, 352 U.S. at 227. The United States in *Bank of New York* was acting "like any private claimant" trying to acquire property "it never possessed and that [was] in the hands" of a party appointed by the state court to liquidate an insurance company. *Id.* at 227-28. In *Leiter Minerals,* the United States, as mentioned above, was in a defensive posture, "seeking to protect . . . possession and quiet title by a federal court proceeding." *Id.* at 228. Speaking directly to Leiter Minerals' argument that the government could not enjoin the state court litigation because the state court had been the first to acquire jurisdiction over the property, the Court wrote that the United States should be able to choose its forum "even though the state litigation has the elements of an action characterized as *quasi in rem*." *Id.* (emphasis added). *Leiter Minerals* contemplated the government's ability to enjoin state court litigation when its interest in the subject property went beyond a claim that could be asserted by a private creditor. *See id.*

This part of the *Leiter Minerals* reasoning evokes but did not elaborate on a doctrine that is sometimes called the "prior-exclusive-jurisdiction rule," helpfully discussed at some length in a key treatise on federal court practice. *See* 13F Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3631 (3d ed. 2009). The authors write that "when a state or federal court of competent jurisdiction has obtained possession, custody, or control of particular property, that authority and

power over the property may not be disturbed by any other court[,]" and cite an array of Supreme Court cases for this proposition. *Id.* (collecting cases). The "prior- exclusive-jurisdiction rule" applies even when the United States is a party. *Id.* Neither party in the present appeal has discussed this doctrine, though the focus on *Leiter Minerals* at least tangentially touches on it. We will briefly explore the doctrine.

The Supreme Court, principally in cases that predate *Leiter Minerals*, frequently referred to the principle "that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other . . . ." *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466 (1939); *see also Farmers' Loan & Trust Co. v. Lake St. Elevated R.R. Co.*, 177 U.S. 51, 61 (1900); *Freeman v. Howe*, 65 U.S. 450, 459 (1860). The primary reason for this rule is "one of necessity to prevent unseemly conflicts between the federal and state courts and to prevent the impasse which would arise if the federal court were unable to maintain its possession and control of the property, which are indispensable to the exercise of the jurisdiction it has assumed." *Mandeville v. Canterbury*, 318 U.S. 47, 49 (1943).

Wright and Miller make no allowance for a situation where, as in *Leiter Minerals*, the government's attempted federal lawsuit is largely defensive and attempts to mitigate the possible effect state court litigation might have on the government's rights, including avoidance of conflict with a later-filed federal lawsuit. *See Leiter Minerals*, 352 U.S. at 227-28. *Leiter Minerals* squarely addressed the petitioner's attempted application of this rule and identified a set

of facts that allow a government-filed action to take precedence over this longstanding principle. *Id.*

In this arena, *Leiter Minerals* has a limited but powerful impact. Where the United States is a party, and it asserts a claim of right to a piece of property that is subject to ongoing litigation in state court, the government will be able to enjoin that litigation to protect its interests if certain conditions are met. *Leiter Minerals* identified several factors that could allow the government to take this step: the state court's inability to make a complete determination of the basic issue in the litigation, confusion that could be caused by inconsistent judgments, and a claim of right or interest in the property that precedes the state court litigation. *See id.* at 226-28. Therefore, the "prior- exclusive-jurisdiction rule" must be read in light of the principles supporting *Leiter Minerals*.

In the years following the *Leiter Minerals* decision, courts of appeals have had few opportunities to apply its holding to cases involving the United States as a party. One case deserves our focus because a sister circuit applied the "prior-exclusive-jurisdiction rule" to deny the United States' request to enjoin a state court proceeding in which the government claimed an interest in the property subject to litigation. *See United States v. Certified Indus., Inc.*, 361 F.2d 857 (2d Cir. 1966). In *Certified Industries*, a sub-contractor filed a mechanic's lien against a contractor in New York state court to recoup unpaid fees and later attempted to foreclose on the lien. *Id.* at 859. The United States, seeking unpaid taxes from the same contractor, later filed an action in federal district court, asserting a state-law claim to impose a trust on funds owed to the contractor. *Id.* The district

court granted the government a preliminary injunction which enjoined the state court suit. *Id.*

The Second Circuit reversed, concluding that the principles of *Leiter Minerals* were inapplicable. *Id.* at 860. The subcontractor's assertion of the lien in state court was not, in the court's view, "a direct or an indirect challenge to the right of the United States to retain funds or title to property in its possession at the commencement of the state proceeding." *Id.* at 861. Therefore, *Certified Industries* presented facts more closely akin to *Bank of New York* than *Leiter Minerals*. *See id.* at 861-62. The Second Circuit applied the "prior-exclusive-jurisdiction rule" and vacated the injunction. *See id.*

Certified Industries is part of a line of cases that apply the "prior-exclusive-jurisdiction rule" to factual scenarios where the concerns that prompted *Leiter Minerals* are not present. The facts in today's case, however, are more closely aligned with those in *Leiter Minerals* than either *Certified Industries* or *Bank of New York*. In *Certified Industries*, the court focused on the government's lack of possession of the property at issue in the state court suit when that suit was filed to find the "prior-exclusive-jurisdiction rule" should preclude enjoining the state proceedings. *See id.* at 861.

Here, beginning in March 2006, the interest of the United States, as asserted by the State of Louisiana's commandeering, has been clear. Indeed, it was the government's delay in pursuing its claims that, according to Sid-Mar's, led Sid-Mar's to file its own state court suit. We discuss later the nature of the interest the United States gained. We also will discuss that the precise interest gained either by Louisiana or the United States by the act of

commandeering is unclear, but what is beyond question is that Louisiana acted in concert with the United States in taking control of this property prior to the state court litigation. This prior assertion of control distinguishes our circumstances from those in *Certified Industries* or *Bank of New York*, where the government had no control over or title in the property involved in the state court suits they attempted to enjoin in federal court. *See id.*; *Bank of N. Y. & Trust Co.*, 296 U.S. at 470, 475-77.

In our case, the United States claimed the state court litigation could interfere with the federal condemnation because the suits involved some of the same property and there was a risk of inconsistent judgments. The federal condemnation action required the United States to pay the former owner of the property from whom title had been taken by the Declaration of Taking. In the state court suit, Sid-Mar's sought to have itself determined to be the owner and to receive compensation from the State of Louisiana. The United States argued that Louisiana had not taken the subject property. Because Sid-Mar's had not joined the federal government as a party, the United States could not remove the suit to federal court. Finally, the United States argued it was entitled to have its rights and interests in the property resolved in federal court.

The parties agree on appeal about one error in the district court's stay order. In its summary of facts, the district court stated the federal court condemnation suit was filed at the same time as Sid-Mar's state court suit. In fact, the state court action predates the federal suit by three years. The parties do not agree on the importance of the error. As will be discussed, we find none.

Sid-Mar's denied there was any risk of inconsistent judgments or any burdens of the rights of the United States. Its explanation starts with describing what occurred prior to the federal condemnation. The property was commandeered on February 10, 2006. The authority for the seizure was the Louisiana Homeland Security and Emergency Assistance and Disaster Act. La. Rev. Stat. § 29:721. According to the governor's executive order, Louisiana "commandeer[ed] the use" of about ten acres. The commandeering was at the request of the Army Corps of Engineers and was for levee and floodwall construction. The executive order also required that the owners be identified and compensated.

According to Sid-Mar's, the government was dilatory in identifying and paying owners of the commandeered property. Thus, in June 2006, Sid-Mar's brought suit against the State of Louisiana. The litigation had not been resolved when in February 2009, a trial date of August 3, 2009 was set. On June 2, the State sought leave to file a third-party demand against the Corps of Engineers. The federal government almost immediately removed the suit to federal court. Within days, the action was remanded, and the Corps was never made a party.

The day after the short-lived removal of the state court suit, the United States filed this condemnation action. Sid-Mar's argues there was no need to file the condemnation action, as the State of Louisiana and the Corps of Engineers had possession of the property for over three years, a period beginning with the Louisiana governor's order to commandeer the property. Sid-Mar's argues it should be allowed to proceed against Louisiana. Only issues of state law will be involved, Sid-Mar's says, as it does not

challenge the federal government's right to condemn the same property.

Sid-Mar's agrees that the acquisition of title by the United States and the setting of the compensation it will pay are matters solely for the federal suit. Sid-Mar's contends, though, that there is no possibility the state court judgment would conflict with the federal judgment. It alleges the state and federal courts will examine who held title to the property during separate time periods, *i.e.*, the state proceedings will determine who had title when the commandeering occurred. Sid-Mar's argues Louisiana must have had title on June 3, 2009, when the United States took the land. As stated in its brief, "the federal condemnation proceedings will determine the compensation the Government owes the State, as the owner of the property at the time of the" Declaration of Taking. In effect, Sid-Mar's alleges there have been two seizures of title, first by Louisiana from Sid-Mar's, then by the United States from Louisiana. Sid-Mar's shapes its argument about title being in the State of Louisiana from 2006 to 2009 into an impenetrable barrier, preventing the state court suit's decision on title from affecting the federal suit's decision- making.

Having set up the issues in the two suits in this way, Sid-Mar's then discusses at some length the case that it argues is most analogous to the present suit. *See Eden Memorial Park Ass'n v. United States*, 300 F.2d 432 (9th Cir. 1962). In that case, the United States had agreed to the State of California's request to condemn part of a cemetery and then to convey it to the state to construct an interstate highway. *Id.* at 433-34. The request had followed a state appellate court's holding that the relevant state agency had no

authority to condemn a cemetery for a highway. *Id.* at 434. After the federal condemnation was filed, the cemetery owner filed in state court to enjoin the state agencies from taking possession of the property condemned by the United States or to construct a highway across the cemetery. *Id.* at 435-36. The federal district court entered a stay. *Id.* at 436.

The Ninth Circuit held that *Leiter Minerals* gave federal courts authority to issue stays against state court suits whenever the applicant was the United States, but the stay was not proper in the circumstances of that case. *Id.* at 437-39. The cemetery owner was not contesting the ownership of the United States to the land, and thus the federal court did not need a stay to protect its jurisdiction. *Id.* at 437. Further, the condemnation suit would fully invest the United States with title to the part of the cemetery property it sought. *Id.* at 437-38. Whether state law could thereafter block construction across the cemetery would not be an issue for the condemnation action. *Id.* at 438-39.

In contrast, Leiter Minerals had been enjoined from prosecuting its action against the mineral lessees in state court because the United States might suffer "irreparable injury in the form of loss of royalties . . . from any temporary, wrongful dispossession of its lessees by the state court proceedings." *Leiter Minerals*, 352 U.S. at 223. Because the title of the United States to the minerals could only be finally determined in federal court, there was the potential for conflicting judgments if the state court proceedings were not stayed. *Id.* at 228.

Sid-Mar's argues there is no potential for conflicting judgments here, just as there was not in *Eden* and unlike *Leiter Minerals.* In Sid-Mar's view, no

conflict will arise because the federal court may decide title (in the State of Louisiana) and the compensation amount (presently unknown) without needing to know the result of the state court suit.

The argument, able as it is, requires our accepting the premise that in 2009, title was in the State of Louisiana. The premise may, however, be false. The United States concedes that it is uncertain what estate is seized by the act of commandeering. Determining what property interest Louisiana acquires by commandeering begins with the relevant statute. Pursuant to the Louisiana Homeland Security and Emergency Assistance and Disaster Act (the "Act"), the governor has the authority to "commandeer or utilize any private property" found necessary to cope with a disaster or emergency subject to applicable compensation requirements. La. Rev. Stat. § 29:724D(4). The Sid-Mar's property was commandeered in order to provide the United States with "right of entry to all lands, easements, and rights-of-way, including suitable borrow and dredged or excavated material disposal areas" as needed for the repairs to the 17th Street Canal. The Executive Order specifically reserved to the private owners "all such rights and privileges in said land as may be used without interfering with or abridging the rights hereby acquired" by the commandeering.

In addition, the Cooperation Agreement between the United States and the State of Louisiana contemplated that the State would commandeer property such as that involved in this suit. It then provided that the United States would "obtain a deed or servitude agreement, as appropriate," to the property. If necessary, the United States would acquire property in its name through eminent

domain. These terms support the proposition that the act of commandeering displaced Sid-Mar's right to use the property, but it was understood that the United States would thereafter acquire the interests it needed through negotiation or by eminent domain.

It is unresolved whether the premise of Louisiana's ownership from 2006 to 2009 is correct. If Sid-Mar's or other owners still had title because title was among "such rights and privileges in said land as may be used without interfering with or abridging the rights hereby acquired" by the commandeering, then the condemnation is necessary to establish that title and the compensation due. There remains a serious issue of who is to receive the compensation in the federal condemnation suit. To the United States, that uncertainty makes *Leiter Minerals* factually similar. There could be conflicting just-compensation awards that are based on different interpretations of the interests acquired by the act of commandeering. In addition, if title were not acquired by Louisiana through commandeering this property, another question will be how compensation for the loss of use prior to condemnation is to be calculated and who is to pay it. We do not need to decide the state law issues. Resolving them in the most appropriate manner that still protects the jurisdiction of the district court for the condemnation action is a matter to be considered on remand.

The district court was correct about the potential conflict between state and federal judgments concerning who held title to the property at the time of the June 3, 2009 taking by the United States, and how the amount of compensation due. Without deciding the issue of ownership, it is possible the United States had a claim to the land that preceded

the commencement of the state court lawsuit. Since March 2006, the federal government has been in continuous possession of the land. Further, the Executive Order that acted to commandeer the property referred specifically to the Cooperation Agreement between the United States and the Orleans Levee District in the section that set out compensation for the previous owner of the property. That Cooperation Agreement, as mentioned above, indicated the federal government would later acquire full ownership rights in the property.

One circuit court, applying *Leiter Minerals*, has allowed the government to enjoin state court litigation involving a piece of property because the government held a future interest in that property. *See Alonzo v. United States*, 249 F.2d 189, 196-97 (10th Cir. 1957). At the very least, the uncertainty surrounding the ownership of this property and the extent of the United States' interest militates in favor of enjoining the state court litigation.

Sid-Mar's also argues that *Leiter Minerals* was incorrectly decided. We understand the argument may be offered in order to preserve it for possible review by the Supreme Court. Surely all also understand that this court does not have the authority to overturn a Supreme Court ruling.

Central to the final resolution of the condemnation issues is whether the State of Louisiana acquired title by the act of commandeering. The Supreme Court in *Leiter Minerals* also faced a foundational issue of state law. After holding that a stay was permissible, it also suggested the need for the federal court to receive the opinion of the state court on the state law issues.

> Before attempting to answer [the state law questions] and to decide their relation to the issues in the case, we think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court. The Louisiana declaratory judgment procedure appears available to secure such an interpretation, and the United States of course may appear to urge its interpretation of the statute. It need hardly be added that the state courts in such a proceeding can decide definitively only questions of state law that are not subject to overriding federal law.
>
> We therefore modify the judgment of the Court of Appeals to permit an interpretation of the state statute to be sought with every expedition in the state court in conformity with this opinion.

Leiter Minerals, 352 U.S. at 229-30 (citations omitted).

The Louisiana Supreme Court subsequently ruled on the declaratory judgment. *Leiter Minerals v. California Co.*, 132 So. 2d 845, 849-50 (La. 1961).

The district court will need to determine the best manner in which to proceed in reaching an answer to the title questions that arise because of the commandeering. It might resolve the question itself, lift the stay for the limited purpose of allowing the state court to determine title, or take other steps to avoid the potential for inconsistent rulings in the two proceedings.

AFFIRMED.

DENNIS, *Circuit Judge*, dissenting:

I respectfully dissent because the majority refuses to apply the "prior exclusive jurisdiction doctrine" under which the United States is not entitled to an injunction staying state court proceedings where the state court is the first court to assume jurisdiction over the subject matter property of an action in rem or quasi in rem. *United States v. Bank of N.Y. & Trust Co.*, 296 U.S. 463, 477-81 (1936); *United States v. Certified Indus., Inc.*, 361 F.2d 857 (2d Cir. 1966); *see also Penn Gen. Cas. Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189 (1935). The majority misapplies the Supreme Court's decision in *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957), by broad, rough analogy and holds that the prior exclusive jurisdiction doctrine does not apply when the United States brings suit offensively in federal court to condemn private property. Thus, the majority sweepingly abrogates the prior exclusive jurisdiction doctrine in this circuit in respect to subsequently filed federal condemnation suits by allowing and perhaps compelling federal district courts, at the government's request, to enjoin and supersede prior filed state court in rem condemnation proceedings involving the same property. In my view, however, *Leiter Minerals,* at most, creates only a very narrow exception to the doctrine, when the United States sues defensively to quiet its pre-existing title to property, that does not apply here. In *Leiter Minerals*, the Supreme Court indicated that where the United States' position is "defensive" it should be able to choose its forum "even though the state litigation has the elements of an action characterized as quasi in rem." *Leiter Minerals,* 352 U.S. at 228. However, the position of the United States in this action is offensive, not defensive; it is not seeking to quiet its title

to property that it already claims to own, as was the case in *Leiter Minerals*, but to supersede the state court's jurisdiction and acquire title to the property in the first instance by condemnation. Furthermore, Sid-Mar's assertion of their state constitutional rights in an in rem inverse condemnation proceeding against the state in state court is neither a direct nor an indirect challenge to the right of the United States to bring a condemnation action against whomever the state court declares to be the owner of the subject property under Louisiana property law. The present case is more akin to *Bank of New York & Trust Co.*, in which the Supreme Court relied on the prior exclusive jurisdiction doctrine "in remitting the United States to the state court, [because] the Court saw no 'impairment of any rights' or 'any sacrifice of its proper dignity as a sovereign.'" *Leiter Minerals*, 352 U.S. at 227 (quoting *Bank of N.Y. & Trust Co.,* 296 U.S. at 480-81).

I.

The United States brought this suit to condemn approximately 0.166 acres of land abutting Lake Pontchartrain in Jefferson Parish, Louisiana for a federal hurricane protection and flood control project. Upon the United States' motion, the district court asserted jurisdiction over the 0.166 acres and enjoined the alleged private owners' pending state court inverse condemnation suit against the State of Louisiana for taking and ousting them from the same property, in addition to other parcels. In that state court action, the plaintiffs had alleged that the State had physically taken 10.2 acres—including the 0.166 acres of their property that the United States seeks to condemn in the present federal case—without compensating them for the taking.

A.

Prior to Hurricane Katrina, which struck New Orleans and Jefferson Parish in August, 2005, Sidney and Marion Burgess, and their Louisiana corporation, Sid-Mar's Seafood Restaurant & Lounge, Inc., (collectively "Sid-Mar's") allegedly maintained and operated a seafood restaurant, on or near the 0.166-acre res, which was destroyed by the storm. On February 10, 2006, the Governor of Louisiana, pursuant to Louisiana Revised Statutes § 29:721 *et seq.,* commandeered 10.2 acres of land, including the 0.166 acres at issue in this case, for emergency hurricane protection and flood control purposes. Louisiana Revised Statutes § 29:721 *et seq*. authorizes the Governor to take private property if necessary to cope with a disaster or emergency, subject to any applicable requirements for compensation; and provides that the amount of compensation shall be calculated in the same manner as for a taking of property pursuant to the condemnation laws of Louisiana. *See* La. Rev. Stat. Ann. §§ 29:722, 29:724, 29:730.

The Governor's February 10, 2006 commandeering order declared that a state of emergency continued to exist after Katrina because of the potential for future hurricanes to cause severe flooding, damage to private and public property, and danger to the safety and security of citizens; that the United States Army Corps of Engineers and numerous state and local officials and entities had requested that the Governor commandeer the property for the construction of the Lake Pontchartrain Louisiana and Vicinity Hurricane Protection Project, 17th Street Outfall Canal Interim Closure Structure, and necessary appurtenances and clearings, "reserving however, to the landowners, their heirs and assignees, all such rights

and privileges in said land as may be used without interfering with or abridging the rights hereby acquired"; that the subject property containing approximately 10.2 acres had been commandeered as required by the Department of the Army; that the owners of the commandeered property shall be identified and compensated in accordance with the terms of the Cooperation Agreement Between the United States of America and the Orleans Levee District for Rehabilitation of a Federal Hurricane/Shore Protection Project executed on October 21, 2005, as supplemented by Supplemental Agreements Nos. 1 and 2, dated January 27, 2006; and that the Division of Administration, State Land Office, shall take immediate steps to grant right of entry to the property commandeered for the above purposes pursuant to this order.

On June 2, 2006, Sid-Mar's filed suit against the State of Louisiana, through the Governor and the Division of Administration, State Land Office, in the 24th Judicial District of Louisiana in Jefferson Parish, alleging that Sid-Mar's were owners of property included within the property taken by the Governor's February 10, 2006 commandeering order; that the State of Louisiana has physically occupied Sid-Mar's property and deprived Sid-Mar's of any use of or access to that property; that on February 13, 2006, construction of the Lake Pontchartrain Louisiana and Vicinity Hurricane Protection Project, 17th Street Outfall Canal Interim Closure Structure began on the property; but that the state has not compensated Sid-Mar's for the property taken or their resulting damages; and that Sid-Mar's were entitled to compensation and damages as a result of the commandeering or taking of the property and to

other legal and equitable relief pursuant to Louisiana law.[1]

B.

In the present federal case, on June 3, 2009, the United States filed this action in the United States District Court for the Eastern District of Louisiana against the 0.166-acre sub-part of the commandeered property involved in Sid-Mar's state court suit, seeking to take and condemn that 0.166 acres for the construction, repair and rehabilitation of a federal project, *viz*., the Lake Pontchartrain, Louisiana and Vicinity Hurricane Protection Project, 17th Street Outfall Canal, Interim Control Structure, Jefferson Parish, Louisiana.[2] Sid-Mar's and others were named as defendants. The government prayed for judgment granting it a fee simple title to the land, reserving to the landowners only the right, title and interest to the underlying minerals.

On July 21, 2009, pursuant to the United States' motion, the district court enjoined Sid-Mar's from further prosecution of their state court inverse condemnation suit against the State of Louisiana. The federal district court's decree stated it had the authority to issue the injunction because the Anti-Injunction Act, 28 U.S.C. § 2283, does not apply when

---

[1] On June 5, 2009, Sid-Mar's filed a motion for partial summary judgment in their state court suit, but before any state court decision thereon, the federal district court enjoined the state proceedings on July 21, 2009 as described below.

[2] This appears to be the same or a similar project for which the Louisiana Governor commandeered the subject property on February 10, 2006. However, neither the pleadings nor the parties' briefs explain whether the state project and the federal project are one and the same.

the United States seeks to stay state court proceedings, citing *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 226 (1957), for this proposition. Moreover, the district court concluded that "this case is sufficiently analogous to the factual situation in *Leiter* [*Minerals*], where the Supreme Court held that a stay of state court proceedings was appropriate," to warrant an injunction. It explained that similar to *Leiter Minerals*, the suit in federal court is "the only one that [can] finally determine the basic issue in the litigation." (alteration in original) (quoting *Leiter Minerals*, 352 U.S. at 226) (internal quotation marks omitted). "In addition, currently pending before the state court is a motion for partial summary judgment. Plaintiffs in that case seek a state court order declaring plaintiffs the rightful owners of property currently at issue in this federal matter. Such a finding by the state court specifically undermines this Court's ability to determine to whom compensation should be paid as part of the federal takings procedure. The Court is mindful that although it is rare that a federal court will enjoin and stay a state court proceeding, the government's motion fits squarely within clearly established law on when such a stay is appropriate." After the injunction issued, Sid-Mar's moved the district court to lift the injunction in light of their previously filed state court inverse condemnation proceeding. However, the district court denied that motion in an oral order without any additional findings of fact or conclusions of law. Sid-Mar's timely filed an interlocutory appeal. *See* 28 U.S.C. § 1292(a)(1).

II.

It is well settled that "if two suits [are] pending, one in a state and the other in a federal court, [and they] are in rem or quasi in rem, so that the court or its officer must have possession or control of the property which is the subject matter of the suits in order to proceed with the cause and to grant the relief sought, the court first acquiring jurisdiction or assuming control of such property is entitled to maintain and exercise its jurisdiction to the exclusion of the other." *Mandeville v. Canterbury*, 318 U.S. 47, 48-49 (1943). Accordingly, "an abundance of federal decisional law, including an impressive array of Supreme Court decisions,[3] makes it clear that in all cases involving a specific piece of property, real or

---

[3] The Wright and Miller treatise cites the following cases as supporting this proposition: Mandeville, 318 U.S. 47; *Toucey v. N.Y. Life Ins. Co*., 314 U.S. 118 (1941); *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939); *Penn Gen. Cas. Co.*, 294 U.S. 189; *Harkin v. Brundage*, 276 U.S. 36, 43 (1928); *Lion Bonding & Sur. Co. v. Karatz*, 262 U.S. 77, 88-90 (1923); *Kline v. Burke Constr. Co*., 260 U.S. 226 (1922); *Palmer v. Texas*, 212 U.S. 118 (1909); *Wabash R.R. Co. v. Adelbert Coll*., 208 U.S. 38 (1908); *Farmers' Loan & Trust Co. v. Lake St. Elevated R.R. Co*., 177 U.S. 51 (1900); *Moran v. Sturges*, 154 U.S. 256 (1894); *Byers v. McAuley*, 149 U.S. 608 (1893); *Porter v. Sabin*, 149 U.S. 473 (1893); *Rio Grande Ry. Co. v. Vinet*, 132 U.S. 478 (1889); *Borer v. Chapman*, 119 U.S. 587, 600 (1887); *Heidritter v. Elizabeth Oil-Cloth Co*., 112 U.S. 294 (1884); *Krippendorf v. Hyde*, 110 U.S. 276 (1884); *Ellis v. Davis*, 109 U.S. 485 (1883); *Yonley v. Lavender*, 88 U.S. (21 Wall.) 276 (1874); *Buck v. Colbath*, 70 U.S. (3 Wall.) 334 (1865); *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1860); *Taylor v. Carryl*, 61 U.S. (20 How.) 583 (1857): *Orton v. Smith*, 59 U.S. (18 How.) 263 (1855); *Peale v. Phipps*, 55 U.S. (14 How.) 368 (1852); *Williams v. Benedict*, 49 U.S. (8 How.) 107 (1850); and *Peck v. Jenness*, 48 U.S. (7 How.) 612 (1849). 13F Charles Alan Wright et al., Federal Practice & Procedure § 3631, at 271 n.15 (3d ed. 2009).

personal (including various forms of intangible property), the federal court's jurisdiction is qualified by the ancient and oft-repeated rule—often called the doctrine of prior exclusive jurisdiction—that when a state or federal court of competent jurisdiction has obtained possession, custody, or control of particular property, that authority and power over the property may not be disturbed by any other court." 13F Charles Alan Wright et al., *Federal Practice & Procedure* § 3631, at 271-72 (3d ed. 2009).

"Although the prior- exclusive-jurisdiction rule is based at least in part on considerations of judicial comity, it very often is referred to as a jurisdictional limitation, and *has been applied even when the United States is a party." Id.* at 275-77 (emphasis added) (footnotes omitted); *see also Penn Gen. Cas. Co.*, 294 U.S. at 195 ("To avoid unseemly and disastrous conflicts in the administration of our dual judicial system, *see Peck v. Jenness*, 48 U.S. (7 How.) 612, 625 (1849); *Taylor v. Carryl*, 61 U.S. (20 How.) 583, 595 (1857); *Freeman v. Howe*, 65 U.S. (24 How.) 450, 459 (1860); *Buck v. Colbath*, 70 U.S. (3 Wall.) 334, 341 (1865); *Farmers' Loan & Trust Co. v. Lake Street Elevated R.R. Co.*, 177 U.S. 51, 61 (1900), and to protect the judicial processes of the court first assuming jurisdiction, *Wabash R.R. Co. v. Adelbert Coll.*, 208 U.S. 38, 54 (1908); *Palmer v. Texas*, 212 U.S. 118, 129, 130 (1909), the principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other.").

The basis of the doctrine in considerations of judicial comity and federalism was explained by the

Supreme Court over one hundred years ago in *Palmer v. Texas*, 212 U.S. 118, 125 (1909):

> The Federal and state courts exercise jurisdiction within the same territory, derived from and controlled by separate and distinct authority, and are therefore required, upon every principle of justice and propriety, to respect the jurisdiction once acquired over property by a court of the other sovereignty. If a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty.

"The origin of the rule, however, predates our dual federal-state court system, and its primary purpose is to protect the jurisdiction of the court that has acquired control over the property." 13F Wright et al., *supra*, at 278-79.

> It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. Where the action is in rem the effect is to draw to the federal court the possession or control, actual or potential, of the res, and the exercise by the state court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first

> attached, the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction.

Kline v. Burke Constr. Co., 260 U.S. 226, 229 (1922).

As a result, the Wright and Miller treatise is able to cite ample authority demonstrating that the doctrine has been applied equally to suits brought by the United States and private parties. It highlights that *Bank of New York & Trust Co.*, 296 U.S. 463, held that "[t]he United States, as a plaintiff, must follow the general rule that the court first acquiring jurisdiction of a res acquires exclusive jurisdiction [over] the res." 13F Wright et al., *supra*, § 3631, at 277 n.20. In addition, the treatise cites *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142 (9th Cir. 1989); *United States v. Certified Industries, Inc.*, 361 F.2d 857 (2d Cir. 1966); *Pridgen v. Andresen*, 891 F. Supp. 733 (D. Conn. 1995); and *United States v. Augspurger*, 452 F. Supp. 659 (W.D.N.Y. 1978), *amended*, 477 F. Supp. 94 (W.D.N.Y. 1979), as further support. 13F Wright et al., *supra*, § 3631, at 277 n.20. Therefore, substantial controlling authority establishes that possibly always, and certainly in every case except where the United States seeks to defend its pre-existing property rights, federal courts lack authority to proceed with in rem proceedings if there is a prior initiated state court in rem proceeding involving the same subject matter property.

III.

It is undisputed that both this federal condemnation suit and the state court inverse condemnation action are in rem proceedings. In the absence of explicit Louisiana case law or commentary to that

effect regarding inverse condemnation suits, however, I will set forth my reasons for so concluding. After that, I will discuss further why my colleagues in the majority have fallen into serious error in failing to adhere to the prior exclusive jurisdiction doctrine in this case and how this decision stems from their misinterpretation of *Leiter Minerals.* I will also demonstrate how their holding creates undesirable precedent, rests on faulty factual and legal support, and splits us from the Second Circuit.

A.

Federal and Louisiana courts have expressly recognized that condemnation suits brought by federal, state and local governments to take private property for public purposes are in rem proceedings. *See United States v. Carmack*, 329 U.S. 230, 235 n.2 (1946) ("The proceeding to condemn the land being in rem . . . ." (citing *United States v. Dunnington*, 146 U.S. 338, 352 (1892); and *In re Condemnation Suits by the United States*, 234 F. 443, 445 (E.D. Tenn. 1916))); *United States v. Petty Motor Co.*, 327 U.S. 372, 376 (1946) ("Condemnation proceedings are in rem . . . ." (citing *A. W. Duckett & Co. v. United States,* 266 U.S. 149 (1924); and *Dunnington*, 146 U.S. at 350-54)); *A. W. Duckett & Co.*, 266 U.S. at 151 ("[I]t seems to us manifest that the United States, although not taking the fee, proceeded in rem as in eminent domain, and assumed to itself by paramount authority and power the possession and control of the piers named, against all the world."); *Eagle Lake Improvement Co. v. United States*, 160 F.2d 182, 184 (5th Cir. 1947) ("A condemnation proceeding is an action in rem. It is not the taking of rights of designated persons, but the taking of the property itself." (citing *A. W. Duckett & Co.*, 266 U.S. at 151)); *New*

Orleans Redevelopment Auth. v. Lucas, 881 So. 2d 1246, 1255 (La. Ct. App. 4th Cir. 2004); *State Through Dep't of Highways v. Boudreaux*, 401 So. 2d 428, 430 (La. Ct. App. 1st Cir. 1981) ("An expropriation is in the nature of an in rem proceeding." (citing *Garber v. Phillips Petroleum Co.*, 146 So. 2d 518 (La. Ct. App. 3d Cir. 1963))); *Garber*, 146 So. 2d at 521 ("A condemnation proceeding is a proceeding in rem. It is not a taking of rights of persons in the ordinary sense but an appropriation of the land or property itself. When the property is conveyed by judgment, all previous existing estates or interests in the land are extinguished." (citing *A. W. Duckett & Co.*, 266 U.S. 149; *Dunnington*, 146 U.S. 338; and *United States v. Certain Lands in Borough of Brooklyn*, 129 F.2d 577 (2d Cir. 1942))); *State Through Dep't of Highways v. Walker*, 129 So. 2d 35, 37 (La. Ct. App. 2d Cir. 1961) ("Condemnation proceedings are in rem . . . .").

Although I have not found cases explicitly declaring that inverse condemnation suits are in rem proceedings, I conclude that they should be so considered because the United States Supreme Court and Louisiana's highest court have held that they are substantially equivalent to condemnation actions and essential to the self-executing constitutional protection of private property owners from governmental takings without just compensation. "In addition to . . . three statutory methods, the United States is capable of acquiring privately owned land summarily, by physically entering into possession and ousting the owner." *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5 (1984) (citing *United States v. Dickinson,* 331 U.S. 745, 747-49 (1947)). "In such a case, the owner has a right to bring an 'inverse condemnation' suit to recover the value of the land on the date of the intrusion by the Government." *Id.* (citing *United*

States v. Dow, 357 U.S. 17, 21-22 (1958)). "Such a suit is 'inverse' because it is brought by the affected owner, not by the condemnor." *Id.* at 5 n.6 (citing *United States v. Clarke*, 445 U.S. 253, 257 (1980)). "The owner's right to bring such a suit derives from 'the self-executing character of the constitutional provision with respect to condemnation.'" *Id.* (quoting *Clarke*, 445 U.S. at 257, in turn quoting 6 P Nichols, *Eminent Domain* § 25.41 (rev. 3d ed. 1972)). As the Supreme Court stated in *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, "[t]he fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. *The suits were thus founded upon the Constitution of the United States*." 482 U.S. 304, 315 (1987) (quoting *Jacobs v. United States*, 290 U.S. 13, 16 (1933)) (internal quotation marks omitted).

Similarly, the Louisiana Supreme Court has held that an "action for inverse condemnation arises out of the self-executing nature of" the state constitutional requirement that "the expropriating entity is bound to make reparations," and the action requires the state to compensate private landowners for their property taken or damaged for public purposes even when the state has not initiated statutorily authorized expropriation proceedings. *State Through Dep't of Transp. & Dev. v. Chambers Inv. Co.*, 595 So. 2d 598, 602 (La. 1992); *see also Avenal v. State*, 886 So. 2d 1085, 1104 (La. 2004) ("Inverse condemnation claims derive from the Takings Clauses contained in

both the Fifth Amendment of the U.S. Constitution and Art. I, § 4 of the Louisiana Constitution."); *Constance v. State Through Dep't of Transp. & Dev., Office of Highways*, 626 So. 2d 1151 (La. 1993); *St. Tammany Parish Hosp. Serv. Dist. No. 2 v. Schneider*, 808 So. 2d 576, 582 (La. Ct. App. 1st Cir. 2001) ("[T]he Louisiana Supreme Court has recognized that the action for 'inverse condemnation' arises out of the self-executing nature of the constitutional command to pay just compensation."). Further, the Louisiana Supreme Court held that the "aim of Article I, § 4, of [the Louisiana] [C]onstitution [of 1974] in requiring that the owner shall be compensated for property 'taken or damaged . . . to the full extent of his loss' . . . was deliberate, prompted by a belief on the part of the sponsors that inadequate awards had been provided under the prior law." *Chambers Inv. Co.*, 595 So. 2d at 602 (first omission in original) (citing L. Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 15 (1974); and citing as "*cf.*" *State v. Dietrich*, 555 So. 2d 1355, 1358-59 (La. 1990); and *State Through Dep't of Highways v. Constant*, 369 So. 2d 699, 702 (La. 1979) as indicating that "the purpose of the additional language in Article I, § 4 was to compensate an owner for any loss sustained by reason of the taking, and not merely restricted as under the former constitution to the market value of the property taken and to reduction in the market value of the remainder"); *see also Avenal*, 886 So. 2d at 1103 n.23 (citing *Chambers Inv. Co.*, 595 So. 2d at 602 for this same proposition).

For these reasons, I conclude that the inverse condemnation action arising out of the self-executing nature of the United States and Louisiana Constitutions affords Sid-Mar's the same protection to the full

extent of their loss as would be provided them in a statutory condemnation action brought by the state or any governmental entity in an in rem proceeding. Functionally, an action in rem is "[a]n action determining the title to property and the rights of the parties not merely among themselves, but also against all persons at any time claiming an interest in that property; a real action." *Black's Law Dictionary* 32 (8th ed. 2004). Sid-Mar's alleged in their state inverse condemnation suit that they held a valid title to the 0.166-acre parcel at issue in the instant federal suit (which was part of the 10.2 acres commandeered by the state) against all persons claiming an interest in that property when the Governor of Louisiana commandeered the property by physically taking it and ousting them from possession and access to the land. Accordingly, I conclude that Sid-Mar's commenced a valid inverse condemnation action in rem in the state court prior to the United States' filing of the federal condemnation suit against the same property in rem in the present case. Therefore, the federal courts must respect the previously filed state court in rem proceedings as establishing that court's exclusive jurisdiction to adjudicate the title to the property taken and the compensation to be paid by the state in connection with the taking.[4] Additionally, the Louisiana Gover-

---

[4] The Louisiana Homeland Security and Emergency Assistance and Disaster Act, La. Rev. Stat. Ann. § 29:721 *et seq*., empowers the Governor, subject to any applicable requirements for compensation, to "commandeer or utilize any private property if he finds it necessary to cope with a disaster or emergency." La. Rev. Stat. Ann. § 29:724(D)(4). The Act provides that the amount of compensation for such a loss "shall be calculated in the same manner as compensation due for the taking of property pursuant to the condemnation laws of

nor's commandeering order reserved to the owners of the land taken "all such rights and privileges in said land as may be used without interfering with or abridging the rights hereby acquired." This reservation necessarily contemplates that a state court with in rem jurisdiction and possession and control of the property will determine the nature and the extent, if any, of the landowners' future right to use the property commandeered and taken from them.

B.

Contrary to the majority's and district court's conclusions, I also conclude that this case is neither analogous to nor controlled by *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957), and therefore the prior exclusive jurisdiction doctrine applies to and demands dismissal or a stay of this later filed federal in rem condemnation action in light of the earlier filed state in rem inverse condemnation action.

In *Leiter Minerals*, the Supreme Court first decided that the Anti-Injunction Act, 28 U.S.C. § 2283, does not apply to bar injunctions or stays sought by the United States because "statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect." 352 U.S. at 224 (quoting *United States v. United Mine Workers of Am.*, 330 U.S. 258, 272 (1947)) (internal quotation marks omitted). But the

---

[Louisiana]." La. Rev. Stat. Ann. § 29:730(G). The Act does not, however, establish or refer to any particular statutory method or procedure to govern the compensation of persons whose property is taken or condemned under the Governor's emergency commandeering power. Accordingly, Sid-Mar's inverse condemnation action is an in rem action based on the self-executing nature of the state and federal constitutions.

Court then stated that "[t]he question still remains whether the granting of an injunction was proper under the circumstances of that case." *Id.* at 226. The Supreme Court went on to give qualified approval of the district court's injunction of the state court proceedings in *Leiter Minerals*, *id.* at 226-28, but the Court distinguished the situation in *Leiter Minerals* from the "*more unusual situation where the United States, like any private claimant, made a claim against funds that it never possessed* and that were in the hands of depositaries appointed by the state court. In [*Leiter Minerals*], a private party is seeking by a state proceeding to obtain property *currently in the hands of persons holding under the United States*; the United States is seeking to *protect* that possession and *quiet title* by a federal court proceeding," *id.* at 227-28 (emphasis added). Put another way, as the majority recognizes, *Leiter Minerals* did not directly analyze the prior exclusive jurisdiction doctrine or its implications. Majority Op. 7-8. However, it did allude to the doctrine through distinguishing *Bank of New York & Trust Co.*, which, as discussed *supra*, applied the doctrine against a later initiated in rem action brought by the United States. When its tangential consideration of the doctrine is understood in this manner, it becomes clear that *Leiter Minerals* did not fundamentally alter or amend the prior exclusive jurisdiction doctrine, but rather, at most, recognized a narrow exception where the sovereign, who is only required to litigate in the courts of its choosing, was seeking defensively to "protect" and "quiet" title it already possessed.

An enhanced recounting of *Leiter Minerals*' facts and legal analysis, drawn from the district court's opinion, helps to contrast its situation from other cases, such as this one, in which the prior exclusive

jurisdiction doctrine applies. "On December 21, 1938, the United States acquired [by cash sale] from Thomas Leiter a tract of land comprising more than 8,000 acres" in Louisiana, reserving "mineral rights in the land to the vendor, with a stipulation that, with certain exceptions," the rights "would expire on April 1, 1945." *United States v. Leiter Minerals, Inc.*, 127 F. Supp. 439, 440 (E.D. La. 1954). Leiter Minerals, Inc. claimed "to have succeeded Thomas Leiter in title to the reserved mineral interest." *Id.* On March 1, 1949, the United States executed several mineral leases to Frank and Allen Lobrano, who conveyed operating rights under the leases to the California Company, which drilled eighty producing wells on the property. *Id.* Subsequently, the United States received royalty therefrom in excess of $3.5 million. *Id.* Thus, any interruption in the operation of the wells would have caused the United States irreparable damage. *Id.* Also, "[s]ince the date of its acquisition, the United States ha[d] . . . maintained and administered the lands acquired from Thomas Leiter as part of a wild life refuge, thus retaining physical possession of the surface of the land . . . [and] the mineral rights by virtue of the mineral operations conducted by its lessees." *Id.* Leiter Minerals filed suit in state court in Louisiana against the California Company and Allen Lobrano as mineral lessees from the United States and prayed that Leiter Minerals be recognized as the lawful owner of all mineral rights under the land acquired by the United States from Thomas Leiter. *Id.* at 440-41; *see also Leiter Minerals*, 352 U.S. at 221 (stating that Leiter Minerals "founded its claim on Louisiana Act No. 315 of 1940, La. Rev. Stat. § 9:5806 (1950), which, it alleged, made 'imprescriptible' a reservation of mineral rights in a deed of December 21, 1938, to the United States by

its predecessor in title"). The United States brought suit in the federal district court for the Eastern District of Louisiana to quiet its title to the mineral rights and for a preliminary injunction to restrain Leiter Minerals from prosecuting its state court action. *Leiter Minerals*, 127 F. Supp. at 441. "It s[ought] equitable relief in the form of an action to quiet title and to remove clouds on the title of the United States. A federal court has jurisdiction to grant such relief." *Id.* The district court held that, since the United States was not and could not be made a party to the state court suit, the title of the United States could be tried only in the federal court action, and that an injunction against prosecution of the state proceedings should issue to protect its jurisdiction pending determination of the ownership of the property. *Id.* at 443-46. The Court of Appeals affirmed, holding that the preliminary injunction was proper because "the district court under the clear provisions of the statute, 28 U.S.C. § 1345, became vested with exclusive jurisdiction to determine the title of the United States to the mineral rights claimed by appellant." *Leiter Minerals, Inc. v. United States*, 224 F.2d 381, 383-84 (5th Cir. 1955).

Subject to one modification,[5] the Supreme Court affirmed the judgment of the Court of Appeals upholding the district court's injunction of the state court proceedings and allowing the United States' suit to quiet title to its property to proceed in the

[5] To avoid the possibility that the district court would unnecessarily reach and decide a federal constitutional question, the Supreme Court "modif[ied] the judgment of the Court of Appeals to permit an interpretation of the state statute to be sought with every expedition in the state court in conformity with this opinion." *Leiter Minerals*, 352 U.S. at 230.

federal district court. The Court based its conclusions on principles more fully elaborated upon in the district court opinion: The United States as "sovereign cannot be sued in its own courts, or in any other, without its consent and permission." *Leiter Minerals*, 127 F. Supp. at 442 (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857)) (internal quotation marks omitted). "Officers or agents of the United States may be sued, however, for possession of property held by them in behalf of the United States." *Id.* (citing *Land v. Dollar*, 330 U.S. 731 (1947); *United States v. Lee*, 106 U.S. 196 (1882)). "Such an action is not one against the United States and, of course, would not be res judicata as against the United States." *Id.* (citing *Dollar*, 330 U.S. 731; *Lee,* 106 U.S. 196). Therefore, "[w]here a suit is brought in a state or federal court *against* officers or agents of the United States *claiming property held by those officers for the United States*, the United States may bring its own action in a state or federal court asking the court to adjudicate its claim to title to the property involved in the former suit and is entitled to an injunction staying further proceedings therein." *Id*. (emphasis added).[6] In other words, "since the

[6] The court cited the following as support for this proposition: *Land v. Dollar*, 341 U.S. 737 (1951); *Dollar*, 330 U.S. 731; *Lee*, 106 U.S. 196; *United States v. Dollar*, 196 F.2d 551 (9th Cir. 1952); *United States v. Dollar*, 193 F.2d 114 (9th Cir. 1952); *Dollar v. United States*, 190 F.2d 547 (9th Cir. 1951); *Brown v. Wright*, 137 F.2d 484 (4th Cir. 1943); *United States v. McIntosh*, 57 F.2d 573 (4th Cir. 1932); *United States v. Dollar*, 100 F. Supp. 881 (N.D. Cal. 1951); *United States v. Dollar*, 97 F. Supp. 50 (N.D. Cal. 1951); *United States v. Taylor's Oak Ridge Corp*., 89 F. Supp. 28 (E.D. Tenn. 1950); *United States v. Cain*, 72 F. Supp. 897 (W.D. Mich. 1947); *United States v. Babcock*, 6 F.2d 160 (D. Ind. 1925); and *United States v. Inaba*, 291 F. 416 (E.D. Wash. 1923).

United States cannot be made a *defendant* to a suit concerning *its property*, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, . . . the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights," which, because of sovereign immunity, must occur in federal court. *Id.* at 443 (emphasis added) (quoting *Lee*, 106 U.S. at 222) (internal quotation marks omitted). Therefore, an injunction was proper in the circumstances presented in *Leiter Minerals* because the United States came into federal court in a defensive position, seeking to protect and quiet title to an existing property right that was being litigated against its agents in state court. *Id.* at 444.

By contrast, the district court continued, an injunction would not have been proper, were the circumstances present in *Leiter Minerals* like those at issue in *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936). *Leiter Minerals*, 127 F. Supp. at 444. "In [*Bank of New York & Trust Co.*] the Supreme Court held that the federal court did not have exclusive jurisdiction of the claim of the United States to certain funds of three Russian insurance companies dissolved by the Soviet government in 1918, which funds were in the custody of the state court in New York in connection with proceedings in that court liquidating the insurance companies. The funds were being held subject to appropriate orders of the court providing for their distribution to creditors, policyholders, and other claimants, in accordance with the state insurance laws. The Soviet government claimed ownership of these funds and assigned its claim to

the United States, which filed suit in 1933, eight years after the state liquidation proceedings began, in the United States District Court for the Southern District of New York, and sought to enjoin further proceedings concerning the funds in the state court. The judgment of the federal district court, dismissing the complaint and denying a motion for injunction, was affirmed by the Supreme Court on the ground that the state court had first assumed jurisdiction and control of the funds, and that such control was essential to give effect to that court's jurisdiction to protect the rights of claimants in the state court proceeding, none of whom was before the federal court." *Id*. at 444-45. Thus, the *Leiter Minerals* district court emphasized that were the United States entering federal court *offensively*, seeking to secure possession of a property right through an in rem proceeding, and there was a prior initiated in rem state court proceeding involving the same property, the prior exclusive jurisdiction doctrine would apply and require the federal court to stay or dismiss its case in deference to the prior in rem state court action.

Albeit with not as much clarity or detail as the district court, the Supreme Court affirmed on the same basis: that the circumstances presented in *Leiter Minerals* warranting an injunction were narrow: An injunction was only proper because the United States had invoked the federal court's jurisdiction defensively, being forced to quiet its *existing* title that had been put at issue in a state court suit brought against its lessors. The Court explained that the injunction was proper because "the federal court was the only one that could finally determine the basic issue in the litigation—whether the title of the United States to the mineral rights was affected by

Louisiana Act No. 315 of 1940. The United States was not a party to the state suit and, under settled principles, title to land *in possession* of the United States under a claim of interest cannot be tried as against the United States by a suit against persons holding under the authority of the United States." *Leiter Minerals*, 352 U.S. at 226 (emphasis added) (citing *Lee*, 106 U.S. 196).

The Supreme Court also distinguished, rather than overruled, *Bank of New York & Trust Co.*, 296 U.S. 463, upon which Leiter Minerals continued to rely, stating: "the *Bank of New York* case presented the more unusual situation where the United States, like any private claimant, *made a claim against* funds that it *never possessed* and that were in the hands of depositaries appointed by the state court. In [*Leiter Minerals*], a private party is seeking by a state proceeding to obtain property *currently* in the hands of persons holding under the United States; the United States is seeking to protect that possession and quiet title by a federal court proceeding. Therefore, since the position of the United States is *essentially a defensive one*, we think that it should be permitted to choose the forum in this case . . . ." *Leiter Minerals*, 352 U.S. at 227-28 (emphasis added). Thus, the Court affirmed the district court's analysis that were the United States to have entered federal court offensively, seeking to secure a right it did not posses through an in rem proceeding, and were there a prior initiated in rem state court proceeding involving the same property, the prior exclusive jurisdiction doctrine would prevent the federal

district court from issuing an injunction against the state court proceedings.[7]

Lest there be any doubt as to this reading of *Leiter Minerals*, it has been supported and adhered to consistently by subsequent Supreme Court and circuit cases. In *Colorado River Water Conservation District v. United States*, the Court reaffirmed the continued validity of the prior exclusive jurisdiction rule—including when the United States initiates the later federal in rem action—by explaining, "It has been held, for example, that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts." 424 U.S. 800, 818 (1976) (citing *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964); *Princess Lida,* 305 U.S. at 466; *Bank of N.Y. & Trust Co.*, 296 U.S. at 477). The

---

[7] Further demonstrating that *Leiter Minerals* did not meaningfully, if at all, alter or amend the long-established prior exclusive jurisdiction doctrine, the *Leiter Minerals*' district court explained that it was an open question whether the state suit being enjoined in that case was in fact an in rem action. It explained that one of the "many and obvious" distinctions between *Leiter Minerals* and *Bank of New York & Trust Co*., is that "[t]here is no case . . . from the Supreme Court which holds that the mere filing of a suit claiming ownership of property places that property under the control of the court so that no other court has the right to adjudicate claims against that property. In fact, the decisions seem to be to the contrary." *Leiter Minerals*, 127 F. Supp. at 446 (citing *Markham v. Allen*, 326 U.S. 490 (1946); *Mandeville*, 318 U.S. 47; *Commonwealth Trust Co. v. Bradford*, 297 U.S. 613 (1936)). Although the Supreme Court later acknowledged that "the state litigation has the elements of an action characterized as quasi in rem," it declined to call into question the district court's insinuation that the prior exclusive jurisdiction doctrine might not be implicated at all because the state court proceedings were not truly in rem or quasi in rem. *Leiter Minerals*, 352 U.S. at 228.

Court continued that "[t]his has been true even where the Government was a claimant in existing state proceedings and then sought to invoke district-court jurisdiction." *Id.* (citing *Bank of N. Y. & Trust Co.*, 296 U.S. at 479). The Court acknowledged the *Leiter Minerals* precedent, but only through a citation, "but cf." In this manner, the Court indicated that *Leiter Minerals* could be read as a narrow exception to its broad statement that the prior exclusive jurisdiction doctrine applies "even where the Government was a claimant." Nonetheless, the Court's cursory treatment of the precedent clearly indicated that it understood *Leiter Minerals* to provide, at most, an unremarkable and very narrow exception to the general rules articulated in *Colorado River Water Conservation District*.

More recently and directly, the Tenth Circuit in *United States v. Buck* described *Leiter Minerals* as standing *solely* for the narrow proposition described above, that a federal court may enjoin a "state court proceeding[] . . . to protect jurisdiction of [the] federal court in [a] quiet title action brought by [the] United States." 281 F.3d 1336, 1344 (10th Cir. 2002).

The situation here, involving Sid-Mar's prior state court inverse condemnation in rem action vis-a-vis the subsequently filed United States' federal court condemnation in rem action, is markedly different from that in *Leiter Minerals*. Sid-Mar's state suit does not challenge the title to land or minerals held by a lessee who obtained rights in the property from the United States. The United States' federal suit is not an action to quiet its pre-existing title or claim of interest to land or minerals or to remove a cloud on its title created by Sid-Mar's. Instead, the United States is seeking to condemn land in which it

previously did not have a title or a claim of interest. In this manner, the present situation is more similar to the situation in *United States v. Bank of New York & Trust Co.*, where the United States, like any private claimant, made a claim against funds that it did not possess or that were not in the hands of persons holding under the United States' title. Therefore, assuming arguendo that *Leiter Minerals* intended to speak to and amend the prior exclusive jurisdiction doctrine, it did not do so in a manner that would keep the doctrine from applying to the facts of this case; as in *Bank of New York & Trust Co.*, the rule that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other applies to the present case. Accordingly, the state court in Sid-Mar's inverse condemnation action should be allowed to maintain its jurisdiction to adjudicate title and compensation with respect to the 0.166 acres commandeered and taken by the State of Louisiana, to the exclusion of the federal district court's jurisdiction to adjudicate the United States' condemnation of the same property. Once that state court litigation is complete, there would be no barrier the United States filing its condemnation action in federal district court.

C.

The facts and analysis in *Leiter Minerals* underscored that it created a narrow exception, if any, to the prior exclusive jurisdiction doctrine: That when the United States, which is only required to litigate in the courts of its choosing, is seeking *defensively* to "protect" and "quiet" title *it already possesses*, it can obtain an injunction against a prior initiated state court in rem proceeding concerning the same property. The majority, however, reads this narrow

exception expansively, as providing federal district courts with the power to enjoin prior initiated state court in rem suits any time the United States conceives of a "future interest" it might have in the res. Majority Op. 17. Momentarily recognizing the unacceptable implications of such a rule, the majority attempts to characterize the United States' "future interest" in this case as concrete: "[I]t is possible the United States has a claim to the land that preceded the commencement of the state court lawsuit. . . . [T]he [state] Executive Order that acted to commandeer the property referred specifically to the Cooperation Agreement between the United States and the Orleans Levee District . . . . That Cooperation Agreement . . . indicated the federal government would later acquire full ownership rights in the property." Majority Op. 17. Yet this mischaracterizes the Cooperation Agreements, of which there are actually three: the original agreement and two supplements. The Cooperation Agreements between the U.S. Department of the Army and the Orleans Levee District, among other local entities, do not purport to grant the United States any interest in the parcel of land that the Governor of Louisiana commandeered from Sid-Mar's nor do they obligate the Governor nor the State of Louisiana to transfer property to the Department. The Agreement merely obligates the Orleans Levee District, and the other named local entities, to try to acquire necessary land and right-of-ways, both of which are described by their general location and not by legal descriptions; and it states that if that strategy fails, the United States can obtain such an interest "through the exercise of eminent domain authority" *if* there existed sufficient appropriations. That is, at the time the United States signed the Cooperation Agreements, its interest in

the property subject to the Agreements was no more of a legal interest than it might have in any property in the nation: If the Levee District's strategy outlined in the Cooperation Agreements failed, and the United States determined that it was appropriate and desirable for it to exercise its power of eminent domain, and funds were available, it intended to do so. Consistent with this, the United States never alleged nor argued as part of this federal suit that it had an *existing* interest in Sid-Mar's property when Sid-Mar's state suit was filed. To the contrary, in its brief in the district court arguing for a stay, the United States acknowledged that this case was distinguishable from *Leiter Minerals* because it was not filing "a quiet title action in the instant case." As a result, the majority's rule is as broad and unwieldy as it appears. It undermines the principles of federalism that the prior exclusive jurisdiction doctrine was designed to protect. Not surprisingly then, the case law that the majority cites in support of its holding stands for no such principle and, in fact, the majority splits us from the Second Circuit.

As I described above, the prior exclusive jurisdiction doctrine is designed to defend and respect our national system of dual sovereignty. "The Federal and state courts exercise jurisdiction within the same territory, derived from and controlled by separate and distinct authority, and are therefore required, upon every principle of justice and propriety, to respect the jurisdiction once acquired over property by a court of the other sovereignty." *Palmer v. Texas*, 212 U.S. 118, 125 (1909). Accordingly, the prior exclusive jurisdiction doctrine was designed to force courts' "circumspection in undertaking any action that might result in the interference with a res in the custody of another court, which thereby might violate

the autonomy of the state and federal judicial systems." 13F Wright et al., *supra*, at 278.

By holding that the prior exclusive jurisdiction doctrine does not apply whenever the United States has a conceived "future interest" in the res, the majority provides the federal district courts with largely unfettered discretion to debase previously filed state court proceedings. According to the majority, because the United States *could* exercise its power of eminent domain over property, that is a sufficient federal interest to empower the district courts proceeding in rem to reach into the state courts and strip them of their existing jurisdiction over property under their control. Although the United States has no direct interest at stake in the state court suit and it will suffer no impairment of any pre-existing property right or its right to choose its forum in which to establish such rights, the majority allows federal courts to stay state court proceedings and potentially circumvent the state courts in the name of a federal interest. The majority allows for such an outcome even though these are precisely the circumstances in which the Supreme Court has stated that our interests in federalism are at their highest and thus the prior exclusive jurisdiction doctrine should be fully enforced. *See Bank of N. Y. & Trust Co.*, 296 U.S. at 480-81 (stating that the prior exclusive jurisdiction doctrine prevented the federal court's from assuming jurisdiction over the res in a suit brought by the United States because "[t]here is no merit in the suggestion that the United States, in presenting its claim in the state proceedings, would be compelled to take the position of a defendant—being sued without its consent" and "[w]e cannot see that there would be impairment of any rights the United States may possess").

The majority cites *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), as supporting its holding that the United States' "future interest" in the res is a sufficient basis for a federal court to enjoin a prior initiated state court in rem proceeding; but that case establishes no such rule. There, the Tenth Circuit held that because the United States had an *existing* interest in property subject to a state court suit, "as clear as it would be if the fee were in the United States," a federal district court could enjoin the state proceeding, allowing the United States to litigate in federal court. *Id.* at 197. In *Alonzo*, Lupe, Jim, Joe and Valentino Alonzo and James Garcia filed suit in a New Mexico court seeking to eject the Pueblo Indian tribe from "certain lands described in their complaint . . . and damages for minerals alleged to have been wrongfully extracted from said lands." *Id.* at 190. The United States then entered federal court "in its own behalf and in behalf of the Pueblo . . . seeking a judgment *quieting the title to* certain of the lands embraced in the state court action and enjoining the plaintiffs in the state court action from prosecuting such action." *Id.* (emphasis added). The district court issued a preliminary injunction against the state court plaintiffs preventing them from prosecuting their state court suit and they appealed.

The Tenth Circuit upheld the injunction, citing *Leiter Minerals*. *Id.* at 196-97. It reviewed the history of the Pueblo's ownership of the land and their relationship with the United States and concluded that although the Pueblo had many traditional aspects of ownership, "[r]estricted Indian land is property in which the United States has an interest. 'This national interest is not to be expressed in terms of property, or to be limited to the assertion of

rights incident to the ownership of a reversion or to the holding of a technical title in trust.'" *Id.* at 197 (quoting *United States v. Hellard*, 322 U.S. 363, 366 (1944), in turn quoting *Heckman v. United States*, 224 U.S. 413, 437 (1912)) (internal quotation marks omitted). Therefore, "the Governmental interest in the instant action is as great as it would be if the fee to the lands involved were in the United States. Indeed, since the United States is suing as a guardian of a dependent nation in discharge of a fiduciary duty, its right and duty to protect the interests of its wards may be even greater then it would if it were suing in its own behalf with respect to its own lands." *Id.* It was in light of this relationship to and authority over the land—not, as the majority claims, the United States' "future interest in that property," Majority Op. 17—that the Tenth Circuit concluded, under *Leiter Minerals,* that the United States could seek and obtain an injunction of the state court suit. *Alonzo*, 249 F.3d at 197 (citing *Leiter Minerals*, 352 U.S. 220).

Moreover, the majority's holding splits us from the Second Circuit. In *United States v. Certified Industries, Inc.*, 361 F.2d 857 (2d Cir. 1966), the Second Circuit considered essentially the same question presented by this case: whether *Leiter Minerals* amends the prior exclusive jurisdiction doctrine so that it does not apply to later initiated federal in rem proceedings brought by the United States. Consistent with my analysis, a unanimous panel of the Second Circuit held that *Leiter Minerals* was distinguishable and that the prior exclusive jurisdiction doctrine continued to apply to federal court actions brought by the United States except where the United States enters federal court defensively, seeking to protect and quiet its *pre-existing* title to property.

In the Second Circuit's case, Certified Industries, a construction subcontractor, sued in state court seeking to "foreclose a lien" for funds it was owed for work it had performed for Meteor, a contractor. *Id.* at 858-59. The United States sought to enjoin that state court suit "on the theory that it [was] entitled to have a trust imposed" on those same funds. *Id.* at 859. The district court granted the United States a preliminary injunction, but the Second Circuit reversed, stating that both the prior initiated state court suit and the federal suit were in rem. *Id.* at 859-60. The Second Circuit explained that *Leiter Minerals* did "not mean . . . that a stay is automatically granted simply on the application of the United States." *Id.* at 859. As recounted by the Second Circuit, while the Supreme Court in *Leiter Minerals* held that the Anti-Injunction Act did not bar injunctions of state court suits sought by the United States, the *Leiter Minerals* Court also "went on to say that it was also necessary to inquire 'whether the granting of an injunction was proper in the circumstances of this case.'" *Id.* (quoting *Leiter Minerals*, 352 U.S. at 226). Therefore, the Second Circuit held, consistent with my analysis and contrary to the conclusion of the majority, that in light of the prior exclusive jurisdiction doctrine, "[t]he United States is not entitled to an injunction staying state court proceedings where the state court is the first court to assume jurisdiction over the subject matter property of an action in rem or quasi in rem." *Id.* at 860 (citing *Bank of N.Y. & Trust Co.*, 296 U.S. at 447; *Penn Gen. Cas. Co.*, 294 U.S. at 195).

The Second Circuit acknowledged that *Leiter Minerals* may have carved out a narrow exception to the prior exclusive jurisdiction doctrine, but, for the same reasons that I believe that *Leiter Minerals* is distinguishable from the instant case, the Second

Circuit explained that the exception did not apply to its case. *Id.* at 861. The Second Circuit reasoned: "The Supreme Court in [*Leiter Minerals*] indicated that where the United States' position is 'defensive' it should be able to choose its forum 'even though the state litigation has the elements of an action characterized as quasi in rem.'" *Id.* at 861 (quoting *Leiter Minerals*, 352 U.S. at 228). However, in *Certified Industries* the United States' position was not "defensive" because it was not seeking to protect or retain "funds or title to property *in its possession* at the commencement of the state proceeding." *Id.* (emphasis added). Therefore, analogizing the case to *Bank of New York & Trust Co.,* the Second Circuit concluded that the prior exclusive jurisdiction doctrine applied to bar the injunction sought by the United States. *Id.* at 861-62; *see also United States v. Akin*, 504 F.2d 115, 122 n.5 (10th Cir. 1974) (stating that the Supreme Court allowed the injunction in *Leiter Minerals* because "the United States [was] seeking to protect [its] possession and quiet title by a federal court proceeding" (citing *Leiter Minerals*, 352 U.S. at 227-28)).

Just last year, the Second Circuit positively cited to *Certified Industries*' reading of *Leiter Minerals* and the prior exclusive jurisdiction doctrine in *Interworks Systems Inc. v. Merchant Financial Corp.*, 604 F.3d 692, 701 n.7 (2d Cir. 2010) (indicating that *Certified Industries*' analysis of when an "injunction against state court proceedings could issue" remained good law). This court too has positively cited *Certified Industries* for its articulation of the prior exclusive jurisdiction doctrine. *Signal Props., Inc. v. Farha*, 482 F.2d 1136, 1137 (5th Cir. 1973) (citing *Certified Indus.,* 361 F.2d 857).

CONCLUSION

Therefore, I conclude that, consistent with the relevant Supreme Court and circuit authority and the views of the leading commentators, *Leiter Minerals* does not exempt in rem actions by the United States from the prior exclusive jurisdiction doctrine—except possibly where it is defensively seeking to quiet its pre-existing title to property—and because the United States in this case is proceeding offensively, not defensively, to acquire title to property for the first time in this federal action filed after Sid-Mar's commenced the in rem state court action involving the same parcel of land, the doctrine requires that the injunction of Sid-Mar's state court in rem action issued by the district court be withdrawn. Accordingly, I would vacate the district court's injunction and remand the case to it for dismissal, stay, or other proceedings consistent with this opinion. For these reasons, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed August 29, 2011]

No. 09-30869

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

SID-MARS RESTAURANT & LOUNGE, INC.,
Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

Before DENNIS, OWEN, and SOUTHWICK, *Circuit Judges.*

LESLIE H. SOUTHWICK, *Circuit Judge*:

No member of the panel nor judge in regular active service of the court requested the court be polled on rehearing en banc. The petition for rehearing en banc is DENIED. *See* 5th Cir. R. 35. Treating that petition as a petition for panel rehearing, the panel DENIES the petition but supplements the discussion of *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957). *See United States v. Sid-Mars*, 644 F.3d 270, 279 (5th Cir. 2011).

Though the United States had not yet condemned and obtained title to the land at issue here at the time that the state court suit commenced, the United States' interest was certain enough to allow an injunction. The government's interest in and possession of this property, and its stated intent to acquire title to that property, predated the Sid-Mar's state court lawsuit. Indeed, Sid-Mar's dismay about the slow pace following the commandeering is what led to its responding with its own suit in state court. The government had the right to possess the land as a result of the commandeering before the state suit commenced. The Supreme Court identified the claimant's lack of possession in *Bank of New York* as a factor weighing against allowing an injunction in that case. *See Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 227 (1957). The opposite is true here. The government's possession derived from a cooperation agreement with Louisiana.

It is the aggregation of these factors, and not merely a possible future interest, that comprise the United States' property interest.

One circuit court, applying *Leiter Minerals*, has allowed the government to enjoin state court litigation involving a piece of property because the government had the right to prevent the Indian tribe that owned the property at issue from alienating it. *See Alonzo v. United States*, 249 F.2d 189, 196-97 (10th Cir. 1957). At the very least, the uncertainty surrounding the ownership of the property Sid-Mar's claims and the existence of some interest by the United States supports enjoining the state court litigation. Indeed, the foundational "certainty" upon which the Supreme Court ruled when deciding *Leiter Minerals* was that the "suit in federal court was the

only one that could finally decide the basic issue in the litigation" and would foreclose confusing, inconsistent judgments. *Leiter Minerals*, 352 U.S. at 226-27. Before the Court distinguished its facts from those in *Bank of New York*, it identified this principle as a basis for its decision. *See id.* Our decision advances this rationale by ensuring the state court suit will not conflict with a later-in-time federal judgment.

DENNIS, *Circuit Judge*, dissenting:

I continue to dissent for the reasons assigned in my earlier dissenting opinion, *see United States v. Sid-Mars Restaurant & Lounge, Inc.*, 644 F.3d 270, 280-96 (5th Cir. 2011) (Dennis, J., dissenting), but add the following remarks in response to the panel majority's supplemental discussion.

This is a condemnation action by the Government to acquire title to land in Louisiana from its present owners. This is not an action by the Government to obtain possession to the land or to quiet a preexisting title to the property. No evidence has been taken and no decision has been rendered by the district court on whether the Government has possession of the particular land claimed to be owned by Sid-Mar's. Therefore, the majority opinion's assertion that the Government has lawful possession of the property in question is unfounded in the record of this case. Assuming for the sake of argument that the Government has obtained lawful possession of the particular property from the State of Louisiana, however, that does not relieve the federal courts of their obligation to honor and defer to the previously filed in rem proceeding involving the same property in state court under the prior exclusive jurisdiction doctrine. Sid-Mar's inverse condemnation action under the state constitution and laws accrued at the moment the State of Louisiana's Governor commandeered and seized the land in question and ousted Sid-Mar's from their property. Sid-Mar's timely and diligently brought its in rem inverse condemnation suit in state court based on the state's commandeering of the land. Therefore, under the ancient prior exclusive jurisdiction doctrine, the federal district court is required to stay its proceeding and refrain from interfering with

Sid-Mar's in rem inverse condemnation state court action. The fact that the Government may have obtained possession of or a right of entry to parts of Sid-Mar's land after the accrual of Sid-Mar's state-law inverse condemnation action does not create an exception to the doctrine in this case. The only exception to the doctrine that has been recognized by the Supreme Court is the exceptional situation in *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957), in which the Government was allowed to bring a federal court action to quiet its preexisting title to its valuable oil and gas mineral estate because the United States' title thereto had been challenged by claimants in state court. The present case does not fall within the special situation of the *Leiter Minerals* case because here the Government is not asserting or attempting to quiet a previously acquired title to the property in a defensive manner; instead, it is offensively seeking to acquire title to the property for the first time.

Further, the majority contends that "[t]he government's interest in and possession of this property, and its stated intent to acquire title to that property, predated the Sid-Mar's state court lawsuit" and that the government's "interest was certain enough to allow an injunction." However, the majority never specifies what exactly the government's interest was prior to its filing of the present condemnation suit. The majority suggests that it may be that the government had "possession" of the land; however, the record is entirely unclear about whether the government in fact possessed the land. All the record reveals is that the Governor's commandeering order declared that "the Division of Administration, State Land Office, shall take immediate steps to grant right of entry to the property commandeered . . .

pursuant to this order." (R. at 181); *see also* Sid-Mar's Br. 14 ("[S]ince February 10, 2006, the subject property has been in the hands of the State of Louisiana . . . . In or around March 2006, the Corps entered the property pursuant to the State-provided right of entry . . . ."). As I explained in my earlier opinion, the government's mere right to enter the land—or, as the majority would have it, the government's "right to possess the land as a result of the commandeering" and "its stated intent to acquire title"—is "no more of a legal interest than it might have in any property in the nation." *Sid-Mars*, 644 F.3d at 293 (Dennis, J., dissenting). Thus, the government's interest in the property before Sid-Mar's state suit was filed was inadequate to bring this case under the "narrow exception" created by *Leiter Minerals*. *Id.* at 293-94.

Even if the government somehow "possessed" the land before Sid-Mar's commenced their state court suit, that fact would not bring this case within an exception to the prior exclusive jurisdiction doctrine created by *Leiter Minerals*. *See United States v. One 1979 Chevrolet C-20* Van, 924 F.2d 120, 123 (7th Cir. 1991) ("At the time the complaint was filed in federal district court, the state forfeiture action was pending and the state court had jurisdiction over the van to the exclusion of the federal court. The fact that the federal authorities muscled in on the van and began an administrative forfeiture proceeding before the state court action was filed did not confer jurisdiction on the federal court. We stated in [*United States v. $79,123.49 in United States Cash & Currency*, 830 F.2d 94, 98 (7th Cir. 1987)], and maintain here as well, that jurisdiction obtained by mere possession 'goes much too far.'"); *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1146 (9th Cir. 1989) ("[W]e reject, as did the Seventh Circuit, the argu-

ment that the fact of federal possession of the res takes jurisdiction from the state court and bestows it upon the district court. Although we are familiar with the maxim, 'possession is nine-tenths of the law,' we prefer to apply the remaining one-tenth and decline to 'substitute a rule of force for the principle of mutual respect embodied in the prior exclusive jurisdiction doctrine.' The district court must decline federal jurisdiction over money taken from the state court's jurisdiction in such a manner." (citations omitted) (quoting *$79,123.49*, 830 F.2d at 98)); *$79,123.49*, 830 F.2d at 97-98 ("Since the earliest days of the Republic the rule has been established that, when state and federal courts each proceed against the same res, the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other. . . . [The rule's] subsequent invocation in [inter alia] . . . *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936), . . . confirms the rule's modern-day vitality. . . . The United States argues . . . that the district court had jurisdiction by virtue of the federal government's possession of the property. This argument goes much too far. Possession obtained through an invalid seizure neither strips the first court of jurisdiction nor vests it in the second. To hold otherwise would substitute a rule of force for the principle of mutual respect embodied in the prior exclusive jurisdiction doctrine." (citation omitted)). Sid-Mar's right to compensation for the taking accrued at the moment of the commandeering, and therefore preceded any possessory interest of the Government. Furthermore, the *Leiter Minerals* exception depends on the United States having a pre-existing right of title allowing it to bring an action to quiet its title in a defensive manner in federal court, and not just

possession of the property. *See Leiter Minerals*, 352 U.S. at 227-28 ("In this case, a private party is seeking by a state proceeding to obtain property currently in the hands of persons *holding under the United States*; the United States is seeking to protect that possession *and quiet title* by a federal court proceeding. Therefore, . . . the position of the United States is essentially a *defensive* one . . . ." (emphasis added)). Here, as I repeatedly stressed in my earlier opinion, the United States did not have a preexisting title to the property; has not brought a defensive action to quiet its title; and instead, it is suing offensively to acquire title to property for the first time. Accordingly, it is clear that possession alone does not bring this case within the exception identified in *Leiter Minerals*.

The majority mistakenly relies on the distinction of *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936), drawn in *Leiter Minerals* for the apparent proposition that the alleged but questionable prior possession of land by the United States trumps the prior exclusive jurisdiction doctrine and a state in rem action involving the same res filed previously to this federal court condemnation action. As the Court in *Leiter Minerals* observed: In *Bank of New York*, "in a federal district court proceeding, the United States was claiming by assignment certain funds of three Russian insurance companies that were being held in the custody of a state court, in connection with the liquidation of the companies, subject to court orders concerning distribution to claimants under the state insurance laws. On the basis of this claim, the United States sought to enjoin distribution of the funds and to require payment of them to it. This Court, affirming dismissal of the complaints and denial of the injunction, held that the

state court had obtained jurisdiction over the funds first and that the litigation should be resolved in that court. The Court also noted that there were numerous other claimants, indispensable parties, who had not been made parties to the federal court suit. In remitting the United States to the state court, the Court saw no 'impairment of any rights' of the United States or 'any sacrifice of its proper dignity as a sovereign.'" *Leiter Minerals*, 352 U.S. at 227 (quoting *Bank of New York*, 296 U.S. at 480-81). Thus, *Leiter Minerals* did not distinguish *Bank of New York* from the present case as the majority contends. Here, the state's commandeering of Sid-Mar's private property vested Sid-Mar's immediately with a right under Louisiana constitutional and statutory provisions to inverse condemnation and compensation for the land taken. Sid-Mar's suit for this relief was filed in the state court prior to the Government's commencement of this federal condemnation action thereby giving the state court in rem jurisdiction over the property as of the time of its taking. The present federal condemnation suit was filed in the district court subsequently to the state's taking and Sid-Mar's filing of its state court in rem inverse condemnation action. Consequently, under the prior exclusive jurisdiction doctrine, the federal courts cannot interfere with or defeat Sid-Mar's rights against the State of Louisiana asserted in the state court action, even if the state has transferred a form of possession or right of entry to the property to the Corps of Engineers, or any other third person. Further, it is self evident that possession of the property by an executive branch agency of the federal government is not equivalent to a federal court having jurisdiction over the property for purposes of the prior exclusive jurisdiction doctrine. *See One 1979 Chevrolet C-20* Van, 924 F.2d

at 123; *One 1985 Cadillac Seville*, 866 F.2d at 1146; *$79,123.49*, 830 F.2d at 98.

The majority is further mistaken that "the foundational 'certainty' upon which the Supreme Court ruled when deciding *Leiter Minerals* was that 'the suit in federal court was the only one that could finally decide the basic issue in the litigation' and would foreclose confusing, inconsistent judgments," and thus, allowing the injunction here "advances this rationale by ensuring the state court suit will not conflict with a later-in-time federal judgment." The reason the *Leiter Minerals* Court said the federal court was the only one that could decide the basic issue was that it was the United States' preexisting land and minerals title that was the issue; and it was well settled that the state court did not have jurisdiction to decide a quiet title action by the Government or bind the Government by a judgment against its agents. *Leiter Minerals*, 352 U.S. at 226 ("The United States was not a party to the state suit and, under settled principles, title to land in possession of the United States under a claim of interest cannot be tried as against the United States by a suit against persons holding under the authority of the United States." (citing *United States v. Lee*, 106 U.S. 196 (1882)). Further, the exceptional situation in the *Leiter Minerals* case, of course, consisted of several factors and did not depend on that as a single or exclusive "foundation." At bottom, the majority's argument is based on the assumption that the prior exclusive jurisdiction principle must yield to the United States' right to condemn property in an action in federal court regardless of a preexisting state court condemnation suit between other parties over the same property if the state and federal cases could reach conflicting results. In effect, the argument is

that the prior exclusive jurisdiction principle does not apply to the United States as a litigant, which simply flies in the face of a compendium of authorities including Supreme Court cases to the contrary, which I cited in my earlier opinion.

Alonzo v. United States, 249 F.2d 189 (10th Cir. 1957), continues to be inapposite and of no help to the majority's position for the reasons assigned in my previous dissenting opinion.

The majority's original opinion suggests that the district court could avoid inconsistent results between it and the state courts by "lift[ing] the stay for the limited purpose of allowing the state court to determine title." 644 F.3d at 280. I certainly agree that the district court can and should pursue this course, but not merely to have the state courts determine only the issue of title to the property at the time of its taking. Instead, the district court should defer to the previously filed state court action until it completely adjudicates title, compensation for the land taken, and all other elements of the inverse condemnation suit. In my view, the doctrine of prior exclusive jurisdiction rules out the majority's other suggested alternatives.

For these reasons, I respectfully continue to dissent.

APPENDIX C

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

Civil Action No: 09-3714 c/w 09-3743
[REF: ALL CASES]
SECTION: "C" (2)

UNITED STATES OF AMERICA

versus

0.166 ACRES OF LAND, MORE OR LESS, SITUATE IN PARISH OF JEFFERSON, STATE OF LOUISIANA, AND SID-MAR'S RESTAURANT & LOUNGE, INC., et al.

ORDER AND REASONS

Before the Court is the United States Government's Motion to Stay State Court Proceeding. (Rec. Doc. 20.) The only other party to have filed an appearance in this case,[1] the State of Louisiana, has notified the Court that it does not oppose the motion.[2] Based on the record in this case, the applicable

---

[1] Since the only other party with an appearance on the record consents to this motion, the Court finds a hearing on the matter unnecessary. Therefore, the United States Government's Motion to Expedite Hearing On the Government's Motion to Stay State Court Proceedings (Rec. Doc. 21) is rendered moot by consent.

[2] The Court also notes it was informed that defendant Sid-Mar's opposes the motion, but that counsel for Sid-Mar's has not yet made an appearance in this litigation. The basis for Sid-Mar's opposition to the motion has not been presented to the Court. Once an appearance is made, Sid-Mar's may file their opposition or otherwise request this Court to revisit its opinion.

law, and the government's memorandum, the Court GRANTS the motion for the following reasons.

The United States seeks to enjoin and stay *Sid-Mar's Restaurant & Lounge, Inc. et. al. v. State of Louisiana etc.*, No. 632-032, Div. K, in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana. (Rec. Doc. 20.) Plaintiffs in that case filed suit for compensation and damages arising from the taking of their property. Neither the United States nor the Army Corps of Engineers were named as defendants.[3] (Rec. Doc. 20-2 at 3.) At the same time, the United States government initiated condemnation proceedings concerning the same property in this Court under the Declaration of Taking Act, 40 U.S.C. §3114, as part of a broader federal effort to construct floodgates and a permanent pump station following Hurricane Katrina. (Rec. Doc. 10 at 1-2.) In condemnation proceedings, this Court must determine the appropriate amount of compensation to be paid to the previous rightful owners. *See* 40 U.S.C. §3114.

This Court has the authority to stay the state court proceeding. The Anti-Injunction Act, 28 U.S.C. § 2283, does not apply when the United States seeks to stay the state court proceedings. *Leiter Minerals, Inc. v. U.S.,* 352 U.S. 220, 226 (1957)(holding Anti-Injunction applies to litigation between private parties). Moreover, this case is sufficiently analogous to the factual situation in *Leiter*, where the Supreme Court held that a stay of state court proceedings was appropriate. *Leiter* concerned a state court action where

[3] The State of Louisiana has filed a third-party demand as part of the state court litigation, but the court has not yet ruled on the state's request.

the United States was not a named defendant, although defendants alleged that the United States was an indispensable party. *Id*. at 222. The United States brought a quiet title action in federal court seeking to stay and enjoin the state court proceedings. *Id*. Similar to *Leiter*, the suit in federal court is "the only one that [can] finally determine the basic issue in the litigation," in this case the amount of compensation due and to whom. *Id*. at 226.

In addition, currently pending before the state court is a motion for partial summary judgment.[4] Plaintiffs in that case seek a state court order declaring plaintiffs the rightful owners of property currently at issue in this federal matter. Such a finding by the state court specifically undermines this Court's ability to determine to whom compensation should be paid as part of the federal takings procedure. The Court is mindful that although it is rare that a federal court will enjoin and stay a state court proceeding, the government's motion fits squarely within clearly established law on when such a stay is appropriate.

Accordingly,

IT IS ORDERED that the United States' Government's Motion to Stay State Court Proceeding (Rec. Doc. 20) is hereby GRANTED. Defendants are hereby ENJOINED from further prosecution of Case No. 632-032, Div. K, in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana until further order of the Court.

---

[4] Plaintiffs' motion for partial summary judgment was filed on June 5, 2009 after the government filed its complaint in condemnation here in federal court on June 3, 2009.

IT IS FURTHER ORDERED that the United States Government's Motion to Expedite Hearing On the Government's Motion to Stay State Court Proceedings (Rec. Doc. 21) is RENDERED MOOT by consent.

New Orleans, Louisiana, this 21st day of July, 2009.

/s/ Helen G. Berrigan
Helen G. Berrigan
United States District Judge

APPENDIX D

Minute Entry
Berrigan, J.
September 2, 2009

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

Civil Action Number: 09-3714

UNITED STATES OF AMERICA

versus

0.166 ACRES OF LAND, MORE OR LESS, ETC., *et al*

MOTION HEARING

APPEARANCES: Glenn Kenneth Schreiber, Counsel for the United States of America Barry W. Ashe, Charles Louis Stern, Jr. and Kathryn Marie Knight, Counsel for Sid-Mars Restaurant & Lounge, Inc. Irys Lynn Voyles Algood, Counsel for the State of Louisiana Thomas P. Anzelmo, Counsel for East Jefferson Levee District

COURT REPORTER: Pinkey Ferdinand

COURTROOM DEPUTY: Kimberly County

Motion by Sid-Mar's Restaurant & Lounge, Inc. to lift injunction of state court litigation and to enter stay of federal proceeding (28)

AFTER ARGUMENT: DENIED

APPENDIX E

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

[Div. K. Judge
Martha Sassone]

[Filed June 2, 2006]

NO. 632-032 DIVISION DOCKET NO.

SID-MAR'S RESTAURANT & LOUNGE, INC.,
MARION GEMELLI BURGESS AND
SIDNEY KENT BURGESS

versus

STATE OF LOUISIANA, THROUGH THE GOVERNOR
AND/OR THE DIVISION OF ADMINISTRATION,
STATE LAND OFFICE

FILED: _____ _____
DEPUTY CLERK

VERIFIED PETITION

The petition of Sid-Mar's Restaurant & Lounge, Inc., Marion G. Burgess and Sidney K. Burgess, Jr. respectfully represents the following:

Parties

1.

Plaintiff Sid-Mar's Restaurant & Lounge, Inc. ("Sid-Mar's") is a Louisiana corporation with its principal place of business in Metairie, Jefferson Parish, Louisiana, and more particularly in the historic part of Metairie known as "Bucktown."

2.

Plaintiffs Marion G. Burgess and Sidney K. Burgess, Jr. are residents of the state of Louisiana and are all of the shareholders of Sid-Mar's (together, the "Burgesses," and together with Sid-Mar's, the "Plaintiffs").

3.

State of Louisiana (the "State" or "Defendant"), through the Governor and/or the Division of Administration, State Land Office, is the defendant herein.

Jurisdiction and Venue

4.

Jurisdiction and venue lie in this Court pursuant to La. R.S. 5104(A) and La. Code Civ. P. art. 80.

Factual Allegations

5.

On February 10, 2006, Governor Kathleen B. Blanco, Governor of Louisiana, issued Executive Order No. KBB 2006-6 (the "Executive Order"), which ordered and directed the State of Louisiana's commandeering (that is, taking) of certain property located in the Parish of Jefferson, State of Louisiana, Section 121 and 122, Township 12 South, Range 11 East, and land extending north into Lake Pontchartrain, containing approximately 10.2 acres, as shown on the map attached to the Executive Order (the "Commandeered Land"). *See* Executive Order § 1 (a copy of which is attached here to as Exhibit 1 and made a part hereof as if copied herein *in extenso*).

6.

The Executive Order declares that the Commandeered Land was taken or commandeered for work that is intended to include levee and floodwall construction and repair, constructing an interim gated closure structure north of the Hammond Highway Bridge, miscellaneous clearing and selective demolition of damaged flood control works, driving sheet pile, placement of an interim closure structure, integrated pumps, crushed stone backfill and rip-rap placement, and any other work necessary and incident to the construction of the Lake Pontchartrain Louisiana and Vicinity Hurricane Protection Project, 17th Street Outfall Canal Interim Closure Structure (the "Project"). *See* Executive Order (Exh. 1), § 2.

7.

The Executive Order further declares that the Commandeered Land was taken or commandeered pursuant to La. R.S. 29:721, *et. seq*. (the "Louisiana Homeland Security Act").

8.

Sid-Mar's owns immovable property included within the Commandeered Land, which immovable property is shown in red on the map attached hereto and made a part hereof as Exhibit 2 (the "Restaurant Property"), and is described as follows:

> That certain tract or parcel of land, together with all the buildings and improvements thereon, and all the rights, ways, means, privileges, servitudes, advantages, *and* prescriptions thereunto belonging or in anywise appertaining, situated in Section 122, Township 12 South, Range 11 East,

Parish of Jefferson, State of Louisiana, and being more fully described as follows, to-wit:

Commencing at the corner common to Sections 120 & 192, Township 12 South, Range 11 East, Parish of Orleans, State of Louisiana; thence S 82°47'04" W for a distance of 701.09 feet to a point on the 1872 G.L.O. Meander line on the shore of Lake Pontchartrain. Thence N 85°55'05" W for a distance of 84.85 feet to the point of beginning. Thence N 86°20'42" W for a distance of 198.00 feet to a point, thence S 00°42'29" E along a chain link fence, for a distance of 129.20 feet to a point, thence N 84°50'35" E along a chain link fence, for a distance of 67.66 feet to a point. Thence N 74°37'36" E along a chain link fence, for a distance of 69.65 feet to a point. Thence S 86°20'42" E for a distance of 55.46 feet to a point. Thence N 03°39'18" E for a distance of 95.75 feet to a point, being the point of beginning.

Containing: 21,263 square feet or 0.488 acres of land, more or less.

9.

Sid-Mar's is the lessee of immovable property included within the Commandeered Land, which immovable property is shown in red on the map attached hereto and made a part hereof as Exhibit 3 (the "Leased Property").

10.

Plaine Street is an undeveloped street that runs between the Restaurant Property and the Leased Property from Orpheum Avenue into Lake Pontchartrain ("Plaine Street"). Although Plaine Street appears

on old subdivision plats, no roadway has ever been constructed on the Plaine Street area, and it has never been used for any public purpose. Indeed, Plaine Street could not be used for any public purpose because it is surrounded by the Restaurant Property, the Leased Property, Orpheum Avenue and Lake Pontchartrain. For more than 30 years, this "paper street" has been used in conjunction with the Leased Property as a parking lot for Sid-Mar's business. Sid-Mar's has maintained the property as part of its business premises. Based on the continuous and uninterrupted use of Plaine Street by Sid-Mar's and its predecessors in title, the lack of any public use or purpose to which Plaine Street could be put, and the fact that Sid-Mar's owns or leases all private property abutting Plaine Street, Sid-Mar's has economic rights in Plaine Street.

11.

On information and belief, the land north of the Restaurant Property was created by dumping spoil from the dredging of the 17th Street Canal in 1872 and 1873, and, prior to such dumping the Restaurant Property was riparian to the shoreline of Lake Pontchartrain. The State of Louisiana, through representatives of the State Land Office, has informed the Plaintiffs that the State claims ownership of the Commandeered Land north of the Restaurant Property, due to its status as reclaimed water bottom. If the State is correct in its assertion, Sid-Mar's has economic rights in such property as riparian owner. This immovable property includes the Leased Property and comprises all of the Commandeered Land other than the Restaurant Property (the "Reclaimed Property," and together with the Restaurant

Property, the Leased Property and Plaine Street, the "Sid-Mar's Property").

12.

In August 2005, Hurricane Katrina devastated south Louisiana, including the New Orleans area and the improvements Plaintiffs had made to the Sid-Mar's Property. These improvements included the world-renowned Sid-Mar's Seafood Restaurant, a New Orleans area fixture for decades (the "Restaurant"). The Restaurant had been a profitable business for Plaintiffs and was an integral part of the Sid-Mar's Property. Likewise, the unique location of the Restaurant was an integral part of the Restaurant's image and charm.

13.

It was Plaintiffs' intention to rebuild the Restaurant after Hurricane Katrina. To that end, Plaintiffs had pursued insurance proceeds, initiated the process of obtaining necessary permits and hired consultants to advise them on rebuilding. The Plaintiffs also considered putting the Sid-Mar's Property to commercial use by leasing land to construction crews for placement of trailers until such time as it became feasible to rebuild the Restaurant.

14.

On January 30, 2006, at a public meeting of the East End Bucktown Civic Association, Mr. Burgess was surprised to learn that the Sid-Mar's Property would be commandeered for the construction of the Project. No one had advised him of the taking of the Sid-Mar's Property at any time before the public meeting. On the basis of such information, the Plaintiffs halted plans to rebuild the Restaurant and lease

portions of the Sid-Marts Property. The announcement by government officials of the imminent taking of the Sid-Mar's Property amounted to a constructive taking and is referred to herein as the "Constructive Taking."

15.

Since the date of the Constructive Taking and at least since issuance of the Executive Order commandeering the Sid-Mar's Property on February 10, 2006, through the date of the filing of this Petition, Sid-Mar's has continually been prevented from exercising its rights of ownership of such property, which rights it and its ancestors in title had previously and continuously, without interruption, enjoyed for over 30 years with respect to the Restaurant Property and Leased Property.

16.

On February 13, 2006, work on the Project began, including work that uses the Sid-Mar's Property commandeered by the Executive Order.

17.

With the commandeering or taking of the Sid-Mar's Property by means of the Constructive Taking and/or the Executive Order, Plaintiffs have been divested of their ability to operate the Restaurant. This has caused the Burgesses to suffer mental anguish and inconvenience in addition to causing Plaintiffs economic loss.

18.

Notwithstanding the taking or commandeering of the Sid-Mar's Property, none of the Plaintiffs has been tendered or provided with any compensation.

19.

The Louisiana Homeland Security Act provides that the Governor may, "[s]ubject to any applicable requirements for compensation, commandeer or utilize any private property if [s]he finds this necessary to cope with the disaster or emergency." La. R.S. 29:724(D)(4).

20.

The Louisiana Homeland Security Act also provides, in pertinent part: "Any person claiming compensation for the use, damages, loss, or destruction of property under this Chapter shall file a claim therefor with the authority which ordered the use or caused the loss or destruction of the property." La. R.S. 29:730(F). This Verified Petition constitutes Plaintiffs' claim for the full extent of their loss.

21.

The Louisiana Homeland Security Act further provides, in pertinent part: "Unless the amount of compensation on account of property damaged, lost, or destroyed is agreed between the claimant and the authority which ordered the use or caused the damage, the amount of compensation shall be calculated in the same manner as compensation due for a taking of property pursuant to the condemnation laws of this state." La. R.S. 29:730(G).

22.

As a result of the commandeering or taking of the Sid-Mar's Property, Sid-Mar's has sustained the physical loss of its property, including the Restaurant; economic and consequential losses arising from the closing of the Restaurant and the cessation of its operations; economic and consequential losses

arising from the prohibition of putting the Sid-Mar's Property to any commercial use; and such other, additional damages as constitute the full extent of Plaintiffs' loss.

23.

As a result of the commandeering or taking of the Sid-Mar's Property, the Burgesses have sustained economic and consequential losses arising from the closing of the Restaurant and the cessation of its operations; mental anguish and inconvenience; and such other, additional damages as constitute the full extent of Plaintiffs' loss.

24.

Defendant has failed to provide any compensation to any of the Plaintiffs, much less compensation to the full extent of their respective losses, as is required under Louisiana law.

25.

Plaintiffs are entitled to receive from Defendant any and all damages, of whatever kind, they have sustained as a result of the commandeering or taking of the Sid-Mar's Property, the amount of which is to be determined pursuant to Louisiana law, together with their litigation expenses, including but not limited to attorneys' fees, costs and interest from the date of the taking.

Jury Demand

26.

Plaintiffs are entitled to, and hereby demand, trial by jury on all issues in this proceeding.

Prayer for Relief

WHEREFORE, Plaintiffs pray for the following relief in its favor and against the Defendant:

1. Judgment for any and all damages Plaintiffs have sustained, and litigation expenses, including but not limited to attorneys' fees, costs and interest from the date of the taking; and

2. All such other legal and equitable relief the law allows and as is appropriate.

Respectfully submitted,

/s/ Barry W. Ashe
Barry W. Ashe, 14056
Scott T. Whittaker, 14494
Kathryn M. Knight, 28641

Of
STONE PIGMAN WALTHER
WITTMANN L.L.C.
546 Carondelet Street
New Orleans, LA 70130
Telephone: (504) 581-3200

Attorneys for Sid-Mar's
Restaurant & Lounge, Inc.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Filed June 3, 2009]

CIVIL ACTION NUMBER: 09-3714
SECTION: SECT. C MAG. 2
TRACT NO. 306A

UNITED STATES OF AMERICA,
Plaintiff,

v.

0.166 ACRES OF LAND, MORE OR LESS, SITUATE IN PARISH OF JEFFERSON, STATE OF LOUISIANA, AND SID-MAR'S RESTAURANT & LOUNGE, INC., et al.,
Defendants.

COMPLAINT IN CONDEMNATION

1. This is an action of a civil nature brought by the United States of America for the taking of property, under its power of eminent domain, and for the ascertainment and award of just compensation to the parties in interest.
2. The uses for which the property is to be taken and the authority for the taking are set forth in Schedule "A" annexed hereto and made a part hereof.
3. The property to be taken, the estates to be taken and the names and addresses of the persons having or claiming an interest in said property

are described in Schedules "B", "C", "D", and "E" annexed hereto and made a part hereof.

4. Local and state taxing authorities may have or claim an interest in the property by reason of taxes and assessments due and exigible.

WHEREFORE, Plaintiff demands judgment that the property be condemned, and that just compensation for the taking be ascertained and awarded, and such other relief as may be lawful and proper.

Respectfully submitted,

JIM LETTEN
UNITED STATES ATTORNEY

/s/ GLENN K. SCHREIBER
GLENN K. SCHREIBER
Assistant United States Attorney
Hale Boggs Federal Building
500 Poydras Street, Room 210B
New Orleans, Louisiana 70130
Telephone: (504) 680-3093
Facsimile: (504) 680-3186
glenn.schreiber@usdoj.gov

SCHEDULE A
Tract No. 306A

AUTHORITY FOR THE TAKING:

The authority for the taking of the land is under and in accordance with the 40 U.S.C. §§3113 and 3114; 33 U.S.C. §§594, section 204 of the Flood Control Act of 1965, Pub. L. No. 89-298, 79 Stat. 1073, 1077, as amended which authorizes the Lake Pontchartrain, Louisiana and Vicinity Hurricane Protection Project, and 33 U.S.C. §701n, which authorizes the repair and rehabilitation of any flood control work threatened or destroyed by flood; and Chapter 3 of Title I of Division B of the Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub L. No. 109-148, 119 Stat. 2680, 2762-2763, which Act made funds available for such purposes.

PUBLIC USES:

The public uses for which said land is taken are as follows:

Said land is necessary for the construction, repair and rehabilitation of the Lake Pontchartrain, Louisiana and Vicinity Hurricane Protection Project, 17th Street Outfall Canal Interim Control Structure, Jefferson Parish, Louisiana, and for such other uses as may be authorized by Congress or by Executive Order.

SCHEDULE B
Tract No. 306A

DESCRIPTION:

A certain tract of land designated as TRACT 306A, together with any and all buildings, improvements and appurtenances thereon, located in Jefferson Parish, Louisiana, and being more particularly described as follows:

For a POINT OF REFERENCE (P.O.R.), commence at the Northwest corner of Lot 1, Metairieville Subdivision, which said location is marked by a 1/2" iron pipe; thence proceed South 86 degrees 20 minutes 41 seconds East a distance of 34.00 feet to a point; which said point is the POINT OF BEGINNING (P.O.B.).

From said POINT OF BEGINNING, continue along said bearing of South 86 degrees 20 minutes 41 seconds East a distance of 85.99 feet to a point; thence South 03 degrees 39 minutes 10 seconds West a distance of 63.88 feet to a point; thence North 86 degrees 20 minutes 41 seconds West a distance of 120.00 feet; thence North 03 degrees 39 minutes 23 seconds East a distance of 36.88 feet to a point; thence North 55 degrees 12 minutes 07 seconds East a distance of 43.42' feet to a point and the POINT OF BEGINNING (P.O.B.)

The herein tract of land described as TRACT 306A contains 0.166 acres and is bounded on the North by Plane Street (not constructed), on the East by Orpheum Avenue, on the South by Lot 3, Metairieville Subdivision and on the West by Lot 24, Metairieville Subdivision.

It is the intent of this description to include a portion of Lot 1 and all of Lot 2, (also called Lot E)

Square 128, Metairieville Subdivision, as per plat of survey by Chustz Surveying, Inc., signed by James H. Chustz, Jr., P.L.S., dated November 24, 2008.

SCHEDULE C
Tract No. 306A

FEE, RESERVING TO THE LANDOWNER ALL RIGHT, TITLE AND INTEREST TO THE UNDERLYING MINERALS WITHOUT RESTRICTION:

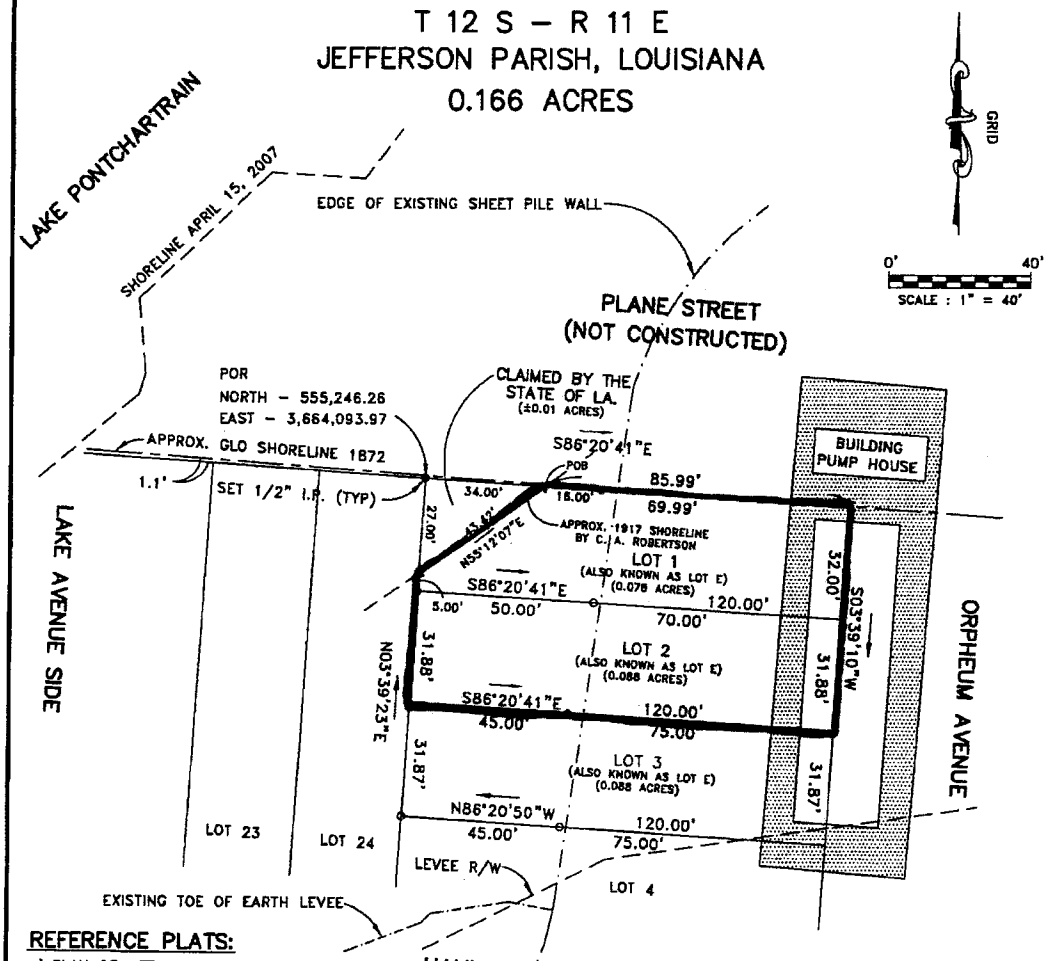
The fee simple title to the land, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines; excepting and excluding from the taking all oil, gas, and other minerals in and under said land and all appurtenant rights for the exploration, development, production, and removal of said oil, gas, and other minerals.

SCHEDULE D

[Insert Fold-In]

SCHEDULE D

LOTS 1 & 2 (ALSO KNOWN AS A PORTION OF LOT E) SQUARE 128 METAIRIEVILLE SUBDIVISION T 12 S – R 11 E JEFFERSON PARISH, LOUISIANA 0.166 ACRES



REFERENCE PLATS:

1) PLAN OF METAIRIERVILLE DATED MAY 5, 1877.
2) PLAN OF METAIRIERVILLE DATED OCTOBER 7. 1922
3) PLAT FOR L. C. SHULTZ BY F. G. STEWART, DATED AUGUST 14, 1947.
4) PLAT FOR CHARLES P. RENO BY F. G. STEWART, DATED NOVEMBER 3, 1947.
5) PLAT FOR LEROY SCHULTZ BY F. G. STEWART, DATED SEPT. 3, 1960, REVISED MARCH 1, 1961.
6) MAP SHOWING THE JEFFERSON AND ORLEANS PARISH LINE BY ROESSLE AND GALLOWAY, CONSULTING ENGINEERS, DATED APRIL 30, 1959.
7) SURVEY OF LOTS 1, 2 & 3 SQUARE 128, METAIRIEVILLE SUBDIVISION, BY BFM CORP., DATED AUG. 20, 1991, REVISED NOV. 19, 1992.
8) LOCATION OF THE 1872 GLO MEANDER LINE BY BFM CORP., DATED SEPT. 16, 2003.

NOTES:

HORIZONTAL DATUM: NAD-1983 (BASED ON NGS MONUMENT ALCO)
PROJECTION: LAMBERT, LOUISIANA SOUTH ZONE
UNITS: U.S. SURVEY FEET
BEARINGS ARE BASED ON GPS MEASUREMENTS.

THIS SURVEY IS IN ACCORDANCE WITH THE APPLICABLE STANDARDS OF PRACTICE AS STIPULATED IN TITLE 46, CHAPTER 29 OF THE PROFESSIONAL AND OCCUPATIONAL STANDARDS, PART XLI FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS FOR CLASS "C" SURVEY.

THE SERVITUDES AND RESTRICTIONS SHOWN ON THIS SURVEY ARE LIMITED TO THOSE SET FORTH IN THE DESCRIPTION FURNISHED US, AND THERE IS NO REPRESENTATION THAT ALL APPLICABLE SERVITUDES AND RESTRICTIONS ARE SHOWN HEREON. THE SURVEYOR HAS MADE NO ATTEMPT TO VERIFY TITLE, ACTUAL LEGAL OWNERSHIP, OR OTHER BURDENS ON THE PROPERTY.

THE PUMP HOUSE WAS PHYSICALLY PRESENT AT THE TIME OF THE SURVEY; HOWEVER, PER INSTRUCTION FROM THE CORPS OF ENGINEERS, IT WAS NOT PRESENT AT THE TIME THE PROPERTY WAS COMMANDEERED ON FEBRUARY 13, 2006.

TRACT REGISTER		
TRACT NO.	ACREAGE	DESCRIPTION
306A	0.166	FEE EXCLUDING MINERALS, WITH RESTRICTIONS ON USE OF SURFACE

CERTIFICATION:

I CERTIFY THAT IN APRIL 2007 CHUSTZ SURVEYING, INC. MADE A GROUND SURVEY OF THE AREA SHOWN HEREON AND THAT THIS PLAT IS IN ACCORDANCE WITH THE DATA OF SAID SURVEY.

JAMES H. CHUSTZ, JR.
PROFESSIONAL LAND SURVEYOR
LOUISIANA REGISTRATION NO. 4657
225-638-5949

DECEMBER 2, 2008
DATE

STATE OF LOUISIANA
JAMES H. CHUSTZ, JR.
REG. No. 4657
REGISTERED PROFESSIONAL
LAND SURVEYOR

PREPARED UNDER CONTRACT W912P8-06-D-0050 TASK ORDER 11 BY CHUSTZ SURVEYING, INC., NEW ROADS, LOUISIANA

DEPARTMENT OF THE ARMY
U. S. ARMY ENGINEER DISTRICT
NEW ORLEANS CORPS OF ENGINEERS
MISSISSIPPI VALLEY DIVISION

TASK FORCE GUARDIAN
17TH STREET OUTFALL CANAL
ORLEANS AND JEFFERSON PARISHES, LOUISIANA

SID-MARS RESTAURANT & LOUNGE, INC.

TRACT 306A

SCHEDULE E

Name and Address of Owner for Tract No. 306A

Sid-Mar's Restaurant & Lounge, Inc.
c/o Marion G. Burgess
1300 Lakeshore Drive
Metairie, LA 70005

Name and Address of Purported Interested Party for Tract No. 306A

Sheriff & Ex-Officio Tax Collector
Parish of Jefferson
200 Derbigny Street
Gretna, LA 70054

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Filed June 3, 2009]

CIVIL ACTION NUMBER: 09-3743
SECTION: SECT. C. MAG. 1
TRACT NO. 306B

UNITED STATES OF AMERICA
Plaintiff

v.

0.088 ACRES OF LAND, MORE OR LESS, SITUATE IN PARISH OF JEFFERSON, STATE OF LOUISIANA, AND JOHN M. BACH, DECEASED, AND SID-MAR'S RESTAURANT & LOUNGE, INC., *et al.*
Defendants

COMPLAINT IN CONDEMNATION

1. This is an action of a civil nature brought by the United States of America for the taking of property, under its power of eminent domain, and for the ascertainment and award of just compensation to the parties in interest.
2. The uses for which the property is to be taken and the authority for the taking are set forth in Schedule "A" annexed hereto and made a part hereof.
3. The property to be taken, the estates to be taken and the names and addresses of the persons having or claiming an interest in said property are

described in Schedules "B", "C", "D", and "E" annexed hereto and made a part hereof.

4. Local and state taxing authorities may have or claim an interest in the property by reason of taxes and assessments due and eligible.

5. There are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to Plaintiff, and such persons are made parties to this action under the designation "Unknown Owners."

WHEREFORE, Plaintiff demands judgment that the property be condemned, and that just compensation for the taking be ascertained and awarded, and such other relief as may be lawful and proper.

Respectfully submitted,

JIM LETTEN
UNITED STATES ATTORNEY

/s/ GLENN K. SCHREIBER
GLENN K.SCHREIBER
Assistant United States Attorney
Hale Boggs Federal Building
500 Poydras Street, Room 210B
New Orleans, Louisiana 70130
Telephone: (504) 680-3093
Facsimile: (504) 680-3186
glenn.schreiber@usdoj.gov

SCHEDULE A
Tract 306B

AUTHORITY FOR THE TAKING:

The authority for the taking of the land is under and in accordance with the 40 U.S.C. §§3113 and 3114; 33 U.S.C. §§594, section 204 of the Flood Control Act of 1965, Pub. L. No. 89-298, 79 Stat. 1073, 1077, as amended which authorizes the Lake Pontchartrain, Louisiana and Vicinity Hurricane Protection Project, and 33 U.S.C. §701n, which authorizes the repair and rehabilitation of any flood control work threatened or destroyed by flood; and Chapter 3 of Title I of Division B of the Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub L. No. 109-148, 119 Stat. 2680, 2762-2763, which Act made funds available for such purposes.

PUBLIC USES:

The public uses for which said land is taken are as follows:

Said land is necessary for the construction, repair and rehabilitation of the Lake Pontchartrain, Louisiana and Vicinity Hurricane Protection Project, 17th Street Outfall Canal Interim Control Structure, Jefferson Parish, Louisiana, and for such other uses as may be authorized by Congress or by Executive Order.

SCHEDULE B
Tract No. 306B

DESCRIPTION:

A certain tract of land designated as TRACT 306B, together with any and all buildings, improvements and appurtenances thereon, located in Jefferson Parish, Louisiana, and being more particularly described as follows:

For a POINT OF REFERENCE (P.O.R.), commence at the Northwest corner of Lot 1, Metairieville Subdivision, which said location is marked by a 1/2" iron pipe; thence proceed South 03 degrees 39 minutes 23 seconds West a distance of 63.88 feet to the Northwest corner of lot 3, Metairieville Subdivision; also being the POINT OF BEGINNING (P.O.B.).

From said POINT OF BEGINNING, proceed South 86 degrees 20 minutes 41 seconds East a distance of 120.00 feet to a point; thence South 03 degrees 39 minutes 10 seconds West a distance of 31.87 feet to a point; thence North 86 degrees 20 minutes 50 seconds West a distance of 120.00 feet to a 1/2" iron pipe; thence North 03 degrees 39 minutes 23 seconds East a distance of 31.87 feet to a point and the POINT OF BEGINNING (P.O.B.)

The herein tract of land described as TRACT 306B contains 0.088 acres and is bounded on the North by Lot 2, Metairieville Subdivision, on the East by Orpheum Avenue, on the South by Lot 4, Metairieville Subdivision and on the West by Lot 24, Metairieville Subdivision.

It is the intent of this description to include all of Lot 3, (also called Lot E) Square 128, Metairieville Subdivision, as per plat of survey by Chustz Surveying, Inc., signed by James H. Chustz, Jr., P.L.S., dated November 24, 2008.

SCHEDULE C
Tract No. 306B

FEE, RESERVING TO THE LANDOWNER ALL RIGHT, TITLE AND INTEREST TO THE UNDERLYING MINERALS WITHOUT RESTRICTION:

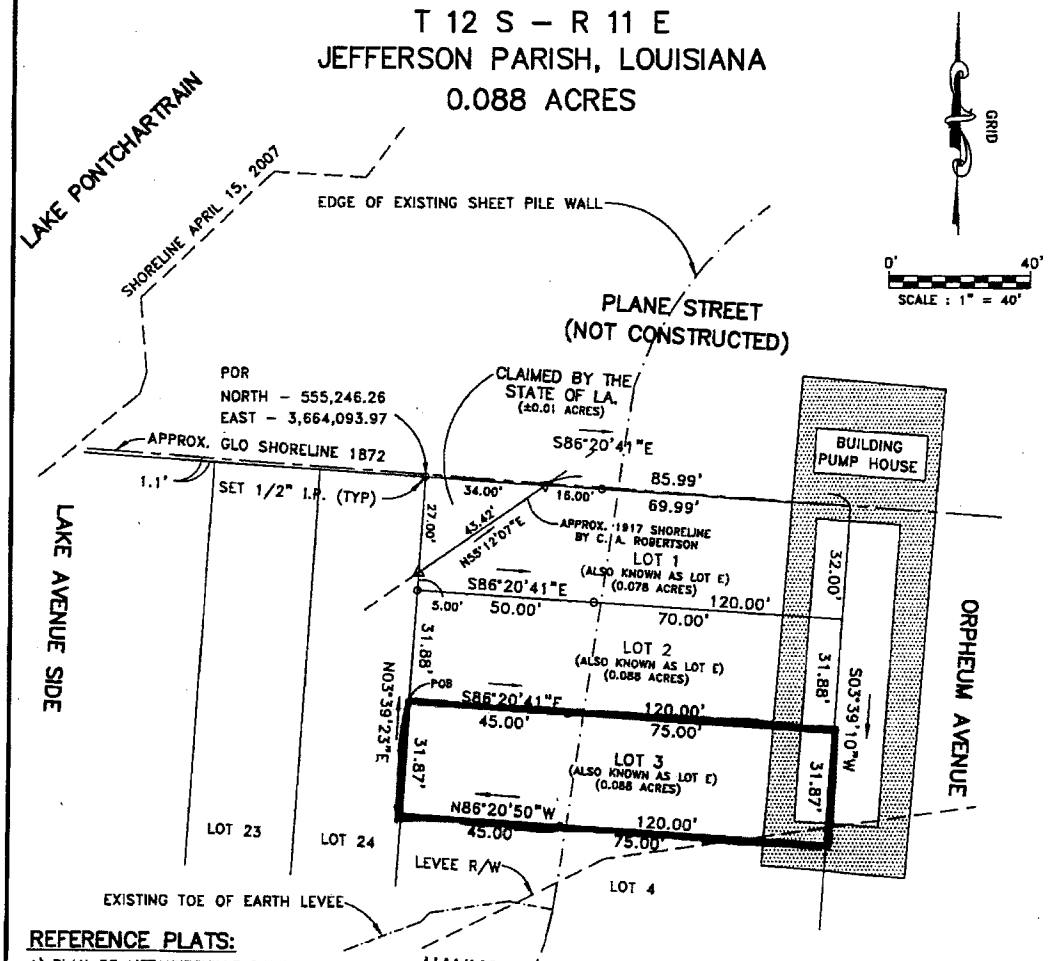
The fee simple title to the land, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines; excepting and excluding from the taking all oil, gas, and other minerals in and under said land and all appurtenant rights for the exploration, development, production, and removal of said oil, gas, and other minerals.

SCHEDULE D

[Insert Fold-In]

SCHEDULE D

LOT 3 (ALSO KNOWN AS A PORTION OF LOT E) SQUARE 128
METAIRIEVILLE SUBDIVISION
T 12 S – R 11 E
JEFFERSON PARISH, LOUISIANA
0.088 ACRES



REFERENCE PLATS:

1) PLAN OF METAIRIERVILLE DATED MAY 5, 1877.
2) PLAN OF METAIRIERVILLE DATED OCTOBER 7, 1922
3) PLAT FOR L. C. SHULTZ BY F. G. STEWART, DATED AUGUST 14, 1947.
4) PLAT FOR CHARLES P. RENO BY F. G. STEWART, DATED NOVEMBER 3, 1947.
5) PLAT FOR LEROY SCHULTZ BY F. G. STEWART, DATED SEPT. 3, 1960, REVISED MARCH 1, 1961.
6) MAP SHOWING THE JEFFERSON AND ORLEANS PARISH LINE BY ROESSLE AND GALLOWAY, CONSULTING ENGINEERS, DATED APRIL 30, 1959.
7) SURVEY OF LOTS 1, 2 & 3 SQUARE 128, METAIRIEVILLE SUBDIVISION, BY BFM CORP., DATED AUG. 20, 1991, REVISED NOV. 19, 1992.
8) LOCATION OF THE 1872 GLO MEANDER LINE BY BFM CORP., DATED SEPT. 16, 2003.

NOTES:

HORIZONTAL DATUM: NAD–1983 (BASED ON NGS MONUMENT ALCO)
PROJECTION: LAMBERT, LOUISIANA SOUTH ZONE
UNITS: U.S. SURVEY FEET
BEARINGS ARE BASED ON GPS MEASUREMENTS.

THIS SURVEY IS IN ACCORDANCE WITH THE APPLICABLE STANDARDS OF PRACTICE AS STIPULATED IN TITLE 46, CHAPTER 29 OF THE PROFESSIONAL AND OCCUPATIONAL STANDARDS, PART XLI FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS FOR CLASS "C" SURVEY.

THE SERVITUDES AND RESTRICTIONS SHOWN ON THIS SURVEY ARE LIMITED TO THOSE SET FORTH IN THE DESCRIPTION FURNISHED US, AND THERE IS NO REPRESENTATION THAT ALL APPLICABLE SERVITUDES AND RESTRICTIONS ARE SHOWN HEREON. THE SURVEYOR HAS MADE NO ATTEMPT TO VERIFY TITLE, ACTUAL LEGAL OWNERSHIP, OR OTHER BURDENS ON THE PROPERTY.

THE PUMP HOUSE WAS PHYSICALLY PRESENT AT THE TIME OF THE SURVEY; HOWEVER, PER INSTRUCTION FROM THE CORPS OF ENGINEERS, IT WAS NOT PRESENT AT THE TIME THE PROPERTY WAS COMMANDEERED ON FEBRUARY 13, 2006.

TRACT REGISTER		
TRACT NO.	ACREAGE	DESCRIPTION
306B	0.088	FEE EXCLUDING MINERALS, WITH RESTRICTIONS ON USE OF SURFACE

CERTIFICATION:

I CERTIFY THAT IN APRIL 2007 CHUSTZ SURVEYING, INC. MADE A GROUND SURVEY OF THE AREA SHOWN HEREON AND THAT THIS PLAT IS IN ACCORDANCE WITH THE DATA OF SAID SURVEY.

James H Chustz Jr.

JAMES H. CHUSTZ, JR.
PROFESSIONAL LAND SURVEYOR
LOUISIANA REGISTRATION NO. 4657
225-638-5949

DECEMBER 2, 2008
DATE

STATE OF LOUISIANA
JAMES H. CHUSTZ, JR.
REG. No. 4657
REGISTERED PROFESSIONAL
LAND SURVEYOR

PREPARED UNDER CONTRACT W912P8-06-D-0050 TASK ORDER 11 BY CHUSTZ SURVEYING, INC., NEW ROADS, LOUISIANA

DEPARTMENT OF THE ARMY
U. S. ARMY ENGINEER DISTRICT
NEW ORLEANS CORPS OF ENGINEERS
MISSISSIPPI VALLEY DIVISION

TASK FORCE GUARDIAN
17TH STREET OUTFALL CANAL
ORLEANS AND JEFFERSON PARISHES, LOUISIANA

JOHN M. BACH

TRACT 306B

SCHEDULE E

Names and Addresses of Purported Owners for Tract No. 306B

John M. Bach, Deceased

Unknown Owners

Sid-Mar's Restaurant and Lounge, Inc.
c/o Marion G. Burgess
1300 Lakeshore Drive
Metairie, LA 70005

Name and Address of Interested Party for Tract No. 306B

Sheriff & Ex-Officio Tax Collector
Parish of Jefferson
200 Derbigny Street
Gretna, LA 70054

APPENDIX H

[Logo]
STATE OF LOUISIANA
EXECUTIVE DEPARTMENT
EXECUTIVE ORDER NO. KBB 2006-6

COMMANDEERING PROPERTY FOR REPAIR
OF THE 17TH STREET CANAL

WHEREAS, the Louisiana Homeland Security and Emergency Assistance and Disaster Act, R.S. 29:721, *et seq*., confers upon the governor of the state of Louisiana emergency powers to deal with, respond to, or recover from emergencies and disasters, including those caused by fire, flood, earthquakes, or other natural or man-made causes;

WHEREAS, Proclamation No. 48 KBB 2005, issued on August 26, 2005, declared a state of emergency for the state of Louisiana due to Hurricane Katrina's potential to cause severe storms, high winds, and torrential rain that could cause flooding and damage to private property and public facilities, and threaten the safety and security of the citizens of Louisiana;

WHEREAS, Proclamation No. 54 KBB 2005, issued on September 22, 2005, extended the state of emergency until October 25, 2005; Proclamation No. 61 KBB 2005,

issued on October 24, 2005, extended the state of emergency until November 24, 2005; Proclamation No. 68 KBB 2005, issued on November 17, 2005, extended the state of emergency until December 24, 2005; Proclamation No. 75 KBB 2005, issued on December 22, 2005, extended the state of emergency until January 23, 2006, and Proclamation No. 10 KBB 2006, issued on January 20, 2006, extended the state of emergency until February 22, 2006;

WHEREAS, Hurricane Katrina struck the state of Louisiana causing catastrophic flooding and damage to southeastern Louisiana, including the parish of Jefferson, the effects of which have threatened the safety, health, and security of the citizens of the parish of Jefferson, along with private property and public facilities;

WHEREAS, pursuant to R.S. 29:724(D)(4), the governor may commandeer any private property if necessary to cope with a disaster or emergency, subject to applicable requirements for compensation; and

WHEREAS, at the request of the U.S. Army Corps of Engineers, Jefferson Parish, and East Jefferson Levee District, and upon the recommendation of the Attorney General's Office, the Department of Transportation and Development, and

the Division of Administration, State Land Office, the best interests of the citizens of the state would be served by the commandeering of certain property in the parish of Jefferson for the construction and repair of the 17th Street Canal, as further described below;

NOW THEREFORE I, KATHLEEN BABINEAUX BLANCO, Governor of the state of Louisiana, by virtue of the authority vested by the Constitution and laws of the state of Louisiana, do hereby order and direct as follows:

SECTION 1: The state of Louisiana hereby commandeers the use of certain property located in the parish of Jefferson, state of Louisiana, Section 121 and 122, Township 12 South, Range 11 East, and land extending north into Lake Pontchartrain, containing approximately 10.2 acres, as shown on the attached map (Exhibit A) entitled "Lake Pontchartrain and Vicinity, New Orleans Plan, Emergency Restoration, 17th Street Canal Interim Closure Structure, Exhibit A" and dated January, 2006.

SECTION 2: Said property shall be used for work that will include levee and floodwall construction and repair, constructing an interim gated closure structure north of the Hammond Highway

Bridge, miscellaneous clearing and selective demolition of damaged flood control works, driving sheet pile, placement of the interim closure structure, integrated pumps, crushed stone backfill and rip-rap placement, including the right to deposit fill, spoil and waste material thereon, to move, store and remove equipment and supplies and erect and remove temporary structures on the land, to construct, repair, operate, patrol and to perform any other work necessary and incident to the construction of the Lake Pontchartrain Louisiana and Vicinity Hurricane Protection Project, 17th Street Outfall Canal Interim Closure Structure, and any appurtenances, together with the right to trim, cut, fell, and remove therefrom all trees, underbrush, obstructions, and any other vegetation, structures, or obstacles within the limits of the right-of-way; reserving however, to the landowners, their heirs and assignees, all such rights and privileges in said land as may be used without interfering with or abridging the rights hereby acquired; subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines.

SECTION 3: The state of Louisiana has commandeered the real property interests for the property required by the Depart-

ment of the Army as indicated on the attached map (Exhibit A). Said property is commandeered pursuant to R.S. 29:721, *et seq*. Said owners of the property so commandeered shall be identified and compensated in accordance with the terms of the Cooperation Agreement Between the United States of America and the Orleans Levee District for Rehabilitation of a Federal Hurricane/Shore Protection Project executed on October 21, 2005, as supplemented by Supplemental Agreement No. 1, dated January 27, 2006, and as further supplemented by Supplemental Agreement No. 2, dated January 27, 2006.

SECTION 4: The Division of Administration, State Land Office, shall take immediate steps to grant right of entry to the property commandeered for the above purposes pursuant to this Order.

SECTION 5: This Order is effective upon signature and shall continue in effect until amended, modified, terminated, or rescinded by the governor, or terminated by operation of law.

[State Seal]

IN WITNESS WHEREOF, I have set my hand officially and cased to be affixed the Great Seal of Louisiana, at the Capitol, in the city of Baton

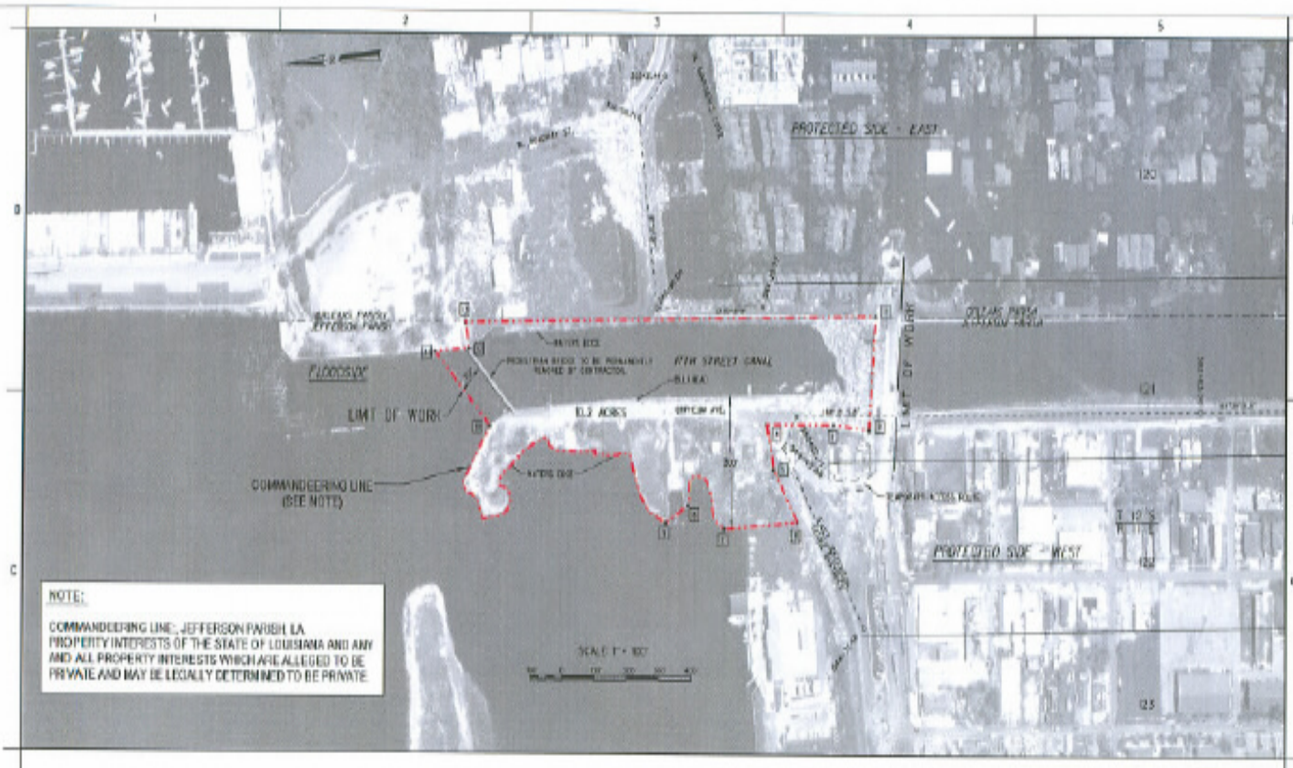
Rouge, on this 10th day of February, 2006.

/s/ Kathleen Babineaux Blanco
GOVERNOR OF LOUISANA

ATTEST BY
THE GOVERNOR

/s/ Al Ater
SECRETARY OF STATE

102a
Fold in



TABULATION OF COMMANDEERING LINE

POINT NO.	X-COORDINATE	Y COORDINATE
1		
2		
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		

EXHIBIT A
EXECUTIVE ORDER NO. KBB 2006-06

EXHIBIT
A

LEGEND
- EXISTING RIGHT-OF-WAY
- COMMANDEERING LINE
- LEVEE CENTERLINE AND P.I. STA.

103a
Fold in


Property
for
Commandeering
(Jefferson Parish)
Purported Privately
Owned Land