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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22-30416

[Filed March 14, 2023]

DAVID ANTHONY NEWBOLD; BRIANA CAROLINE STOCKETT; DEANNA NICOLE SMITH,
Plaintiffs—Appellants,

versus

KINDER MORGAN SNG OPERATOR, L.L.C.; SOUTHERN NATURAL GAS COMPANY, L.L.C.,
Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 3:21-cv-929

Before WIENER, STEWART, and ENGELHARDT, *Circuit Judges*.

KURT D. ENGELHARDT, *Circuit Judge*:

Two years after an unfortunate single-boat accident, one of the boat's two occupants died as a result of his injuries. The boat in which he was a passenger had struck a warning sign that was totally submerged at the time of the allision between the boat and sign. His

estate and survivors sued the companies responsible for the sign in question. The district court granted summary judgment to the Defendants on the ground that the incident occurred on water governed by Louisiana law rather than federal. The parties agree that if Louisiana law governs, the claims are barred. At issue in this appeal is whether or not the allision occurred in "navigable" waters such that federal law governs. For the reasons that follow, we hold that the allision occurred on non-navigable waters and thus AFFIRM the decision of the district court.

Factual Background

On April 16, 2020, John Andrew Newbold and his nephew Jason Rodgers went fishing in the D'Arbonne Wildlife Refuge. As they were making their way back to the boat launch after a largely unsuccessful day, Newbold and Rodgers noticed a clear channel of water off to one side and decided to make one last go at fishing for the day. They turned into the swath and Rodgers, who was operating the boat, accelerated down the center. The boat then struck a submerged object and Newbold, who was sitting on a bench in the front of the boat, was ejected. Newbold hit his head on the boat's propeller, which left two large gashes on the left side of his head. Roughly two years later, Newbold died of those injuries.

It was later determined that the clear swath of water was atop a right-of-way granted to the Southern Natural Gas Company for two natural gas pipelines. Those pipelines, which are operated by Kinder

Morgan,[1] cross Bayou D'Arbonne. The rights-of-way are mowed regularly and the land above which the allision occurred had been dry roughly 67 percent of the time in the past 30 years, according to an expert report prepared on behalf of the Defendants. The submerged item which the boat struck is believed to have been a sign warning boaters not to anchor or dredge above the pipeline. The sign was subsequently replaced after it was damaged by a hurricane, but at the time of the allision the sign was roughly 15 feet high. According to the Defendants' expert report, due to seasonal flooding, the sign has been submerged for roughly seven percent of the time across the past 30 years.

Procedural History

Through a curator,[2] Newbold, joined by his children (collectively, "Plaintiffs"), filed a petition for damages against Kinder Morgan and Southern Natural Gas in Louisiana state court. The Defendants then removed to the Western District of Louisiana under diversity jurisdiction. After roughly a year of litigation in the district court, the Defendants filed a motion for summary judgment in which they sought dismissal on the grounds that Louisiana's Recreational Use Statute ("RUS") provided them immunity from tort liability on

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[1] Collectively, Kinder Morgan and Southern Natural Gas will be referred to as "Defendants."

[2] At the time the petition was filed and removed, Newbold was alive but incapacitated. As has been noted, Newbold passed away during the pendency of litigation. His children, who were already in the suit, carried the suit forward and amended it to include a survival action.

the uncontested facts. The Plaintiffs conceded that, if applicable, the RUS would bar recovery. They submitted, however, that "the location of the allision was navigable in fact and in law." Finding no material issue of fact on this issue, the district court held that the location was not navigable and thus granted summary judgment to the Defendants. This appeal followed.

Standard of Review

"We review a grant of summary judgment de novo, viewing all the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor." *Parm v. Shumate*, 513 F.3d 135, 142 (5th Cir. 2007) (citing *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir. 2000)). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Discussion

"It is well established that the Commerce Clause of the United States Constitution gives the federal government a 'dominant servitude' over the navigable waters of the United States." *Parm*, 513 F.3d at 142-43 (quoting *United States v. Cherokee Nat. of Okla.*, 480 U.S. 700, 704 (1987)). Congress has exercised that power in part to declare that "[t]he creation of any obstruction not affirmatively authorized by Congress[] to the navigable capacity of any of the waters of the United States is prohibited." 33 U.S.C. § 403. Louisiana law, however, provides that "[a]n owner, lessee, or

occupant of premises owes no duty of care to keep such premises safe … for … fishing … or boating or to give warning of any hazardous conditions … whether the hazardous condition … is one normally encountered … or one created by the placement of structures." LA. REV. STAT. § 9:2791. Louisiana courts have noted, however, that "an injury which occurs on a navigable waterway … is not subject to a defense under" this statute. *Buras v. United Gas Pipeline Co.*, 598 So. 2d 397, 400 (La. Ct. App. 1992). As such, the parties agree that if the injury occurred in navigable water, summary judgment was unwarranted; if, conversely, the injury occurred in non-navigable water, summary judgment is appropriate.

We have elsewhere noted that "[t]he navigational servitude does not burden land that is only submerged when the river floods." *Parm*, 513 F.3d at 143. The location of the allision is on such land. Any flood waters on land unburdened by the navigational servitude are by definition not navigable for purposes of federal law and summary judgment would therefore be appropriate. However, the Plaintiffs posit three independent grounds by which they suggest an exception to this general rule may be found. Each are addressed in turn.

I. Whether, due to rights procured by the Army Corps of Engineers, the navigational servitude for the Refuge is 65 feet above mean sea level.

The first ground on which the Plaintiffs claim that the allision took place on navigable water is that the "navigational servitude" for the Refuge is alleged to be 65 feet above the mean sea level ("MSL"). The allision is claimed to have occurred at 55 feet above MSL. As

part of the Comprehensive Conservation Plan for the Refuge, the Army Corps of Engineers "has the right to permanently flood those lands lying below 65 feet above MSL and to flood on a seasonal basis any land lying between 65 feet above MSL and 70 feet above MSL." As such, Plaintiffs assert that the navigational servitude for the land of the Refuge is now 65 feet above MSL. At no point do the Plaintiffs assert that the Corps has, in fact, permanently flooded the Refuge, though the Comprehensive Conservation Plan notes that seasonal flooding may reach as high as 70 feet above MSL at times (a rise which the Plaintiffs attribute to the Corps' work). In response, the Defendants contend simply that "[t]he right to flood a national wildlife refuge, and not doing so, does not create navigable waters where none exist."

Any water burdened by the navigational servitude is by definition navigable, and federal law would therefore apply. "The so-called navigational servitude extends 'laterally to the entire water surface and bed of a navigable waterway, which includes all the land and waters below the ordinary high water mark.' A river's ordinary high water mark is set at 'the line of the shore established by the fluctuations of water.'" *Parm*, 513 F.3d at 143 (quoting 33 C.F.R. § 329.11(a)) (internal citation omitted). In other words, the navigational servitude relates to actualities – "the waters below the ordinary high water mark," "the line of the shore," and so forth, *id.* – rather than potentialities. Should the Corps permanently flood the Refuge, the water there would likely be navigable. But as the parties agree that the Corps has not in fact permanently flooded the

refuge, the water may not be said to be navigable under this theory.

II. Whether the allision occurred below the ordinary high-water mark of the Bayou D'Arbonne.

The district court reasoned that the location of the allision is above the ordinary high-water mark of the Bayou D'Arbonne because "[t]he area … is dry 67% of the time." What's more, the district court suggested that "[t]he fact that the area has vegetation at all shows it is outside of the navigable waters of Bayou D'Arbonne." This latter ground, the Plaintiffs suggest, "defies over a century of jurisprudence and is inconsistent with the tests established by the Corps, and state and federal courts." Instead, Plaintiffs submit that the ordinary high-water mark "is found at the line below which the water is so consistently present that it changes the soil and destroys the terrestrial vegetation and agricultural value of the land." The channel in which the allision occurred, an expert employed by the Plaintiffs concluded, is a "semi-permanently flooded" area which "is not … suitable for agriculture, grazing, or growing and harvesting desirable or marketable hardwood timber." Thus, Plaintiffs submit, the location of the allision is below the ordinary high-water mark of the Bayou.

Any water below the ordinary high-water mark of a navigable waterbody is navigable. "A river's ordinary high water mark is set at 'the line of the shore established by the fluctuations of water.' It is ascertained by 'physical characteristics such as a clear, natural line impressed on the bank; ... changes in the character of the soil; destruction of terrestrial

vegetation; ... or other appropriate means that consider the characteristics of the surrounding areas.'" *Parm*, 513 F.3d at 143 (quoting 33 C.F.R. § 329.11(a)) (internal citation omitted). None of these characteristics – clear banks, changes in soil, destruction of vegetation and so on – is dispositive in itself. Instead, they are markers which direct courts to the type of characteristics worth evaluating: namely, "physical characteristics" which "consider the characteristics of the surrounding areas." A vegetation-based test may not be useful, for example, in a desert area in which vegetation is scarce; likewise, a vegetation-based test may be difficult to apply in a swampy area in which vegetation coincides with standing water. The D'Arbonne National Wildlife Refuge, in which the relevant location sits, is "17,421 acres of deep overflow swamp, bottomland hardwood forest, and mixed pine/hardwood uplands" which is held by the United States for the "conservation, maintenance, and management of wildlife, resources thereof, and its habitat thereon."

Plaintiffs suggest that we follow the test laid out in *Borough of Ford City v. United States*, in which the Third Circuit held that the ordinary high-water mark should be determined by finding "the land upon which the waters have visibly asserted their dominion, the value of which for agricultural purposes has been destroyed." 345 F.2d 645, 648 (3d Cir. 1965). "[T]he vegetation test for a navigable stream's ordinary high-water mark means not that within such line all vegetation has been destroyed by the water covering the soil but that the soil has been covered by water for sufficient periods of time to destroy its value for

agricultural purposes." *Id.* As noted in that very case, however: "The vegetation test is useful where there is no clear, natural line impressed on the bank. If there is a clear line, as shown by erosion, and other easily recognized characteristics such as shelving, change in the character of the soil, destruction of terrestrial vegetation, and litter, it determines the line of ordinary high-water." *Id.* at 648.

Here, the location of the allision is on land that is dry 67 percent of the time, where vegetation is not destroyed and the land is not bare, as evidenced by the need to mow it with some regularity. More significantly, the Bayou D'Arbonne *does* have an "unvegetated channel" which is some 597 feet wide at the location where the boat split off to fish near the sign. The sign was located 58 feet away from the unvegetated channel. The unvegetated channel is a neat, natural line by which the ordinary high-water mark may be established. Within the channel, there is no vegetation; outside of it, there is.

In *United States v. Harrell*, the Eleventh Circuit rejected a definition of the navigational servitude that would have extended it "laterally over the entire area covered by the ordinary high waters of the stream, including tributaries that might not otherwise be considered navigable and areas *adjacent to the low water channel that revert to a swampy or even a dry condition as the waters recede*." 926 F.2d 1036, 1043 (11th Cir. 1991) (emphasis in original opinion). The court there called the proposed definition "ludicrous" and cited favorably the district court's assertion that such a definition "would recognize no horizontal limits

to the bed of a navigable river in those areas where the banks are relatively low and flat." *Id.* (internal quotation marks and citation omitted). That language applies equally here. The unvegetated channel establishes the ordinary high-water mark of the Bayou; water outside of that channel is not navigable.

III. Whether the location is navigable in fact.

Alternatively, the Plaintiffs suggest that "there is a question of material fact as to whether the location of allision is susceptible of being used in its ordinary condition as a highway for commerce." To be clear, there is no allegation that the channel *is* currently being used for commercial purposes; the nearest evidence of that is that the boat in which Mr. Newbold was a passenger was able to traverse the channel, but "[n]either navigation nor commerce encompass recreational fishing." *Parm*, 513 F.3d at 143 (citations omitted). Instead, the Plaintiffs suggest that the channel has the *potential* to be used for commerce, and that it *may* be used either presently or in the future for commerce in manners as yet apparently unknown to either the Plaintiffs or the court. As possible evidence for this, Plaintiffs note that the very placement of the sign suggests that the Defendants "expected water levels to be frequently high enough for boats to regularly travel through the area."[3]

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[3] At oral argument, Defendants' counsel suggested that the sign was not intended for boaters traversing the seasonally-flooded right-of-way but was instead designed to warn boaters on the Bayou D'Arbonne itself not to anchor over the pipeline. Given the posture of the case, we assume as correct Appellant's position on the matter.

In 1870, the Supreme Court declared that the term "navigable" refers to "every stream or body of water, susceptible of being made, in its natural condition, a highway for commerce, even though that trade be nothing more than the floating of lumber in rafts or logs." *The Daniel Ball*, 77 U.S. 557, 560 (1870). The Supreme Court has also made clear that "[t]he extent of existing commerce is not the test" for navigability. *United States v. Utah*, 283 U.S. 64, 82 (1931). Instead, while "[t]he evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes may be most persuasive, … where conditions … explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved." *Id.* As a later Supreme Court decision summarized, "lack of commercial traffic [is not] a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 416 (1940) (citing *Utah*, 283 U.S. at 82).

Finally, "[n]avigability, in the sense of the law, is not destroyed because the water course is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water." *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 122 (1921). "Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. … the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If

this be so the river is navigable in fact." *The Montello*, 87 U.S. 430, 443 (1874).

The Plaintiffs here fail to present even slight evidence concerning a commercial purpose for the channel in question. The closest they get is noting that the presence of the sign evinces expected boat traffic in the channel. The forms of evidence which convinced the Supreme Court that particular bodies of water are navigable are illustrative as to why this is insufficient. The Supreme Court has found navigability in fact on the basis of: (1) accounts of "large interstate commerce" involving "vessels from seventy to one hundred feet in length, with twelve feet beam, [which] drew when loaded two to two and one-half feet of water," *The Montello*, 87 U.S. at 441, (2) evidence that a channel had previously been used to support the fur trade, *Econ. Light & Power Co.*, 256 U.S. at 117, (3) evidence that a relevant section of the Colorado river had been used for "a large number of enterprises, with boats of various sorts, including rowboats, flatboats, steamboats, motorboats, barges and scows, some being used for exploration, some for pleasure, some to carry passengers and supplies, and others in connection with prospecting, surveying, and mining operations," *Utah*, 283 U.S. at 82, and (4) evidence of "two keelboats operating in 1881, eight in 1882, and eight together with a small steamboat in 1883 …. [which] carried iron ore and pig iron, as well as produce and merchandise," *Appalachian Electric Power Co.*, 311 U.S. at 411–12. No evidence of the sort exists here. If the channel in question, in its ordinary condition, has potential commercial value such that it may be called "navigable," Plaintiffs have not carried their burden to

"satisfactorily prove[]" as much. *See Utah*, 283 U.S. at 82. Thus, the water in which the allision occurred was not navigable and summary judgment was proper.

Conclusion

The district court's judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CASE NO. 3:21-CV-00929
JUDGE TERRY A. DOUGHTY
MAG. JUDGE KAYLA D. MCCLUSKY

[Filed June 21, 2022]

JOHN ANDREW NEWBOLD ET AL	)
	)
VERSUS	)
	)
KINDER MORGAN S N G	)
OPERATOR L L C ET AL	)
	)

MEMORANDUM RULING

Pending before this Court is a Motion for Summary Judgment [Doc. No. 23] filed on behalf of Defendants Kinder Morgan SNG Operator, LLC ("Kinder Morgan") and Southern National Gas Company LLC ("SNG") (collectively "Defendants"). On May 31, 2022, an Opposition [Doc. No. 32] was filed by Plaintiffs David Anthony Newbold ("Newbold"), Briana Caroline Stockett ("Stockett") and Deanna Nicole Smith ("Smith") (collectively "Plaintiffs"). A Reply [Doc. No. 33] was filed by Defendants Kinder Morgan and SNG on June 7, 2022.

For the reasons set forth herein, the Motion for Summary Judgment filed by Kinder Morgan and SNG is GRANTED.

I. BACKGROUND

The determinative issue in this case is whether the location of a boating accident on April 16, 2020, was within the navigable waters of Bayou D'Arbonne. The parties concede that if the boating accident occurred at a location within the navigable waters of Bayou D'Arbonne, federal maritime law would govern liability in the accident. The parties also concede that if the location of the boating accident were not within the navigable waters of Bayou D'Arbonne, Louisiana law would govern liability. Therefore, as discussed herein, Louisiana's Recreational Use Immunity statutes[1] ("RUS") would bar Plaintiffs' liability claims.

On April 16, 2020, John Newbold ("JN") and his nephew, Jason Rodgers ("Rodgers") spent the day fishing in Bayou D'Arbonne, which is in the D'Arbonne Wildlife Refuge. JN and Rodgers were in a 14-foot flat bottom aluminum boat that was owned and operated by Rodgers.

JN and Rodgers had been fishing for approximately seven hours and were traveling south on Bayou D'Arbonne, returning to the area where they had launched the boat, when they saw a straight East/West

[1] La. R.S. 9:2791 and La. R.S. 9:2795.

waterbody[2] intersecting the meandering bayou.[3] JN and Rodgers decided to proceed up the straight waterbody in search of fish.[4]

Rodgers began driving the boat up the waterway, and Rodgers stated he gave the 25-horsepower engine full throttle in a western direction.[5] As the boat traveled westward, it struck an object which was a "Do Not Anchor or Dredge" pipeline sign ("pipeline sign"), the top of which was located approximately six (6") inches below the water surface. JN was thrown out of the boat and was struck by the boat's engine, causing injuries.[6] JN allegedly died as a result of these injuries on February 15, 2022.[7]

As it turns out, the straight East/West waterbody was two 50' pipeline right of ways, which were owned by the Defendants, Kinder Morgan and SNG.[8] Kinder Morgan and SNG provided a survey of the area of the alleged accident. Project Engineer and Professional Land Surveyor Ronald Riggin declared that the location of the base of the pipeline sign was within the

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[2] Deposition of Jason Rodgers, [Doc. No. 23-3, p. 8-10, and 12-13].

[3] Id. p 17.

[4] Id. p. 9-10.

[5] Id. p. 16

[6] [Doc. No. 1-1, para. 22].

[7] [Doc. No. 29, para. 77].

[8] Declaration of Norman G. "Gregg" Kirk. [Doc. No. 23-4].

Defendants' right of way but located 58 feet west of the western perimeter of the unvegetated channel of the bayou.[9] There is no disagreement as to the location or dimensions of the pipeline sign, but there is a legal dispute as to whether the location of the pipeline was navigable.

A Petition was filed by Plaintiffs on March 15, 2021, in the Third Judicial District Court, Parish of Union, Civil Docket No. 49,745. The case was removed to this Court on April 8, 2021.[10]

II. LAW AND ANALYSIS

A. Motion for Summary Judgment

Summary judgment is appropriate when the evidence before a court shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A fact is "material" if proof of its existence or nonexistence would affect the outcome of the lawsuit under applicable law in the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" if the evidence is such that a reasonable fact finder could render a verdict for the nonmoving party. *Id.*

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to

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[9] Id. para. 12.

[10] [Doc. No. 1].

interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting *Anderson*, 477 U.S. at 247). "The moving party may meet its burden to demonstrate the absence of a genuine issue of material fact by pointing out that the record contains no support for the non-moving party's claim." *Stahl v. Novartis Pharm. Corp.,* 283 F.3d 254, 263 (5th Cir. 2002). Thereafter, if the non-movant is unable to identify anything in the record to support its claim, summary judgment is appropriate. *Id.* "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3).

In evaluating a motion for summary judgment, courts "may not make credibility determinations or weigh the evidence" and "must resolve all ambiguities and draw all permissible inferences in favor of the non-moving party." *Total E & P USA Inc. v. Kerr–McGee Oil and Gas Corp.*, 719 F.3d 424, 434 (5th Cir. 2013) (citations omitted). While courts will "resolve factual controversies in favor of the nonmoving party," an actual controversy exists only "when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air. Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994). To rebut a properly supported motion for summary judgment, the opposing party must show, with "significant probative evidence," that a genuine issue of material fact exists. *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000) (emphasis added). "'If the evidence is merely colorable, or is not significantly probative,' summary judgment is appropriate." *Cutting*

Underwater Tech. USA, Inc. v. Eni U.S. Operating Co., 671 F.3d 512, 517 (5th Cir. 2012) (quoting *Anderson,* 477 U.S. at 248).

Relatedly, there can be no genuine dispute as to a material fact when a party fails "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.,* 477 U.S. at 322-23. This is true "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id*. at 323.

B. Expert Testimony

Kinder Morgan and SNG submitted the declarations of three witnesses.[11] Plaintiffs submitted the Affidavits of Robert M. Edmunds ("Edmunds")[12]

Norman G. Kirk

Norman G. "Gregg" Kirk ("Kirk") is the Supervisor of Operations for the Eastern Region, Division 9, for Kinder Morgan. His area of responsibility includes the rights of way where the boating accident occurred. He declared the pipeline sign was located within those rights of way. Kirk further confirmed that SNG owns the two natural gas pipelines and the pipeline sign, and Kinder Morgan is the operator. Kirk also declared that

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[11] Declaration of Norman G. "Gregg" Kirk [Doc. No. 23-4]; Declaration of Ronald J. Riggin [Doc. No. 23-5]; and Declaration of G. Paul Kemp [Doc. No. 23-6].

[12] Affidavit of Robert Martin Edmunds [Doc. No. 32-5].

Kinder Morgan hires a contractor to periodically mow the surface of the rights of way on both sides of Bayou D'Arbonne. Kirk also attached copies of the right of way agreements.

Ronald J. Riggin

Ronald J. Riggin ("Riggin") is a Project Engineer and Professional Land Surveyor with Lazenby & Associates, Inc. Riggin declared the area location of the pipeline sign is shown on a Google Earth satellite photo.[13] Riggin determined the height and location of the pipeline sign and addressed water levels at Bayou D'Arbonne and at nearby boat landings over a thirty-year period.

Riggin declared the pipeline sign at issue was approximately 14.78' in height, the base elevation of the pipeline sign is 55.59', and the top of the pipeline sign is 70.37'. Riggin further declared the pipeline rights of way in the area of Bayou D'Arbonne are subject to seasonal flooding from the Ouachita River.

Riggin determined the water levels at Bayou D'Arbonne and surrounding area over a thirty-year period, from 1992 to 2022. The water level data was provided to Riggin by Dr. Paul Kemp ("Kemp"). Riggin declared that over the thirty-year period, the highest water levels attained each year on Bayou D'Arbonne have ranged from approximately 60 feet in 1996, 2000, 2006, and 2013 to approximately 79 feet in 2009.

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[13] [Doc. No. 23-5 p. 2].

Riggin also determined the water levels at two boat landings located approximately 1,600 feet from the accident location.[14] He declared that when seasonal flooding in the D'Arbonne Refuge reaches the top of the pipeline sign (70.37'), both nearby boat ramps, and roads in between them are also submerged by flooding.

G. Paul Kemp

G. Paul Kemp ("Kemp") is an Adjunct Professor of Oceanography and Coastal Science of Louisiana State University in Baton Rouge, Louisiana. He was hired as an expert to research the history of Bayou D'Arbonne to address water levels and vegetation in Bayou D'Arbonne and around the pipeline sign.

Kemp declared that according to the United States Fish & Wildlife Service ("USFWS") map and classification, Bayou D'Arbonne itself was classified as a "riverine and permanently flooded." Kemp declared that the area of the pipeline sign was as "plustrine with perennial emergent grassy vegetation" which can tolerate semi-permanent, but not permanent, flooding.

Kemp determined the width of the unvegetated channel of Bayou D'Arbonne, at the intersection of the two rights of way, is 597 feet. Kemp further determined the pipeline sign was located 58 feet away from the western perimeter of the unvegetated channel of Bayou D'Arbonne.

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[14] Where JN and Rodgers initially put the boat into Bayou D'Arbonne.

Kemp also declared that the base of the pipeline sign was four feet above the elevation of the western perimeter of the unvegetated channel of Bayou D'Arbonne. Kemp examined the water levels for the past thirty years, and determined, relative to Bayou D'Arbonne's unvegetated bed, the SNG pipeline sign and the SNG pipeline rights of way, that:

(a) 47.8% - the time period when Bayou D'Arbonne water levels are within the unvegetated bed;

(b) 67% - time period that the base of the pipeline sign is on dry land; and

(c) 7.05% - the time period the top of the pipeline sign is submerged by seasonal flooding.

Robert M. Edmunds

Robert M. Edmunds ("Edmunds") is a thirty-year, retired employee from the Louisiana Department of Wildlife & Fisheries. Edmunds received his BS in Wildlife Management in 1974 and an MS in Zoology in 1976 from Louisiana Tech University.

Edmunds was hired by Plaintiffs to analyze the vegetation of Bayou D'Arbonne and the location of the pipeline sign on the day of the boating accident. Edmunds stated that based upon his training and knowledge of plants, and the photos of vegetation found in the area of the pipeline sign, the vegetation is the type he would expect to find in an area that is semi-permanently flooded. Edmunds identified the vegetation in the area of the pipeline sign as *Quercus lyrata and Brunnichia ovata*, which are reliable

indicators that the area is semi-permanently flooded. It was also Edmunds's opinion that the area of the pipeline sign was not an area that would be suitable for agriculture, grazing, or growing and harvesting desirable or marketable hardwood timber.

C. Navigability

The primary issue in deciding this motion for summary judgment is whether the area where the collision occurred is navigable. If it occurred in a navigable waterway, Louisiana's recreational use statutes do not apply.[15] However, if the location were not in a navigable waterway, Louisiana law applies and Louisiana's RUS bar the claim.

A stream is navigable if, in its ordinary condition, trade and travel are, or may be, conducted over it in the customary modes of trade and travel on water. The navigable servitude of the government extends to the ordinary high-water mark on either side of the stream.[16]

A river's ordinary high-water mark is set at the line of the shore established by the fluctuation of water. It is ascertained by physical characteristics such as a clear, natural line impressed on the bank; changes in the character of the soil; destruction of terrestrial vegetation; or other appropriate means that consider

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[15] *Buras v. United Gas Pipeline Co.*, 598 So.2d 397, 400 (La. App. 4th Cir. 1992).

[16] *Goose Creek Hunting Club, Inc., v. U.S.*, 207 Ct. Cl. 323 (U.S. Ct. of Claims 1975); *The Daniel Ball*, 77 U.S. 557, 563 (1870).

the characteristics of the surrounding areas. The navigational servitude does not burden land that is only submerged when the river floods.[17]

Plaintiffs maintain the area where the accident occurred was "navigable in fact." Property is "navigable in fact" when it is used or susceptible of being used in its ordinary condition to transport commerce. Susceptibility of use as a highway for commerce should not be confined to exceptional conditions or short periods of temporary high waters.[18]

The expert witnesses of Kinder Morgan and SNG submit facts showing the following:

> 1. SNG owns the gas pipeline rights of way and Kinder Morgan operates them;
>
> 2. Kinder Morgan periodically hires a contractor to mow the surface of the rights of way on both sides of Bayou D'Arbonne;
>
> 3. The pipeline sign was located 58 feet away from the western perimeter of the unvegetated channel of Bayou D'Arbonne;
>
> 4. The pipeline sign was 14.78 feet in height, the base elevation of the pipeline sign was 55.59 feet, and the top of the pipeline sign was 70.37 feet;

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[17] *Parm v. Shumate*, 513 F.3d 135, 143 (5th Cir. 2007).

[18] *U.S. v. Harrell*, 926 F.2d 1036, 1039-40. (11th Cir. 1991); *United States v. Appalachian Electric Power Company*, 311 U.S. 377 (1940).

> 5. The area where the pipeline sign was located is described by the USFWS map as "plustrine with perennial emergent grassy vegetation which can tolerate semi-permanent, but not permanent, flooding";
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> 6. The base of the pipeline sign was four feet above the elevation of the western perimeter of the unvegetated channel of Bayou D'Arbonne;
>
> 7. Based on the last thirty-year water levels, 47.8% of time, the Bayou D'Arbonne water levels are within the unvegetated bed;
>
> 8. Based on the last thirty-year water levels, 67% of time, the base of the pipeline sign is on dry land; and
>
> 9. Based on the last thirty-year water levels, 7.05% of time, the top of the pipeline sign is submerged by seasonal flooding.

In their opposition, Plaintiffs argue that the US Corp of Engineers established the Ordinary High Water Mark ("OHWM") of Bayou D'Arbonne is sixty-five feet, approximately ten feet over the bottom of the pipeline sign.[19] Plaintiffs also argue that the USFWS classified the area of the pipeline sign as a semi-permanently flooded water regime, meaning surface water persists throughout the growing season in most years and when water is absent, the water table is

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[19] Citing USFWS D'Arbonne National Wildlife Refuge Comprehensive Conservation Plan [Doc. No. 32-4, pp. 22 and 24].

usually at or very near the land surface.[20] Plaintiffs further maintain that based upon this evidence, the area where the pipeline sign was located, is "navigable in fact."

The burden of proof of navigability rests upon the person asserting it.[21] Therefore, Plaintiffs have the burden of proof in proving navigability of the area where the pipeline sign was located.

By showing the area of the pipeline sign was 58 feet from the location where vegetation stops, and in showing that the base of the pipeline sign is dry 67% of the time, Kinder Morgan and SNG have shown that the location of the pipeline sign is above the OHWM and not navigable. The area cannot be used for navigation in its ordinary condition because it is dry 67% of the time. In closely examining Plaintiffs' arguments, Plaintiffs have not created a material issue of fact that the location was navigable.

In Plaintiffs' first argument, they maintain the OHWM at the location was 65 feet, almost ten feet over the base of the pipeline sign. In support of this claim, Plaintiffs reference the USFWS D'Arbonne National Wildlife Refuge Comprehensive Conservation Plan, pages 22 and 24.[22] However, this argument is not supported by the evidence Plaintiff references. Page 22 indicates the permanent pool level is 52 feet and that

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[20] Citing map in Declaration of G. Paul Kemp [Doc. No. 23-6, p. 5].

[21] *Goose Creek*, 207 Ct. Cl. At 583.

[22] [Doc. No.32-4].

the Corps of Engineers has the right to permanently flood those lands lying below 65 feet. Page 24 is a map which shows the D'Arbonne National Wildlife Refuge covered at various stages as flooding increases from a permanent pool of 52 feet up to flooding at 70 feet. This evidence does not support Plaintiffs' position that the OHWM at the location of the accident was 65 feet.

Plaintiffs further argue USFWS classified the area of the pipeline sign as semi-permanently flooded, citing a map in the Declaration of G. Paul Kemp. Kemp states that the USFWS classified the area of the pipeline sign as PEMIF, meaning "plustrine with perennial emergent grassy vegetation" which can tolerate semipermanent, but not permanent, flooding.[23] Neither Kemp, nor his attached map, say the area of the pipeline sign is semi-permanently flooded. It only says the vegetation can "tolerate" semi-permanent, but not permanent, flooding.

Additionally, Plaintiffs submit the Affidavit of Robert M. Edmunds.[24] Edmunds classified the vegetation he saw photos of in the area of the pipeline sign as *Quercus lyrate* and *Brunnchia ovata,* which he indicated was the type of vegetation he would expect to find in a semi-permanently flooded area. This does not create a material issue of fact because it is consistent with Defendant's testimony. The fact that the area has vegetation at all shows it is outside of the navigable waters of Bayou D'Arbonne.

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[23] [Doc. No. 23-6, para. 10].

[24] [Doc. No. 32-5].

Therefore, Plaintiffs have not created a genuine issue of material fact that the area of the pipeline sign is navigable. Therefore, Louisiana law applies.

D. Recreational Use Statutes

Plaintiffs concede that if Louisiana law applies, the Louisiana RUS would bar recovery.[25] However this Court will examine the RUS to determine whether they bar Plaintiffs' recovery. The Louisiana RUS are found in two statutes, La. R.S. §§ 9:2791 and 9:2795.

The RUS should be construed with reference to each other. When the two statutes conflict, R.S. 9:2795 controls because it is the last enacted and amended statute.[26] The RUS are in derogation of common or natural right, and are to be strictly interpreted, and must not be extended beyond their obvious meaning.[27] The purpose of the RUS is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.[28]

La. R.S. 9:2791 states:

> §2791: Liability of owner or occupant of property not used primarily for commercial recreational purposes

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[25] [Doc. No. 32 p. 2].

[26] *Richard v. Hall*, 874 So.2d 131, 151 (La. 2004).

[27] Id at 148.

[28] Id at 150.

A. An owner, lessee, or occupant of premises owes no duty of care to keep such premises safe for entry or use by others for hunting, fishing, camping, hiking, sightseeing, or boating or to give warning of any hazardous conditions, use of, structure, or activities on such premises to persons entering for such purposes, whether the hazardous condition or instrumentality causing the harm is one normally encountered in the true outdoors or one created by the placement of structures or conduct of commercial activities on the premises. If such an owner, lessee, or occupant gives permission to another to enter the premises for such recreational purposes he does not thereby extend any assurance that the premises are safe for such purposes or constitute the person to whom permission is granted one to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to persons or property caused by any act of person to whom permission is granted.

B. This Section does not exclude any liability which would otherwise exist for deliberate and willful or malicious injury to persons or property, nor does it create any liability where such liability does not now exist. Furthermore the provisions of this Section shall not apply when the premises are used principally for a commercial, recreational enterprise for profit; existing law governing such use is not changed by this Section.

C. The word "premises" as used in this Section includes lands, roads, waters, water courses, private ways and buildings, structures, machinery or equipment thereon.

D. The limitation of liability extended by this Section to the owner, lessee, or occupant of premises shall not be affected by the granting of a lease, right of use, or right of occupancy for any recreational purpose which may limit the use of the premises to persons other than the entire public or by the posting of the premises so as to limit the use of the premises to persons other than the entire public.

La. R. S. 9:2795, in pertinent part, states:

§2795. Limitation of liability of landowner of property used for recreational purposes; property owned by the Department of Wildlife and Fisheries; parks owned by public entities

(1) "Land" means urban or rural land, roads, water, watercourses, private ways or buildings, structures, and machinery or equipment when attached to the realty.

(2) "Owner" means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises.

(3) "Recreational purposes" includes but is not limited to any of the following, or any combination thereof: hunting, fishing, trapping, swimming, boating, camping, picnicking, hiking, horseback riding, bicycle riding, motorized, or

nonmotorized vehicle operation for recreation purposes, nature study, water skiing, ice skating, roller skating, roller blading, skate boarding, sledding, snowmobiling, snow skiing, summer and winter sports, or viewing or enjoying historical, archaeological, scenic, or scientific sites.

B.(1) Except for willful or malicious failure to warn against a dangerous condition, use, structure, or activity, an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes as herein defined does not thereby:

(a) Extend any assurance that the premises are safe for any purposes.

(b) Constitute such person the legal status of an invitee or licensee to whom a duty of care is owed.

(c) Incur liability for any injury to person or property caused by any defect in the land regardless of whether naturally occurring or man-made.

(2) The provisions of this Subsection shall apply to owners of commercial recreational developments or facilities for injury to persons or property arising out of the commercial recreational activity permitted at the recreational development or facility that occurs on land which does not comprise the commercial

> recreational development or facility and over which the owner has no control when the recreational activity commences, occurs, or terminates on the commercial recreational development or facility.
>
> C. Unless otherwise agreed in writing, the provisions of Subsection B shall be deemed applicable to the duties and liability of an owner of land leased for recreational purposes to the federal government or any state or political subdivision thereof or private persons.
>
> D. Nothing in this Section shall be construed to relieve any person using the land of another for recreational purposes from any obligation which he may have in the absence of this Section to exercise care in his use of such land and in his activities thereon, or from the legal consequences of failure to employ such care.
>
> E.(1) The limitation of liability provided in this Section shall apply to any lands or water bottoms owned, leased, or managed by the Department of Wildlife and Fisheries, regardless of the purposes for which the land or water bottoms are used, and whether they are used for recreational or nonrecreational purposes.

Both Kinder Morgan (operator) and SNG (owner) are "owners" that are entitled to protection under the RUS. Kinder Morgan is the person in control of the pipelines, and SNG is the owner of the pipelines.

Also, the type of activity JN and Rodgers were engaged in (fishing/boating) is clearly covered under

9:2795 A(3)'s definition of "recreational purposes." There are no facts submitted or alleged which would result in the alleged failure to warn being "willful or malicious."

Therefore, in accordance with R.S. 9:2795 B and R.S. 9:2791 A, the RUS statutes bar Plaintiffs' claims.

III. CONCLUSION

For the reasons set forth herein, the Motion for Summary Judgment [Doc. No. 23] filed by Kinder Morgan and SNG is GRANTED, and Plaintiffs' claims against Defendants are hereby DISMISSED WITH PREJUDICE.

MONROE, LOUISIANA, this 21st day of June 2022.

/s/ Terry A. Doughty
TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CASE NO. 3:21-CV-00929
JUDGE TERRY A. DOUGHTY
MAG. JUDGE KAYLA D. MCCLUSKY

[Filed June 21, 2022]

JOHN ANDREW NEWBOLD ET AL	)
	)
VERSUS	)
	)
KINDER MORGAN S N G	)
OPERATOR L L C ET AL	)
	)

JUDGMENT

For the reasons set forth in this Courts Memorandum Ruling,

IT IS ORDERED, ADJUDGED, AND DECREED that the Motion for Summary Judgment [Doc. No. 23] filed by Defendants Kinder Morgan and SNG is **GRANTED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all claims of Plaintiffs are **DISMISSED WITH PREJUDICE**.

MONROE, LOUISIANA, this 21st day of June 2022.

/s/ Terry A. Doughty
TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22-30416

[Filed April 11, 2023]

DAVID ANTHONY NEWBOLD; BRIANA CAROLINE STOCKETT; DEANNA NICOLE SMITH,
Plaintiffs—Appellants,

versus

KINDER MORGAN SNG OPERATOR, L.L.C.; SOUTHERN NATURAL GAS COMPANY, L.L.C.,
Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 3:21-cv-929

ON PETITION FOR REHEARING EN BANC

Before WIENER, STEWART, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service

requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.