

Gas Gathering Agreements: The Treatment of GGAs as Executory Contracts in Bankruptcy

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Midstream Agreements in Bankruptcy

- *In re Sabine Oil & Gas Corporation*
- *In re Quicksilver Resources Inc.*
- *In re Magnum Hunter Resources Corporation*

Covenants

- A covenant is a type of non-possessory interest to use an estate possessed by someone else
- Real Covenant vs. Personal Covenant
 - Real Covenant
 - Real property interest
 - “Run with the land”
 - Binds covenanting parties, heirs and assigns
 - Personal Covenant
 - Contractual interest
 - Binds direct parties to covenant
 - Binds those who later purchase the estate with notice of the covenant if the covenant restricts the estate or its use

Restrictive Covenants & Equitable Servitudes

- A restrictive covenant, real or personal, restricts the use of real property
- May be enforceable in equity through an equitable servitude
- Equitable servitudes, like real covenants, constitute a non-possessory real property interest

	REAL COVENANT	PERSONAL COVENANT	EQUITABLE SERVITUDE
<u>Parties Bound</u>	<ul style="list-style-type: none"> • Direct parties • All covenanting parties' heirs and assigns 	<ul style="list-style-type: none"> • Direct parties • Covenanting parties' heirs and assigns if: <ol style="list-style-type: none"> 1. Parties have notice of the covenant, and 2. The covenant restricts the estate or its use 	<ul style="list-style-type: none"> • Parties to the suit
<u>Type of Interest</u>	Real Property Interest	Contractual Interest	Real Property Interest

Real Covenants

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Elements of a Real Covenant

- Running with the “estate in land”
- In Texas, a covenant runs with the land when:
 1. It “touches and concerns” the land;
 2. It relates to a thing in existence, such as a tangible piece of property, or specifically binds the parties and their assigns;
 3. The original parties to the covenant intend for it to run with the land; and
 4. The successors to the burden have notice
- In addition to the four criteria above, the parties must be in privity of estate at the time the covenant was made.
 - Vertical Privity
 - Horizontal Privity

Touch and Concern

- A covenantor's interest in the estate is burdened by the covenant, such as being rendered less valuable by the promise
- Covenantee's rights are known as the "benefit," while the covenantor's duties are known as the "burden"

Example: A, who owned Blackacre and Whiteacre, covenanted with B, the grantee of Whiteacre, that she would not drill more than two wells on Blackacre. The burden of the covenant touches and concerns Blackacre because it diminishes A's rights in connection with her use of Blackacre.

Thing in Existence/Specifically Binds

- Rarely litigated
- Common for agreements to expressly state that the covenant binds successors and assigns.

Intent

- May be implied from the fact that the burden or benefit of the covenant was intended to be of more than a temporary nature
- Sought in the language of the transaction
- “Assigns” and “Running” constitutes strong evidence of the running intent

Notice

- Rarely an issue
- Record, Actual, Inquiry

Privity

- Describes common interests in real property burdened or benefitted by a covenant
- Vertical
 - Required by all states
 - When a party is a successor to the estate of the original covenantor or covenantee
 - Standing
- Horizontal
 - The covenant is made in connection with and at the same time as the transfer of some interest in the real property in question between covenantor and covenantee in addition to the covenant itself
 - Leaseholds, conveyances in fee, easements

Example: A and B are neighboring landowners, neither having any rights in the other's land. For good consideration, A promises B, "for herself, her heirs, successors, and assigns," that A's parcel "will never be used to produce oil and gas." The horizontal privity requirement is not met, and successors in interest to A will not be bound because at the time A made this covenant, she and B shared no interest in land independent of the covenant.

For a Real Covenant to Run With the Land

Conveyance + Real Covenant

- Horizontal Privity
- “Touch and Concern”
- Thing in existence/specifically binds
- Intent
- Notice

If applicable, Vertical Privity is required

In re Energytec, Inc., 739 F.3d 215 (5th Cir. 2013)

- Modified the requirement of horizontal privity by ruling that a conveyance made to one party contemporaneous with a covenant made to a different party within the same instrument satisfied the requirement for horizontal privity
- *Conveyance*: Mescalero Oil & Gas, Inc. (“Mescalero”) conveyed all its gas pipeline system, including rights-of-way and a processing plant, to Producers Pipeline Corporation (“PPC”) in a letter agreement
- As partial consideration for the conveyance of the pipeline system, PPC was required to pay Newco Energy (“Newco”) a transportation fee based on the amount of gas flowing through the pipeline
- *Covenant*: The agreement specified that Newco had the right to approve any subsequent assignment of the pipeline system and that Newco’s interest in transportation fees was to “run with the land”
- Mescalero, PPC, and Newco were all parties to the agreement
- The letter agreement, along with a separate Assignment and Bill of Sale subject to the letter agreement, were recorded in the land records of the relevant county

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In re Energytec, Inc., 739 F.3d 215 (5th Cir. 2013)

- Energytec, Inc. (“Energytec”) acquired PPC’s interest in the pipeline system, then later filed for bankruptcy and sought court approval to sell the property free and clear of any liens, claims, or encumbrances
- Newco objected, arguing that its interest in transportation fees and its consent right ran with the land and, therefore, the pipeline could not be sold free and clear of those interests
- Issues: the “touch and concern” element and horizontal privity

In Re Energytec, Inc. 739 F.3d 215 (5th Cir. 2013).

- Touch and Concern
 - Burdened Estate: Energytec’s gas pipeline system and associated rights-of-way
 - Newco’s interest in the transportation fee and assignment consent right impacted Energytec’s interest in the pipeline system and impacted the pipeline’s value in the eyes of prospective buyers
 - Whenever Energytec wants to transport natural gas, the fee to Newco must be paid
 - If Energytec stops transporting gas, Newco’s rights are dormant, subject to revival should the natural gas ever again flow
- Horizontal Privity
 - “Much-criticized doctrine”
 - The transportation fee and other benefits were created at the time of a conveyance of real property (carved out of the conveyance the covenant to Newco)
 - Had Mescalero retained the transportation fee and consent right for itself when it conveyed the pipeline and real property interests to PPC, there would be no question about privity
 - “Simultaneous existing interests”

For a Real Covenant to Run With the Land

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Equitable Servitudes

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Elements of an Equitable Servitude

- In Texas, an equitable servitude exists when
 - A prior agreement imposes a restriction, limiting the use of burdened land
 - The restriction benefits the land of the party seeking to enforce it, and
 - If the agreement was made by a predecessor in title, the successor to the burdened land took its interest with notice of the restriction
- Can only be enforced if the party seeking to enforce it owns actual land that benefits from the restriction
 - Personal covenant
- If the restriction has ceased to have a beneficial value to the complainant's property, it can no longer form a ground for equitable relief

Example: A and B are neighboring landowners, neither having any rights in the other's land. A, owner of Blackacre, promises B, "for herself, her heirs, successors, and assigns," that A's parcel "will never be used for other than residential purposes." B records the agreement. A sells Blackacre to C. The burden created by this promise would not run at law as a real covenant because horizontal privity is missing. However, under an equitable servitude theory, the burden will run.

Executory Contracts

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Executory Contracts in Bankruptcy

- “A contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other.”
- The debtor or trustee, subject to the court’s approval, may assume or reject any executory contract of the debtor if it is in the best interest of the debtor and its estate
- Real Covenant or Equitable Servitude vs. Personal Covenant

	REAL COVENANT	PERSONAL COVENANT	EQUITABLE SERVITUDE
<u>Parties Bound</u>	<ul style="list-style-type: none"> • Direct parties • All covenanting parties’ heirs and assigns 	<ul style="list-style-type: none"> • Direct parties • Covenanting parties’ heirs and assigns if: <ol style="list-style-type: none"> 1. Parties have notice of the covenant, and 2. The covenant restricts the estate or its use 	<ul style="list-style-type: none"> • Parties to the suit
<u>Type of Interest</u>	Real Property Interest	Contractual Interest	Real Property Interest

Gas Gathering Agreements (“GGAs”)

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Gas Gathering Agreement Application

- A producer will covenant to dedicate all production from its interest in oil, gas, and mineral leases within a designated area, to a designated gatherer, for the purpose of gathering gas for a term of years.
- Touch and Concern
 - Producer no longer has the right to deliver natural gas to another gatherer and cannot convey that right
 - Estate in oil, gas, and mineral leases less valuable
 - Extracted minerals vs. mineral acreage

Access Rights of Producers – Natural Gas

- Gas Utility

- A gas gathering company that owns, operates or manages a pipeline system that carries natural gas for public hire
- If the gas corporation exercises its eminent domain power, it becomes a gas utility subject to the rules of the Texas Railroad Commission (“RRC”)
- It must not directly or indirectly charge, demand, collect or receive from anyone a greater or lesser compensation for a service provided than it does from another for a similar and contemporaneous service; must comply with non-discrimination rules.

- Private Line

- A gas gatherer’s pipeline that carries gas owned by others – transported for a fee – may hold the status of a “private pipeline” if it meets the requirements set forth in Texas Utilities Code § 121.005
- Not subject to the rules of the RRC

APPLICATION FOR PERMIT TO OPERATE A PIPELINE IN TEXAS

Form T-4

Rev. 02/2016

Railroad Commission of Texas
Oversight and Safety Division
Pipeline Safety Department
Permitting/Mapping

Natural Gas Pipelines
(See 16 Texas Administrative Code §3.70)



Permit Number _____

ORGANIZATIONAL INFORMATION	
1. Operator Name:	P-5 No.:
Operator Address:	
2. Does the operator identified in item 1 own the pipeline? <input type="checkbox"/> Yes <input type="checkbox"/> No If "No", give name and address of owner	
Owner Name:	
Owner Address:	
3. Does the operator control the economic operations of the pipeline? <input type="checkbox"/> Yes <input type="checkbox"/> No If "No", provide name, address, and P5# of economic operator	
Eco. Operator Name:	P-5 No.:
Eco. Operator Address:	
PIPELINE INFORMATION	
1. Mark the appropriate box for each of the following questions:	
a) New permit? <input type="checkbox"/> Yes <input type="checkbox"/> No	New Construction Report Number: <u> </u> NC <u> </u>
b) Renewal for same operator? <input type="checkbox"/> Yes <input type="checkbox"/> No	
c) Extensions or modifications? <input type="checkbox"/> Yes <input type="checkbox"/> No	
d) Change in Operator or Ownership? <input type="checkbox"/> Yes <input type="checkbox"/> No	
If "Yes", submit Form T-4B with this application	
Total Permit Miles: _____ (after all changes)	
2. Mark the appropriate box for each of the following questions:	
a) Are the pipelines covered under this permit: <input type="checkbox"/> Interstate <input checked="" type="checkbox"/> Intrastate	
b) Commodity transported: <input checked="" type="checkbox"/> Natural Gas <input type="checkbox"/> Full Gas Well Stream <input type="checkbox"/> Gas - Other (specify): _____	
c) Does the commodity contain H2S? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If "Yes", at what concentration? _____ ppm	
d) Requested Pipeline Classification (Gas Utility or <u>Private Pipeline</u>): _____	
e) Does pipeline use any public highway or road, railroad, public utility easement, or other gas utility right-of-way? <input type="checkbox"/> Yes <input type="checkbox"/> No	
f) Does the pipeline carry only the gas produced by the operators? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If "No", select the activity below: <input type="checkbox"/> Purchased from others <input checked="" type="checkbox"/> Owned by others but transported for a fee <input type="checkbox"/> Both purchased from and transported for others <small>clear f) ☺</small>	
3. Select the purpose being sought for the pipeline.	
<input type="checkbox"/> Transmission	<input type="checkbox"/> Gas Lift
<input checked="" type="checkbox"/> Gathering	<input type="checkbox"/> Gas Plant
<input type="checkbox"/> Gas Injection	<input type="checkbox"/> Own Consumption
<input type="checkbox"/> Other (describe): _____ If "Other", attach a sworn statement providing factual basis supporting the purpose being sought for the pipeline.	
Basis for Requested Classification Select the basis supporting a requested classification of Private Pipeline. If requesting Gas Utility status select the Not Applicable block below.	
<input type="checkbox"/> This pipeline ONLY handles natural gas produced by the operator (and is not already a Gas Utility due to other operations).	
<input type="checkbox"/> The purpose of this pipeline is solely for the operator's own consumption.	
<input type="checkbox"/> This pipeline is Interstate (gathering).	
<input checked="" type="checkbox"/> While this pipeline handles natural gas other than the operator's own production, it meets the standards set forth in Texas Utility Code §121.005 (in-or-within the vicinity of the field where produced, and no condemnation ever used and no Town Border/City Gate deliveries). Attach a Non-Utility Certificate to support a Private Pipeline classification.	
<input type="checkbox"/> Not Applicable. Operator is requesting Gas Utility status.	

NON-UTILITY CERTIFICATE

3/2015

Railroad Commission of Texas
Oversight and Safety Division-Gas Services
Utility Audit Section



Permit Number: _____

Pursuant to Texas Utilities Code, § 121.005, _____ elects to be treated as a non-utility.
The statutory requirements for such treatment have been met and the company certifies that:

I. Does the company own, operate, manage, lease or control a pipeline for the carriage of natural gas where any part of the right-of-way
for said line has (ever) been acquired by exercising the right of eminent domain?

[] Yes [X] No [from the original date(s) of construction to present]

II. Does the company make city-gate deliveries for local distribution?

[] Yes [X] No [includes either sales at or transportation delivery to a 'City Gate']

III. The company transports natural or synthetic gas, whether for sale, hire or otherwise, solely: (Check appropriate box or boxes.)

- 1. In, or in the vicinity of, the field or fields where the gas is produced to a gas processing plant or treating facility; or
from the outlet of such plant or treating facility to:
A. a person at or within the vicinity of such plant or treating facility; or
B. (1) to another person for transportation or sale in interstate commerce; or
(2) to another person in or within the vicinity of the field or fields where produced for
transportation or sale in intrastate commerce;
2. To another person for transportation or sale in interstate commerce; or
3. To another person in or within the vicinity of the field or fields where produced for transportation or sale in intrastate
commerce.

If items 1, 2 and/or 3 above are not applicable, are your deliveries or sales solely:

- 1. For lease use, compressor fuel, processing plant fuel or similar uses; or
2. Pursuant to lease or right-of-way agreements.

AFFIDAVIT

I declare under penalties prescribed in Texas Natural Resources Code § 91.143, that I am authorized to make this certification to the Gas Services
department of the Railroad Commission of Texas, that this Certificate was prepared by me or under my supervision, and that data and facts stated
herein are true, correct and complete to the best of my knowledge.

REPRESENTATIVE OF COMPANY (Signature)

TITLE (Type or Print)

REPRESENTATIVE OF COMPANY (Type or Print)

DATE

Inquiries regarding this Certificate should be directed to:

NAME (Print)

ADDRESS

TELEPHONE NO.

NOTE: If the pipeline is to be classified as a Private Pipeline and will carry natural gas other than the operator's own production, this
certificate, in support of the factual basis, must be attached to the Form T-4 application.

The Railroad Commission of Texas does not discriminate on the basis of race, color, national origin, sex, religion, age, or disability in employment or the provision of services. TDD/TDY
(512)463-7284

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