Issues in Midstream Restructurings

PART I: COVENANTS RUNNING WITH THE LAND

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Davis Polk

Issues in Midstream Restructurings: Series Overview

Part I: Covenants Running with the Land

Topics to be discussed:

- Overview of covenants running with the land
- Summary and analysis of recent decisions
- Paths for getting relieved from covenants running with the land
- Analysis of key factors in predicting the outcome

Part II: FERC and the Bankruptcy Process (Jan. 7, 2021 (Thur.), at 11:00 a.m. ET)

Topics to be discussed:

- Jurisdiction over rejection of a FERC-filed contract
- Legal standard applicable to rejection
- Procedural considerations
- Options for addressing FERC-related concerns

Part III: The 1-2-3s of MLPs (Jan. 21, 2021 (Thur.), at 11:00 a.m. ET)

Topics to be discussed:

- Fundamentals of an MLP structure
- Benefits of an MLP structure
- MLP structure in the oil and gas industry
- Bankruptcy considerations for an MLP

Covenants Running with the Land: Overview

Midstream Contracts

- Midstream companies provide the infrastructure that connects extracted oil and gas to an end user or a major downstream transportation facility. The midstream process generally begins with gathering production at or near the well where oil or gas is extracted and involves the transportation of the production to a downstream facility. Midstream facilities may also treat or process gas before it enters a downstream facility
- The term "midstream contracts" can encompass various types of contracts between producers and midstream companies, including:
  - gas purchase agreements,
  - agreements for midstream services on FERC-regulated pipelines (generally referred to as "transportation agreements"), and
  - gathering and processing agreements ("*GPAs*"), which are agreements governing: (i) the gathering of natural gas at the well head; (ii) the movement of natural gas through pipelines not regulated by FERC; and/or (iii) gas processing, including the separation of a gas production stream into natural gas liquids ("*NGLs*") and a residue gas stream, the further fractionation and compression of the gas to increase pressure and enable transportation to downstream facilities
- GPAs have received significant attention as a result of issues that have arisen in certain E&P restructurings and are the focus of the following discussion

Covenants Running with the Land: Overview (cont.)

GPAs

- Gathering and processing services are necessary to get natural gas production to market, and became even more important as producers expanded into new (sometimes isolated) geographic regions and increased production from certain shale plays over the last decade
- Gathering and processing companies generally agree to bear the initial investment of building local pipelines and processing facilities and connecting these systems to the producers' wells with a custom infrastructure
  - In order to recoup this up-front investment over time, GPAs generally are longer-term contracts and often contain requirements for the producer to deliver minimum amounts of gas for processing and/or transportation
- Because GPAs govern systems that are not regulated, the rates, terms and conditions of service must be negotiated
  - By contrast, the rates, terms and conditions of pipelines regulated by FERC or a state utility or public service commission are contained in tariffs that must be filed with and approved by the regulatory body, and the ability to negotiate these terms may be more limited
- Notwithstanding the importance of a producer's access to midstream facilities, an upstream debtor may be incentivized to reject certain long-term contracts with its midstream service providers if alternative providers are available or if the debtor wishes to abandon operations at certain geographic locations altogether
- The threat of rejection may also be used by producers to renegotiate long-term contract economics, even where the producer has limited alternatives for gathering and processing services

Contract or Property Interest?

In a bankruptcy case, classifying the obligations contained in a GPA as contractual interests versus property interests (e.g., a covenant running with the land) becomes important primarily in two contexts:

- Whether the GPA can be assumed/assigned/rejected by the debtor pursuant to section 365
  - To the extent that obligations pursuant to a GPA are determined to be "covenants running with the land," the producers may not be able to "reject" those obligations under section 365, although the case law is evolving
  - This distinction can have a meaningful impact on the producer's ability to restructure operations and achieve a fresh start in bankruptcy
    - For example, in some cases, the economic burden of the producer's obligation to deliver gas or make deficiency payments can be the very reason why the company must file
  - This determination can also have a meaningful impact on the Gatherer's recovery and negotiating position
    - If the producer can reject the GPA, the Gatherer is generally left with an unsecured claim for rejection damages
    - Also note that, even if the Gatherer is determined to have a covenant running with the land, its property interest in the land/minerals may still be inferior to the perfected mortgages of secured creditors who are first in time

- Whether the debtor can sell assets free and clear of the midstream provider's interests pursuant to section 363
  - Generally, a sale pursuant to section 363 may not be free and clear of a covenant that runs with the land and the purchased assets will remain subject to the covenant
  - However, a recent decision has highlighted the possibility that a debtor may sell oil and gas properties free and clear of a covenant running with the land under section 363 if (a) the properties are subject to the superior perfected mortgages of secured creditors (see below) or (b) the covenant can be satisfied by means of a cash payment under the agreement's terms

Contract or Property Interest? (cont.)

Bankruptcy courts look to state law to determine whether a GPA contains a "covenant running with the land"

- Ultimately, this is a fact-specific inquiry, and state laws (and courts' interpretations of them) vary as to what factors they find relevant to determining whether the particular elements required to establish a covenant running with the land have been satisfied

State	Requirements to Constitute a "Covenant Running with the Land"
AL	• intent of parties • touches and concerns the land
CO	• intent of parties • touches and concerns the land • privity of estate between the original covenanting parties at the time of the covenant's creation
LA	• a real covenant is a creature of common law, but at least one court applying Louisiana law concluded that a real covenant runs with the land if it is established in the title to the land and clearly apparent from the title documents
ND	• covenant must directly benefit the land (regardless of intent of parties) • relates to, touches or concerns the land granted or demised and the occupation or enjoyment thereof
NM	• touches and concerns the land • original covenanting parties must intend the covenant to run • successor to the burden must have notice of the covenant
OH	• privity of estate between the party claiming the benefit and the party with the burden • the covenant must either affect or touch and concern the land • the original covenanting parties intend for the covenant to run with the land
OK	• privity of estate between the party claiming the benefit and the party on whom the burden rests • the benefit or burden must "touch and concern" the land • the original covenanting parties must have intended for the burden or benefit to pass to successors

Contract or Property Interest? (cont.)

State	Requirements to Constitute a "Covenant Running with the Land"
PA	• intent of parties alone is dispositive (though some decisions have suggested that a requirement of privity of estate can be read into the intent requirement)
TX	• touches and concerns the land • relates to a thing in existence or specifically binds the parties and their assigns • the original parties to the covenant intend it to run with the land • the successor in interest to the burdened land has notice of the covenant • the parties must be in privity of estate when covenant is made (debate over whether horizontal or vertical privity,* or both is required)
UT	• touches and concerns the land • covenanting parties must intend the covenant to run with the land • privity of estate (vertical privity required; uncertain whether mutual or horizontal privity, or both are additionally required) • must be in writing
WV	• privity of estate between covenantor and covenantee • the benefit and burden had to "touch and concern" the respective estates of the covenantor and covenantee • where the covenant related to a thing not in esse, the word "assigns" is necessary
WY	• the original covenant must be enforceable • the parties must intend that the covenant run with the land • the covenant must touch and concern the land • there must be privity of estate between the parties

* "Horizontal privity of estate" is the relationship between two parties where one party conveys rights in a real property estate to the other party. "Vertical privity of estate" is where one party conveys its interests (which may be subject to covenants running with the land) to the other party. "Mutual privity of estate" exists when two parties have a continuing and simultaneous interest in the same property. The conveying party and the recipient are said to be "in privity of estate."

Recent Cases

- The issue of "real covenant running with the land" has been litigated in a number of recent cases, in which bankruptcy courts applied the laws of different states and reached diverging conclusions:

Case	Southland Royalty Co. (2020)	Chesapeake Energy (2020)	Extraction Oil & Gas (2020)*	Alta Mesa Resources (2019)	Badlands Energy (2019)	Sabine Oil & Gas (2016)
Venue	D. Del.	S.D. Tex.	D. Del.	S.D. Tex.	D. Colo.	S.D.N.Y.
Governing Law	Wyoming	Texas	Colorado	Oklahoma	Utah	Texas
Creation of Real Covenant	No	No	No	Yes	Yes	No

- *Sabine* was affirmed by the District Court and the Second Circuit
- The *Chesapeake Energy and Extraction Oil & Gas* decisions are the subject of pending appeals in federal district court
- The *Extraction Oil & Gas* opinion on "covenant running with the land" was followed by an important bench ruling on rejection, discussed below

*** Note**: In *Extraction Oil & Gas*, the court issued memorandum opinions in each of three separate adversary proceedings commenced by the debtors, each against a separate counterparty to an agreement purporting to contain a covenant running with the land. The analysis in the three opinions is substantially overlapping and we analyze them as a unit, focusing primarily on the decision regarding the Elevation Midstream gathering agreement.

Summary of Recent Cases: *Sabine, Extraction* and *Southland*

Sabine Oil & Gas v. HPIP (Bankr. S.D.N.Y. 2016); *Extraction Oil & Gas v. Elevation Midstream* (Bankr. D. Del. 2020); and *Southland Royalty v. Wamsutter* (Bankr. D. Del. 2020), which respectively analyzed requirements under the laws of Texas, Colorado and Wyoming, respectively conducted a searching inquiry that significantly restricts which midstream agreements will run with the land

Touch and concern

- *Sabine, Extraction* and *Southland* held that (under applicable state law) the practical and economic impact of an exclusive gathering agreement on a producer's oil and gas reserves was not sufficient to satisfy the "touch and concern" requirement, so long as such impact was indirect
- In reaching the conclusion that the agreements' dedications and delivery obligations did not touch and concern the producers' real property, they highlighted the agreements' "reservations," i.e., provisions typical of midstream agreements that reserve all decisions concerning the timing and manner of production to the producer
  - *Extraction* did hold that one covenant in the gathering agreements, namely Extraction's "drilling commitment" would touch and concern the producer's real property

Privity

- Moreover, *Extraction* and *Southland* held expressly (and *Sabine* could be read to suggest) that conveying a surface easement contemporaneously with the midstream agreement is not sufficient to create horizontal privity (under state law)
- *Extraction* could even be read to hold that it is never possible to establish privity in a midstream agreement under Colorado law, stating as follows:
  - "Extraction lacked the ability to convey an easement appurtenant to the mineral estates separate and apart from the land the easement appurtenant is annexed to;" and
  - "Extraction also lacked the ability to convey its rights of ingress and egress upon the surface estates, which are incidental (and appurtenant) to ownership of Extraction's mineral estates"

Summary of Recent Cases: *Badlands* and *Alta Mesa*

By contrast, *Alta Mesa Resources v. Kingfisher Midstream* (Bankr. S.D. Tex. 2019) and *Badlands Energy v. Wapiti Utah* (Bankr. D. Colo. 2019) are much more favorable to the creation of covenants running with the land, with the *Alta Mesa* decision expressly disagreeing with and criticizing *Sabine*

Animating Logic

- The animating logic of the *Alta Mesa* decision is that an oil and gas lessee holds a "leasehold estate," not just an amalgam of a "surface estate" and a "mineral estate"
- "The Alta Mesa gathering agreements dedicate to Kingfisher the products of oil and gas leases, not the products of fee mineral estates. Entering into the agreements, Alta Mesa possessed a bundle of rights that included the right to search for and reduce hydrocarbons to possession, surface easements for exploration and production, and other rights and privileges necessary for profitable production. Those leasehold rights exist to facilitate the capture of hydrocarbons. Unlike in *Sabine*, where that court focused its inquiry on a fee mineral estate, the relevant starting point here is Alta Mesa's leasehold interest"

Touch and concern

- According to the *Alta Mesa* court, the gathering agreement touched and concerned the oil and gas leases for two reasons: (1) the gathering system had a practical impact on the value of the producer's oil and gas leases; and (2) the gathering agreement entailed the granting of a surface easement that limits Alta Mesa's possessory interest in its leases

Privity

- As to privity, the *Alta Mesa* court held that the grant of a surface easement was sufficient to create horizontal privity, rejecting the *Sabine* court's implication (later adopted expressly by *Extraction*) that a grant of property in the surface estate was not sufficient to establish privity with respect to the mineral estate

Summary of Recent Cases: *Chesapeake v. ETC*

The recent decision issued in *Chesapeake v. ETC* (Bankr. S.D. Tex. 2020) does not fully embrace either approach

Touch and Concern

- With respect to touch and concern, the court held that the agreement did not touch and concern real property because of the language of the dedication clause, which dedicated only "produced" oil and gas, and not the underlying leases, suggesting that:
  - "Had the agreement between the parties included a dedication of 'all of the Debtors' right, title and interest in and to the leases,' the Court's analysis might have been profoundly different"
- Under the prevailing law of most states, once oil and gas is produced from a well, it is severed from the real property and becomes personal property; personal property cannot be subject to a covenant running with the land

Intent

- In addition, the court adopted the novel analysis (not advanced by either party) that the parties did not intend for the covenant to run with the land because the remedy for breach was limited to monetary damages only, not specific performance

Alternative Path 1: Rejection as a Means to Escape Covenants Running with the Land

Recent decisions have opened up another possibility for E&Ps to address burdensome midstream contracts, even if they contain covenants running with the land: ordinary rejection of the agreement under section 365 of the Bankruptcy Code

***Extraction* (D. Del., applying Colorado law to the covenant running with the land issue)**

- After the "covenant running with the land" adversary proceedings were decided against them, certain of the debtors' counterparties (Grand Mesa, Platte River and DJ South) continued to press their objection to rejection of the agreements on the following grounds:
  - rejection did not satisfy the business judgment standard;
  - rejection did not satisfy a higher "public interest" standard that they argued was required because the agreements were subject to regulation by the Federal Energy Regulatory Commission (FERC);
  - in the event these parties prevailed in their appeal of the adversary proceeding decisions, the agreements contained covenants running with the land that would continue to bind the debtors post-rejection
- The court rejected each of these theories. Of critical relevance to this presentation, the court held that even if the covenants ran with the land, they would not bind the debtors post-rejection. The court reasoned as follows:

> *"Even if the TSAs contain covenants running with the land . . . the question then becomes what effect the covenants have on the Debtors' property post rejection. The answer is simple: any covenant running with the land still exists (as the contract still exists), but it is unenforceable against the Debtors and their assigns after the Rejection Counterparties' claims are satisfied as part of the reorganization process.* ***Upon rejection, the Rejection Counterparties' claims under the TSAs will be compensated, rendering the claims fully satisfied and incapable of subsequent enforcement against the Debtors and its assigns*** *through either privity of contract or privity of estate. Importantly, the Rejection Counterparties cannot seek duplicative recovery for the breached covenants by using privity of estate as justification for suing successors to the Debtors' real property interests for a breach of the fully satisfied covenants."*

Alternative Path 1: Rejection as a Means to Escape Covenants Running with the Land (cont.)

***Chesapeake Energy* (S.D. Tex., applying Texas law to the covenant running with the land issue)**

- In *Chesapeake*, which was briefed and argued before *Extraction* (although decided afterward), the debtors pressed the same line of reasoning, arguing that regardless of whether it contained a covenant running with the land, the ETC Texas gas processing agreement could be rejected and would no longer bind the debtors post-rejection, except that the counterparty could assert a claim in the bankruptcy case
- The court agreed in part, concluding that "executory contracts and covenants that run with the land are **not mutually exclusive**"
  - However, the court did not reach the conclusion urged by the debtors regarding the consequences of rejection, instead stating that "[d]epending on the particular language of the subject agreement, a plethora of outcomes [is] possible"
  - The court stated that the ongoing effect of a covenant that runs with the land post-rejection would have to be evaluated in light of the Supreme Court's recent decision in *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, which held that rejection relieves a debtor of its obligation to perform but does not deprive a counterparty of its other contractual entitlements

***Southland Royalty* (D. Del., applying Wyoming law to the covenant running with the land issue)**

- Most recently, in *Southland Royalty*, the bankruptcy court concurred with *Extraction* and concluded that a dedication covenant could be rejected even were it to constitute a covenant running with the land
- In line with the *Extraction* court, the *Southland* court held that the dedication covenant, even if it were a covenant running with the land, would not bind the debtors post-rejection
  - "[I]t appears to the Court that the purpose of the [dedication covenant] will be satisfied by [the midstream's] bankruptcy claims for fees. . . . A claim against the estate for [the fee] amounts due to [the debtor's] rejection and resulting breach of the [dedication agreement] would fully compensate [the midstream] and be consistent with the terms of the [dedication agreement] and state law"

Alternative Path 1: Rejection as a Means to Escape Covenants Running with the Land (cont.)

Analysis

- The argument that rejection would relieve a debtor and its assigns of covenants running with the land appears to be new, and has not been considered by any appellate court. Prior to *Southland, Chesapeake* and *Extraction,* both litigants and courts appear to have presumed that covenants running with the land would bind post-rejection
- Unique facts in *Chesapeake* and *Extraction* strengthened the debtors' arguments, and other contracts could be distinguished:
  - In *Chesapeake*, the agreement contained a provision limiting remedies to monetary damages only
  - In *Extraction*, the debtors' obligations under the agreements could be satisfied either by shipping the quantities required by the minimum volume commitments ("MVCs") or by prepaying the "Total Financial Commitment"

Alternative Path 2: 363 Sale as a Means to Escape Covenants Running with the Land

The recent *Southland* case has opened up one more possibility for E&Ps to address burdensome midstream contracts: sale of burdened property free and clear of GPAs under section 363 of the Bankruptcy Code

Southland

- The debtor sought declarations that (a) the GPA at issue did not create a covenant running with the land and (b) even if it did, the debtor could still sell the burdened assets free and clear of such covenant
- The court held that the assets could be sold free and clear of any such covenant, for two reasons:
  - The assets were subject to the prior perfected mortgages of the RBL lenders, who could remove the covenant by foreclosing on the assets. *See* 11 U.S.C. § 363(f)(1) (allowing a sale free and clear if "applicable nonbankruptcy law permits sale of such property free and clear of such interest")
  - Under the terms of the gathering agreement, the debtors' obligations could be satisfied in full by prepayment of the MVC. *See* 11 U.S.C. § 363(f)(5) (allowing a sale free and clear if "such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest")

<u>Analysis</u>

- The *Southland* decision builds on the Fifth Circuit's decision in *Energytec*, which stated in dicta that a covenant running with the land would not foreclose a sale of assets free and clear of that covenant
  - In spite of *Energytec,* it has often been assumed that a covenant running with the land is not an interest subject to elimination under section 363 (see *Badlands*)
- The *Southland* decision was dependent on the existence of prior perfected RBL mortgages and/or the debtor's ability to prepay the MVC
- The *Southland* decision was decided under Wyoming law and may not translate to other jurisdictions

Predicting Outcomes: Key Factors

Venue

- As can be seen from the express disagreement between the *Alta Mesa* and *Sabine* decisions, some courts are inclined to enforce covenants running with the land and others to maximally enforce a debtor's right to reject executory contracts

State Law

- None of the recent decisions expressly identified the relevant state law as the reason it parted ways with other courts. However, as noted above, different states do have somewhat different tests for covenants running with the land. For instance, states differ in their articulation of the "touch and concern" element, which may have been a factor in certain of the decisions
  - *Badlands*: the Utah law adopts a broad test for the touch and concern element that focuses on a covenant's effect on the land's value rather than a physical effect upon the land (*accord Alta Mesa* under Oklahoma law)
  - *Sabine/Chesapeake*: under Texas law, the oil and gas, once severed from the land, are personal properties. Hence, a covenant that pertains to extracted oil and gas does not "touch and concern" a real property *(accord Extraction* under Colorado law)

Contract Terms

- In addition, the terms of the contract being analyzed are very important. The subsequent pages explore the following key factors in greater detail:
  - Intent: Although express intent to run with the land is usually sufficient, certain contracts may contain language that undermines the articulated intent
  - Touch and Concern: Breadth of the interests dedicated by the producer to the midstream company, and the rights reserved by the producer
  - Privity: Was there a contemporaneous transfer of a property interest that can satisfy privity?

Analysis of Contract Terms in Recent Cases: Intent

Case	Chesapeake	Extraction
Contract Term	"**Seller's dedication hereunder is a covenant running with the land**, and Buyer and Seller shall sign, and Buyer shall file in the property records of the applicable county or counties, a Memorandum of this Transaction Confirmation." "The **sole and exclusive remedy** of the parties in the event of a breach of a Firm obligation to deliver or receive Gas shall be recovery of the following: (i) in the event of a breach by Seller on any Day(s), **payment by Seller to Buyer** in an amount equal to . . . ."	"The Dedication and the Delivery Obligation, the grant of servitude hereinafter provided and other Property Rights and Producer's covenants under Section 2.3, together with all other related commitments in this Agreement and [certain other matters] are not merely contract rights but are covenants running with (and touching and concerning) all of the Dedicated Interests."
Court's Analysis	Such a remedy is inherently personal in nature and unrelated to any real property interest held by Chesapeake. This economic provision better expresses the parties' true intent under, and the personal nature of, their agreement. The damages limitation, along with the acknowledgement that the ETC Purchase Agreement is a two-party forward contract as discussed below, suggests that the added language that "the parties intended for the obligation to run with the land" was an ill-conceived attempt to portray the ETC Purchase Agreement as a horse of a different color.	"The only covenants that the parties intended to run with the land were clearly and expressly identified in the Gas Agreement."
Holding	No intent for covenant to run with the land.	Intent found for enumerated covenants only.
Commentary	*Chesapeake*: Of the six recent decisions, *Chesapeake* is the only one that looks beyond the parties' articulation of their intent. The damages limitation in the Chesapeake agreement appears to be relatively unique, and likely due to the agreement being a gas processing agreement (the contract was termed a "Contract for Sale and Purchase of Natural Gas," and provided that it constituted a forward contract) rather than a gathering agreement. *Extraction*: Midstream agreements vary in formulation, with some providing that specified covenants run with the land and others providing more broadly that the "agreement" is a covenant that runs with the land.	

Analysis of Contract Terms in Recent Cases: Touch and Concern

Case	Chesapeake	Alta Mesa
Contract Term	Dedication: "Seller dedicates for sale and delivery hereunder **all of the Gas** owned or controlled by Seller or an Affiliate of Seller **that is produced** from the oil and gas leases described in Exhibit "C" to this Transaction Confirmation (such gas, "**Seller's Gas**")." Delivery obligation: "Seller shall tender all of Seller's Gas to Buyer [up to certain quantities]"	Dedication: Section 3.3 dedicates to Kingfisher "all Interests within the Dedicated Area" and required Alta Mesa to "deliver to [Kingfisher] all Committed [oil and gas] produced."
Court's Analysis	The thing or object of the parties' agreement is gas to be delivered to ETC's entry point if any such gas is produced . . . . Only after gas is produced and becomes personal property does an obligation regarding the disposition of that gas arise." "Had the agreement between the parties included a dedication of 'all of the Debtors' right, title and interest in and to the leases,' the Court's analysis might have been profoundly different."	The gathering agreements touch and concern the Alta Mesa's oil and gas leases because both the benefits and the burdens of the covenants affect the value of Alta Mesa's real property interests. Kingfisher used its surface easement to build a modern gathering system for the dedicated wells, which enhances the value of Alta Mesa's leases. On the other hand, the gathering agreements impose costs and delivery restrictions on produced hydrocarbons, which diminish the value of Alta Mesa's unproduced reserves. Thus, there is a logical connection between both the burden and benefit of the covenants and Alta Mesa's real property. **This simple fact persists even though Kingfisher is not entitled to possession until after the hydrocarbons become personal property**.
Holding	Touch and concern requirement not satisfied.	Touch and concern requirement satisfied.
Commentary	It is possible to reconcile the touch and concern analysis in *Chesapeake* and *Alta Mesa*, which issued from the same jurisdiction. One possible distinction lies in the contractual language of the Chesapeake agreement, which applies only to gas "that is produced." However, the *Alta Mesa* court's reasoning does not appear tethered to particular contract language. Another possible distinction is that *Alta Mesa* was decided under Oklahoma law, which requires only that "there must be a logical connection between the benefit to be derived from enforcement of the covenant and the property."	

Analysis of Contract Terms in Recent Cases: Privity

Case	Sabine	Alta Mesa
Contract Term	"One of the Nordheim Agreements, the Gas Gathering Agreement, contemplates a separate and subsequent conveyance from Sabine to Nordheim of a mutually agreed tract of land in connection with Nordheim's construction and operation of a gathering system." Subsequently, on March 11, 2014, "Sabine conveyed to Nordheim [the mutually agreed tract]. Also on March 11, 2014, Sabine conveyed to Nordheim a Pipeline and Electrical Easement, which granted Nordheim a 90-foot pipeline and electrical easement over the remaining 21 acres of the Nordheim Parcel, so that Nordheim could install and operate two pipelines and one electrical utility line over that tract of land."	"In Section 3.2, Alta Mesa pledged to convey or assign to Kingfisher "any easement or rights-of-way for purposes of constructing, owning, operating, repairing, replacing and maintaining any portion of the [ ] Gathering System." "On December 1, 2016, OEA and Kingfisher amended both the gas and crude oil gathering agreements to include additional interests in furtherance of the construction and operation of the gathering system. The 2016 amended agreements modified the originals in two important ways. First, the amendments adjusted the gathering fees . . . . Second, the amendments added a "Conveyance of Transportation Right," which the parties intended to "be a conveyance of a portion of [Alta Mesa's] real property interests."
Court's Analysis	"Nordheim suggests that horizontal privity of estate can be satisfied by a contractual provision that contemplates but does not effectuate a future assignment by Sabine of real property interests to Nordheim. This argument defies common sense — the possibility of horizontal privity of estate does not constitute actual horizontal privity of estate."	"Although less than a fee simple estate, the easements conveyed to Kingfisher a possessory interest in the leasehold estate. The surface easement is integrally tied to the purpose of an oil and gas lease. The conveyance of the easements to Kingfisher is enough to show horizontal privity with respect to the gathering agreements."
Holding	Horizontal privity requirement not satisfied.	Horizontal privity requirement satisfied.
Commentary	The *Alta Mesa* directly criticizes and disagrees with *Sabine*'s privity analysis, as discussed further below. However, the cases are factually distinguishable. In *Sabine,* there was no contemporaneous conveyance of a surface easement—the transfer was subsequent. By contrast, in *Alta Mesa*, there was a conveyance of an easement contemporaneous with 2016 amendments. In fact, the Alta Mesa 2016 amendments are generally understood to have been a response to the *Sabine* decision, and similar transportation easements have been granted in many gathering agreements that postdate *Sabine.* However, *Alta Mesa* cannot be reconciled with *Extraction*, which held that a contemporaneous grant of surface easement did not establish privity with respect to the oil and gas leases.	

Issues in Midstream Restructurings

PANELIST BIOS

Part I: Covenants Running with the Land

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Davis Polk | Energy and Natural Resources Restructurings
Davis Polk has held leading roles in some of the largest energy and natural resource-related restructurings in recent years, including Chesapeake Energy, California Resources Corporation, PG&E, Sable Permian Resources, Cloud Peak Energy, Hornbeck Offshore Services, Ultra Petroleum, Key Energy Services, Chaparral Energy, Philadelphia Energy, EdgeMarc Energy, First Energy Solution, San Juan Offshore, Cloud Peak Energy, Murray Energy, Southcross, Odebrecht Engenharia e Construção S.A., Arena Energy, Fieldwood, and FTS International.