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Rundown of Recent Developments in Covenant Running with the Land Tension

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Since the *Sabine* decisions, courts are continuing to opine on purported covenants running with the land contained in gathering and transportation agreements. The cases highlighted below indicate that courts can reach different results based on the language of the agreements at issue and the law that is applicable to them.

Recent Developments Applicable to Analysis

I. Monarch

The United States Bankruptcy Court for the District of Colorado in *Monarch Midstream v. Badlands Production* recently acknowledged the Sabine decision but reached a different outcome based on the facts and law (Utah) at issue.[2] The *Monarch* court found that that the gas gathering and processing agreement and the saltwater disposal agreement at issue in that case did contain covenants with the land under Utah law. Notably, the *Monarch* court found that the covenant in *Monarch* "touched and concerned" the land because, in part, the dedication language differed from that of *Sabine*. Specifically, the contract language in *Monarch* included "non-extracted minerals" when it dedicated "the interest of [the Debtor] in all Gas reserves *in and under*, and all Gas owned by [the Debtor] and produced or delivered from (i) the Leases and (ii) other lands within the [designated area] ...." This was a contrast to *Sabine's* dedication language of "all [gas and condensate] *produced and saved* ... from wells ... located within the Dedicated Area." Interpreting the privity requirements under Utah state law, the court found that horizontal privity did exist by virtue of the covenants burdening the real property interests (including the non-extracted minerals as well as certain leases) having been made in the context of a simultaneous conveyance of real property

interests (the gathering and saltwater disposal systems described in the agreements). The court also noted that the agreements conveyed a "floating easement" across the leases and lands in which the Producer may have had an interest, thereby constituting a conveyance that simultaneously burdened the same real property interest.

II. Verde

The United State District Court for the Southern District of Texas recently interpreted *Sabine*, admittedly not in a bankruptcy setting or in the context of midstream and transportation agreements, in *Verde Materials v. Burlington*.[3] The *Verde* court found *Sabine* "inapposite" because the mineral deed created a transfer of a property interest in *Verde* whereas the *Sabine* case "concerned the delivery and refinement of resources *extracted from* real property, along with ancillary obligations." It quoted with approval the statement from Sabine that "[a] right to transport or gather produced gas is clearly not one of the 'sticks' comprising the mineral Estate." The *Verde* court noted that "by contrast" the parties in *Verde* intended to convey an interest in oil and gas. The language of the instrument conveying the mineral interest in *Verde* purported to convey "any and all oil, gas or minerals that may be found to be *in, under or upon* any part of said tract." The *Verde* court noted that the language is "reminiscent of the in and under formulation customarily used to convey mineral interests."

III. Alta Mesa

The debtors in *In re Alta Mesa Resources, Inc*., a Chapter 11 proceeding before Judge Isgur in the United States Bankruptcy Court for the Southern District of Texas, have teed up the issue of whether certain gas gathering agreements are capable of rejection in an adversary proceeding.[4] Importantly, the agreements in question are governed by Oklahoma law.

An Ongoing Concern

Mindful practitioners will keep an eye on these and future developments in this area of law, regardless of jurisdiction, as bankruptcy courts continue to struggle with the application of differing state law on this nuanced topic. These disputes are sure to continue under the current and projected landscape in the industry and offer interested parties helpful guidance when crafting their own arguments for or against the rejection of the underlying midstream and marketing contracts in the bankruptcy context.

[1] *In re Sabine Oil & Gas Corp.*, 547 B.R. 66 (Bankr. S.D.N.Y. 2016); *Sabine Oil & Gas Corp. v. HPIP Gonzales Holdings, LLC*, 550 B.R. 59 (Bankr. S.D.N.Y. 2016); *aff'd*, 567 B.R. 869 (S.D.N.Y. 2017); *aff'd* 734 Fed.Appx. 64 (2d Cir. 2018).

[2] *Monarch Midstream, LLC, f/k/a Monarch Natural Gas, LLC v. Badlands Production Company f/k/a Gasco Production Company, et al.*, Adv. Case No. 17-01429-KHT (Bankr. D. Colo. Sept. 30, 2019), ECF No. 61.

[3] *Verde Minerals, LLC v. Burlington Res. Oil & Gas Co., LP*, 360 F. Supp. 3d 600, 618 (S.D. Tex. 2019).

[4] *Alta Mesa Holdings, LP v. Kingfisher Midstream, LLC, et al.*, Adv. Case No. 19-03609 (Bankr. S.D. Tex.), ECF No. 1.

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