**UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF COLORADO**

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| In re:<br>BADLANDS ENERGY, INC.,<br>Debtor. | Case No. 17-17465 KHT<br>Chapter 11 |
| In re:<br>BADLANDS PRODUCTION COMPANY,<br>Debtor. | Case No. 17-17467 KHT<br>Chapter 11 |
| In re:<br>BADLANDS ENERGY-UTAH, LLC,<br>Debtor. | Case No. 17-17469 KHT<br>Chapter 11 |
| In re:<br>MYTON OILFIELD RENTALS, LLC,<br>Debtor. | Case No. 17-17471 KHT<br>Chapter 11<br><br>**Jointly Administered Under Case No. 17-17465 KHT** |
| MONARCH MIDSTREAM, LLC, f/k/a MONARCH NATURAL GAS, LLC,<br><br>Plaintiff,<br>v.<br><br>BADLANDS PRODUCTION COMPANY f/k/a GASCO PRODUCTION COMPANY, a Colorado corporation; BADLANDS ENERGY, INC. f/k/a GASCO ENERGY, INC., a Colorado corporation; and WAPITI UTAH, LLC f/k/a WAPITI NEWCO, LLC, a Delaware limited liability company,<br><br>Defendants. | Adversary No. 17-01429 KHT |

**ORDER ON WAPITI UTAH, L.L.C.'S MOTION FOR JUDGMENT ON THE PLEADINGS AND MONARCH NATURAL GAS, LLC'S MOTION FOR SUMMARY JUDGMENT**

THIS MATTER comes before the Court on the following motions filed by Plaintiff Monarch Midstream, LLC ("Monarch") and Defendant Wapiti Utah, LLC ("Wapiti Utah"):

(1) Wapiti Utah's Motion for Judgment on the Pleadings ("Wapiti Utah's Motion," docket #22); Monarch's Opposition thereto (docket #26); Wapiti Utah's Reply (docket #31); Wapiti Utah's Supplement to the Motion (docket #55); and Monarch's Response to the Supplement (docket #57); and

(2) Monarch's Motion for Summary Judgment and Supporting Memorandum ("Monarch's Motion," docket #27) and supplemental exhibits (docket #29); Wapiti Utah's Opposition thereto and Objection to Materials in Support Thereof (docket #32); and Monarch's Reply (docket #34).

## I. INTRODUCTION

Badlands Production Company, f/k/a Gasco Production Company, and Badlands Energy, Inc., f/k/a Gasco Energy, Inc., are Colorado corporations and Debtors in the above captioned Chapter 11 bankruptcy cases. Badlands Energy, Inc. owns 100% of Badlands Production Company and will be collectively referred to herein as "Badlands". Badlands was a consolidated natural gas and petroleum exploration, development and production company.

Following notice and a hearing, on October 26, 2017, the Court entered an Order authorizing Badlands to sell its oil and gas assets located in the Uintah Basin, Utah (the "Riverbend Assets") to Wapiti Utah, formerly known as Wapiti Newco, L.L.C.,[1] a Delaware limited liability company, free and clear of liens, claims, encumbrances and interests pursuant to Sections 363(b) and (f) of the Bankruptcy Code[2] ("Sale Order").[3]

Monarch is a Delaware limited liability company and the owner and operator of natural gas gathering and processing and salt water disposal systems in Uintah and Duchesne Counties, Utah.

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[1] Both entities will be referred to as "Wapiti Utah."

[2] All references to the Bankruptcy Code or to Sections thereof are to 11 U.S.C. §§ 101, *et seq.*

[3] *See* Case No. 17-17465 KHT, docket #223, Order (A) Approving the Asset Purchase Agreement Between Debtor Badlands Production Company and Wapiti Utah, L.L.C., (B) Authorizing the Sale of Substantially All of the Debtor's Assets Free and Clear of All Liens, Claims, Encumbrances, and Interests, (C) Authorizing the Assumption and Assignment of Contracts, and (D) Granting Related Relief.

Monarch objected to the sale of the Riverbend Assets to Wapiti Utah. Monarch had midstream gas gathering/processing and saltwater disposal contracts with Badlands and asserted those contracts could not be rejected because they constitute covenants running with the land. Just prior to the sale hearing, Monarch filed this adversary proceeding, requesting a declaratory judgment that its midstream contracts with Badlands burden the Riverbend Assets as covenants running with the land. Monarch also asserts a claim for breach of contract for over $1.2 million in unpaid pre-petition fees under the contracts.

The purchaser, Wapiti Utah, agreed to take the Riverbend Assets subject to the outcome of this adversary proceeding, and the Court approved the sale with consensual language in the Sale Order to that effect. Debtors did not assume and assign the Monarch contracts to Wapiti Utah, but Wapiti Utah purchased the Riverbend Assets subject to the outcome of this litigation.

## II. JURISDICTION

The Court has jurisdiction over this core matter pursuant to 28 U.S.C. §§ 157(b)(2)(N) and (O), 28 U.S.C. § 1334, and 28 U.S.C. § 2201. The Court retained jurisdiction to interpret, implement, and enforce the terms of its Sale Order[4], and the Court has jurisdiction to interpret and enforce its own prior Orders. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009). Monarch and Wapiti Utah[5] both consent to the entry of final orders by the Bankruptcy Court in this proceeding.

## III. STANDARD OF REVIEW

Rules 12(b)-(i) of the Federal Rules of Civil Procedure apply in adversary proceedings. Fed.R.Bank.P. 7012(b). Pursuant to Fed.R.Civ.P. 12(c), a party may move for judgment on the pleadings after the pleadings are closed. The Court "accept[s] the well-pleaded allegations of the complaint as true and construe[s] them in the light most favorable to the non-moving party." *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1160 (10th Cir. 2000) (citing *Realmonte v. Reeves*, 169 F.3d 1280, 1283 (10th Cir.1999); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 529 (10th Cir.1992)).

Under applicable rules on a motion for judgment on the pleadings, if "matters outside the pleadings are presented to and not excluded by the court, the motion

[4] *See* Sale Order, Case No. 17-17465 KHT, docket #223, p.29 at ¶46.

[5] On May 14, 2018, pursuant to a Court-approved settlement, Debtors Badlands Production Company and Badlands Energy, Inc. were dismissed as Defendants. *See* docket #44.

must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed.R.Civ.P. 12(d); Fed.R.Bankr.P. 7012(b).

Similarly, Fed.R.Civ.P. 56 applies in adversary proceedings and provides summary judgment is appropriate 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); Fed.R.Bankr.P. 7056; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). When reviewing a motion for summary judgment, the Court is to "view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1212 (10th Cir. 2000) (citation omitted), *cert. denied*, 531 U.S. 926 (2000).

The Court treats the parties' pleadings as cross motions for summary judgment. Both parties submitted materials beyond what is attached to the Complaint and both incorporated arguments from their respective pleadings concerning Monarch's Motion into their arguments on Wapiti Utah's Motion. The Court held oral argument on these matters and finds both sides have had ample opportunity to present their arguments and materials to the Court. Although the Motions were filed early on in this case before discovery commenced, the material facts largely set forth in Monarch's Complaint are not disputed and the issues the Court is called upon to resolve are questions of law. To the extent the Court considered materials outside of the Complaint as noted below, those materials are undisputed as well. *See* note 6, below.

## IV. UNDISPUTED FACTS

On January 29, 2010, Monarch executed an Asset Purchase Agreement to purchase gas gathering and salt water disposal systems in Uintah and Duchesne Counties from Badlands Energy, Inc.'s predecessor, Gasco Energy, Inc., and Riverbend Gas Gathering, LLC (together, "Gasco Energy"). A copy of the Asset Purchase Agreement is attached to Monarch's Motion as Exhibit 2-A.[6]

[6] In responding to Monarch's Motion, Wapiti Utah did not follow L.B.R. 7056-1(b)(3) by providing a short and concise statement of agreement or opposition, in numbered paragraphs corresponding to those of the moving party, of the material facts as to which it is contended there is a genuine issue to be tried. Wapiti Utah, however, objected to the Affidavits of Lesa S. Adair, a partner in an energy consulting firm, and Judson Williams, Monarch's Chief Financial Officer and Treasurer, submitted by Monarch in support of its Motion. Wapiti Utah asserts, pursuant to Rule 56(d), that in the event the Court considers Monarch's Affidavits, the Court allow discovery on the intent issue "as well as securing rebuttal expert testimony regarding the use of covenants running with the land in the midstream sector". *See* Rubio Affidavit attached to Wapiti Utah's Response, docket #32, Exhibit A at ¶11. The Court did not consider the Affidavits, nor any of the background industry information, opinions or understandings expressed therein; such information was unnecessary to decide the issues presented by the Motions as a matter of law. The only

Badlands, as successor-in-interest to Gasco Production Company ("Gasco"), and Monarch are parties to a Gas Gathering and Processing Agreement, effective March 1, 2010, which was amended and restated by the Amended and Restated Gas Gathering and Processing Agreement effective March 22, 2012 (the "Amended and Restated Agreement"). The original Agreement and the Amended and Restated Agreement are attached to Monarch's Complaint as Exhibits 1 and 2[7], respectively. The Amended and Restated Agreement was further amended on two occasions: Amendment No. 1, dated November 6, 2012, and effective as of March 22, 2012; Amendment No. 2, dated August 29, 2014, and effective as of July 1, 2014. The Amendments are attached to Monarch's Complaint as Exhibits 3 and 4, respectively. The Amended and Restated Agreement, together with Amendment Nos. 1 and 2, are hereinafter collectively referred to as the "GPA."

Wapiti Oil & Gas II, LLC ("WOG II") acquired a 50% interest in Badlands' oil and gas leases subject to the GPA (hereafter, the "Leases"), and in connection therewith, WOG II executed a Joinder to the Amended and Restated Agreement on March 22, 2012. Badlands and WOG II are hereafter collectively referred to as "Producers."

The Leases under the GPA are comprised of over 400 oil and gas leases in which Producers own interests. *See* Amended and Restated Agreement, Schedule 3 (Complaint, Exhibit 2).

Monarch and Gasco also entered into an Agreement for Disposal of Salt Water (the "SWDA"), effective February 26, 2010. The SWDA is attached to Monarch's Complaint as Exhibit 5. Amendment No. 1 to the SWDA, dated August 29, 2014, is effective as of July 1, 2014 and is attached to Monarch's Complaint as Exhibit 6. Gasco caused WOG II to be bound to the terms and

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facts contained in the Declarations considered by the Court are (a) the undisputed fact of the existence of the Asset Purchase Agreement between Monarch and Gasco attached to the Declaration of Judson Williams as Exhibit 2-A, and (b) the undisputed fact of the sale memorialized by that agreement. These facts are neither disputed by Wapati Utah nor facts within the designated areas of inquiry on which Wapiti Utah asserted it needed discovery. Accordingly, the Court finds these facts are undisputed pursuant to Fed.R.Civ.P. 56(c); Fed.R.Bankr.P. 7056; and L.B.R. 7056-1(d). Wapiti Utah additionally requests the Affidavits be stricken under Rule 37 because the affiants were not disclosed and discovery had not yet commenced. Given the early stage of the litigation and the fact initial disclosures have not been exchanged by either party, the Court declines the request.

[7] Exhibit 2 to the Complaint was supplemented to include the date on the first page, at docket #58. All references to Exhibit 2 to the Complaint are to the supplemented version.

conditions of the SWDA. The GPA and the SWDA shall together be referred to herein as the "Agreements."

On August 11, 2017, Badlands and certain of its affiliates filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.[8]

On August 14, 2017, Badlands filed a Motion for Entry of an Order (A) Approving the Purchase and Sale Agreement Between Badlands Production Company and the Successful Auction Bidder, (B) Authorizing the Sale of Substantially All of its Property Pursuant Thereto, Free and Clear of Liens, Claims, Encumbrances, and Interests, (C) Authorizing the Assumption and Assignment of Contracts, and (D) Granting Related Relief ("Sale Motion").[9] The Sale Motion identified Wapiti Utah as a "Stalking Horse Bidder" and potential purchaser of the Riverbend Assets. The Purchase and Sale Agreement between Badlands and Wapiti Utah dated August 7, 2017, attached to the Sale Motion as Exhibit "A," provides Wapiti Utah shall not assume any contracts with Monarch in connection with the purchase of the Riverbend Assets, including the GPA and SWDA.[10]

Following an auction, Wapiti Utah became the successful bidder of the Riverbend Assets on October 12, 2017.

On October 23, 2017, before the hearing on the Sale Motion, Monarch filed this adversary proceeding. Complaint, docket #1. Monarch seeks a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, holding the covenants in the Agreements run with the land as a matter of law and equity and consequently, Wapiti Utah could not purchase the Riverbend Assets free and clear of the Agreements under Section 363 of the Bankruptcy Code. Monarch also asserts a claim for breach of contract, alleging Badlands breached the Agreements for nonpayment of pre-petition fees to Monarch in an amount not less than $1.2 million. Monarch requests Badlands' monetary defaults be cured by Wapiti Utah under Section § 365. Alternatively, Monarch seeks money damages against Wapiti Utah as a result of the breach, alleging the Agreements are covenants that run with the land.

The Court conducted a hearing on the Sale Motion on October 25, 2017. Following the hearing, on October 26, 2017, the Court approved the Sale Motion and the Purchase and Sale Agreement between Badlands and Wapiti Utah. In its Sale Order entered on October 26, 2017, the Court held:

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[8] See Case Nos. 17-17467 KHT, 17-17465 KHT, 17-17469 KHT and 17-17471 KHT.

[9] See docket #18, Case No. 17-17465 KHT.

[10] *Id.*, at ¶2(a), p. 3.

> The sale of the Property is subject to the determination in the Monarch Adversary, subject to the parties' rights to appeal, whether Monarch's gas gathering agreement or the salt water disposal agreement is a "covenant running with the land" and thus cannot be sold free and clear. … [I]f it is determined that the Monarch agreements cannot be rejected or sold free and clear, Buyer [(Wapiti Utah)] will be responsible for the obligations under the agreements, including any pre-petition obligations that cannot be sold free and clear, or that the Court otherwise determines must be cured by the Buyer.[11]

## V. THE MOTIONS

### A. Wapiti Utah's Motion for Judgment on the Pleadings.

Wapiti Utah admits (or does not dispute) the facts asserted in the Complaint are true for purposes of its Motion, including that the documents attached to Monarch's Complaint are what they purport to be, but disagrees with Monarch as to how these documents should be construed.

Wapiti Utah maintains it purchased the Riverbend Assets free and clear of any interests of Monarch, including the Agreements, pursuant to Section 363(f) of the Bankruptcy Code. Badlands did not assume and assign any contracts it had with Monarch to Wapiti Utah under Section 365 and, in fact, Badlands rejected the Agreements in its confirmed Chapter 11 plan. In addition, Wapiti Utah asserts the Agreements do not possess the required characteristics of either real covenants running with the land or equitable servitudes under Utah law and contain no such covenants. Even if they did, Wapiti Utah maintains its purchase of the Riverbend Assets would still be free and clear of such interests of Monarch under Section 363(f). Finally, Wapiti Utah argues Monarch cannot hold Wapiti Utah liable for Badlands' pre-petition breach of contract as a matter of law. Accordingly, Wapiti Utah requests judgment on Monarch's claims for relief.

### B. Monarch's Motion for Summary Judgment.

Monarch asserts the Producer's dedication of gas reserves in the GPA and the commitment to provide salt water in the SWDA to Monarch constitute covenants running with the land and satisfy all of the elements for covenants running with the land under Utah law. Alternatively, Monarch asserts the dedication and commitment constitute equitable servitudes that run with the land under Utah law. Monarch argues such covenants are not "interests" subject to a free and clear sale under Section 363(f) or rejection under Section 365 of the

[11] *See* Sale Order, Case No. 17-17465-KHT, docket #223 at ¶39.

Bankruptcy Code; rather, they run with the land and bind the successor, Wapiti Utah. Monarch also asserts the Agreements must be viewed as a whole and Wapiti Utah is liable for any pre-petition defaults. Therefore, Monarch requests declaratory judgment in its favor.

## VI. DISCUSSION

### A. The Agreements.

#### 1. The GPA.

The GPA designates Monarch as "Gatherer" and Badlands (as successor in interest to Gasco) as "Producer." *See* Amended and Restated Agreement, Preamble (Complaint, Exhibit 2).

The GPA provides:

> 3.4 Dedicated Reserves. Subject to Producer's Reservations and to the other terms and conditions of this Agreement . . . Producer (i) exclusively dedicates and commits *to the performance of this Agreement* the Dedicated Reserves, (ii) represents that the Dedicated Reserves are not otherwise subject to any other gas gathering agreement or commitment and (iii) agrees not to deliver any Gas produced from the Dedicated Reserves and owned by Producer to any other gas gatherer, processor, or gas gathering system. Producer possesses the right to deliver the Dedicated Reserves to the Gathering System[12]. Producer agrees to cause any existing or future Affiliates of Producer holding Dedicated Reserves to be bound by, and to execute and join as a party, this Agreement. *The dedication and commitment made by Producer under this Agreement is a covenant running with the land.*

(Emphasis added.) Amended and Restated Agreement, §3.4 (Complaint, Exhibit 2). Hereafter, the above provision will be referred to as the "Dedication."

[12] "'Gathering System' means the gas gathering facilities of Gatherer extending generally from the Receipt Points to the Delivery Points, including any facilities for compression, treating, and processing, and all modifications, alterations, replacements, extensions, or expansions made by Gatherer, from time to time." Amended and Restated Agreement, §1.1, Definitions, p.3 (Complaint, Exhibit 2).

"Dedicated Reserves" is defined in the GPA as:

> [T]he interest of Producer in *all Gas reserves in and under*, and all Gas owned by Producer and produced or delivered from (i) the Leases and (ii) other lands within the AMI, whether now owned or hereafter acquired, along with the processing rights, subject to certain volume exclusions as described herein, and any and all additional right, title, interest, or claim of every kind and character of Producer or its Affiliates in (x) the Leases or (y) lands within the AMI, and Gas production therefrom, and all interests in any wells, whether now existing or drilled hereafter, on, or completed on, lands covered by a Lease or within the AMI. . .

(Emphasis added.) Amended and Restated Agreement, §1.1, p.2 (Complaint, Exhibit 2). "AMI" (Area of Mutual Interest) is defined as the geographical area described in Schedule 1 attached to the Amended and Restated Agreement. *Id*.

The agreed-upon term of the GPA "commence[d] on March 1, 2010 and continue[s] in effect until February 28, 2025. For Wells already connected to the Gathering System on February 25, 2025, the Term as to those Wells shall continue in effect for so long as Producer's Gas can be produced in commercial quantities from such Wells." Amended and Restated Agreement, §2.1 (Complaint, Exhibit 2).

The GPA obligates Monarch to provide "gathering, compression and processing services as further detailed in [the GPA] and as can be provided by the existing Gathering System (the "Services") for Producer's Gas delivered by Producer to the Receipt Point(s) for receipt into the Gathering System." Amended and Restated Agreement, §3.1 (Complaint, Exhibit 2). "Producer's Gas" is defined as "the Dedicated Reserves committed hereunder by Producer." Amended and Restated Agreement, §1.1 Definitions, p.5 (Complaint, Exhibit 2). The GPA sets forth pricing for the fees to be paid by Producer "[a]s consideration for the Services provided [by] Gatherer," based upon the quantity of Producer's Gas delivered to the Receipt Points and/or a percentage of certain gas revenues. Amended and Restated Agreement, §4.1 (Complaint, Exhibit 2).

Under the GPA, "Producer agrees to tender, or cause to be tendered, to the Receipt Points, Producer's Gas, each [d]ay, and Gatherer agrees to accept Producer's Gas at the Receipt Points and redeliver Producer's Gas, to the Delivery Points, subject to the terms hereof." Amended and Restated Agreement, §5.1 (Complaint, Exhibit 2).

The GPA also requires Producer to deliver a minimum volume of Producer's Gas to the Gathering System within each calendar quarter. Amended and

Restated Agreement, §5.2 (Complaint, Exhibit 2). If delivery in a given calendar quarter falls short of the minimum volume required, "Producer shall pay Gatherer in cash . . . an amount equal to the shortfall quantity for such calendar quarter . . . multiplied by the then-current Gathering and Processing Fees[13] . . . for such calendar quarter, as liquidated and agreed damages . . ." Amended and Restated Agreement, §5.2(b) (Complaint, Exhibit 2).

The GPA also granted Monarch a right of way and easement "across the Leases, and across adjoining lands in which Producer may have an interest, for the purposes of installing, using, inspecting, repairing, operating, replacing, and removing [Monarch's] facilities (including installation of new custody transfer meters and other equipment) used or useful in the performance of this Agreement." Amended and Restated Agreement, Exhibit A, at ¶4(a) (Complaint, Exhibit 2).

In addition, Producer grants Monarch an irrevocable right and option to purchase "50 acres of land contiguous to certain property owned by [G]atherer", "[i]n consideration of the mutual covenants and restrictions granted in the [GPA] and consummation of the transactions contemplated by the Asset Purchase Agreement." Amended and Restated Agreement, Schedule 4, ¶X.1 (Complaint, Exhibit 2).

The GPA further provides "neither Party may assign or delegate any of its rights or obligations under [the] Agreement, by operation of law, change of control, or otherwise, without the prior written consent of the other Party, which consent shall not be unreasonably withheld." Amended and Restated Agreement, §11.1 (Complaint, Exhibit 2). Further, the GPA "binds and inures to the benefit of the Parties and their respective successors and assigns." *Id*. at §11.2.

2. The SWDA.

Under the SWDA, Producer committed water extracted from oil and gas operations within certain areas of the AMI – known as the Wilkin Ridge and Riverbend Production Areas – to Monarch's newly-acquired salt water disposal facilities. SWDA, ¶2.1(a) and Schedule A (Complaint, Exhibit 5). The SWDA provides:

> Gasco hereby commits all Water requiring disposal from its operations in the Wilkin Ridge and Riverbend Production Areas, beginning with the effective date, to the performance of this Agreement and to Monarch's Disposal Facilities, up to the existing capacity and existing

[13] Terms governing the fees were later amended. *See* Amendment No. 1, subsection (e), p. 2 (Complaint, Exhibit 3); Amendment No. 2, ¶4, pp. 3-4 (Complaint, Exhibit 4).

> daily rates of that Facility. Gasco further agrees to cause any assignee of Gasco's now-existing leasehold to be bound by this Agreement. *The commitment made by Gasco hereunder is a covenant running with the land.*

(Emphasis added.) SWDA at ¶2.1(a) (Complaint, Exhibit 5). Hereafter, the above provision will be referred to as the "Commitment."

> "Water" means any and all produced water and water from drilling and well completion activities that are generated or used by Gasco as part of its oil and gas operations in the Wilkin Ridge and Riverbend Production Areas.

SWDA, Article I, Definitions, p.2 (Complaint, Exhibit 5).

> "Wilkin Ridge and Riverbend Production Areas" means the geographic area(s) specifically identified in the map attached to [the SWDA] as Schedule A.

*Id*.

In exchange for Monarch's disposal and treatment of the produced water from Producer's oil and gas wells, Producer agreed to pay disposal fees detailed in the SWDA. SWDA, §3.1 (Complaint, Exhibit 5).

3. The Asset Purchase Agreement.

The Asset Purchase Agreement specifically conditioned Monarch's obligation to close its purchase of the Gathering System upon execution of the GPA, a form of which is attached to the Asset Purchase Agreement as Exhibit A. *See* Asset Purchase Agreement at §6.2(c) and §1.1, p.5 (Monarch's Motion, Exhibit 2-A). Likewise, another condition of Monarch's obligation to close under the Asset Purchase Agreement was the execution of the SWDA, a form of which is attached to the Asset Purchase Agreement as Exhibit C. *See* Asset Purchase Agreement at §6.2(g) and §1.1, p.9 (Monarch's Motion, Exhibit 2-A).

**B. Are the Agreements Real Covenants?**

By their terms, the Agreements are to be governed and construed by the laws of the State of Colorado. *See*, Amended and Restated Agreement, §14.2 (Complaint, Exhibit 2) and SWDA, §9.1 (Complaint, Exhibit 5). However, since "[p]roperty interests are created and defined by state law" and the Riverbend Assets are located in Utah, the Court turns to Utah law concerning real covenants. *See Butner v. United States*, 440 U.S. 48, 55 (1979); *see also*, *Clarke v. Clarke,*

178 U.S. 186, 191 (1900) ("[i]t is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer").

"A covenant that 'runs with the land' binds successive owners of the burdened or benefited land." *Stern v. Metro. Water Dist. of Salt Lake & Sandy*, 274 P.3d 935, 945 (Utah 2012) (citing *Flying Diamond*, 776 P.2d at 623). Under Utah law, covenants running with the land have four attributes. The first three are: "(1) [t]he covenant must 'touch and concern' the land; (2) the covenanting parties must intend the covenant to run with the land; and (3) there must be privity of estate." *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618, 623 (Utah 1989). The fourth is: "for a covenant to run with the land, it must be in writing. Because covenants that run with the land must be based on some interest in land, the statute of frauds must be satisfied." *Id*. at 629, and n.14 (citing Utah Statute of Frauds, Utah Code Ann. § 25-5-1 (1989)).

"[T]he absence of any one of the requirements prevents a covenant from running with the land." *Flying Diamond*, 776 P.2d at 623 (citing Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 Minn.L.Rev. 167, 219 (1970)). If privity of estate is missing, a covenant may constitute an equitable servitude. An equitable servitude runs with the land in equity if the "touch and concern" and "intent" requirements are met. But the successor must have notice of the covenant. *Flying Diamond*, 776 P.2d at 623, n.6.

Both the GPA and the SWDA are in writing, so the fourth requirement is satisfied. The Court therefore turns to the remaining requirements.

1. Touch-and-Concern.

A "covenant" is "a formal agreement or promise . . . to do or not do a particular act." *Black's Law Dictionary*, 443 (10th ed. 2014). Under Utah law, not every covenant that purports to run with the land binds subsequent owners or users; the "effect of the touch-and-concern requirement is to restrict the types of duties and liabilities that can burden future ownership of interests in the land." *Flying Diamond*, 776 P.2d at 623.

The touch-and-concern factor "is an objective test that courts are capable of analyzing without reference to the subjective mindset of original covenantors who are frequently not before the court." *Stern v. Metro. Water Dist. of Salt Lake & Sandy*, 274 P.3d 935, 946 (Utah 2012). As explained by the Utah Supreme Court:

> The touch-and-concern requirement focuses on the nature of the burdens and benefits that a covenant creates. What is essential is

> that the burdens and benefits created must relate to the land and the ownership of an interest in it; the burdens and benefits created are not the personal duties or rights of the parties to a covenant that exist independently from the ownership of an interest in the land.

*Flying Diamond*, 776 P.2d at 623. Accordingly, "to touch and concern the land, a covenant must bear upon the use and enjoyment of the land and be of the kind that the owner of an estate or interest in land may make because of his ownership right." *Id*. at 623-24 (citing *Eagle Enterprises, Inc. v. Gross*, 349 N.E.2d 816, 819 (N.Y. App. 1976); 5 R. Powell, ¶673[2][a], at 60-41, citing Bigelow, *The Content of Covenants in Leases*, 12 Mich.L.Rev. 639, 645 (1914)).

In *Flying Diamond*, the Utah Supreme Court recognized a broad test for touch-and-concern that does not require a physical effect upon the land but rather, requires a court to evaluate whether a covenant "enhances the land's value [on the benefit side], and for the burden side, whether it diminishes the land's value." *Flying Diamond*, 776 P.2d at 624, quoting *Leighton v. Leonard*, 589 P.2d 279, 281 (Wash. App. 1978). "[*A]ll that must be shown* for a covenant to run with the land is that it 'be of such character that its performance or nonperformance will so affect the use, value or enjoyment of the land itself that it must be regarded as an integral part of the property.'" *Flying Diamond*, 776 P.2d at 624 (quoting *Lundeberg v. Dastrup*, 497 P.2d 648, 650 (Utah 1972) (footnote omitted) (emphasis added)).

*Flying Diamond* illustrates and explains Utah law. The covenant in *Flying Diamond* was made in a "Surface Owner's Agreement" containing the promise by Champlin, the mineral owner, to pay 2½% of its production to the surface owner, Newton's predecessor. *Flying Diamond*, 776 P.2d at 620-21. The covenant was made in exchange for broad easements the surface owner conveyed to Champlin on the land overlying Champlin's mineral interests "to enable Champlin and its successors to carry on oil and gas exploration and production." *Id.* at 620. The parties agreed the covenant to pay was a covenant running with the land (the surface ownership), binding upon present and future owners thereof. *Id*. at 621. The agreement specified, however, "that the surface owner ha[d] no rights in Champlin's mineral estate." *Id*. Later, Newton assigned a portion of the 2½% to another party and attempted to retain another portion of the 2½% for itself in connection with Newton's sale of the surface estate overlying Champlin's mineral interests to Flying Diamond. *Id*. Flying Diamond sued to enforce the covenant, claiming the entire 2½% as a covenant running with its land. *Id*.

At first blush, the covenant in *Flying Diamond* appeared to be personal, because it involved payment. *Id*. at 625. Similarly, Wapiti Utah argues "[d]espite that dedication, Badlands could fail to deliver gas and simply make a deficiency payment to Monarch." Response, ¶34. But the Utah Supreme Court concluded

the covenant "must be viewed in light of the other provisions of the Agreement which create various easements and surface rights in favor of Champlin, the owner of the mineral estate that underlies the surface of the land subject to the Agreement." *Id*. When viewed in the context of its *purpose*, the payment covenant in *Flying Diamond* compensated the surface owner "for the burdens imposed on [its] surface operations." *Id*. (emphasis added).

Here, Producers' interests in the Leases are diminished by the Agreements. The burdens imposed under the Agreements directly affect the Producers' use and enjoyment of its interests in the Leases in the AMI. Similar to *Flying Diamond*, the purpose of the Agreements is to compensate Monarch for the burdens associated with acquiring and operating the Gathering System, which is connected to the Producer's Wells located on the Leases via the Receipt Points. *See* Amended and Restated Agreement, Recital B and Schedule 2 (Complaint, Exhibit 2). Accordingly, both Agreements satisfy the touch-and-concern requirement for a covenant running with Riverbend Assets conveyed to Wapiti Utah. Finally, as in *Flying Diamond*, there are provisions in both Agreements that bind successors and assigns. *See*, Amended and Restated Agreement, §11.1 (Complaint, Exhibit 2); SWDA, §2.1(a) (Complaint, Exhibit 5).

The Court is not persuaded the Agreements cannot be said to touch-and-concern the land simply because one of the objectives of the Agreements is indeed the gathering, processing and disposal of "produced gas" and water, which are not real property interests under Utah law.[14] This argument concerns the operations of Producers and Monarch – the tasks to be undertaken to satisfy the benefits and burdens that flow both ways with respect to their real property interests. The underlying objective of the Agreements to compensate for the burdens imposed by and upon the mineral and surface estates' property interests in the AMI for the production of natural gas.

Utah law does not require the conveyance of a real property interest for a covenant to "touch and concern"; in *Flying Diamond*, the covenant was to make payments of money. The question is not *what* is conveyed by the covenant, but viewed in the context of its purpose, does the performance or nonperformance of it affect the use, value or enjoyment of the land itself. *Flying Diamond*, 776 P.2d at 624. If either side fails to perform, the use, value or enjoyment of real property is unquestionably affected; thus, execution of the Agreements were conditions of Monarch's purchase of the Gathering and Saltwater Disposal Systems under the Asset Purchase Agreement.

[14] Wapiti Utah asserts (1) undetached minerals are real property interests under Utah law, but extracted minerals are not, citing Utah Code § 57-1-1(3), and (2) water is not a "mineral" and therefore not a real property interest, citing *Stephen Hays Estate, Inc. v. Togliatti*, 38 P.2d 1066, 1068 (Utah 1934).

Wapiti Utah likens the Dedication to the one in *Sabine Oil*, asserting it is "merely a promise by the Producer to use Monarch's gathering and processing services", and these are contractual, not real, covenants. Wapiti Utah's Response, docket #32, at ¶32. The Court does not find the holding in *Sabine Oil* applicable. At the outset, it involved the application of Texas law to a very different dedication than the one made by Producers here. *See Sabine Oil & Gas Corp. v. HPIP Gonzales Holdings, LLC (In re Sabine Oil & Gas Corp.)*, 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 (2nd Cir. 2018). Sabine's dedication set forth in the midstream contract was of "all [gas and condensate] produced and saved … from wells … located within the Dedicated Area". *Sabine Oil*, 567 B.R. 869, 872. The *Sabine* Court held this did not create a covenant running with the land because it "concern[ed] only minerals extracted from the ground, which indisputably constitute personal property, not real property, under Texas law." *Sabine Oil*, 550 B.R. at 66.

By contrast, the "Dedicated Reserves" under the GPA are interests in real property, not personal. "Dedicated Reserves" is defined broadly as "*the interest of Producer in all Gas reserves in and under*, and all Gas owned by Producer and produced or delivered from (i) the Leases and (ii) other lands within the AMI. . ." (emphasis added). Amended and Restated Agreement, §1.1, p.2 (Complaint, Exhibit 2). Under Utah law, "real property" includes non-extracted minerals. Utah Code 57-1-1(3). Unlike the *Sabine* dedication, the present Dedication encompasses real property.

Finally, to the extent *Sabine Oil* required a conveyance of real property to meet the touch-and-concern element, *Flying Diamond* does not. Under Utah law, "all that must be shown for a covenant to run with the land is it 'be of such character that its performance or nonperformance will so affect the use, value or enjoyment of the land itself that it must be regarded as an integral part of the property." *Flying Diamond*, 776 P.2d at 624 (quoting *Lundeberg v. Dastrup*, 497 P.2d 648, 650) (Utah 1972) (footnote omitted)). The Court agrees with Monarch that by requiring Producers to dedicate their interest in oil and gas reserves, leases and all other lands within the AMI, the Agreements affect the use, value or enjoyment of their interest in the Leases by limiting the right to possess, develop, and dispose of the minerals and salt water.

2. Intent.

The Dedication in Section 3.4 of the GPA contains the following language:

> Producer agrees to cause any existing or future Affiliates of Producer holding Dedicated Reserves to be bound by, and to execute and join

> as a party, this Agreement. The dedication and commitment made by Producer under this Agreement is a covenant running with the land.

Amended and Restated Agreement, §3.4 (Complaint, Exhibit 2). Attached to the Amended and Restated Agreement as Exhibit D is a Form of Recording Memorandum. *See* Exhibit D to Amended and Restated Agreement (Complaint, Exhibit 2). The Memorandum sets forth the substance of the Dedication (mirroring Section 3.4 of the GPA) and provides:

> This Memorandum and all rights and covenants in connection herewith shall run with the underlying Leases and associated lands and shall be binding upon the parties hereto and their respective successors and assigns.

*Id*. at ¶6. The GPA also contains a restriction on assignment without prior written consent of the other party, as well as a provision that binds the parties' respective successors and assigns. *See*, Amended and Restated Agreement at §§11.1 and 11.2 (Complaint, Exhibit 2).

Likewise, the Commitment in Section 2.1(a) of the SWDA also expressly provides all successors and assigns are bound:

> Gasco further agrees to cause any assignee of Gasco's now-existing leasehold to be bound by this Agreement. The commitment made by Gasco hereunder is a covenant running with the land.

SWDA, at ¶2.1(a) (Complaint, Exhibit 5).

The Court need not "infer the parties' intent in the face of silence" by examining the nature of the agreements. *See Stern v. Metro. Water Dist. of Salt Lake & Sandy*, 274 P.3d 935, 946 (Utah 2012). In light of the intent clearly expressed in the Agreements themselves, the Court concludes Monarch and Producers intended the Agreements to run with the land, and the intent element is satisfied. Under either Utah or Colorado law, "[a]n express statement in the document creating the covenant that the parties intend to create a covenant running with the land is usually dispositive of the intent issue." *Flying Diamond*, 776 P.2d at 627 (citations omitted); *see also, Cloud v. Ass'n of Owners, Satellite Apartment Bldg. Inc.*, 857 P.2d 435, 440 (Colo. App. 1992) (express language in covenant demonstrated intent to run with the land).

In its Response to Monarch's Motion, Wapiti Utah urges the Court to conclude Monarch's undisputed failure to record the Memorandum demonstrates a genuine dispute as to the parties' intent and seeks time to obtain discovery on

this issue. *See* Response, docket #32 at ¶43. But the failure to record implicates notice, not intent. *See Flying Diamond*, 776 P.2d at 629 ("a properly executed and recorded writing [s]erves the critical and important function of imparting *notice* to subsequent purchasers") (emphasis added). Here, Wapiti Utah had actual knowledge of the Agreements. *See* Sale Order, at docket #223.

In any event, at oral argument conducted after Wapiti Utah filed its Response, counsel for Wapiti Utah conceded the intent element was met, for purposes of the Motions, due to the language in the agreements:

> [T]he second requirement is "the covenanting parties must intend the covenant to run with the land," and our review of the case is . . . at least for the purposes of this hearing, that a statement in the agreement that says "this agreement is intended to run with the land" is sufficient evidence of that, and we're not going to argue over that provision in our arguments today . . . for purposes of the motion for summary judgment, we're not going to take on issue number two -- element number two. . .

*See* Transcript of Hearing on Oral Argument, docket #52, p.18.

The Court finds there is no genuine dispute the parties to the Agreements intended the GPA and the SWDA run with the land.

3. Privity.

"Privity of estate requires a particular kind of relationship between the original covenantor and the covenantee." *Flying Diamond*, 776 P.2d at 628 (citing *H.T. & C. Co. v. Whitehouse*, 154 P. 950, 951 (Utah 1916) (further citations omitted). As set forth in *Flying Diamond*, traditionally there were three types of privity: (1) vertical, (2) mutual, and (3) horizontal. *Flying Diamond*, 776 P.2d at 628. Regarding the different types of privity, the courts have required them "singly and in combination". 9 Powell on Real Property, ¶60.04[3][c](i) (2001).

Vertical privity "arises when the person presently claiming the benefit, or being subjected to the burden, is a successor to the estate of the original person so benefited or burdened. ... Vertical privity exists in all covenant situations except where a successor to the burdened or benefited land is an adverse possessor or a disseisor." *Flying Diamond*, 776 P.2d at 628, n.12 (citing 5 R. Powell, ¶673 [2][c], at 60-64). Vertical privity clearly exists in this case. Wapiti Utah does not dispute

its acquisition of the Riverbend Assets, including all interests in the Dedicated Reserves, establishes vertical privity.

"Mutual privity exists when the parties have a continuing and simultaneous interest in the same property." *Flying Diamond*, 776 P.2d at 628 (citing Note, *Covenants Running with the Land: Viable Doctrine or Common-Law Relic?*, 7 Hofstra L. Rev. 139, 145 (1978); Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 Minn. L. Rev. 167, 180 (1970)). "Horizontal privity exists when the original covenanting parties create a covenant in connection with a simultaneous conveyance of an estate." *Flying Diamond*, 776 P.2d at 628 (citing 5 R. Powell, ¶673[2][c], at 60-61; Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 Minn. L. Rev. at 181)). In *Flying Diamond*, the Utah Supreme Court noted modern legal authorities advocate abolishing at least the mutual and horizontal privity requirements.[15] *Flying Diamond*, 776 P.2d at 628.

While the *Flying Diamond* court listed mutual and horizontal privity separately, some courts have combined these two under the horizontal privity requirement. For example, in *Sabine Oil*, the Bankruptcy Court stated the model of horizontal privity of estate requires "conveyance of an interest in property that itself is being burdened with the relevant covenant". *Sabine Oil*, 550 B.R. at 69. The modern view of mutual privity, which is distinct and set apart from horizontal privity in *Flying Diamond***,** is that it is not required:

> The original parties to the covenant in *Spencer's Case*, as landlord and tenant, also had simultaneously existing interests in the same land. Such simultaneous interests, most commonly termed "Massachusetts privity," has also been called "simultaneous privity," "substituted privity," and "continuing privity." In those jurisdictions that still require this form of mutual privity for covenants to run at law, no privity is required for covenants to run in equity. Simultaneous real property interests exist not only when there is a landlord and tenant relationship between the original covenanting parties, but also when those parties are the dominant and servient owners of an easement. It is immaterial whether the easement existed prior to, or as a consequence of, the instrument containing the covenant. The strictness of the rule has been mitigated by liberality in finding the existence of easements where the operative facts would not lead to such a finding in jurisdictions having a less strict concept of the requisite privity. Despite these efforts to cause the rule to work satisfactorily, it has produced results that seem harsh. It is not clear

[15] Under the particular facts of *Flying Diamond*, privity was satisfied under traditional standards anyhow. *Flying Diamond*, 776 P.2d at 628.

> which states (including Massachusetts) currently require mutual privity. As with "tenurial privity," criticisms of "Massachusetts privity" have been strong.

9 Powell on Real Property, ¶60.04[3][c](ii) (2001) (citations omitted).

Utah has never adopted the requirement mutual privity be shown. In *Flying Diamond*, the Utah Supreme Court sidestepped this issue, because it found mutual privity[16] was established in the same land between the covenanting parties, Newton and Champlin, by "Newton's grant of the surface easements and rights to Champlin." *Flying Diamond*, 776 P.2d at 628 (citations omitted).

Nonetheless, the Utah Supreme Court has intimated its views on the subject. In *Flying Diamond*, the Utah Supreme Court quoted comments of Judge Charles E. Clark, "a noted authority on the law of covenants," strongly criticizing the privity requirement:

> [The privity] requirement is probably the greatest source of confusion in the subject, because an understandable policy against title encumbrances (carried, however, to an unreal extreme in these days of modern community land developments) has been buttressed by privity doctrines of seemingly authentic, but actually dubious, historicity. That the parties to an action to enforce a covenant, if not themselves makers of the contract, must each have succeeded by privity to the estate of one of such makers is good enough sense; it is why we say a covenant runs with such estate. But to go further and require that there must be some such succession between the covenanting parties themselves—*that there must have been a grant or conveyance between them at the time of the covenant or possibly some continuing interest of tenure, easement, or otherwise—is supported neither by ancient land law nor by modern policy*.

*Flying Diamond, 776 P.2d at 628, n.13 (quoting 165 Broadway Bldg., Inc. v. City Investing Co.,* 120 F.2d 813, 816–17 (2nd Cir. 1941), *cert. denied*, 314 U.S. 682 (1941) (emphasis added)).

The Utah Supreme Court also noted when addressing privity, substance should prevail over form. *Flying Diamond*, 776 P.2d at 628, n.13 (citing *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank,* 278 N.Y. 248, 262, 15 N.E.2d 793, 798 (N.Y. App. 1938) ("*Neponsit* . . . abandoned a strict approach to privity doctrine and held that substance should prevail over technical form so that

[16] Horizontal privity was also present, although not discussed, in *Flying Diamond*.

a homeowner's association which had no interest in the property at all could sue to enforce a covenant")).

As stated earlier, in *Sabine Oil*, the Court collapsed mutual and horizontal privity into one, noting "[t]he traditional paradigm involves a property owner reserving by covenant, either for itself or another beneficiary, a certain interest out of the conveyance of the property burdened by the covenant." *In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 76 (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). The Court is cognizant the respective interests of the parties in this case do not fit within that traditional paradigm. Here, the parties simultaneously own property interests – Monarch's Gathering and Saltwater Disposal Systems and easements and Producers' easements and interests in the Leases and the Dedicated Reserves – on the same land, the AMI. *See* Asset Purchase Agreement, §1.1 (Monarch's Motion, Exhibit 2-A). While this scenario is not identical to the traditional paradigm, the Court concludes the simultaneous property interests of the Producer and Gatherer in the AMI satisfies mutual privity to the extent mutual privity would be required in Utah.

In addition, the parties share simultaneous interests in the "Dedicated Reserves," defined broadly as "the interest of Producer[s] in all Gas reserves in and under, and all Gas owned by Producer[s] and produced or delivered from (i) the Leases and (ii) other lands within the AMI" and extend to "all additional right, title, interest, or claim of every kind and character of Producer[s] or [their] Affiliates in (x) the Leases or (y) lands within the AMI". Amended and Restated Agreement at §1.1, Definitions, p.2 (Complaint, Exhibit 2). Although Monarch does not have a fee estate to the Dedicated Reserves, the Dedication is based upon an interest Monarch has in land. See *Flying Diamond*, 776 P.2d at 629. Accordingly, mutual privity is satisfied.

Finally, horizontal privity is established under the facts of this case and under the definition set forth in *Flying Diamond*. Producers and Monarch created the covenants at issue in connection with a simultaneous conveyance of an estate from Badlands to Monarch: the Gathering and Saltwater Disposal Systems. The Asset Purchase Agreement expressly required delivery of the executed Agreements as a condition for closing. *See* Asset Purchase Agreement, §6.2(c) and (g) (Monarch's Motion, Exhibit 2-A).

Wapiti Utah argues horizontal privity is lacking, relying upon the Second Circuit's summary affirmance of *Sabine Oil* on the basis of privity. *See* Supplement at docket #55, ¶¶25-28 (citing *Sabine Oil & Gas Corp. v. Nordheim Eagle Ford Gathering, LLC (In re Sabine Oil & Gas Corp.)*, 734 Fed.Appx. 64 (2nd Cir. 2018)). The *Sabine* Court concluded horizontal privity was not met under Texas law because the gatherers only had horizontal privity of estate "with respect to property

separate from the property burdened by the covenant at issue" in the form of a pipeline easement and separate parcel conveyed after the covenants were made. *Sabine Oil*, 550 B.R. at 69. The *Sabine* court concluded horizontal privity of estate requires "conveyance of an interest in property that itself is being burdened with the relevant covenant." *Id*. Wapiti Utah contends horizontal privity is absent because neither the GPA nor the SWDA convey any real property interest. *See* Supplement, docket #55 at ¶¶22-28. Wapiti Utah asserts the easement granted in the GPA – as in *Sabine Oil* – is not a conveyance satisfying horizontal privity because it burdens the only the "related" surface estate – not the same, mineral estate from which the covenant flows.

The Court disagrees. Here, unlike in *Sabine*, the covenants burden Producers' real property interests (the Dedicated Reserves and Producers' interests in the Leases) in the context of a simultaneous conveyance of real property interests (the Gas Gathering and Saltwater Disposal Systems) to Monarch, both of which are located in the same geographic area (the AMI). Moreover, the GPA granted Monarch a floating easement across the Leases and lands in which Producer may have an interest. *See* Amended and Restated Agreement, Exhibit A, at ¶4 (Complaint, Exhibit 2). These same Leases subject to the easement are interests within the AMI, also subject to the Dedication. Therefore, the easement and Dedication are conveyances that simultaneously burden the same real property interest.

**C. Application of Sections 363(f) and 365.**

"Under the Bankruptcy Code, if a contract is not executory, a debtor may assign, delegate, or transfer rights and/or obligations under section 363 of the Bankruptcy Code, provided that the criteria of that section are satisfied. If a contract is executory, the debtor must also comply with section 365 of the Bankruptcy Code, which provides special rules governing the transfer of rights and obligations under a contract." *DB Structured Prods., Inc. v. Am. Home Mortgage Holdings, Inc. (In re Am. Home Mortgage Holdings, Inc.)*, 402 B.R. 87, 93 (Bankr. D. Del. 2009).

Section 363(f) provides a trustee (or debtor in possession) can only sell property of an estate free and clear of "any interest" under one of the following five circumstances:

> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
> (2) such entity consents;
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

> (4) such interest is in bona fide dispute; or
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

Under Utah law, the nature of a covenant that runs with the land is such "that it must be regarded as an integral part of the property." *Lundeberg v. Dastrup*, 497 P.2d 648, 650 (Utah 1972). Therefore, the Agreements are part of the bundle of sticks Wapiti Utah acquired when it purchased the Riverbend Assets, and they are not subject to elimination utilizing Section 363(f).

Similarly, this Court has previously held restrictions that run with the land are not "interests" to which Section 363 applies:

> Restrictions that run with the land "create equitable interests that do not compel a person to accept a monetary interest; thus, when restrictive covenants are involved, there is nothing that can force those who benefit from restrictive covenants to 'forego [sic] equitable relief in favor of a cash award.'"

*In re Lonesome Pine Holdings, LLC*, Case No. 10-34560 HRT (Bankr. D. Colo. Sept. 9, 2011), citing *Skyline Woods Homeowners Ass'n, Inc. v. Broekmeier*, 758 N.W.2d 376, 393 (Neb. 2008) (property sold in bankruptcy subject to implied restrictive covenant running with the land requiring property only be used as a golf course) (further citations omitted); *see also, Gouveia v. Tazbir*, 37 F.3d 295, 299 (7th Cir. 1994); *Banning Lewis Ranch Co., LLC v. City of Colo. Springs, Colo. (In re Banning Lewis Ranch Co., LLC)*, 532 B.R. 335, 345-46 (Bankr. D. Colo. 2015); *In re Oyster Bay Cove, Ltd.*, 161 B.R. 338 (Bankr. E.D.N.Y. 1993), *aff'd*, 196 B.R. 251 (E.D.N.Y. 1996); *In re 523 E. Fifth St. Housing Pres. Dev. Fund Corp.*, 79 B.R. 568 (Bankr. S.D.N.Y. 1987).[17]

Even if the real covenants at issue were subject to Section 363(f), neither Section 363(f)(1) nor (f)(5) serve to strip the Riverbend Assets of the Agreements. Under applicable nonbankruptcy law, covenants that run with the land in Utah "bind successive owners of the burdened or benefited land." *Stern v. Metro. Water Dist. of Salt Lake & Sandy*, 274 P.3d 935, 945 (Utah 2012) (citing *Flying Diamond*, 776 P.2d at 623). In other words, Section 363(f)(1) cannot be satisfied because Utah law does not permit sale of property free and clear of the covenants that run with it. Under Section 363(f)(5), Monarch could not be "compelled, in a legal or

[17] Wapiti Utah cites *Newco Energy v. Energytec, Inc. (In the Matter of Energytec Inc.)*, 739 F.3d 215 (5th Cir. 2013) in support of its argument under Section 363(f), "interests" include real covenants. But in *Energytec*, "[t]he *applicability* of Section 363(f)(5) was raised in the [lower] court but not resolved" and the case was remanded for further proceedings. *Energytec*, 739 F.3d at 225 (emphasis added).

equitable proceeding, to accept a money satisfaction of such interest" because the interests of Monarch are part of the Riverbend Assets themselves.

Because the Agreements are covenants that run with the land under Utah law, Section 365 is simply not available. As the District Court in *Sabine Oil* concluded, under Section 365, "it is not possible for a debtor to reject a covenant that 'runs with the land,' since such a covenant creates a property interest that is not extinguished through bankruptcy." *Sabine Oil*, 567 B.R. 869, 874.

**D. Is Wapiti Utah Liable for Badlands' Pre-petition Default?**

In its Complaint, Monarch asserts a breach of contract claim and seeks to hold Wapiti Utah responsible for in excess of $1.2 million in unpaid fees that arose during the time Badlands operated the Riverbend Assets pre-petition. While previously arguing the Agreements were not executory contracts but covenants that run with the land, Monarch now argues Wapiti Utah must assume the contracts, and cure all prepetition defaults.

Wapiti Utah argues it cannot be held liable for Badlands' pre-petition default under the Agreements because no contracts existed between Wapiti Utah and Monarch.

The Court agrees with Wapiti Utah. The concept of assumption or rejection is purely a creature of Section 365. As the Court has concluded herein, the Agreements are covenants that run with the land under Utah law. As such, Wapiti Utah is not responsible for curing Badlands' prepetition breach.

Moreover, Monarch's "argument conflates real covenants with the claims that arise from them." Wapiti Utah's Reply, docket #31 at ¶12. Even though the Agreements are covenants that run with the land, there was neither privity of contract nor privity of estate between Monarch and Wapiti Utah before Wapiti Utah purchased the Riverbend Assets. The Court concludes Monarch's claim is an unsecured monetary claim against the bankruptcy estate only and Wapiti Utah is not liable, not because of how Monarch voted on Badlands' Chapter 11 plan or whether it filed a proof of claim, but because generally, a subsequent owner of land burdened by a real covenant takes subject to the covenant, but is not liable for his predecessor's breach:

> Under the rules relating to the running of the burden of promises respecting the use of land the successor to the promisor becomes bound, if the promise runs to him, as though he were himself a promisor. *This does not mean that he becomes bound in all ways as though he had himself made the promise.* During the time that he is

> a successor he must perform the acts called for by the promise. For failure during that time to perform them he is liable as for a breach of a promise made by him. But *he is not responsible as a promisor for any defaults in the performance of the promise which may have occurred before he succeeded to the interest of the promisor in the land with which the promise runs* nor is he so liable for defaults which occur after he ceases to have that interest.

*Vinson v. Meridian Masonic Temple Bldg. Ass'n*, 475 So.2d 807, 810 (Miss. 1985), citing *Volume 5, Restatement of the Law, Property § 530(c) (1944) (emphasis added)*; *see also Grace v. Yarnall*, 441 F.Supp.2d 130, 143 n.11 (D. Me. 2006); *MCI Telecommunications Corp. v. Tri-County Metropolitan Dist. of Oregon*, 201 F.3d 444 at *2 (9th Cir. 1999) (unpublished disposition).

Once a real covenant is breached, it becomes a cause of action. *See, e.g., Gibbons v. Tenneco, Inc.*, 710 F.Supp. 643, 648 (E.D. Ky. 1988) ("coal clause" covenant, once breached, became chose in action retained by owner of property at the time claim arose, and did not pass to purchaser); *Conti v. Duve*, 15 A.2d 494, 495-96 (Pa. 1940) (party who first acquired title after breach of obligations imposed by covenant running with the land to repair or replace bridge held not liable, as no privity of contract or estate existed); *see also, e.g., H.T. & C. Co. v. Whitehouse*, 154 P. 950 (Utah 1916). In sum, "[w]hile a covenant . . . may run with the land, damages arising from broken covenants do not." *Wallace v. Paulus Bros. Packing Co.*, 231 P.2d 417, 419 (Or. 1951), citing *Wesco v. Kern*, 59 P. 548, 549 (Or. 1900).

Wapiti Utah took the Riverbend Assets free and clear of Monarch's claim for payment pursuant to Section 363(f)(5) because Monarch "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." 11 U.S.C. § 363(f)(5). The Sale Order does not require any different conclusion; by its terms, Monarch's claims in this proceeding were left for the Court to decide. Whatever monetary claim Monarch has for pre-petition fees is a claim against the bankruptcy estate of Badlands.

Accordingly,

THE COURT ORDERS Monarch's Motion is GRANTED IN PART and DENIED IN PART. Summary judgment shall enter in favor of Monarch and against Wapiti Utah on Monarch's first claim for relief, declaring the GPA and the SWDA constitute covenants running with the land that continue to encumber the Riverbend Assets, and to which Wapiti Utah is bound.

IT IS FURTHER ORDERED Wapiti Utah's Motion is GRANTED IN PART AND DENIED IN PART. Summary judgment shall enter in favor of Wapiti Utah and against Monarch on Monarch's second claim for relief for breach of contract.

A separate judgment shall enter.

Entered this 30th day of September, 2019.

BY THE COURT:

Kimberley H. Tyson, Judge
United States Bankruptcy Court