

# Can Midstream Agreements be rejected in Bankruptcy or are they immune from rejection as Running Covenants and/or Equitable Servitudes?

**Owen L. Anderson**

Professor and Distinguished Oil and Gas Scholar  
The University of Texas School of Law

[oanderson@law.utexas.edu](mailto:oanderson@law.utexas.edu)

Kuntz Chair Emeritus & Cross Research Professor Emeritus  
The University of Oklahoma College of Law

## What's all the Hubub? Setting the Stage

- Section § 365(a) of the Bankruptcy Code permits an executory contract agreement to be rejected by a debtor.
- 
- “Executory contract” is not defined, but most courts accept that the definition is very broad.
- If a contract is rejected, the counterparty may assert a pre-petition claim for damages but generally may not enforce the contract against the debtor.
- However, certain obligations – “interests in property” - may not be rejected pursuant to § 365(f).

## Midstream Agreements

- What are they:
  - Pipeline Transportation Agreements
  - Gathering Agreements
  - Processing Agreements
  - “Midstream” generally encompasses gathering and transportation (pipeline, rail, barge, tanker, or truck), storage, processing, and wholesale marketing of crude oil and natural gas [Upstream is exploration and production. Downstream is refining, distribution of refined products, natural gas, NGLs, and retailing.]

## What is an interest in property that “Runs with the Land”

- Most basically – it is an interest in real property that is tied to the land in contrast to a contract interest, which is personal to the owner and moves from deed to deed when the land is transferred.
- STATE LAW defines property rights that “run with the land”
  - Example: An oil and gas lease is a fee simple determinable in Texas and a profit-à-prendre in Oklahoma
- Common covenants that run with the land include properly recorded “in rem” interests like mortgages, liens, restrictive covenants, and easements.

## REAL COVENANTS AS TAUGHT IN PROPERTY CLASS

### Real Covenants Defined:

- A "promise" that "touches and concerns land" whereby the "burdened owner" promises the "benefited owner" (perhaps of a "benefited estate") to do (affirmative covenant) or not to do (negative covenant) something (often, but not always, on a "burdened estate").  
*or stated otherwise*
- a covenant imposing a restriction on the use of land so that the value and enjoyment of adjoining land will be preserved.
- Examples:
  - A deed restriction for a neighborhood development requiring homes of a certain size
  - A property may only be used for certain purposes

## How are real covenants different from easements?

- An affirmative easement is a right to do something on the servient estate. An affirmative covenant is a burden to do something regarding real property, including paying money or providing services.
- A negative easement is a "grant," not a "promise," and is confined to the four types at common law (light, air, support, and flow) plus, in some states, view, conservation, and solar energy. In contrast, a negative real covenant can cover virtually any activity.
- An easement is "appurtenant" if there is a "dominant" estate; a real covenant benefit may and a real covenant burden does "run with the land." For both easements and real covenants, if there is no benefited estate, then the benefit is "in gross".
- In case of an easement, there is always a "servient estate." In case of real covenants, there might not be a "burdened" estate, in which case the burden is "in gross."
- Note that if both the burden and benefit of a promise are in gross, then only contract law applies because no interest in real property is involved.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: Can Midstream Agreements Be Rejected in Bankruptcy or Are They Immune from Rejection as Running Covenants and/or Equitable Servitudes?

Also available as part of the eCourse

[2016 Bankruptcy eConference](#)

First appeared as part of the conference materials for the 35<sup>th</sup> Annual Jay L. Westbrook Bankruptcy Conference session

"The *Sabine* Bankruptcy Decision: Do Midstream Gathering and Processing Agreements Run With the Land in Texas (and elsewhere)?"