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A Promise to Pay Money if Transferred Land is used for Identified Energy-Related Activity: Can Successors of the Promisor be Bound?

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A PROMISE TO PAY MONEY IF TRANSFERRED LAND IS USED FOR IDENTIFIED ENERGY-RELATED ACTIVITY: CAN SUCCESSORS OF THE PROMISOR BE BOUND?

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I. INTRODUCTION

Whether or not one works in the field of energy law, or pays much or absolutely no attention to what goes on in energy markets, the reality of ever-increasing and heretofore unknown demands for power to drive the wheels of modern society appears a fact far too obvious to deny.[1] Those demands have sent entrepreneurs world-wide on a search for deposits of long-familiar carbon fuel sources, and for the identification of prime locations

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1. On the growing demand for energy, *see generally* ENERGY INFORMATION AGENCY, U.S. DEPT. OF

for the production of power from alternative energy resources such as wind and solar.[2]

Against that backdrop, the forms of legal arrangement that can be struck between an energy entrepreneur and an owner of land in which such an entrepreneur might express interest would seem limited only by one's imagination. Obviously, the most familiar arrangement is that of a royalty payment made by the energy entrepreneur to the owner of land used by the entrepreneur for some energy-related activity, with the activity itself occurring on the basis of the entrepreneur being granted a right to engage in such activity, while title to the land itself is retained by the original owner.[3]

This essay focuses on another entirely distinct form of arrangement. That arrangement essentially involves an actual enforceable sale to the energy entrepreneur of land of interest, with the sale occurring in the context of a wholly separate written commitment through which the seller purports to obligate the purchaser—and any heirs, successors, assigns, or transferees of the purchaser—to make periodic and regular money payments to a seller-established entity created to receive such payments for the benefit and favor of the seller or its heirs, when and if prescribed energy-related activity is undertaken on the conveyed land. Such an arrangement might be struck because of seller-perceived tax advantages, a desire for a long-term income stream benefiting the seller or its heirs, or the simple fact of wanting to structure the sale and purchase of the land itself in a way that affords an interested energy entrepreneur otherwise priced-out with an opportunity not available using more standard commercial financing.[4]

In terms of sequencing the various parts of the transaction, the referenced wholly separate commitment between the seller and the seller-established entity might even be

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ENERGY, INTERNATIONAL ENERGY OUTLOOK 2013 (July 25, 2013), *available at* http://www.eia.gov/forecasts/archive/ieo13/ (indicating that between 2010 and 2040 world energy demand will increase 56%, from 524 quadrillion BTUs in 2010 to 820 quadrillion BTUs in 2040); Moming Zhou, *World Energy Consumption to Increase 56% by 2040 Led by Asia*, BLOOMBERG BUSINESS (July 25, 2013), http://www.bloomberg.com/news/articles/2013-07-25/world-to-use-56-more-energy-by-2040-led-by-asia-eia-predicts. By comparison, a 2014 report from the International Energy Agency noted that total world energy consumption increased from 4.674 million tons of oil equivalent (MTOEs) in 1973 to 8.979 MTOEs in 2012. *See* INTERNATIONAL ENERGY AGENCY, 2013: KEY WORLD ENERGY STATISTICS 28, *available at* http://www.iea.org/publications/freepublications/publication/KeyWorld2014.pdf.

2. Concerning the search for traditional and newer forms of energy, *see generally* INTERNATIONAL ENERGY AGENCY, CHINA'S WORLDWIDE QUEST FOR ENERGY SECURITY (2000), *available at* www.oecdchina.org/OECDpdf/china2000.pdf; Linda Jakobson & Zha Daojijong, *China and the Worldwide Search for Oil Security*, 13 ASIA PAC. REV. (No. 2) (2006); Alison Kemper & Roger Martin, *The Rush for New Oil and Gas Sources is Pushing Us Towards Extreme Actions*, THE GUARDIAN (Mar. 27, 2014), www.theguardian.com/sustainable-business/blog/rush-new-oil-gas-sources-extreme-measures-arctic-russia. On the search for locations for alternative energy activity, *see generally Renewable Energy Information Services*, 3TIER (providing maps of solar, wind, and hydro power locations), *available at* www.3tier.com/static/ttcms/us/images/support/maps/3tier_all_renewables_poster.pdf; on ocean thermal energy conversion activities, *see* WORLD ENERGY COUNCIL, SURVEY OF ENERGY RESOURCES: OCEAN THERMAL ENERGY CONVERSION 573 (2007), *available at* www.energy.ca.gov/oceanenergy/WEC_Country_Notes_OTEC.pdf.

3. The mineral royalty payment generally is discussed in JUDON FAMBROUGH, REAL ESTATE CENTER, MINERALS, SURFACE RIGHTS AND ROYALTY PAYMENTS (2009), *available at* www.recenter.tamu.edu/pdf/840.pdf.

4. In terms of the purchaser otherwise being priced-out of the land transaction, it is not difficult to imagine that either the cash flow situation of an energy entrepreneur, or its ability to secure necessary financing from a third party, could have the effect of preventing the accomplishment of a particular land transaction. Willingness on the part of the seller to essentially take a portion of the price for the purchase in the form of regular periodic payments linked to the use of the property for identified energy-related activities can play an important role in securing the completion of such transactions.

earlier in time than the sale of the land in which the entrepreneur expresses an interest, and might take the form of a "Declaration" or "Transfer" entered into by only the seller and the seller-established entity. Further, the wholly separate commitment might even be properly and timely recorded within the chain of title of the property eventually purchased and conveyed, and also be a commitment clearly and expressly referenced in the deed taken by the energy entrepreneur executing that purchase.[5] However, despite these indicia of awareness of the periodic payment obligation and the corresponding suggestion of its inescapably obligatory nature, in the event the energy entrepreneur purchasing the land does not engage in the payment "triggering" energy activity, the question arises of the legal theory on which a successor-in-interest to the relevant land could be held bound to the money payment promise. After all, neither the successor-in-interest, nor the original energy entrepreneur, was formally a party to the "Declaration" or "Transfer" between the seller and the seller-established entity designated to take payments under the arrangement. Thus, the absence of such a contractual basis for liability would appear to draw into question the existence of grounds for binding the successor-in-interest to the promise to make money payments.

And this is far from a matter of idle curiosity. With the growth of interest in solar energy generating plants,[6] it is conceivable owners of prime locations for the siting of solar plants could express interest in conveying out-right ownership of the land itself, in return for, among other things, regular money payments made when and if such plants are constructed. Likewise, as wind energy gains a larger toehold in the mix of sources of energy for factories, businesses, and residential accommodations,[7] the most attractive locations for the siting of such plants might be one's where the land owner desires to convey actual title to the energy entrepreneur, receiving part of the remuneration in the form of regular periodic cash payments in the event wind turbines or associated facilities are ever constructed. Similarly, with the advent of new technologies for the exploitation of previously hard-to-get oil and gas resources,[8] it is not inconceivable that owners of land on which

5. For public documents of an actual transaction involving the described situation in the context of oil storage tanks, *see* "Royalty Interest Related to Tanks," Filed in Lincoln County, OK (July 7, 2009), Book 1849, at p. 127-29 (creating a so-called royalty interest, i.e., payment interest, granting to earlier established Deeprock Farms, LLC the right to receive money payments in the event certain lands are used for the construction of oil storage tanks, and fixing on any owner of the described lands the payment obligation).

6. On solar energy's growth, *see generally* SOLAR ENERGY INDUSTRIES ASSOCIATION, SOLAR INDUSTRY DATA (2014), *available at* www.seia.org/research-resources/solar-industry-data (in 2013 there was a 41% increase in solar energy capacity over 2012, with solar accounting in 2013 for 29% of all the new electricity generating capacity added that year); U.S. RENEWABLES & CO2 EMISSIONS SUMMARY, SHORT –TERM ENERGY OUTLOOK (2014), *available at* www.eia.gov/forecasts/steo/report/renew_co2.cfm (discussing solar still accounting for a small portion of total renewable energy production, chart reveals total BTUs generated by renewables in the U.S. being 8.784 quadrillion in 2014, with only .415 quads supplied by solar).

7. On the growth of wind energy, *see generally* WORLDWATCH INSTITUTE, U.S. RENEWABLE ENERGY GROWTH ACCELERATES (2014), *available at* www.worldwatch.org/node/5855 (wind energy generating capacity in U.S. expected to grow by 7500 megawatts in 2014, a 45% increase over total available in 2013); AMERICAN COUNCIL ON RENEWABLE ENERGY, THE OUTLOOK FOR RENEWABLE ENERGY IN AMERICA 7 (2014), *available at* www.acore.org/files/pdfs/ACORE_Outlook_for_RE_2014.pdf (wind power on track to account for 20% of power in the electricity grid by 2030).

8. On horizontal drilling and so-called "fracking," *see generally* Wendy Koch, *Fracking Puts U.S. First in Shale Gas Production*, USA TODAY (Oct. 23, 2013), http://www.usatoday.com/story/news/nation/2013/10/23/fracking-shale-gas-us-global-leader/3170255/ (natural gas production up by one-third over 2005 production low point); David Usborne, *Fracking is Turning the U.S. into a Bigger Oil Producer than Saudi*

such might be located or even stored once extracted, or owners of land where extraction companies might wish to bivouac equipment necessary for oil and gas activity, could link any such permission to the energy entrepreneur taking an out-right conveyance of the land itself, in return for a purchase arrangement involving, in part, regular periodic money payments in the event the land is ever used for any such energy-related activity.

II. BRIEF COMMENT ON THE OVERALL LEGAL CONTEXT

Prior to looking closely at the several problems associated with any effort to bind a successor-in-interest to an energy-related activity money payment commitment taken-on by an earlier promisor transferred the subject land, at least three other relevant matters deserve brief comment.

The first has to do with the rule against perpetuities.[9] In view of the fact the money payment commitment may be linked to a particular energy-related activity very likely not to be taking place at the time the original commitment arises, and, in fact, without any guarantee that such activity may ever occur, it is clear the promise to pay creates in any beneficiary an expectation of a future money payment that is purely contingent—uncertain to ever come to fruition.[10] In the event the subject land becomes used for such an activity, the obligation to make payment is triggered. However, as noted, no assurance exists that such activity will occur. The contingent or uncertain nature of this commitment appears to make it just the kind of situation the rule against perpetuities was designed to address. Nonetheless, authority exists for concluding otherwise, given that the rule strikes at the granting of conditional interests (i.e., interests not arising until some condition has been met), rather than presently vested interests whose mere enjoyment depends upon some futurity.[11] But even if such authority is found unconvincing, there seems ample room for the use of reformation doctrines—like *cy pres* and wait-and-see—to salvage the commitment. And, beyond that, at the very instant the identified energy activity that triggers the payment obligation is in fact ever undertaken, there seems room to argue that the money payment commitment that may have been viewed as subject to the rule because of its contingent nature is then removed from the rule by virtue of the previously contingent interest in payment becoming completely vested.[12] After all, as originally made, the promise to

Arabia, THE INDEPENDENT (Sept. 1, 2014), www.independent.co.uk/news/world/americas/fracking-is-turning-the-US-into-a-bigger-oil-producer-than-saudi-arabia.9185133.html.

9. For a discussion of the rule against perpetuities, *see generally* JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942); Robert Lynn, *A Practical Guide to the Rule Against Perpetuities*, 1964 DUKE L.J. 1 (1964); Bruce M. Kramer, *Modern Applications of the Rule Against Perpetuities to Oil and Gas Transactions: What the Duke of Norfolk Didn't Tell You*, 37 NAT. RESOURCES J. 281 (1997); W. Barton Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349 (1954). *See also* Thomas F. Bergin & Paul G. Haskell, *Preface to* ESTATES IN LAND AND FUTURE INTERESTS 178-229 (2d ed. 1984); Garrett Logan, *Oklahoma Perpetuities and Such*, 7 TULSA L.J. 5 (1971).

10. Many jurisdictions, including Oklahoma, apply the rule against perpetuities to personal as well as real property. *See, e.g.*, OKLA. STAT. tit. 60, § 175.47 (2014); OHIO REV. STAT. § 2131.08; FLA. STAT. tit. 50 § 689.225.

11. *See, e.g.*, Commerce Bank v. Peabody Coal Co., 861 S.W.2d 569, 575 (Mo. Ct. App. 1993) (quoting from Dauphin Island Property v. Callon Inst., 519 So. 2d 948 (Ala. 1988) ("if [a] futurity is annexed to the substance of the gift, it is *contingent*, but if annexed to the time of payment, enjoyment, or delivery of possession, it is *vested*" and, therefore, completely outside the rule against perpetuities).

12. Typically, the rule against perpetuities demands the meeting of its requirements from the very moment

pay was conditioned upon a particular energy-related activity occurring on the subject land. Once that activity is actually undertaken, the condition upon which the promise to pay had rested is met, thus transforming what had previously been a potential problem under the rule into a vested interest wholly and completely outside the operation of the rule.[13]

The second has to do with the treatment traditionally accorded to the related situation of a money payment commitment in the form of the mineral royalty interest. Specifically, lease and royalty agreements are often clear in their applicability to successors-in-interest to the original obligor,[14] and there is certainly case law holding such royalty interests to bind successors to the exploitation enterprise originally promising to make good on a commitment to make royalty payments in the event of mineral exploitation.[15] The effect is to render a successor-in-interest to a promisor entering into an obligation to make royalty payments for minerals taken from a royalty owners land just as responsible for following through on that commitment as the promisor itself. In light of the distinct similarity between mineral royalty promises, and promises by energy entrepreneurs to make money payments when and if land conveyed to them, or which comes under the subsequent ownership of their heirs, successors, assigns, or transferees, should be subjected to identified, non-extractive, energy-related activities, it seems advisable the standard lease and royalty contract law, as well as the decisional law regarding mineral royalty promises, should not

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the instrument containing a contingent interest subject thereto is created. *See* Sheldon F. Kurtz, *The Iowa Rule Against Perpetuities—Reforms at Last, Restatement Style: Wait-and-See and Cy Pres*, 69 IOWA L. REV. 705, 706 (1984). Nonetheless, the rule has traditionally contained a so-called "second look" doctrine, at least in the context of powers of appointment. This "second look" doctrine saves grants of appointment powers that would otherwise contravene the rule by virtue of looking at the facts as they exist, not as of the time of creation, but at a later point in time when a dispute arises. For an interesting application of the overall rule against perpetuities in the context of Oklahoma law and a dispute concerning an option to purchase oil and gas that might be produced at some undetermined future date. *See* Greenshields v. Warren Petro. Corp., 248 F.2d 61, 70-71 (10th Cir. 1957).

13. The rule against perpetuities, as well as the rule in Shelley's Case, the doctrine of worthier, the rule on destructibility of contingent remainders, and the rule against the transferability of possibilities of reverter and powers of termination were all formulated to evidence the common law's disfavor of future interests that were contingent, questionable, or uncertain to occur. For a case involving a possibility of reverter in which the court took essentially the approach that, once an identified triggering event giving rise to the reverter actually occurred, the contingent interest became vested and, therefore, was no longer subject to the rule preventing the inter vivos transferability of possibilities of reverter. *See* Mahrenholz v. Cnty. Bd. of Sch. Trs., 466 N.E.2d 322 (Ill. App. Ct. 1984) (whenever the event making the reverter a contingency occurs, the future interest becomes vested and, thus, outside the rule against its inter vivos transferability).

On a related point, if the originally contingent commitment was known to exist by one who could have challenged it as in contravention of the rule against perpetuities, but no challenge was initiated at that time, and the interest subject to that commitment was then later transferred to others who also had notice but chose not to raise the rule, it is not inconceivable that one seeking to enforce the payment commitment after the occurrence of the requisite triggering event might have available the claim of laches or estoppel in the event perpetuities is then raised as a reason for viewing the commitment as unenforceable.

14. *See, e.g.*, Sec. 10 of Texas Sample Oil and Gas Lease and Surface Use Agreement (June 2011, Texas Oil & Gas Accountability Project), *available at* www.earthworksaction.org/files/publications/Texas-Sample-Model-Gas-Lease_201106.pdf.

15. Interesting decisions speaking in such terms include *Local Fed. Sav. & Loan Ass'n v. Eckroat et. al.*, 100 P.2d 261, 262 (Okla. 1940) ("an agreement to pay a lessor, ... sums of money to be derived from the sale of oil when the same shall be produced from the leased premises touches and concerns the land very materially and . . . constitute a real covenant, or covenant running with the land. . . . A covenant running . . . is one relating to the land, ... so that its benefit or *obligation* passes with the ownership.") (Emphasis added). *See also* Montgomery v. Hickok, 188 Ill.App. 348 (1914); Holliday v. Erwin, 85 S.W.2d 355 (Tex. Civ. App. 1935); Danciger Oil & Refining Co. v. Christian, 109 S.W.2d 980 (Tex. Civ. App 1937).

be overlooked.

The third, and final, matter deserving comment has to do with the basic legal principles discussed in the balance of this essay—the principles concerning the law of real covenants and equitable servitudes. While normally there is a degree of reluctance to hold that a promise made by one entity can be found to obligate another who was not a party to the promise itself, the ultimate effect of the law of real covenants and equitable servitudes is to explain how others so situated can be found committed to fulfil promises they themselves did not make.[16] With regard to the law of covenants and servitudes, a couple of points are in order.

An initial point might be that, one place to begin is with the Restatement (Third's) suggestion that all such situations are best analyzed from the standpoint of emphasizing the notion of servitudes, rather than that of real covenants.[17] The attractiveness of this approach is perhaps best explained by the fact the law of servitudes has emerged over the centuries as part of equity, and, therefore, has not been subjected to the somewhat stricter standards applied to the enforcement of real covenants at law.[18] It is at least of some relevance to keep in mind here that the remedy customarily available at equity when seeking to enforce a commitment as a servitude would be that of injunction. If what is preferred is the remedy of damages, such would typically be within the cognizance of law, and enforcement would be under the guise of the commitment or promise as a real covenant, not an equitable servitude.[19]

The other point needing to be made has to do with what might be described as the basic elements of the *prima facie* case for demonstrating that a successor-in-interest to the energy entrepreneur can be bound by that entrepreneur's energy-related activity money payment commitment. Though enunciated, arranged, or numbered differently by the various courts and scholars of covenants and servitudes,[20] the fundamentals of such a case in the context of a real covenant would be (1) an enforceable commitment or promise, (2) that touches and concerns land transferred, (3) is intended to run to any successor-in-interest to the land, (4) when there is both horizontal privity between the original parties to the promise or commitment, and vertical privity between those parties and any successors-

16. For the law on real covenants and equitable servitudes generally, *see* Percy Bordwell, *The Running of Covenants—No Anomaly*, 36 IOWA L. REV. 1 (1950); William B. Stoebuck, *Running Covenants: An Analytical Primmer*, 52 WASH. L. REV. 861 (1977). On the notion of binding persons who did not themselves make the promise, *see* James Barr Ames, *Specific Performance For and Against Stranger to the Contract*, 17 HARV. L. REV. 174, 177-79 (1904); Harlan F. Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 18 COLUM. L. REV. 291, 294-96 (1918); William F. Walsh, *Equitable Easements and Restrictions*, 2 ROCKY MTN. L. REV. 234, 236 (1930); RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY 671 (abridged ed. 1968); RESTATEMENT OF PROP. § 539 cmt. a (1944).

17. *See generally* RESTATEMENT (THIRD) OF PROP.: SERVITUDES (2000).

18. On the more relaxed approach to enforcing commitments as servitudes, rather than covenants, *see generally* ROGER A. CUNNINGHAM, WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 8.22, 485-86 (1984).

19. On the relationship between the remedy sought, and the commitment or promise said to give rise to the remedy being a servitude or covenant, *see generally id.* at §§ 8.21 & 8.31. Also, note the use of the term "typically," as there may be circumstances in which damages may be sought in the context of an equitable servitude. *Id.*

20. For instance, the Oklahoma Supreme Court speaks of three elements. *See* Beattie v. State, *ex rel.* Grand River Dam Auth., 41 P.3d 377, 387-89 (Okla. 2002) (Opala, J., concurring).

in-interests to them, and (5) notice of the commitment or promise exists on the part of the successors.[21] Reflective of the more relaxed approach regarding holding successors-in-interest under the principles applicable to equitable servitudes, courts exercising their equitable jurisdiction have eliminated the requirement of having to demonstrate privity demanded by element (4), thereby placing greater emphasis especially on both the elements of notice and touch and concern.[22]

It is also important to note that the problem with which we are here concerned is one involving whether the "burden" said to arise against the energy entrepreneur is capable of "running" to the successor-in-interest to the land taken by the entrepreneur, and not with whether the payment "benefit" incident to that burden can be enforced by someone other than its original beneficiary. As described above, the seller of the property subjected to the payment burden could have initially granted that benefit to a seller-established entity, where the benefit remains. And though in the time leading-up to the sale of the property of concern, the burden to make regular and periodic money payment in the event of identified energy-related activities applied even to the eventual seller, once a sale occurs, the only question is whether the energy entrepreneur who executed the purchase, or that entrepreneur's successors-in-interest, face that same burden "running" to them?

III. DOES A PROMISE TO PAY MONEY "TOUCH AND CONCERN" THE LAND?

Given that any promise to make money payment in the event of land use for certain energy-related activities is a burden that does not obviously appear to be a burden designed to affect, relate to, or be centered upon land as such, it seems qualitatively different from the usual burden that is found to touch and concern land—e.g., a burden not to erect a chain-link fence on land conveyed to the promisor, or to adhere to the commitment to use only wood shingles when roofing a residence conveyed to the promisor. As a result of this difference, authority can be found for the proposition that a promise or commitment to pay money is not a burden that satisfies the requirement that there exist a burden that touches and concerns land.[23] Authority following that line of reasoning would include *Vulcan Materials Co. v. Miller*, where the court found the element of touch and concern not to exist—so as to allow a burden to run to a successor-in-interest—because the promise or commitment involved was not about, related to, or centered upon burdening land. The promise or commitment was regarded as purely personal to the one who made it.[24]

Further, as promises to pay money are also affirmative in nature, and covenants or servitudes found to touch and concern land usually tend to be negative—a commitment

21. *Spenser's Case*, 77 Eng. Rep. 72 (Q.B. 1583), is often cited as the original authority for these basic elements.

22. The case often cited here as the lead authority for the elimination of privity, and for the emphasis on notice, is the old English case of *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (Ch. 1848).

23. *See* Neponsit Prop. Owners' Ass'n, Inc. v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938) (per Lehman, J.) (noting that "[i]t has been often said that a covenant to pay a sum of money is a personal affirmative covenant which usually does not concern or touch the land").

24. *See* Vulcan Materials Co. v. Miller, 691 So. 2d 908 (Miss. 1997) (obligation to make limestone royalty payments personal and do not run). *See also* Burton v. Chesapeake Box & Lumber Corp., 57 S.E.2d 904 (Va. 1950) (promise to pay insurance personal and does not run).

not to do something on or not to use in a certain way a particular piece of land—an additional problem seems faced by any promise to pay money when and if property is subjected to identified energy-related activity. Important early cases discussing the significance of the affirmative nature of a covenant or servitude include *Miller v. Clary*, where the court recognized that the historic English disinclination to hold affirmative commitments as touching and concerning land has been criticized,[25] and Justice Cardozo's opinion in *Guaranty Trust Co. of New York v. New York & Queens County Ry. Co*., in which adherence to the view that affirmative commitments fail to touch and concern the land was nonetheless endorsed.[26]

Despite these two concerns, there is good reason to find that any promise by a purchaser of land to make regular and periodic money payments in the event land sold to them is ever used for energy activity clearly gives rise to a burden that touches and concerns the relevant land. To begin with, though such a promise is ineluctably affirmative, even commitments familiarly negative in nature contain the affirmative commitment to use the property of concern in a way that results in the negative commitment not being contravened. And the reverse would be equally so in the context of a commitment that is affirmative. In short, since every negative or affirmative commitment necessarily contains its mirror opposite, it seems that whether a commitment is to be found to touch and concern land is best divined by inquiring as to whether the commitment is tied to, linked to, or has as its principal objective imposing a burden that emerges out of something regarding land transferred to the promisor.

And with respect to the commitment or promise being one to pay money, again, it is equally clear that some commitments of that sort may have nothing to do with matters regarding land that has been conveyed to the promisor. That would certainly be the case if the money payment promise were something like obligating the receiver of such conveyed land to make regular gifts to a favored charity of the conveyor, irrespective of the uses to which the promisor may be putting the conveyed land. While such promises are to be viewed as independent of land that has been purchased by the promisor (i.e., commitments that stand alone and have no connection to any land acquired), promises to pay which are triggered by, or depend upon, or are linked to use of conveyed land in a certain way are unquestionably capable of being found to touch and concern land. After all, it is because conveyed land is employed in some particular way that one's obligation to make money payments is activated.

Perhaps the seminal case involving direct confrontation of whether the element of "touch and concern" is met by an affirmative obligation to pay money is *Neponsit Property Owners' Association, Inc. v. Emigrant Industrial Savings Bank*.[27] In that case, each property owner purchasing in a particular housing subdivision committed to making regular and periodic money payments to the home owners' association for the purposes of, among other things, maintenance of "common" or "green" areas, available to all homeowners in the burdened subdivision. Observing that the situation raised both the nature of the commitment as merely affirmative, and involved an obligation to do nothing more than merely

25. *See* Miller v. Clary, 103 N.E. 1114 (N.Y. 1913).
26. *See* Guar. Trust Co. of N.Y. v. N.Y. & Queens Cnty. Ry. Co., 170 N.E. 887, 892 (N.Y. 1930).
27. *See Neponsit*, 15 N.E.2d 793.

pay money, the court nonetheless determined the promise to be one which touched and concerned the relevant land acquired by the promisor.

Consistent with what had been expressed above, Justice Lehman, in writing for the court, stressed that it was much more important to look at the connection of the promise made to the land conveyed than at whether the promise concerned an affirmative commitment or one simply to pay money. As he stated, a commitment by a promisor touches and concerns land and can run to successors-in-interest when the commitment "affect[s] the legal relations . . . of the parties to the covenant, *as owners of particular parcels of land* and not merely as members of the community in general."[28] In further elaboration, he noted the following: "*A promise to pay for something to be done in connection with the promisor's land* does not differ essentially from a promise by the promisor to do the thing himself, and both constitute, in a substantial sense, a restriction upon the owners right to use the land, and a burden upon the legal interest of the owner."[29]

The last set of emphasized language from Lehman's opinion calls for focusing attention on the connection between the obligation to pay money and the land conveyed to the promisor. In the context of *Neponsit*, the connection was that, as long as one continued to be a homeowner in the burdened subdivision, the conveyee of the land was to be bound by the commitment to make regular and periodic homeowner association money payments. Though there can be no question that the fulfillment of the obligation would redound to the benefit of the promisor making the payments (as the common areas and green space remained available to them), it is equally significant that the obligation to make payment attaches or arises because the promisor continued as an owner of a particular parcel of land in the burdened subdivision. Stressing the later notion, by linking payments to an association of homeowners and homeownership in the burdened subdivision, the idea is to suggest that the payment obligation touches and concerns land when it is taken on due to the land being owned by one. In the words of *Neponsit*, continuing ownership of land in the burdened subdivision results in the affirmative promise to pay money being a "promise to pay for something . . . in connection with the promisor's land."[30]

With regard to our instant problem of payments triggered by use of purchased land for an energy activity, an even more direct and immediate connection exists between the payment commitment and ownership of particular parcels of land. In other words, while in *Neponsit* it was sufficient that ownership of land continued in the burdened subdivision, in our instant problem, one faces the obligation to make money payments, not simply due to continuing land ownership, but because land owned by one is subjected to a certain use. No payment obligation exists apart from a specified use of particular parcels of owned land. Stated another way, the money payment obligation is clearly connected to particular uses to which the subject land is put. In the absence of such uses of the conveyed land occurring, no obligation attaches. It is only because of what takes place on the conveyed land that payment must be made. A promise of this nature undoubtedly touches and concerns the relevant land. It is an obligation that plainly relates to, is about, or is focused on what occurs on certain lands.

28. *See id.* at 796 (emphasis added).
29. *See id.* (emphasis added).
30. *See id.*

IV. THE SIGNIFICANCE OF A SUCCESSOR TAKING A DIFFERENT "QUANTITY" OF LAND THAN ORIGINALLY BOUND

In the context of our hypothetical situation involving a promise to pay money when, and if, particular parcels of land that have been transferred to the promisor are ever used for identified energy-related activities (e.g., the erection of wind turbines or an array of solar energy collectors, etc.), it is quite possible that a successor to the promisor approached about such payments may attempt to escape "runnability" as a result of having taken a subsequent transfer of something less than the total quantity of land originally subjected to the payment burden. Imagine a situation in which the transfer subjected to that burden was for, say, one-hundred acres, and the party now faced with the demand for payment is a successor-in-interest who has taken only twenty of the entire initially bound acreage. It is certainly true that the very language of the instrument creating the payment obligation might be structured in a way that the promise to pay would not be intended to survive a division of the entire initially bound acreage, with the result that such a division would terminate the burden and relieve the transferee of the smaller quantum of land of a promise to pay otherwise capable of running to the successor-in-interest. To conclude otherwise would be to denigrate and contravene the parties' clearly expressed intention. But what if the language of the instrument of creation revealed no such intention? What if its wording left open the possibility that the promise to pay bound all one-hundred acres of land, whether that land remained together as a single entirety or was split into numerous smaller parcels? Would the mere fact that a successor had taken less than the entire acreage originally bound serve to relieve the successor from an obligation that would otherwise run?

Now, in the event the actual legal interest in the burdened land held by the successor were of a lesser *quality*, e.g., a life estate, while the predecessor-in-interest of the originally burdened land received a fee simple estate, there might appear at least some reason to contend the successor is not subject to the promise to pay. After all, the predecessor-in-interest, as the initially burdened transferee of the subject land, embraced that payment obligation in connection with having taken an estate of a particular quality. And, while that money payment obligation attached to and was generally able to pass along with that specific estate in land, a transfer by the initially burdened purchaser to a successor-in-interest taking an estate of a lesser quality in the subject land would suggest the successor has been afforded the argument that it escapes the obligation by virtue of not receiving an estate of sufficient adequacy to which such a burden could attach. There are certainly at least some areas of the law of real property where such a consequential implication proceeds from receipt of an estate of lesser quality. In that regard, reference can be made to the law surrounding the so-called doctrine of worthier title, which required in its original form that heirs of a devisor or grantor take by way of descent, rather than by way of devise or a conveyed remainder, so long as the estate in land they were to receive was of the same kind and quality as would be received by descent.[31] But just as under what has become

31. *See generally* CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 149–52 (1962). It bears noting that in American law the doctrine has two distinct branches: the wills branch and the inter vivos branch. While in most respects the wills branch is regarded as moribund, Moynihan references authority

referenced in American law as the inter vivos branch of that doctrine, it would not seem impossible for an instrument of transfer involving land and energy-related activities to structure the terms of the promise to pay to make clear an intent it is to run to successors, in spite of their having taken an estate in land of a lesser quality. A clear indication of devisor or conveyor intent that an heir take by way of devise or conveyance instead of descent permits that intent to be given effect under worthier title,[32] suggesting, perhaps, the same result would not be unreasonably expected in connection with a promise to pay associated with energy-related activities, where the language of the promise is crystal clear an estate of a different quality serves as no impediment.[33]

When the quality of the estate in land parallels that initially transferred, yet the *quantity* of land passed between the original promisor and that promisor's successor-in-interest is in an amount less than initially bound, the law finds that not to be an impediment to the runnability of the money payment burden. In discussing the matter of a lesser quantity of land being passed, no less an authority than the celebrated property law expert and late-Professor Richard Powell of Columbia University makes clear that an obligation binding certain lands does not have its capacity to run with those lands impeded when a successor-in-interest takes a lesser quantity than the entirety of lands originally bound at the outset. In discussing this question, he notes that there may be some complications arising from whether the burden imposed on the land is negative in nature (e.g., no chain-link fences), or an affirmative one to render services or pay money. In situations of the former sort, he concludes that "all *segments* of the originally burdened area" carry the burden.[34] As for situations involving the provision of services or the payment of money, he speaks in terms of some sort of pro rata "division of . . . [the] affirmative burdens."[35] Significantly, in both types of cases, the burden still runs, despite the fact a successor-in-interest receives a lesser quantity of land than that originally bound. Further, in our hypothetical concerning the payment of money for uses of land for energy-related activities, there may be no need to think in terms of a pro rata division, if the money payment obligation is cast in such a way that a specific fixed sum is owing for each wind turbine, or solar array erected on a plot of land.

The persuasiveness of Professor Powell on this point is corroborated by the fact that the law of covenants and servitudes shares much, as will be addressed below in greater detail, with the law of easements—as both are incorporeal hereditaments, non-possessory interests in the lands of another.[36] And, under the principles governing that latter body of law, good reason exists to believe that, when a larger section of land transferred to another is fastened with the burden of bearing an easement by reservation or exception in favor of

under that branch for holding the doctrine inapplicable not just to situations in which a different quality of estate is involved in the devise or conveyance, but also in which a different quantity of land would pass than under descent itself. *See id.* at 153.

32. *See id.* at 154–59.

33. *Cf.* JON BRUCE AND JAMES ELY, JR. CASES AND MATERIALS ON THE MODERN LAW OF PROPERTY 375 (6th ed 2007) (indicating transfer of a different type of estate can cause complications in the runnability of a covenant, due to questions of whether adequate vertical privity exists).

34. *See* RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY 731 (abridged ed. 1968).

35. *Id.*

36. *See infra* notes 50–53 and accompanying text.

the transferor, and then that land is later subdivided, successors-in-interest to relevant portions of the larger originally burdened land are to be held subject to the easement rights of the entity in possession of the dominant estate.[37] Presumably, the conveyance of the originally burdened larger section of land would be listed as of record as being subject to the retained easement. Successors to lesser portions of the affected land would therefore be on notice of the easement. Yet even in the event there is no record of the easement's burden, there are other factual circumstances that could serve equally as well to put successors-in-interest on actual or inquiry notice of the burden, thereby assuring they remain just as subject to the easement as the original servient landowner would have been had lesser portions never been carved from the larger holding.[38]

With the preceding in-mind, there is a distinct, yet somewhat related matter that bears comment. As already observed, though it might be argued that the law should not favor the runnability of burdens when a successsor-in-interest to the original purchaser and promisor takes an estate in land of lesser quality than received by the promisor, there appear no qualms regarding runnability when a successor taking an estate of the same quality has been transferred simply a lesser quantity of land than taken at the obligation's outset. In contradistinction to this, the matter presently deserving comment has to do with the fact that, irrespective of whether a lesser quantum of land is transferred to a successor, or an estate of lesser quality is transferred, whenever a transfer has taken place, it may be wondered whether the original promisor (or any successors intervening between the original

37. Obviously, it would be much more onerous to hold that the owner of the servient estate subject to an easement would have to bear the effects of additional usage arising from a subdivision of the dominant estate. Yet courts have seen fit to so rule, as long as the additional usage resulting from such subdivision does not unreasonably increase ("surcharge") the burden on the servient land owner, *see, e.g.*, Cushman Virginia Corp. v. Barnes, 129 SE 2d 633, 640 (Sup. Ct. Va. 1963) (holding that subdivision does not, in and of itself, prove to increase unreasonably the burden borne by the servient land owner). In view of that fact, it would appear sensible to assume that, as long as those taking portions of a larger tract of land subjected to an easement have notice of the easement's existence, then that they take only a portion of the larger land across which such an easement runs should in no way prevent them from being subject thereto. If a servient land owner must bear some burden of increased easement usage associated with a subdivision of a dominant tenement, and a taker of the entirety of a servient estate must bear the undoubted burden of an easement running completely across its land, how is it possible that a transferee of a subdivided portion of land across which an easement runs can be said unbound by burdens inherent in that easement? For a decision not directly reaching that point, but certainly intimating it in regard to a covenant or servitude, *see* Moseley v. Bishop, 470 N.E. 2d 773 (Ct. of App. Ind. 1984) (promise to maintain a drain servicing a dominant estate running across an adjoining land owner's servient estate, with portions of the latter being subdivided into sixteen lots all passed to separate transferees, the original servient estate owner, transferor, and its successors retaining ownership of all portions of the lot where the drain was located). In considering the question of whether a successor-in-interest to the original servient estate owner continued to be burdened by that drain maintenance promise, the court held the promise not applicable to the owners of the sixteen other subdivided lots, presumably because the drain itself did not cross their properties, but only that held by the successor to the original promisor. *See id.* at 778 (stating that that trial court was correct in holding the maintenance promise "does not affect the other [sixteen] defendants' propert[ies]"). For a similar case, *see* Jackvony v. Poncelet, 584 A. 2d 1112 (Sup. Ct. R.I. 1991) (grantor of an easement across land grantor retains later subdivides that burdened land with court acknowledging transferees of affected subdivided lots remain subject to the easement's burden). The principal issue in that case, however, revolved around whether the owner of the dominant tenement, in entering into an earlier partial release arrangement effected a release of its entire easement interest.

38. *See* Sluyter v. Hale Fireworks Partnership, 262 SW 3d 154 (Sup. Ct. Ark. 2007) (for the notion that unless there exists termination by its express terms, or release, or merger, or prescription by the servient estate, or conveyance of the servient estate to one having no actual, constructive, or inquiry notice, termination of the burden of an easement is difficult to demonstrate).

promisor and the successor-in-interest eventually looked to for the promised money payment) may have a form of continuing liability? In other words, in the event an original promisor has transferred the burdened land away, is the party anticipating that it will be the beneficiary of the promised payment in any sort of position to be able to select against whom it will proceed, including, possibly, the original promisor, intervening transferees of the land, or the entity in whose hands the land now resides? Restated, once one has taken land burdened by a running promise to pay money, does the original promisor and the subsequent taker remain potentially liable even after the land of concern has been subsequently transferred to a new successor-in-interest?

By one theory, the initial purchaser of the land burdened by the promise to make the money payment would seem always to be liable on the basis of contract.[39] With a promise taken on by an initial purchaser, privity of contract is extant, and the passage of the land between that purchaser and the seller establishes privity of estate as well. Unless the terms of the contract from which the promise arose provided expressly, or by implication, that the initial purchaser's commitment regarding payment terminated upon the relevant land being transferred to a successor-in-interest, the refusal of a successor to make the requisite payment would appear to leave the initial purchaser vulnerable on the basis of their continuing contractual privity. Especially would this seem to be the case in a situation in which the payment obligation were activated by the initial purchaser undertaking the triggering event (i.e., the energy-related use) while the property were under the title and ownership of one who had taken by way of a subsequent follow-on transfer. Whether this would also be the case in the event it were a successor-in-interest, and not the original purchaser, who executed the identified energy-related activity, would seem to turn on consideration of a couple of important factors. The first would be whether the specific wording of the original promise itself was encompassing enough to hold the initial purchaser upon the acts of another. And the second, whether it would seem fair, in light of whatever wording does appear regarding the promise, and in light of the fact that continuing liability might have the effect of discouraging the making of otherwise socially beneficial promises, to hold the initial purchaser responsible for acts of one not under its control and executed on lands in which that purchaser no longer holds any interest. One such instance in which continuing liability would have a certain appeal would involve an initial purchaser engaging in conduct triggering the payment obligation and then immediately attempting to off-load that obligation by transferring the concerned land to another.

Some jurisdictions have adopted statutes impeding the possibility of continuing liability. Most such statutes turn on rejecting liability when based simply on the fact of one having had land subject to a burden capable of running.[40] Further, though exceptions based

39. For a case in which this sort of result was reached, see Grange Co. v. Simmons, 203 Cal. App. 2d 567, 573 (Cal. Dist. Ct. App. 1962) (holding the original promissor and its later grantee to the terms of a covenant, in part because of the original promissor's fraudulent behavior vis-à-vis its later grantee). *See also* London Cnty. Council v. Allen, L.R. (1914) 3 K.B. 642 (Ct. of App. 1914) (noting, in dictum, that, in a dispute between a covenantee and the successor to an original covenantor who had made certain promises violated by the successor regarding the use of property, "[i]t is clear that the covenantee may sue the covenantor himself though the former has parted with the land to which the covenant relates").

40. *See, e.g.*, CAL. CIV. CODE § 1466; S.D. CODIFIED LAWS § 43-12-5 (2010); N.D. CENT. CODE § 47-04-29.

on other unusual circumstances exist, the case law generally suggests that in many instances where continuing liability is raised courts are not inclined to establish such on the part of the initial purchaser.[41] However, both the statutes addressing this matter, and the slim case law that appears, are susceptible to the possibility of continuing liability in the event surrounding circumstances so warrant.

A slightly more equivocal answer would have to be given as to whether the party expecting to benefit from the promised money payment is merely left in a position of selecting from among several potential entities against whom it may choose to proceed. Certainly, by its very nature, as a transfer of the burdened land results in someone other than the original purchaser undertaking the energy-related activity that serves to trigger the payment obligation, it makes most sense to understand the party undertaking the activity as being the one that initially should be looked to for payment. As noted in the preceding paragraph, however, that does not mean there is a complete absence of potential liability on the part of the initial promising purchaser. Barring appropriate language in that party's contract, their liability would always obtain. What it does mean, however, is that the successor-in-interest undertaking the triggering activity is the one that is to be looked to at the outset.

Concerning potential liability for intervening successors-in-interest after they have divested themselves of the burdened land, it would seem that as long as they themselves undertook none of the relevant energy-related activities during their period of ownership, they should not be looked to for payment triggered by the activities of their own successors. It is that successor party that has primary liability. The original purchaser who has made the promise remains liable on the basis of their specific contract for payment, but if there is to be any possibility of viewing an intervening successor-in-interest as even secondarily liable for payment triggered by energy-related activities of its own successor, such would have to rest on some conception akin to that of how an "assumption" of a mortgage (as opposed to taking "subject to" a mortgage) establishes continuing liability on the part of intervening holders of mortgaged property. Stated in another way, unless there appears some language in the original declaration of the payment obligation, or in a subsequent writing by which any and all intervening successors consent to be bound even after they have transferred the relevant land away, they should not be held to have continuing liability.

V. THE FACT THE PROMISE TO PAY IS CONTAINED IN AN INSTRUMENT SEPARATE FROM THE DEED OF CONVEYANCE

Typically, a promise burdening land taken through conveyance by one who makes the promise involves a situation in which the deed of conveyance either recites the actual promise itself or at least incorporates such by reference to an earlier instrument articulating the promise and properly recorded in the chain of title.[42] Illustrative of the typical situation

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41. *See, e.g.*, Gallagher v. Bell, 516 A.2d 1028 (Md. Ct. Spec. App. 1986); Vinson v. Meridian Masonic Temple Bldg. Ass'n, 475 So. 2d 807 (Miss. 1985).

42. Examples of the typical case where restriction is imposed at the time a deed conveyed would include:

is the classic subdivision restriction. There, it is not uncommon for the subdivision developer, who at first owns the entire subdivision, to record a subdivision plat with the accompanying promises of restriction to which each lot within the subdivision is to be subjected. Thereafter, when the already restricted lots then held by the developer are sold to individual purchasers buying within the subdivision, the deeds of conveyance cross-reference the previously established and recorded restrictions.[43] In the event someone other than your typical developer wishes to sell one or more lots they happen to own, placing the lots sold under restriction, the deeds of conveyance themselves will contain the language that obligates the purchasers to adhere to certain promises that burden the land they take. In the absence of sufficient acreage to create a subdivision, a plat with accompanying subdivision restrictions will not be filed before-hand.[44] It should be noted that, whether focus is cast on the small-scale seller or large-scale real estate developer, in both cases the promise burdening the land conveyed appears either in the instrument of conveyance, or in an earlier filing within the chain of title.

Regarding our present hypothetical involving the promise to make payments in the event of certain energy-related activities, the promise is said to have arisen by virtue of an initial Declaration or Transfer of the benefit of that promise. The Declaration or Transfer of the benefit was said to be vested in an entity created or established by an owner of lands from which an energy entrepreneur would later take a conveyance subject to the obligation to make the relevant payments in the event of undertaking on those lands specified energy-related activities. In other words, there was first the articulation in a separate instrument of a promise to pay money to an entity created or established by an owner of lands, in the event such lands were ever used for certain energy-related activities, and then a later conveyance of the lands subjected to that promise to an energy entrepreneur who would eventually use the lands concerned for the specified activities.

Clearly, our situation here differs from the situation in which a small-scale seller of a few lots of land simply inserts in the deed of transfer language of a promise obligating the purchaser of any lot to comply with some specified burden. In such a situation, there is simultaneity about both the promise and the conveyance of the land to which the promise obtains. The burden containing the promise arises at the very same time the deed executing the conveyance is drafted and passed to another. With respect to our hypothetical situation,

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Blackard v. Good, 248 P.2d 596 (Okla. 1952) (restriction prohibiting construction of animal hospital); Frey v. Poynor, 369 P.2d 168 (Okla. 1962) (restriction of no "gas station" contained in but not in earlier filed subdivision plat); Crowell v. Shelton, 948 P.2d 313 (Okla. 1997) (land not to be used for residences); Caullett v. Stanley Stilwell & Sons, Inc., 170 A.2d 52 (N.J. 1961) (restriction in deed, but court has concerns about whether it is too ambiguous to find enforceable).

43. For subdivision cases, see Sw. Petroleum Co. v. Logan, 71 P.2d 759 (Okla. 1937) (deed cross-references restriction appearing in earlier filed subdivision plat); W.P. Morton v. Clearview Homes, Inc., 324 P.2d 543 (Okla. 1958) (subdivision looks towards recorded plat and recorded restrictions, but at time of conveyance to the purchaser to be under the burden, restrictions not yet recorded—nonetheless court found purchaser to be bound because of purchaser's actual notice); McHuron v. Grand Teton Lodge Co., 899 P.2d 38 (Wyo. 1995) (though restriction subject to questions of clarity, it was contained in earlier filed subdivision plat cross-referenced in deed); Christiansen v. Casey, 613 S.W.2d 906 (Mo. Ct. App. 1981) (filed subdivision restrictions argued as binding a later lot owner, and court struggles with whether original developer, no longer holding any lots in the restricted subdivision, can sue to enforce such).

44. For such a case, see Runyon v. Paley, 416 S.E. 2d 177 (N.C. 1992). *See also Caullett*, 170 A.2d 52; *Crowell*, 948 P.2d 313.

however, the promise arises earlier, in an instrument entirely separate and distinct from the later transferred deed of conveyance. No simultaneity exists at all. The promise, resulting in the burden to which the transferee of land is subjected, appears in a far earlier and entirely separate instrument from the deed actually transferring the land. It might be thought that this difference should impair the effectiveness of the burden's money payment commitment.[45] However, a couple of reasons indicate otherwise.

First, though admittedly distinct from the small-scale seller situation, the facts of our hypothetical energy-related activity situation shares much with instances involving the typical large-scale subdivision developer. In particular, the latter involves promises that were, just as with the instant energy hypothetical, set out earlier and contained in, or accompanying, a filed subdivision plat. Little appears in the later drafted and transferred deed of conveyance about the promises, other than a cross-reference to their existence in the official filings in the land records. Yet, in spite of the complete separation between the earlier instrument containing the land-burdening promises, and the later transferred deed of conveyance, questions have never surfaced about whether the earlier and separate nature of the promises compromised the legal effectiveness of such subdivision restrictions to which they gave rise. The fact the earlier and separately created promises establishing the restrictions were properly and timely recorded within the chain of title of the land concerned, and then further cross-referenced in the deed of conveyance, later transferring that same land to one sought now to be obligated, has been treated as more than sufficient to

45. For an old case in which the absence of simultaneity between the deed of conveyance and the promise to observe a certain obligation proved fatal to the contention the promise was a covenant or servitude, see Wheeler v. Schad, 7 Nev. 204 (1871), *reprinted in* JOHN E. CRIBBET & CORWIN W. JOHNSON, PROPERTY: CASES AND MATERIALS 638 (4th ed. 1978) (deed conveyed and then a few days thereafter the seller of the land enters into a commitment whereby the earlier purchaser agrees to pay half the cost of future maintenance of a dam on the conveyed property, with court holding such promise to be purely contractual, and not one rising to the level of a real covenant or equitable servitude). Interesting language from the opinion would include the language about the deed being first conveyed and then a few days later the relevant promise being contractually agreed to, and then noting that "[u]nless they constituted one instrument or transaction, it cannot be claimed that the covenants of the agreement run with the land so as to charge the grantee of the covenantor." *id.* at 639. Given that the seller in Wheeler had earlier conveyed the land to the person who would later be asserted as bound by their subsequent promise regarding partial payment of maintenance costs related to that land, the court opined: "Did the [seller] in this case have any estate in the land owned by the defendant at the time this agreement was entered into? It is not even claimed they had." *id.* at 640. As the court went on, the subsequently made promise of payment was "a mere contract," not a covenant or servitude attaching to and running with the land. What is critical to note regarding Wheeler is that it finds a fatal flaw with the attempted covenant or servitude because of the absence of what we have earlier referenced as "horizontal" privity. *See supra* notes 19–20 and accompanying text.

Traditionally, the requirement of "horizontal privity" meant that there either had to be a continuing relationship between a transferor and transferee (i.e., a landlord and tenant relationship) or a least a promise (i.e., covenant) made at the very instant that a conveyance of land was made to the promisor. Under such a test, it is obvious that the gap in time of the few days involved in Wheeler between the conveyance of the deed and the making of the promise to pay maintenance costs would fail to satisfy the horizontal privity requirement. Modernly, however, courts are not so strict in insisting on so-called "instantaneous" privity. Indeed, there is some authority for the view that one need not even worry about any sort of "horizontal" privity when the question that arise concerns simply the running of the benefit side of a covenant. *See, e.g.*, City of Reno v. Matley, 378 P.2d 256 (Nev. 1963); 3 HERBERT TIFFANY, THE LAW OF REAL PROP. § 849 (3d ed. 1939). The same relaxed attitude, though, would not obtain in the context of a question about the running of the burden side. Further, it would seem enough, even in the absence of privity of an "instantaneous" sort, if a promise were made in the context of, or in relation to, a conveyance of an interest in land, whether shortly before or shortly after the actual passage of the deed itself. After all, in the event that such a promise were properly recorded within the chain of title of land which, like in Wheeler, had been earlier conveyed, then anyone searching the chain of title in contemplation of a purchase of the property that had been fixed with that promise would have notice thereof.

eliminate questions of its enforceability. Since both the subdivision and the energy situations involve instances where the earlier and separate promises serve initially to obligate even the very entity creating the promises, that entity actually holds the relevant land when the promises are made, and the land burdened by those promises is then later passed to one succeeding to the original owner,[46] the fact the subdivision situation has been seen as enforceable indicates the same results obtain in connection with our energy hypothetical.

A second reason to discount the significance that the promise involved in our hypothetical energy situation arises earlier, and in a separate instrument than the deed conveying the subject property, concerns the implication flowing from viewing it otherwise. For instance, if it were to be said that the absence of simultaneity between the making of the promise creating the payment burden and the formal conveyance of the deed transferring the subject land somehow impaired the ability of the promise to be legally enforced, that would result in an entity against whom enforcement was sought being able to shake off an obligation of which it otherwise had indisputable and unequivocal notice.[47] In purchasing the subject land, the purchaser, and all successors-in-interest, must be charged with knowing what a search of the documents in the recorder's office would reveal. So long as the earlier and separately provided for Declaration or Transfer instrument enunciating the promise to pay connected to energy-related activities is properly recorded, any taker of an interest in land to which such attaches must be viewed as fastened with notice of that promise.[48] Further, given that the recorded promise burdening the land of concern is even explicitly and conspicuously referenced in the actual deed conveying the subject land, to allow that deed's recipient to escape that promise would have the effect of rendering nugatory all but the most elaborately detailed and specified of burdens expressly listed in the operative deed. Not only would this defeat the kind of known payment obligation involved in our energy hypothetical, it would also challenge the enforceability of long-enforced and fully recognized subdivision restrictions. As noted, these arise from recorded declarations,

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46. This is a highly significant point to make in regard to how both the energy hypothetical, and the subdivision restriction situations contrast with the facts of Wheeler v. Schad, 7 Nev. 204 (1871). In that case, a deed to property was passed to one who later was asserted to be the promisor on an obligation to make partial payments on a maintenance commitment associated with the land they had earlier taken. In the context of such a situation, it is clear that the land that could serve as the object to which the burden of the promise could attach, was no longer in the hands of the earlier conveyor. While with respect to both the energy hypothetical and the situation of subdivision restrictions, the land to which the promise could attach was still in the hands of the eventual conveyor. As a consequence, when the eventual conveyor in the hypothetical, or the developer in the case of the subdivision restrictions, extracts the particular promise from one who will become a purchaser and conveyee, there is land in the eventual conveyor's hands that will pass to the conveyee that is capable of supporting the promise the conveyee makes. While it is correct to state that a promise made even after one has taken lands (as in *Schad*) is enforceable, enforcement generally must be sought in contract, and not in property law. A promise made relative to the lands that one then holds, but later conveys to another (the energy hypothetical or subdivision situation), or a promise made in connection with a conveyance of lands to another, see *supra* note 36 and cases cited therein, can witness enforcement in property law, with all of its attendant consequences under the law of real covenants and equitable servitudes.

47. Stressing the role of "notice" in the enforcement of restrictions or promises, *see* Crowell v. Shelton, 948 P.2d 313, 316 (Okla. 1997) (stating that "one who takes with notice of a restriction affecting it cannot equitably refuse to abide by that restriction").

48. The situation in the energy hypothetical would involve one who owns land they are to subsequently convey to another fixing their own land with a recorded burden, and transferring or declaring that the benefit of such (i.e., the receipt of money payment) is in the hands of a separate legal entity the owner has created. Timely and proper recordation of the instrument of transfer or declaration—which both designates who is entitled to invoke the benefit, and establishes the burden that gives rise thereto—provides the basis for either constructive or actual notice on the part of all those who, in the future, may take an interest in the burdened lands.

created in an instrument entirely separate from the conveyances that fastened particular parcels and transferees with the burden of the restrictions. It would also prove antithetical to the very notion of promises (i.e., covenants or servitudes) that exhibit the capacity to "run with the land." For to move in the direction of discounting promises that have been otherwise properly recorded, just because the deed that is said to pass them to a successor, fails to do any more than cross-reference those promises, undercuts all that the notion of "runnability" implies.

VI. IS THE "RUNNABILITY" OF THE BURDEN TO PAY IMPAIRED BY BEING CONTAINED IN AN EARLY DOCUMENT THAT BOTH TRANSFERS THE CORRESPONDING BENEFIT OF PAYMENT AND GIVES RISE TO THE BURDEN OF HAVING TO MAKE SUCH?

The preceding section focused on whether a promise to pay money in connection with energy-related activities would be unenforceable because contained in an earlier and separate instrument than the deed conveying ownership of the subject land to the entrepreneur undertaking the payment triggering activities. It cannot be emphasized strongly enough that, in the instant section, a related, but entirely distinct question is taken up. The focus of the instant section is not the significance of the fact that the promise giving rise to the payment burden is contained in an instrument that is earlier and separate from the later transferred deed. Instead, its focus is whether the payment burden created in that earlier and separate instrument has its runnability impaired by the fact the Declaration or Transfer containing it both passes a payment benefit to an entity established by the one imposing the promise, and simultaneously creates the burden of payment said to attach to certain lands. In other words, the focus in the last section was on the separation of the burden's creation from the conveyance of the land subjected thereto. While the present section, on the other hand, is focused on whether there is significance in the fact the burden arises simultaneously from an instrument that creates a benefit said to be vested in a designated entity.

In this connection, it would serve one well to recall that the two common-place illustrations utilized in the preceding section—the exaction or imposition of a promise not to put up a chain-link fence, and that to use only wood shingles when re-roofing one's home—both simultaneously establish a burden of observance on the one taking the subject land, and give rise to a corresponding benefit of aesthetic uniformity or stability. Importantly, it is the imposition of a burden on one taking land subject thereto that actually gives rise to the corresponding and concomitantly created benefit in favor of another. That is to say, when a piece of land is transferred, it is placed under a burden that gives rise to benefit for someone else. By way of contrast, our hypothetical energy-related situation involves a document—Declaration or Transfer—that is earlier and separate from the deed actually conveying the subject land, but with the creation and grant of that document's benefit, it simultaneously affixes the burden that triggers the obligation to pay. Put simply, the hypothetical differs in that it is not the transfer of a piece of land with a burden attached that gives rise to a benefit, but rather the earlier transfer of a benefit that has given rise to the burden that attaches to land that is eventually conveyed to another. In other words, our energy hypothetical sequences the burden and benefit the other way around from the more common and usual factual situations.

Despite any possible suggestions to the contrary, the fact of the energy hypothetical sequencing the burden and benefit the other way around has absolutely no deleterious or incapacitating effect on the ability of the burden to run to successors-in-interest of the original transferee of the land. There are no less than three reasons for that conclusion.

First, while it is true that such situations are not nearly as common as those where a burden is imposed on a transferee of land, with that giving rise to a corresponding and concomitant benefit in favor of another, the basic *prima facie* elements attached to a burden that is capable of running to successors-in-interest to the relevant land do not seem to require that there, initially, be a burden imposed, and only subsequent thereto a benefit should arise. As noted near the beginning of this essay,[49] when the fundamental requirements for enforceable real covenants and equitable servitudes were briefly taken-up, the keys to a covenant that runs are that the burden touch and concern the land, that it be intended to run, that there be notice of the burden on the part of the party sought to be obligated, and that there be the requisite "privity." With the exception of not having to show "privity," the same keys to runnability obtain in regard to servitudes. In the event it can be demonstrated that the necessary elements of the *prima facie* case exists, the burden is said to pass to successors-in-interest to the land. Nothing requires that some additional requisite of a benefit arising from an initially established burden also be demonstrated. There is no directive mandating that a particular ordering in the sequence of the benefit and burden somehow be established. It is more than sufficient that there be a burden arising from an initially established benefit.

Second, there is the fact that the law of covenants and servitudes shares much with the law of easements, as both are so-called incorporeal hereditaments, non-possessory interests in the lands of another.[50] Without getting into great detail about the particulars of easements, just like covenants and servitudes, they too can arise by virtue of a grant or conveyance from one entity to another.[51] Thus, a person vested with title to a particular piece of land may convey to a transferee a right to use some specified portion of that land—for ingress or egress—to access an adjoining property that the new easement holder may own. Plainly, in such a case, the transferor or grantor of the easement is creating a benefit in favor of the new easement holder. That easement beneficiary is now entitled to exercise a non-possessory use right that had not previously existed in the transferee. Through the initial grant of that benefit to the easement holder, a corresponding burden arises on behalf

49. *See supra* Part II.

50. For Oklahoma cases endorsing this position, see O'Neil v. Vose, 145 P.2d 411 (Okla. 1944); Vranesevich v. Pearl Craft, 241 P.3d 250, 253 (Ok. Civ. App. 2010); Goss v. Mitchell, 259 P. 3d 886, 891 (Ok. Civ. App. 2011). On the relationship of covenants and servitudes to easement, *compare* Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177 (1982) *and* Susan F. French, *Towards a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982) *with* Lawrence Berger, *Unification of the Law of Servitudes*, 55 S. CAL. L. REV. 1339 (1982), *and* Lawrence Berger, *Integration of the Law of Easements, Real Covenants and Equitable Servitudes*, 43 WASH. & LEE L. REV. 337 (1986). *See also* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 470 (3d ed. 2000) (noting that covenants are first cousins to easements appurtenant).

51. Easements, it will be recalled, can also arise by implication from quasi-easements, and by way of prescription through hostile or adverse activity. *See generally* 2 AMERICAN LAW OF PROPERTY §§ 8.1-8.108 (A. James Casner, ed. 1952); 3 HERBERT TIFFANY, THE LAW OF REAL PROP. §§ 756–847 (3d ed. 1939); STOEBUCK & WHITMAN, *supra* note 50, at 435–69.

of the owner of the affected land to permit the easement holder to exercise the rights involved. The benefit and the burden of easements by grant are almost always created in precisely the way described. Questions never arise about the enforceability of such easements against successors-in-interest to the burdened (or servient) property, as long as the successors have notice of the easement's existence, and nothing indicates the easement itself was to somehow end in the event the servient land were ever transferred to another.[52] In light of the fact that covenants and servitudes are in the nature of easements, the refusal to draw into question the enforceability of easements by grant when the burdened land has passed into the hands of a successor indicates the exact same kind of approach should be taken in connection with covenants and servitudes in which it is the initial granting of a benefit that gives rise to a corresponding burden. If it is commonplace for easements, under appropriate circumstances, to be enforced against a successor to the servient land, then there should be no problem with a successor-in-interest to servient land being subjected to a covenant or servitude arising from the Declaration or Transfer of a benefit of the payment of money.[53]

Third, and finally, the 2002 decision in the case of *Beattie v. Grand River Dam Authority* (GRDA)[54] would seem to provide corroboration of that second point. This suggests itself as perhaps the most compelling reason for viewing as irrelevant the fact of the burden imposed preceding the concomitant benefit, or the benefit preceding the burden. *Beattie* involved a situation in which the federal government, as owner of certain lands in the vicinity of the Grand River in northeastern Oklahoma, granted the GRDA various easements on those lands, retaining the right as the servient landowner to require relocation of the easements, should future conditions necessitate. Thereafter, the government conveyed the particular servient lands to Beattie and others, indicating in the quitclaim deeds transferring ownership that the GRDA held the dominant easement rights, but those rights were subject to possible relocation requirements. A series of court cases then raised the question of whether Beattie and the other servient landholders could exercise the relocation rights the federal government had retained in the original easement grant.[55] *Beattie* proceeded to

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52. On the runnability of the burden of an easement, see, e.g., Corbett v. Ruben, 290 S.E.2d 847, 850 (Va. 1982) (The document creating the easement was "signed, acknowledged, sealed, and recorded by the grantors. Thus, the title Corbett [the servient land owner] acquired was burdened by the easement, an encumbrance he accepted with constructive, if not actual, notice.).

53. It should also be noted that the energy-related hypothetical is not a situation in which one Declares or Transfers a benefit without then having an interest in the land to which the corresponding burden is to attach. Just like in the easement recounted in the text above, though the first step is to grant a benefit (rather than subject one to a burden that gives rise to a corresponding benefit), that benefit necessarily involves land held by the benefit's declarant or transferor, immediately burdening the land with which the benefit is associated. This observation is extremely important, for problems would clearly arise in regard to both the law of easements and that of covenants and servitudes in the event one were to attempt to grant an easement, or the benefit accompanying a covenant or servitude, before even having an interest in lands sought to be affected. While easements may generally be described as "non-possessory use interests in the lands of another," the other to which that description refers is the entity said to be the interest holder in the land subjected to the easement. Similarly with regard to covenants and servitudes. If they be described as "non-possessory interests in the lands of another," as they often are, the other referenced is the holder of the land burdened by the affirmative or negative obligation inherent therein. By no stretch of the imagination does either of these quoted descriptions suggest one can create an easement or covenant or servitude in lands in which they have no interest—lands of another.

54. Beattie v. State ex rel. Grand River Dam Auth., 41 P.3d 377, 384 (Okla. 2002).

55. *Id.* at 380–81.

the Oklahoma Supreme Court on the technical issue of whether the matter should be determined on a motion for summary judgment.[56]

The *Beattie* case is of most interest here, however, not for its specific holding on the matter of summary judgment, but for a couple of other reasons. To begin with, in a concurring opinion by Justice Opala,[57] it supports the notions discussed above of covenants and servitudes being non-possessory interests in the nature of easements. Beyond that, just as a factual matter, the dispute in *Beattie* involves a situation in which the grant of the benefit of easements gives rise to a burden on the part the servient owners, across whose lands such easements run; while simultaneously, the imposition of a burden incident to the federal government's retention of the right to require the easements' relocation gives rise to a benefit entitling exercise of the insistence of relocation.[58]

On the former—how covenants and servitudes share with easements the same basic non-possessory interest in the lands of another—Justice Opala diverges from the reasoning of the plurality opinion's reliance on contract law, seeing the facts better analyzed from the vantage of the law of real property.[59] Taking pains to indicate the interplay and relationship between easements and covenants and servitudes,[60] Opala notes that when the benefit of the easements for power transmission lines and other uses were granted by the federal government to GRDA, the government took on the position of servient land owners, subject to the easement rights of GRDA as holders of the dominant tenement.[61] When the servient lands were later sold to Beattie and others, his opinion indicated little hesitancy about viewing the burden of the earlier granted easements to GRDA passing along to the new transferees.[62] Opala also emphasizes that the case at hand concerns whether the benefit arising from the retention of the right to compel easement relocation is preferably analyzed as a matter of the runnability of a benefit under the law of covenants and servitudes.[63] Viewed from that perspective, he sees Beattie and the others as being potential successors-in-interest to a benefit of a right to insist on easement relocation, and GRDA as the party holding the land that is subject to the burden incident to that relocation right.[64]

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56. *See Beattie*, 41 P.3d 377.
57. *Id.* at 384–91 (Opala, J., concurring).
58. *See id.* 377.
59. *Id.* at 384.
60. Justice Opala, in fact, characterizes easements, at the very beginning of an opinion in which he focuses almost exclusively on the attributes of covenants and servitudes, as "nonpossessory right[s] to the use of land in possession of another." *Id.* at 385. Both easements and covenants and servitudes are incorporeal hereditaments, interests in lands that are not possessory, but remain inheritable. But while easements are interests in the "use" of lands, covenants and servitudes are interests which, in many cases, though not exclusively, concern how land is "not used." In light of Opala speaking in such language—language often employed by scholars and commentators sensitive to the relationships and similarities of easements and covenants and servitudes—it would not seem beyond the realm of reason to conclude he accepts that much is shared between the law of easements and that of covenants and servitudes.
61. *Beattie*, 41 P.3d at 385–86. Regarding the easements that had been granted to GRDA, Opala characterizes the United States government—and, thus, the plaintiffs who took subsequent conveyances from the government—as holders of the servient lands, with GRDA the holder of the dominant tenement. In regard to the benefit of the covenant concerning the right to insist on relocation of the easements, this made the government—and then the plaintiffs—holders of dominant estate, with the GRDA the holder of the burdened servient estate.
62. *See id.* at 385–87 (Opala references "burdened by the easement").
63. *Id.* at 390 (referencing "for the benefit of the servient estate").
64. *Id.* at 384–91 (Opala, J., concurring).

The other matter concerns GRDA's easements arising from the grant of a benefit that created a corresponding burden on federal lands later transferred to Beattie and others, while at the same time imposing the burden of a covenant or servitude on GRDA, thus creating a corresponding benefit favoring the holders of the servient land in the form of a right to insist on the easements being relocated.[65] Regarding that matter, it is instructive to reflect on the facts of the case in light of Opala's property law analysis.[66] Again, in terms of the burden of the easements, the burden certainly was capable of running to Beattie and the others who succeeded to the federal government's interest in the servient land.[67] Nothing in Opala's opinion suggests otherwise, even though it is clear the burden arose as a result of an earlier grant of the beneficial aspects of the easement.[68] Runnability was unaffected, despite the fact the burden arose only subsequent to and because of the preceding benefit. However, at the same time the burden of the covenant or servitude concerning the right to require relocation of the easements is what gave rise to the benefit which, in the instant case, Beattie, and the others were hoping to enforce against GRDA.[69] On that score, while Opala's opinion does not explicitly and directly address the matter of the relationship between easements and covenants and servitudes,[70] when it comes to the runnability of benefits and burdens under the law of covenants and servitudes, it would seem permissible to draw the inference that the order of sequencing of benefits and burdens would be seen by him as something of less than monumental significance.[71] Clearly, sequencing did not matter to him in connection with the runnability of the burden of the easements transferred by the federal government to Beattie and the others, even though the beneficial grant of the easements to GRDA occurred, conceptually, prior in time. Since covenants and servitudes share much with easements, why should it matter if, in the context of covenants and servitudes, it is an earlier benefit that gives rise to the relevant burden? It matters not, in connection with easements.

Putting this together in relation to our energy-related hypothetical, it would not matter that the very creation of the money payment burden associated with the use of conveyed land for specified energy activities was preceded by, and essentially arose from, the earlier Declaration or Transfer of the payment benefit, to an entity established by the benefit's conveyor. The capacity of the payment burden to run to successors-in-interest of the entity originally subject to the burden is not compromised as a result of it being the passage of the benefit of the payment that has given rise to the burden to make such payment. Nothing in the basic rules regarding the runnability of covenants and servitudes would suggest such. Indeed, both the principles concerning the other non-possessory interests in the lands of another—the easement—and the inferences that can be drawn from the raw facts of the *Beattie* case,[72] as viewed through the prism of the concurring opinion of Justice Opala,[73]

65. *Id.* at 377.
66. *Beattie*, 41 P.3d at 377.
67. *Id.*
68. *Id.* at 384–91 (Opala, J., concurring).
69. *Id.* at 377.
70. *But see id.* at 57–61 for what he does offer.
71. *See Beattie*, 41 P.3d at 384–91 (Opala, J., concurring).
72. *Id.* at 377.
73. *Id.* at 384–91 (Opala, J., concurring).

suggest the same conclusion. The mere fact that a covenant or servitude exists because of the benefit of such being granted, transferred, or declared first, with the burden following only as a result of the benefit, in no way impairs the ability of burden to run to successors-in-interest.

VII. CONCLUSION

What has been discussed focuses only on several of the more intricate aspects of an obligation to pay money taken on by a purchaser of land and triggered by some later energy-related use being made of that transferred land. As indicated at the outset, this essay is not intended to address some of the many other important issues such as the application of the rule against perpetuities, or the relationship of what is examined herein to the general matter of royalty payments connected to classic mineral interests. Similarly, while it is apparent that extensive attention is devoted to a variety of aspects of the law of covenants and servitudes, it is imperative to note that, since the essay's basic thrust has been concentrated on what might be described as the "burden" side of promise to pay, nothing has been offered on how the interaction between that burden and the corresponding benefit regarding payment can, in the view of some, affect the runnability of the burden to successors-in-interest of the original promisor. Without prejudging the outcome of an examination of that matter, it would serve one well to recall that some cases have suggested that a burden's runnability as a *covenant* is stopped whenever the benefit it creates is personal, while its runnability as a *servitude* might be permitted.[74]

Keeping all of that in mind, by way of wrapping-up this essay, it can be said it is more than apparent from the preceding sections that various complex areas of the law of real property are implicated by any question about holding a successor-in-interest responsible for performing on a predecessor's promise to pay money, when land taken by the predecessor and subsequently passed to the successor, winds up being used for an identified energy-related activity. Much of the pertinent law governing this subject has to do with the mysteries of the runnability of real covenants and equitable servitudes. Illustrated by the foregoing is that circumstances do indeed exist under which such successors can be found legally obligated to fulfill money payment obligations of that nature. At present, the issue of the runnability of such promises may have the most significance in the context of more traditional energy activities like the construction of oil and gas storage facilities. Nonetheless, since the reality is that, with ever-increasing demand for energy from alternative sources like wind and solar, use of more acreage for the production of energy is highly probable. Thus, raising the prospects for transfers of such acreage being accompanied by commitments from transferees to pay money in the event the property changing hands is ever used for identified energy-related activities, and thereby obligating successors-in-interest to fulfill commitments they did not personally make.

74. *See, e.g.*, Caullett v. Stanley Stilwell & Sons, Inc., 170 A.2d 52 (N.J. 1961); Lincoln v. Burrage, 59 N.E. 67 (Mass. 1901). *Contra* Streams Sports Club, Ltd. v. Richmond, 440 N.E.2d 1264 (Ill. App. Ct. 1982), *aff'd*, 457 N.E.2d 1226 (Ill. 1983).