IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*,[1]	Case No. 20-11548 (CSS)
Debtors.	(Jointly Administered)
EXTRACTION OIL & GAS, INC.,	Chapter 11
Plaintiff,	Adv. Proc. No. 20-50813 (CSS)
v.	**Re: Docket No. 1, 2, 4 and 5**
REP PROCESSING, LLC,	
Defendant.	

NOTICE OF FILING OF PROPOSED REDACTED VERSIONS OF PLAINTIFF'S COMPLAINT AND BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that, on August 17, 2020, the above-captioned debtors and debtors-in-possession (the "Debtors") filed the *Plaintiff's Motion for Entry of an Order Authorizing Plaintiff to File Under Seal Debtors' Complaint and Motion for Summary Judgment* [Docket No. 7] (the "Motion to Seal"),[2] seeking, *inter alia*, authority to file (a) the *Complaint for Declaratory Judgment* and the exhibits thereto and (b) the *Brief in Support of Plaintiffs' Motion for Summary Judgment* and the exhibits thereto under seal.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Extraction Oil & Gas, Inc. (3923); 7N, LLC (4912); 8 North, LLC (0904); Axis Exploration, LLC (8170); Extraction Finance Corp. (7117); Mountaintop Minerals, LLC (7256); Northwest Corridor Holdings, LLC (9353); Table Mountain Resources, LLC (5070); XOG Services, LLC (6915); and XTR Midstream, LLC (5624). The location of the Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

[2] Capitalized terms not defined herein shall have the meaning ascribed to them in the Motion to Seal.

PLEASE TAKE FURTHER NOTICE, that, consistent with the relief requested in the Motion to Seal, and pursuant to rule 9018-1(d)(ii) of the Local Rules of Bankruptcy Practice and Procedures of the United States Bankruptcy Court for the District of Delaware, the Debtors hereby file the attached proposed redacted versions of the Complaint with the exhibits thereto and the Brief with the exhibits thereto as Exhibits 1 and 2 respectively.

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Dated: August 17, 2020
Wilmington, Delaware

/s/ *Stephen B. Gerald*

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[3] Whiteford, Taylor & Preston LLC operates as Whiteford Taylor & Preston L.L.P. in jurisdictions outside of Delaware.

Exhibit 1

Complaint

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*,[1]	)	Case No. 20-11548 (CSS)
Debtors.	)	(Jointly Administered)
EXTRACTION OIL & GAS, INC.,	)	
Plaintiff,	)	Adversary Proceeding
v.	)	
REP PROCESSING, LLC,	)	Adv. Pro. No. 20-_____ (CSS)
Defendant.	)	

COMPLAINT FOR DECLARATORY JUDGMENT

Extraction Oil & Gas, Inc. ("Extraction") files this Complaint for declaratory judgment against Defendant REP Processing, LLC ("REP"). As the basis for its Complaint, Extraction states the following:

Nature of the Action

1. In connection with the chapter 11 cases of the above-captioned debtors and debtors in possession (the "Debtors"), this adversary proceeding seeks a declaration that certain covenants (if any) contained in the agreements between REP and certain of the Debtors do not "run with the land."

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Extraction Oil & Gas, Inc. (3923); 7N, LLC (4912); 8 North, LLC (0904); Axis Exploration, LLC (8170); Extraction Finance Corp. (7117); Mountaintop Minerals, LLC (7256); Northwest Corridor Holdings, LLC (9353); Table Mountain Resources, LLC (5070); XOG Services, LLC (6915); and XTR Midstream, LLC (5624). The location of the Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

Jurisdiction and Venue

2. The United States Bankruptcy Court for the District of Delaware has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157, 1334, and 2201. The proceeding arises from the above-captioned chapter 11 cases and seeks a declaratory judgment that certain covenants (if any) contained in the agreements between REP and certain of the Debtors do not run with the land. This is a core proceeding under 28 U.S.C. § 157(b)(2).

3. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

4. Extraction consents to the entry of a final order or judgment by this Court.

Parties

5. Debtors are debtors-in-possession in the above-captioned bankruptcy proceedings by virtue of filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1532, on June 14, 2020 (the "Petition Date").

6. Defendant REP, upon information and belief, is a Colorado limited liability company with its principal place of business in Colorado.

Factual Allegations

A. The REP Gas Gathering, Processing, and Purchase Agreement.

7. Extraction entered into a Gas Gathering, Processing, and Purchase Agreement ("REP Gathering Agreement"), dated April 16, 2019, with REP. A true and correct copy of the REP Gathering Agreement is attached as **Exhibit A**.

8. The REP Gathering Agreement "commence[d] on the Effective Date [April 16, 2019] and, unless sooner terminated . . . shall continue in full force and effect until the fifteenth (15th) anniversary of the In-Service Date . . . and year to year thereafter . . . until cancelled by

either Party upon forty-five (45) Days' written notice one to the other prior to the end of the Primary Term or any Extended Term." Ex. A at Art VII.

9. Under the REP Gathering Agreement, REP agreed it [redacted]

10. Extraction agreed that it "shall deliver and sell to REP, and REP shall receive and purchase, (i) all of Customer's Dedicated Production, subject to [certain reservations] and Customer's then in effect Firm Capacity, and (ii) Customer's Undedicated Production, on an Interruptible basis." *Id.* § 3.03.

11. The REP Gathering Agreement purported to grant "a servitude in the nature of real covenants burdening all of the Interests of Customer . . . in and to the Dedicated Properties and the Dedicated Production . . ., which covenants are (i) deemed to be covenants running with the land with respect to the Dedicated Properties and the Dedicated Production and (ii) binding on the respective successors and assigns of the Interests of Customer and its Controlled Affiliates in and to the Dedicated Properties and the Dedicated Production[.]" *Id.* § 2.01(b).

12. The REP Gathering Agreement is construed in accordance with and is governed by Colorado law, without regard to Colorado's conflict of laws provisions. *Id.* § 16.11.

13. The lands subject to the dedication are all within Colorado. *Id.* at 1 (First Recital) (reciting Extraction's interests "in the Dedicated Properties, located in Weld County, Colorado").

Claims for Relief

14. The allegations set forth above are incorporated herein by reference.

15. Under Colorado law, a covenant runs with the land only when the parties intend the covenant to run with the land and the covenant touches and concerns the land. *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 440 (Colo. App. 2016). Privity of estate is also required. *See Taylor v. Melton*, 274 P.2d 977, 982 (Colo. 1954); *Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 92 P. 290, 293 (Colo. 1907).

16. Although intent is necessary, it is not sufficient. *See Cloud v. Ass'n of Owners, Satellite Apartment Bldg., Inc.*, 857 P.2d 435, 440 (Colo. App. 1992) ("Even if there is an intent to make a covenant run with the land, the covenant must still 'touch and concern' the land, that is, it must closely relate to the land, its use, or its enjoyment.") (citing *Bigelow v. Nottingham*, 833 P.2d 764 (Colo. App. 1991)).

COUNT I
(REP Gathering Agreement – Declaratory Judgment Under 28 U.S.C. § 2201(a))

17. The allegations set forth above are incorporated herein by reference.

18. The parties dispute whether the REP Gathering Agreement creates any covenants that run with the land.

19. The REP Gathering Agreement does not create covenants (if any) that run with the land under Colorado law. In particular, Extraction's promise to deliver to REP certain amounts of gas for processing services is not a covenant that runs with the land.

20. First, the REP Gathering Agreement does not grant REP an interest in Extraction's real property sufficient to satisfy privity of estate under Colorado law. Indeed, the REP Gathering Agreement does not actually grant ***any*** interest in Extraction's allegedly burdened mineral estate. The REP Gathering Agreement grants REP no interest in Extraction's real property but rather merely "identif[ies] and delineat[es] the [parties'] contractual rights and obligations." *In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 76 (Bankr. S.D.N.Y. 2016), aff'd, 567

B.R. 869 (S.D.N.Y. 2017), aff'd, 734 Fed. Appx. 64 (2d Cir. 2018). Furthermore, any interest REP potentially has under the REP Gathering Agreement concerns only personal property. Thus, the parties never shared privity of estate and the covenants (if any) within the REP Gathering Agreement do not run with the land.

21. Second, the covenants (if any) in the REP Gathering Agreement do not "touch and concern" the land. Instead of benefitting or burdening Extraction's mineral estate, the REP Gathering Agreement benefits or burdens only the parties personally. The only interest at issue in the REP Gathering Agreement is produced gas—not real property.

22. As a result of the facts described in the preceding paragraphs, there exists a controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

23. A judicial declaration is necessary and appropriate so that Extraction may ascertain its rights and obligations regarding the REP Gathering Agreement.

24. For the foregoing reasons, Extraction is entitled to a judicial declaration that the covenants (if any) contained in the REP Gathering Agreement fail to run with the land.

25. Such a declaration serves the twin interests of judicial efficiency and cost-effectiveness by terminating the substantial and actual controversy between the parties, or resolving some part of it.[2] It will also serve a useful purpose by enabling the Court to determine

[2] On the Petition Date, Debtors filed the *Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief* [Docket No. 14], which included requested relief to reject the REP Gathering Agreement pursuant to section 365 of the Bankruptcy Code. Bankruptcy courts have expressed a preference for the simultaneous adjudication of the issues raised in this adversary proceeding with a motion to reject the underlying executory contract. *In re Sabine Oil & Gas Corp.*, 547 B.R. at 73 ("[B]ifurcating the motion to reject and further proceedings to finally resolve the underlying property law dispute is an inefficient use of judicial and private resources; it would have been far preferable for the Court to hear the two together.").

whether the REP Gathering Agreement and all obligations thereunder may be rejected under section 365 of the Bankruptcy Code.

Prayer for Relief

WHEREFORE, Extraction respectfully requests that the Court enter judgment in favor of Extraction as follows:

(a) Declaring that the covenants (if any) contained in the REP Gathering Agreement do not run with the land.

(b) Granting Extraction such other relief as the Court deems appropriate under the circumstances.

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Dated: August 14, 2020
Wilmington, Delaware

/s/ Stephen B. Gerald

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EXHIBIT A

GAS GATHERING, PROCESSING, AND PURCHASE AGREEMENT

by and between

REP Processing, LLC

And

Extraction Oil & Gas, Inc.

April 16, 2019

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Exhibit D	-	Form of Memorandum of Agreement
Exhibit E	-	Specifications

GAS GATHERING, PROCESSING, AND PURCHASE AGREEMENT

This Gas Gathering, Processing, and Purchase Agreement ("Agreement") is hereby made and entered into as of this April 16, 2019 (the "Effective Date") by and between **REP Processing, LLC**, a Delaware limited liability company ("REP"), and **Extraction Oil & Gas, Inc.**, a Delaware corporation ("Customer"). Hereinafter, REP and Customer may sometimes be referred to collectively as the "Parties" and individually as a "Party."

WITNESSETH

WHEREAS, Customer owns or Controls (i) certain Interests in and to all or a portion of the certain oil and gas leases, oil and gas and mineral leases, lands, formations, well pads, wells and hydrocarbon reserves in the Dedicated Properties, located in Weld County, Colorado, and (ii) the Gas produced and saved from the same; and

WHEREAS, REP owns and operates a Gathering System and a Plant located in Weld County, Colorado, to transport and process Gas; and

WHEREAS, Customer desires to deliver and REP desires to receive and purchase Customer's Gas into the Gathering System for transportation to, and processing at, REP's Plant on the terms and subject to the conditions in this Agreement; and

NOW, THEREFORE, in consideration of the mutual promises, covenants and agreements herein contained, the Parties covenant and agree as follows:

ARTICLE I.
DEFINITIONS

For the purposes of this Agreement, the following definitions have the meanings as set forth below:

"Access Rights." As defined in Section 6.04.

"Affiliate." With respect to any Person, any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. Any Person shall be deemed to be an Affiliate of any specified Person or entity if such Person or entity owns fifty percent (50%) or more of the voting securities of the specified Person, if the specified Person owns fifty percent (50%) or more of the voting securities of such Person, or if fifty percent (50%) or more of the voting securities of the specified Person and such Person are under common control.

"Agreement." As defined in the opening paragraph.

"Barrel." Forty-two (42) gallons at sixty (60) degrees Fahrenheit and zero (0) gauge pressure if the vapor pressure is at or below atmospheric pressure, or at equilibrium pressure if the vapor pressure is above atmospheric pressure.

"Blending Fee." As defined in Section 5.02(d).

"Btu." One British thermal unit, the amount of heat required to raise the temperature of one pound of water one-degree Fahrenheit at 14.73 psia.

"Business Day." Any day (other than a Saturday or Sunday) on which commercial banking institutions in Denver, Colorado, are generally open for business.

"Bypass Fee." As defined in Section 5.02(b).

"Claims." Any and all claims, demands and causes of action of any kind and all losses, damages, liabilities, costs and expenses of whatever nature (including court costs and reasonable attorneys' fees).

"Committed Production." The Dedicated Production and the Controlled Production.

"Component." Those hydrocarbon and non-hydrocarbon molecular constituents which are definable by industry standards and procedures. Such Components for purposes of this Agreement shall be:

N2 - Nitrogen

CO2 - Carbon Dioxide

H2S - Hydrogen Sulfide

C1 - Methane

C2 - Ethane

C3 - Propane

iC4 - Iso-butane

nC4 - Normal Butane

iC5 - Iso-pentane

nC5 - Normal Pentane

C6+ - Hexanes and Heavier Compounds

"Component Percentage." As defined in Section 11.02(a).

"Contract Year." Each period of twelve (12) consecutive Months during the Term of this Agreement, with the first Contract Year commencing on the In-Service Date, and with each subsequent Contract Year commencing on the anniversary of the In-Service Date.

"Control." The right to possess, market and sell (or to cause the possession, marketing and sale of) Gas produced pursuant to any oil, gas, and mineral lease or oil and gas lease (including any such oil, gas, and mineral lease or oil and gas lease held or owned by a third party), or pursuant

to any joint operating agreement, joint development agreement, marketing agreement or other similar contract.

"Controlled Affiliate." An Affiliate of Customer that, directly or indirectly, through one or more intermediaries, is controlled by, or is under common control with, Customer.

"Controlled Production." All Gas that is Controlled, but that is not owned, by Customer or its Controlled Affiliates (and its and their successors and assigns) and that is produced through wells located in, on, and under the Dedicated Properties, and which Customer or its Controlled Affiliates has the right to deliver to REP.

"CPI-U." As defined in Section 5.03.

"Customer." As defined in the opening paragraph.

"Customer Group." Customer, its Affiliates, its and their successors and permitted assigns, and each of their respective officers, directors, members, managers, employees, representatives, agents, and contractors and subcontractors of any tier.

"Customer's Firm Capacity." In respect of any Day, the volume (in Mcf) of Gas for which REP is obligated to provide Firm gathering and processing service to Customer hereunder. Customer's Firm Capacity is set forth in Exhibit A (and as Exhibit A may be revised or amended from time to time).

"Customer's Gas." Customer's Committed Production and the Undedicated Production.

"Customer's Theoretical Gallons." As defined in Section 11.02(b).

"Day" or "Daily." A period of twenty-four (24) hours, commencing at 9:00 a.m., Mountain Clock Time, on a calendar day and ending at 9:00 a.m., Mountain Clock Time, on the next succeeding calendar day, and "Daily" shall have the corresponding meaning.

"Dedicated Production." All Gas owned by Customer or its Controlled Affiliates (and its and their successors and assigns) on, in and under the Dedicated Properties and that is produced through wells thereon, subject to Section 2.02.

"Dedicated Properties." All Interests owned and operated by Customer and its Controlled Affiliates (and its and their successors and assigns), INSOFAR AND ONLY INSOFAR as such Interests are (a) owned on the Effective Date, and (b) are within the lands described on Exhibit C-1; *provided, however,* the term "Dedicated Properties" does not include any of the Interests described on Exhibit C-2.

"Dedication." The dedication of the Dedicated Properties and Dedicated Production to this Agreement, as set forth in Section 2.01.

"Deduction." As defined in Section 5.02.

"Default Interest Rate." The U.S. Prime Rate (as published in the "Money Rates" table of the Wall Street Journal, eastern edition) plus an additional two points (2.00%) applicable on the first Business Day prior to the due date of payment and thereafter on the first Business Day of each succeeding Month (or, if such rate is contrary to any applicable usury laws, the maximum rate permitted by such applicable laws).

"Delivery Point(s)." The Residue Gas Delivery Point or the Plant Products Delivery Point.

"Downstream Carrier." A downstream carrier, including any pipeline, truck or other means of conveyance, with respect to crude oil, Gas, or any liquid hydrocarbons derived therefrom.

"Drip Liquids." The hydrocarbon liquids formed by condensation of Gas at the Receipt Points and other locations in the Gathering System.

"Effective Date." As defined in the opening paragraph.

"EGM." As defined in Section 10.02.

"Estimated Completion Date." As defined in Section 4.04(a).

"Extended Term." As defined in Article VII.

"Facilities." The Gathering System, the Plant and appurtenant facilities.

"Firm." A level of gathering and processing service in which a customer's reserved capacity is not subject to a prior claim by another customer or class of service.

"Force Majeure." As defined in Section 14.01.

"Fuel." Gas used by REP in the operation of the Facilities to operate compressors, dehydrators, treaters and related equipment and facilities, including Gas vented, relieved or blown down from such equipment and facilities.

"Gallon." A United States gallon containing two hundred thirty-one (231) cubic inches at sixty (60) degrees Fahrenheit.

"Gas." Natural gas and casinghead gas as produced from wells classified as gas wells or oil wells.

"Gathering and Processing Fee." As defined in Section 5.02(a).

"Gathering System." REP's natural gas gathering system, which includes all pipelines, measurement facilities, compressors, dehydrators, and any treating or related facilities, buildings with contents, surface leases and rights-of-way, all of which make up the gathering system, including future additions or modifications to such gathering system.

"Governmental Authority." Any federal, state, local, municipal, tribal or other government; any governmental, regulatory or administrative agency, commission, body or other authority or entitled to any administrative, executive, judicial, legislative, regulatory or taxing

authority or power; and any court or governmental tribunal, including any tribal authority having or asserting jurisdiction.

"GPM Factor." As defined in Section 11.02(d).

"Gross Heating Value." The number of Btus liberated by the complete combustion at constant pressure of one (1) cubic foot of Gas, at a base temperature of sixty degrees Fahrenheit (60°F) and at a reference pressure base equal to 14.73 Psia, with regard to the temperature and pressure of the Gas, after the products of combustion are cooled to the initial temperature of the Gas, and after the water of the combustion is condensed to the liquid state. The gross heating value of the Gas shall be corrected for water vapor under testing conditions to the actual water vapor content of the Gas being delivered; *provided, however,* if the actual water vapor content is less than or equal to seven (7) pounds per 1,000,000 standard cubic feet of Gas, the Gas shall be deemed "dry" and no water vapor correction shall be made.

"Hazardous Substances." As defined in Section 8.03.

"Ideal Gas Laws." The thermodynamic laws applying to perfect gases.

"Interest." Any right, title, or interest in lands, wells, or leases and the right to produce oil and/or Gas therefrom whether arising from fee ownership, working interest ownership, mineral ownership, leasehold ownership, farm-out or arising from any pooling, unitization or communitization of any of the foregoing rights.

"In-Service Date." The first Day of the first Month following the date Customer's Gas first flows to the Receipt Points for gathering and processing services on the Facilities.

"Interruptible." A level of gathering service in which REP, subject to Article III, shall have the right to interrupt, curtail or suspend the receipt, gathering or delivery of Undedicated Production at any time and from time to time without any liability to Customer by reason thereof.

"Losses." Any actual loss, cost, expense, liability, damage, demand, suit, sanction, claim, judgment, lien, fine or penalty, including attorney's fees, which are incurred by the applicable indemnified Persons on account of injuries (including death) to any person or damage to or destruction of any property, sustained or alleged to have been sustained in connection with or arising out of the matters for which the indemnifying party has indemnified the applicable indemnified Persons.

"Lost and Unaccounted for Gas." Gas quantities lost (whether physically and/or by measurement) on the Gathering System other than Gas used for Fuel and shrinkage resulting from the formation of Drip Liquids.

"Mcf." One thousand (1,000) cubic feet at a pressure of 14.73 psia and a temperature of sixty degrees Fahrenheit (60°F).

"MMBtu." One million (1,000,000) Btu.

"Month." A period of time beginning at 9:00 a.m., Mountain Clock Time on the first Day of the calendar month and ending at 9:00 a.m., Mountain Clock Time on the first Day of the next succeeding calendar month.

"Mountain Clock Time." The current time in the Mountain Time Zone taking into consideration the seasonal changes back and forth between Daylight Savings and Standard time.

"New Connection." As defined in Section 4.04.

"New Connection Request." As defined in Section 4.04.

"Non-Conforming Customer's Gas." As defined in Section 8.02.

"Parties." As defined in the opening paragraph.

"Party." As defined in the opening paragraph.

"Permitted Encumbrances." (a) Liens, security interests, or encumbrances granted by Customer or the third party owner of Controlled Production to a lender that is not an Affiliate of Customer; (b) liens for taxes or assessments not yet due and delinquent or, if due, being contested in good faith; (c) materialmen's, mechanics', operators', or other similar liens arising in the ordinary course of business incidental to operation of the relevant facilities that secure amounts not yet due or delinquent; and (d) liens, security interests, or encumbrances created under operating agreements, communitization, unitization, and pooling agreements associated with the relevant facilities or by operation of law securing amounts not yet due or delinquent.

"Person." Any individual or any corporation, company, partnership, limited partnership, limited liability company, trust, estate, Governmental Authority or other entity.

"Plant." A cryogenic natural gas processing plant(s) and related facilities owned or operated by REP, including future additions or modifications of such facilities, located in Weld County, Colorado, as well as those processing facilities which may be added or deleted by REP in its sole discretion from time to time for the efficient operation of the Gathering System or the Plant; *provided* that notwithstanding anything in this Agreement to the contrary, REP, in its sole discretion and from time to time, may perform allocations under this Agreement on a single processing facility basis or on a pooled basis among any or all of the processing facilities constituting the Plants.

"Plant Delivery Point." The point of interconnection between the Gathering System and the Plant.

"Plant Products." The mixture of liquefiable hydrocarbon components ethane, propane, normal butane, iso-butane, normal pentane, iso-pentane and hexanes and heavier compounds that REP recovers and removes from Gas at the Plant.

"Plant Products Delivery Point." The interconnection between the Facilities and the Plant Products Downstream Carrier.

"Primary Term." As defined in Article VII.

"psia." Pounds per square inch absolute.

"psig." Pounds per square inch gauge.

"Receipt Points." The inlet flange of REP's Facilities at which REP receives Gas from Customer. Such locations are listed in Exhibit A, as updated and amended from time to time.

"REP." As defined in the opening paragraph.

"Representatives." As defined in Section 16.08.

"Residue Gas." The quantity of Customer's Gas measured by REP at the Residue Gas Delivery Point hereunder during any period of time.

"Residue Gas Delivery Point." The interconnection between the Facilities and the Residue Gas Downstream Carrier.

"Separation Facilities." Conventional mechanical separators, but specifically excluding any low-temperature separation equipment, absorption or adsorption facilities, and any equipment used in any other method of reducing liquefiable hydrocarbons in Gas.

"Shrinkage." The reduction in MMBtus of Customer's Gas which results from the extraction of Plant Products at the Plant.

"Special Damages." As defined in Section 15.04.

"Specifications." As defined in Section 8.01.

"TIK Imbalance." As defined in Section 3.13(b).

"TIK Period." As defined in Section 3.13(a).

"TIK Plant Products." As defined in Section 3.13(a).

"TIK Residue Gas." As defined in Section 3.13(a).

"TIK Volumes." As defined in Section 3.13(a).

"Term." The Primary Term and each Extended Term (if any).

"Third-Party Gas." As defined in Section 3.04.

"Total Theoretical Gallons." As defined in Section 11.02(c).

"Undedicated Production." All Gas, other than Dedicated Production, owned or controlled by Customer or its Affiliates, that will be delivered to and purchased, gathered and processed by REP on an Interruptible basis.

ARTICLE II.
DEDICATION

2.01 Dedication.

Subject to the terms and conditions of this Agreement, Customer hereby, irrevocably and unconditionally, and through last Day of the last Term hereunder:

(a) exclusively dedicates and commits to the performance of this Agreement the Dedicated Properties and the Dedicated Production, which includes the exclusive right to receive from, gather, and process, in accordance with the terms of this Agreement, all Dedicated Production on, in and under the Dedicated Properties that is produced or producible therefrom;

(b) grants a servitude in the nature of real covenants burdening all of the Interests of Customer, its Controlled Affiliates and its and their respective successors and assigns in and to the Dedicated Properties and the Dedicated Production (expressly including any and all rights granted by Customer to REP under Section 6.04), which covenants are (i) deemed to be covenants running with the land with respect to the Dedicated Properties and the Dedicated Production and (ii) binding on the respective successors and assigns of the Interests of Customer and its Controlled Affiliates in and to the Dedicated Properties and the Dedicated Production;

(c) exclusively commits to the performance of this Agreement the Controlled Production;

(d) agrees to deliver all of the Committed Production to the Gathering System at the Receipt Points;

(e) agrees to cause any existing or future Controlled Affiliates of Customer with Interests in the Dedicated Properties to be bound by this Agreement and to execute and ratify this Agreement; and

(f) covenants that (i) no subsequent transfer of any Interest in the Dedicated Properties or the Dedicated Production will be made without the transferred Dedicated Properties or Dedicated Production being made subject to this Agreement and (ii) at the time of any such transfer, the transferor will provide to REP the transferee's acknowledgement and ratification of this Agreement, which instruments evidencing such acknowledgement and ratification shall be satisfactory to REP in its reasonable discretion.

2.02 Existing Dedications or Commitments.

(a) Currently Owned Interests. REP acknowledges that Customer, or its Controlled Affiliates, may have Interests within the Dedicated Properties that are subject to a prior dedication or commitment for gathering and/or processing services. In the event that after the Effective Date such prior

dedication or commitment terminates or expires, then, subject to the terms and conditions of this Agreement, the Gas produced from such Interests shall automatically become Dedicated Production and included within the Dedication under this Agreement without any further actions by the Parties.

(b) Subsequently Acquired Interests. This Agreement covers any Interests that, after the Effective Date, Customer and/or its Controlled Affiliates may otherwise acquire within the Dedicated Properties.

(c) Extension and Termination of Prior Dedications or Commitments. Customer shall not extend or cause to be extended any prior dedication or commitment described in the foregoing clauses (a) and (b). In the event that at any time in the future Customer or its Controlled Affiliates has the right or reasonable ability to terminate any such prior dedication or commitment, then Customer shall promptly terminate, or cause its Controlled Affiliate to terminate, such prior dedication or commitment, and, subject to the terms and conditions of this Agreement, upon such termination, the Gas subject to such prior dedication or commitment shall automatically be included within the definition of Dedicated Production for all purposes under this Agreement without any further actions by the Parties. Nothing herein shall obligate Customer or any of its Controlled Affiliates to terminate any prior commitment or dedication to the extent that such termination would require Customer or any of its Controlled Affiliates to pay any penalty or endure any undue hardship or financial loss; *provided, however,* that Customer or its Controlled Affiliates, as applicable, shall provide REP with reasonable notice of any such termination option.

2.03 Memorandum of Agreement.

At REP's request, Customer shall promptly execute, acknowledge, deliver, and record a "short form" memorandum of this Agreement in the form of Exhibit D, which shall be placed of record in the counties in which the Dedicated Properties are located.

2.04 No Upstream Processing.

Customer agrees that Committed Production shall be delivered at the Receipt Points without the prior extraction or removal therefrom of any liquefiable hydrocarbons, except for those, if any, which may be recovered by utilization of Separation Facilities operated at ambient temperatures solely for the purpose of removing water and crude oil and not for the extraction of condensate, liquefiable hydrocarbons or other components of Customer's Gas.

2.05 Gas for Lease Operations.

Customer reserves the right to withhold from delivery, and the Committed Production does not include, Gas that (i) may be required to be delivered to a lessor under the terms of any leases, (ii) that is reasonably required for Customer's or its Affiliates' oil and gas producing operations with respect to wells within the Dedicated Propeties, or (iii) that is lost or otherwise unaccounted for upstream of the Receipt Points. Customer reserves the right to operate the wells located within

the Dedicated Properties free from any control by REP and in such manner as Customer, in its sole discretion, deems advisable, including, without limitation, the right to determine the maximum efficient rate of flow for such wells, to repair and rework such wells, to abandon such wells or terminate or surrender any Interest, and to pool, unitize, or communitize the Dedicated Properties with other Interests inside or outside of the Dedicated Properties.

ARTICLE III.
GAS RECEIPT, PROCESSING, DELIVERY AND REDELIVERY

[redacted]

3.02 Excess Service.

Notwithstanding anything in this Agreement to the contrary, REP shall not be obligated to receive, purchase, process and provide capacity for Customer's Gas in excess of Customer's Firm Capacity then in effect; *provided, however,* that REP may accept quantities of Customer's Gas in excess of Customer's Firm Capacity then in-effect, on an Interruptible basis, to the extent REP determines, in its sole discretion, that there is sufficient capacity on the Facilities for such volumes of Customer's Gas.

3.03 Deliveries.

Customer shall deliver and sell to REP, and REP shall receive and purchase, (i) all of Customer's Dedicated Production, subject to the reservations of Customer set forth in Section 2.05 and Customer's then in effect Firm Capacity, and, (ii) Customer's Undedicated Production, on an Interruptible basis.

3.04 Commingling.

Without limiting REP's obligations hereunder, Customer acknowledges and understands that REP utilizes the Facilities to receive, gather and process Gas delivered by multiple Persons (other than Customer, such Gas being "Third-Party Gas") and that all such Third-Party Gas will be commingled in the Facilities with Customer's Gas.

3.05 Gathering System and Plant Operations.

REP shall at all times be entitled to full and complete operational control of the Gathering System, the Plant and its other facilities. REP shall at all times be entitled to manage, operate and reconfigure the Gathering System, the Plant and its other facilities in its sole discretion. The Parties recognize that the gathering and processing services to be provided by REP hereunder may be interrupted from time to time, subject to the terms and conditions of this Agreement. Accordingly, and subject to the terms and conditions of this Agreement, it is agreed and understood by the Parties that the receipt, gathering, processing or delivery of Gas hereunder by REP shall be subject from time to time, to partial or total interruption for (i) safe operation of the Facilities, (ii) conditions of Force Majeure, (iii) the inability of a Downstream Carrier to accept deliveries, (iv) the inability of downstream market(s) to accept Gas, and (v) upon reasonable notice to Customer, maintenance, expansions or modifications of the Gathering System and the Plant from time to time. REP will reasonably cooperate with Customer to minimize adverse effects and interruption of service due to such causes.

3.06 Quantity Restrictions.

REP's obligation to received Dedicated Production under this Agreement is subject to the limitations and conditions set forth below:

(a) If REP is unable to receive the total volumes of Customer's Dedicated Production tendered to REP from Customer's Dedicated Properties, up to Customer's Firm Capacity, due to capacity restriction of the Facilities, or an event of Force Majeure, REP shall receive only that portion of Customer's Dedicated Production available for delivery from Customer's Dedicated Properties, up to Customer's Firm Capacity, on a best efforts basis which is ratable on a volumetric basis in accordance with the terms of Section 3.07 below.

(b) REP shall not be required to accept Dedicated Production from any well where REP reasonably believes an unsafe condition exists that is reasonably likely to result in damage to the Facilities or cause harm to human health and safety or the environment.

3.07 Curtailment.

REP shall use commercially reasonable efforts to maintain capacity of the Facilities available to Customer equal to Customer's Firm Capacity. REP may gather and process Third-Party Gas; provided that for any period during which the quantity of Gas available for delivery to the Facilities exceeds the physical capacity of the Facilities for any reason, including Force Majeure, maintenance, or operational considerations, REP shall have the right to interrupt or curtail receipts of Gas in accordance with the following:

(a) First, REP shall curtail all Gas received from customers on an Interruptible basis prior to curtailing Gas received on a Firm basis. If REP curtails Gas received on an Interruptible basis, REP shall allocate the capacity of the Facilities available to Interruptible customers among such Interruptible

customers on a pro rata basis based upon the volumes (in Mcf) tendered for delivery by such Interruptible customers.

(b) Second, if additional curtailments are required beyond Section 3.07(a) above, REP shall curtail Gas received on a Firm basis. If REP curtails Gas received on a Firm basis, REP shall allocate the capacity of the Facilities available to customers with Firm capacity (including Customer, provided that REP shall give priority during such allocation to Customer's Committed Production over Customer's Undedicated Production) on a pro rata basis based upon each such customer's ratio of its Firm contracted for capacity to the total Firm capacity contracted for on the Facilities. For the avoidance of doubt, REP shall be prohibited from oversubscribing the nameplate capacity of the Facilities with Customer's Firm Capacity or Firm service for Third-Party Gas.

3.08 Flow Rate.

To maintain maximum Facilities efficiency on a (twenty-four) 24-hour operating schedule, it is desired by the Parties to maintain a reasonably uniform rate of flow of Customer's Gas to the Facilities over each (twenty-four) 24-hour period. Accordingly, Customer agrees that it will use its commercially reasonable efforts to cooperate with REP in regulating the flow of Customer's Gas and in establishing a delivery schedule to deliver Customer's Gas at a reasonably uniform and continuous flow rate.

3.09 Imbalances.

The Parties recognize that certain Gas imbalances may occur. The Parties agree to cooperate with each other and with any interconnecting pipeline to remedy any imbalance as soon as either Party becomes aware of an imbalance.

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3.12 Delivery of Customer's Gas.

Subject to the provisions of this Agreement, Customer's Gas shall be delivered to the Receipt Point at a pressure commensurate with the operating pressure existing in the Gathering System from time to time.

3.13 Take In-Kind Right for Residue Gas and Plant Products.

(a) Customer shall have the right, upon no less than ninety (90) Days' prior written notice to REP (or as otherwise provided in Section 3.13(c)), to elect to take Customer's Residue Gas and/or Plant Products "in-kind" at the tailgate of the Plant (such volumes as to Residue Gas, the "TIK Residue Gas," such volumes as to Plant Products, the "TIK Plant Products," and the TIK Residue Gas and the TIK Plant Products are, collectively, the "TIK Volumes," and the period of such election, applicable to both or either TIK Residue Gas or TIK Plant Products, the "TIK Period"). If Customer exercises its right to take TIK Volumes in-kind, such election shall remain in effect for at least twelve (12) Months following Customer's delivery of such written notice to REP and until such time as Customer provides REP at least ninety (90) Days' prior notice of its desire to no longer take such TIK Volumes in-kind under this Agreement. During a TIK Period, Customer shall secure adequate transportation capacity or make appropriate arrangements to market such TIK Volumes downstream of the tailgate of

the Plant. If Customer fails to provide for the disposition of such TIK Volumes, REP may arrange for the disposition and sale of such TIK Volumes and REP will remit the net proceeds to Customer as provided in Sections 5.01 through 5.03. Customer is not entitled to a release from this Agreement under this Article III with respect to the delivery of TIK Volumes that is curtailed due to the failure of Customer to secure adequate transportation capacity or market such TIK Volumes downstream of the tailgate of the Plant.

(b) During a TIK Period, REP will compute the imbalance resulting from the difference between (i) Customer's share of TIK Volumes as determined under this Agreement and (ii) the amount nominated by Customer and confirmed by the applicable Downstream Carrier for Customer's account (the difference between (i) and (ii) being the "TIK Imbalance"). The Parties will use commercially reasonable efforts to minimize the TIK Imbalance and REP will secure an operational balancing agreement with the Downstream Carrier. REP will monitor, adjust, and maintain a record of all TIK Volumes nominated for delivery to the Downstream Carrier at the tailgate of the Plant and will include the TIK Imbalance in the Monthly invoice pursuant to Section 13.01.

(c) If Customer has not elected to exercise its right to take Residue Gas and/or Plant Products in-kind as provided in Section 3.13(a) and REP intends to commit Residue Gas and/or Plant Products attributable to Customer's Gas under a term sale or transportation agreement, REP shall notify Customer of all of the terms of the proposed term sale or transportation agreement and Customer shall have thirty (30) Days after receipt of such notice to elect to take such Residue Gas and/or Plant Products in-kind according to the procedure set forth in Section 3.13(a). If Customer does not elect to take such Residue Gas and/or Plant Products in-kind, REP may enter into such proposed commitment within thirty (30) Days after the end of such notice and response period, and during the term of such term sale or transportation agreement, Customer shall not have the right to take in-kind the Residue Gas and/or Plant Products subject to such commitment.

ARTICLE IV.
RECEIPT AND DELIVERY POINTS, NEW CONNECTIONS AND PRESSURES

4.01 Receipt Points.

All Customer's Gas shall be connected to flow into the Gathering System through the existing Receipt Points or to new Receipt Points as provided for in Section 4.04. REP shall bear one hundred percent (100%) of the costs and expenses associated with the connection of the Receipt Points as listed in Exhibit A to the Facilities.

4.02 Responsibility for Flow Lines.

Customer, at its own expense, shall construct, equip, maintain, and operate, or cause to be constructed, equipped, maintained and operated, all lines and facilities necessary to deliver Customer's Gas hereunder to REP at the Receipt Points, including installation and maintenance of conventional mechanical oil-gas field separators, line heaters, chokes, safety valves, pumps, dehydrators and compressors.

4.03 Receipt Pressure.

Customer shall deliver, or cause to be delivered, Customer's Gas at the Receipt Points at a pressure sufficient to enter the Gathering System at the working pressure therein from time to time; *provided, however,* in no event shall Customer deliver Customer's Gas at a pressure exceeding the maximum allowable operating pressure of the Gathering System as determined by REP. REP anticipates the maximum operating pressure of the Gathering System will not exceed 250 psig.

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ARTICLE V.
CONSIDERATION

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ARTICLE VI.
TAXES, ROYALTIES, TITLE, WARRANTIES REGARDING TITLE, RIGHTS OF WAY

6.01 Certain Taxes.

As between Customer and REP, Customer shall pay or cause to be paid any sales, transaction, occupation, service, production, severance, gathering, transmission, superfund, or excise tax, assessment or fee levied, assessed, or fixed, whether by the United States, any state thereof, or other Governmental Authority, in respect to or applicable to Customer's Gas delivered hereunder. Any taxes and statutory charges levied or assessed against Customer's properties, facilities, or operations shall be borne by Customer. REP shall bear all income taxes and any real or personal property taxes imposed on the Gathering System and Plant and any compressor facility or treating facility associated therewith. If REP incurs direct or indirect costs hereafter as a direct or indirect result of new or changed legislation or regulations regarding environmental matters including, but not limited to, carbon emissions or other greenhouse gases, associated with the operation of the Facilities, or the act, right, or privilege of gathering Gas on behalf of third parties as such service is performed hereunder by REP on behalf of Customer, or any direct or indirect costs similar in effect are imposed with respect to REP's operations hereunder, Customer shall reimburse REP for the amounts of such direct or indirect costs attributable and allocable to the Customer's Gas. Notwithstanding the foregoing, Customer shall retain ownership of and sole responsibility for any carbon emissions or other greenhouse gases contained within or removed from the Customer's Gas received by REP at the Receipt Points.

6.02 Royalties.

As between REP and Customer, Customer shall at all times have the obligation to account for and pay or cause to be paid all royalties, overriding royalties, and other sums due on production and to make settlement with all other Persons having an interest in the Customer's Gas delivered to REP hereunder. Customer shall indemnify, defend and hold REP harmless from and against all Claims arising out of or related to any adverse claims to Customer's Gas delivered to REP hereunder, and royalties, taxes, payment, or other charges due thereon or attributable thereto.

6.03 Title; Warranties Regarding Title.

Title to all Customer's Gas gathered hereunder shall vest with REP or its designee upon

delivery to the Receipt Points. Customer warrants that it will have, at the time of its delivery of Customer's Gas at the Receipt Points for gathering and processing hereunder, Control of and good title to or the full right and authority to deliver such Customer's Gas to REP for gathering and processing hereunder. Customer warrants that the Customer's Gas delivered to REP hereunder shall be free and clear of all liens, encumbrances, and claims whatsoever, subject to and except for the Permitted Encumbrances, and that it will have at such time of delivery good right and title to the Customer's Gas or the right to gather such Customer's Gas hereunder. If any claim is made challenging Customer's right to deliver the Customer's Gas to REP, REP has the right to suspend receipt or deliveries of the Customer's Gas hereunder until such issue is finally resolved to the reasonable satisfaction of REP. Title to TIK Volumes shall pass from REP and shall vest in Customer or its designee at the tailgate of the Plant.

6.04 Rights of Way.

REP shall use reasonable good faith efforts to negotiate with surface owners to obtain its own easements and other access agreements necessary for the construction and operation of the Facilities. If REP is unable to obtain access to the surface for construction and operation of the Facilities, then to the extent Customer may do so without incurring any expense or impairing its own rights, Customer hereby grants to REP, at REP's expense, at each of the Receipt Points, the right to use Customer's oil and gas leases and other interests, on an as-needed basis, for the sole purpose of constructing, installing, commissioning, maintaining, operating, testing, witnessing, and removing the Facilities and related facilities at the Receipt Point (the "Access Rights"). The exercise of these Access Rights by REP shall (a) except in cases of emergency when prior notice is not practicable, require REP to provide Customer with not less than 30 Days' prior written notice of the effective date of REP's intended access, (b) not unreasonably interfere with Customer's operations or with the owners of the surface, (c) be subject to applicable law, (d) be subject to Customer's safety and other access requirements applicable to Customer's personnel, its contractors, and subcontractors, and (e) be subject to Customer's contractual obligations with its applicable land and surface owners. REP's access to the Customer Facilities shall be at REP's sole risk, and **REP HEREBY RELEASES AND SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CUSTOMER GROUP FROM AND AGAINST ANY AND ALL CLAIMS OR LOSSES ARISING OUT OF EXERCISE OF THE ACCESS RIGHTS BY REP, ITS AFFILIATES, ITS AND THEIR SUCCESSORS AND PERMITTED ASSIGNS, OR EACH OF THEIR RESPECTIVE OFFICERS, DIRECTORS, MEMBERS, MANAGERS, EMPLOYEES, REPRESENTATIVES, AGENTS, OR CONTRACTORS AND SUBCONTRACTORS OF ANY TIER, WHETHER OR NOT CAUSED BY OR CONTRIBUTED TO BY THE NEGLIGENCE (WHETHER SOLE, JOINT, OR CONCURRENT), STRICT LIABILITY, OR PRE-EXISTING DEFECT (EXCLUDING ONLY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT) OF ANY MEMBER OF THE CUSTOMER GROUP**.

ARTICLE VII.
TERM

This Agreement shall commence on the Effective Date and, unless sooner terminated hereunder, shall continue in full force and effect until the fifteenth (15th) anniversary of the In-Service Date (the "Primary Term"), and year to year thereafter (each such year, an "Extended

Term") until cancelled by either Party upon forty-five (45) Days' written notice one to the other prior to the end of the Primary Term or any Extended Term.

ARTICLE VIII.
QUALITY

8.01 Quality Specifications.

Customer's Gas delivered hereunder shall meet the quality specifications set forth in Exhibit E (the "Specifications").

8.02 Non-Conforming Gas.

If any Customer's Gas tendered for gathering by Customer at the Receipt Points at any time fails to conform to the Specifications (such Customer's Gas, "Non-Conforming Customer's Gas"), REP may (i) refuse to accept receipt of Non-Conforming Customer's Gas until Customer has corrected the quality deficiency or (ii) blend Customer's Gas for the Blending Fee. REP's option to refuse receipt of Non-Conforming Customer's Gas is in addition to other remedies available to REP. If REP at any time accepts receipt of Non-Conforming Customer's Gas, such acceptance will not constitute a waiver of this provision with respect to any future receipt of Gas. Customer shall indemnify, defend and hold harmless REP for any Claims or Losses arising out of Non-Conforming Customer's Gas that is refused by REP pursuant to the foregoing clause (i), including physical damage to the Facilities.

8.03 Hazardous Substances.

Customer's Gas tendered by Customer for gathering hereunder shall not contain any substance that is determined to be a contaminant or a hazardous waste or substance under the Resource Conservation and Recovery Act, 42 U.S.C. Section 1857, et seq., as amended from time to time, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601, et seq., as amended from time to time, and the regulations issued thereunder, including 40 C.F.R. Parts 302 and 355, together with any other applicable environmental, health, or safety statutes (other than hydrocarbons and/or the natural constituent elements thereof) (collectively, "Hazardous Substances").

8.04 Environmental, Health and Safety Laws.

Customer warrants that, with respect to the Customer's Gas tendered at the Receipt Points, it has complied or caused others to comply with all applicable environmental, health, and/or safety statutes and regulations.

ARTICLE IX.
NOMINATIONS AND SCHEDULING

Customer shall provide REP the anticipated daily Mcfs for each Month, prior to the beginning of such Month, in accordance with REP's then effective nomination procedures. REP's nomination procedures will generally comply with the North American Energy Standards Board's nomination policies and timeline. REP reserves the right to modify its nomination procedures at

any time provided that any modification will not take effect until REP provides Customer with at least ten (10) Days written notice of such modification. The Parties shall cooperate to nominate, schedule, and control the flow of Gas so as to comply with the nomination, scheduling, and flow procedures of the Downstream Carriers.

ARTICLE X.
MEASUREMENT

10.01 Measurement Equipment.

REP shall design, procure, install, maintain and operate, or cause to be installed, maintained and operated, suitable meters and/or other necessary equipment of ample size and proper type for accurate measurement of the following:

(a) the volume (in Mcf) and Gross Heating Value of Customer's Gas delivered to the Receipt Points;

(b) the volume (in Barrels) of Drip Liquids recovered in the Gathering System;

(c) the volume (in Mcf) and Gross Heating Value of Gas that is bypassed;

(d) the volume (in Mcf) and Gross Heating Value of components of Customer's Gas delivered to the Plant for processing;

(e) the volume (in Mcf) of Fuel in the Facilities;

(f) the volume (in gallons) of Plant Products recovered at the Plant;

(g) the volume (in gallons) of TIK Plant Products that are taken in-kind by Customer, if any;

(h) the volume (in Mcf) of TIK Residue Gas that is taken in-kind by Customer, if any; and

(i) the volume (in Mcf), Gross Heating Value and components of Residue Gas.

Customer may desire, procure, install, own, operate, and maintain, at its own expense, such check measuring equipment as desired by Customer; provided, that such equipment must be installed so as not to interfere with the operation of REP's measuring equipment.

10.02 Measurement Standards.

Measurement facilities designed, procured, installed, owned, operated and maintained by REP or its designees hereunder and processing of the data obtained therefrom shall be done so in accordance with generally accepted measurement standards as prescribed in, but not limited to, the latest versions of:

(a) ANSI/API 2530, AGA Report No. 3, API 14.3, GPA 8185 "Orifice Metering of Natural Gas and Other Related Hydrocarbon Fluids";

(b) GPA 2172, API 14.5, "Calculation of Gross Heating Value, Specific Gravity, and Compressibility of Natural Gas Mixtures from Compositional Analysis";

(c) API 21 "Flow Measurement Using Electronic Metering Systems";

(d) AGA Report No. 8, API 14.2 "Compressibility Factors of Natural Gas and Other Related Hydrocarbon Gases" per "Detailed Methodology";

(e) GPA 2165 "Standard for Analysis of Natural Gas Liquid Mixtures by Gas Chromatography"; and

(f) GPA 2166 "GPA Methods of Obtaining Natural Gas Samples for Analysis by Gas Chromatography."

Where electronic gas measurement ("EGM") and flow computers are used, the Parties will use and accept the electronic derivations, measurements and calculations in lieu of mechanical recordings, chart integration and subsequent calculations. The official EGM data from the measuring equipment will remain the property of REP, or its designee, but upon request by Customer, Customer may review REP or its designee's records and EGM data, together with calculations to Customer for inspection and verification.

10.03 Measurement Factors.

As related to Gas measurement hereunder:

(a) The unit of volume shall be one (1) cubic foot of Gas at a base temperature of sixty degrees Fahrenheit (60°F) and at a base pressure of fourteen and seventy-three hundredths (14.73) pounds per square inch absolute. The atmospheric pressure shall be assumed to be a constant, determined by elevation and specific site location, regardless of the variations of such atmospheric pressure from time to time.

(b) Temperature shall be determined by use of a recording thermometer so installed that it may continuously record the temperature of Gas passing the meters.

(c) The specific gravity shall be determined by calculation from fractional analyses of proportional samples taken at REP's measurement facilities.

(d) Corrections for deviation from Ideal Gas Laws shall be made for all Gas metered hereunder as prescribed in the applicable standards.

(e) The Daily arithmetical flow weighted average recorded for temperature, the factor for specific gravity, and the corresponding correction for deviation from Ideal Gas Laws applicable during each Day shall be used to make computations of volumes hereunder.

10.04 Measurement Accuracy Verification.

The accuracy of the measurement facilities at the Receipt Points shall be verified at least once each Month. Customer shall be given reasonable advance notice and shall have the right to be present at the time of any installing, reading, cleaning, changing, repairing, inspecting, testing, calibrating, or adjusting done in connection with REP's measuring equipment hereunder. If after notice, Customer fails to have a representative present, the results of the tests shall, nevertheless, be considered accurate until the next tests are made and upon request by Customer, REP shall furnish Customer a written copy of such test results. The costs of all tests of such measuring equipment shall be borne by REP except that the costs for additional tests requested by Customer shall be borne by Customer where the inaccuracy is found to be two percent (2%) or less.

10.05 Measurement Error.

If at any time any of the measuring or testing equipment is found to be out of service or registering inaccurately in any percentage, it shall be adjusted at once to read accurately, within the limits prescribed by the manufacturer. If such equipment is out of service or inaccurate by an amount exceeding two percent (2%) at a reading corresponding to the average rate of flow for the period since the last preceding test, the previous readings of such equipment shall be disregarded for any period definitely known or agreed upon, or for a period of one-half of the time elapsed since the last test of the measuring equipment affected, not to exceed fifteen (15) Days. The volume measured during such period shall be estimated by (a) using the data recorded by any check measuring equipment if installed and registering accurately, or if not installed or not registering accurately, (b) by correcting the error if the percentage of error is ascertainable by calibration, test, or mathematical calculation, or if neither such method is feasible, (c) by estimating the quantity or quality measured, based upon deliveries under similar conditions during a period when the equipment was registering accurately. No correction shall be made for recorded inaccuracies of two-percent (2%) or less.

10.06 Customer's Right of Inspection.

At all times during business hours, Customer shall have the right to inspect measurement equipment used at the Receipt Points that is installed or furnished by REP, or its designee, and the charts and other measurement or testing data retained by REP. The reading, calibration and adjustment of all metering equipment and changing of charts hereunder shall be done only by REP or REP's designee. REP shall preserve all original test data, charts, and other similar records for a period of at least twenty-four (24) Months or longer if required by law or regulation.

10.07 Gross Heating Value Determination.

The Gross Heating Value and fractional analysis of Customer's Gas shall be determined on a quarterly basis by taking flow proportional stream samples at the Receipt Points, or any other mutually agreed point, using a spot sample. REP shall compute, or cause to be computed, the Gross Heating Value from fractional analysis of the sample. The result shall be controlling and effective in the Month succeeding the Month in which the sample is obtained.

10.08 Fractional Analysis.

Fractional analysis of test samples shall be performed by REP at the laboratory of REP's choosing, through the use of gas chromatography equipment or such other method as may be commonly used in the industry. From such fractional analysis, REP shall determine the composition in mole percent of each of the following chemical compounds: (1) carbon dioxide, (2) nitrogen, (3) methane, (4) ethane, (5) propane, (6) iso butane, (7) normal butane, (8) iso pentane, (9) normal pentane and (10) hexanes and heavier hydrocarbons. REP shall compute or cause to be computed, the Gross Heating Value, specific gravity and correction factors for deviation from Ideal Gas Laws from this fractional analysis of samples. The results from these analyses shall be applied to all subsequent deliveries until such time as new samples are obtained and analyzed. REP shall furnish to Customer each such fractional analysis and Gross Heating Value which will accompany the statement described in Section 13.01 herein.

10.09 Modifications to Measurement Procedures.

REP reserves the right to modify the measurement procedures from time to time in order to conform with the general measurement procedures prevailing for the Gathering System and Plant and/or to remove any inequities which may be found to exist, and it is agreed that any such other method adopted will be applicable to this Agreement; provided, however:

(a) REP shall give Customer at least thirty (30) Days written notice prior to any change or modification to such measurement procedures; and

(b) Any change or modification to such measurement procedures shall be consistently applied to all customers.

ARTICLE XI.
PLANT PRODUCTS AND RESIDUE GAS

11.01 Allocation of Received Gas and Customer's Residue Gas.

(a) REP shall allocate the total quantity of Gas received by REP at the Plant on each Day based upon the actual flows of Customer's Gas and Gas from all other customers to the Receipt Point and all other measurement points for Gas deliveries into the Plant on such Day.

(b) Customer's Residue Gas shall be equal to (i) the received Gas allocated to Customer in respect of such Month in accordance with Section 11.02(a), less, (ii) that quantity attributable to Lost and Unaccounted for Gas, Fuel and Shrinkage allocated to Customer pursuant to this Agreement.

11.02 Allocation of Plant Products.

REP shall allocate Plant Products as measured at the Plant Product Delivery Point each Month by Component in accordance with paragraphs (a) through (e) below.

(a) In respect of each Component, Customer's allocation in each Month shall be equal to its Component Percentage of the total actual Gallons of such Component measured at the Plant Product Delivery Point in that Month. In respect of a Component, Customer's "Component Percentage" for any Month shall mean Customer's Theoretical Gallons of such Component at the Receipt Points for such Month, as a percentage of the Total Theoretical Gallons of such Component at all receipt points (including the Receipt Points) for Gas deliveries by all customers into the Plant for such Month.

(b) "Customer's Theoretical Gallons" in respect of a Component at a Receipt Point in a Month shall be the product of (i) the total measured volume of Customer's Gas passing through such Receipt Point in such Month, multiplied by (ii) the GPM Factor for such Component at such Receipt Point for such Month.

(c) "Total Theoretical Gallons" in respect of a Component in a Month shall be, aggregated for each Receipt Point and all other Component measurement points for Gas deliveries into the Facilities in such Month, the product of (i) the total measured volume of Customer's Gas and all other customers' Gas passing through such Receipt Point or other Component measurement point (as applicable) in such Month, multiplied by (ii) the GPM Factor for such Component at such Receipt Point or other Component measurement point (as applicable) for such Month.

(d) "GPM Factor" in respect of a Component at a Receipt Point or other Component measurement point for Gas deliveries into the Facilities for any Month shall be a factor representing the gallons per Mcf of such Component, as measured at such Receipt Point or other Component measurement point during such Month.

(e) REP shall be entitled to make appropriate adjustments to the allocation methodology set forth in paragraphs (a) through (d) above to take account of any Gas flowing through the Receipt Points but not delivered for processing at the Plant.

ARTICLE XII.
FUEL, LOST AND UNACCOUNTED FOR GAS, AND SHRINKAGE

12.01 Conveyance of Rights to REP.

Subject to the terms and conditions of this Agreement, Customer does hereby grant, bargain, sell, transfer, convey and assign to REP, its successors and assigns, the right to consume Customer's Gas as Fuel, Shrinkage, and Lost and Unaccounted for Gas.

12.02 Calculation of Fuel and Lost and Unaccounted for Gas.

The thermal content of Customer's Gas that is deemed to be consumed as Fuel and Lost and Unaccounted For Gas in the Plant during a given Month shall be determined by multiplying

(i) the total quantity of Btus consumed as Fuel and Lost and Unaccounted For Gas in Facility operations during such Month by (ii) a fraction, the numerator of which is the total quantity of Customer's Gas (in MMBtus) at the Receipt Point during such Month, and the denominator of which is the total quantity of Gas (in MMBtus) received from the Customer and all other customers at the Receipt Point and all other measurement points for Gas deliveries into the Plant during such Month.

12.03 Calculation of Shrinkage.

Customer's share of Shrinkage shall be calculated by REP each Month and shall be an amount, in Btus, equal to the product of (i) the number of Gallons of each Component allocated to Customer for such Month pursuant to Section 11.02, multiplied by (ii) the Btu factor applicable to each such component as set forth in the GPA Technical Standards Publication No. 2145-03, as revised from time to time, and as adjusted to standard conditions of sixty degrees Fahrenheit (60°F) and 14.73 psia base pressure, with the aggregate Btus of all such Components constituting Customer's share of Shrinkage hereunder.

12.04 Fuel, Shrinkage and Lost and Unaccounted for Gas.

Customer shall bear one hundred percent (100%) of the Fuel, Shrinkage and Lost and Unaccounted for Gas attributable to Customer's Gas in accordance with this Article XII, which will be deducted in determining Customer Residue Gas.

ARTICLE XIII.
BILLING AND PAYMENT

13.01 Invoices and Statements and Payments.

On or before the twentieth (25th) Day of each Month, REP shall provide to Customer an invoice and statement showing, with respect to the previous Month:

(a) The volume (in Mcf) and Gross Heating Value of Customer's Gas measured at each Receipt Point;

[redacted]

(c) the volume (in Mcf) and Gross Heating Value of Customer's Gas that is bypassed;

(d) Customer's pro rata share of the volume (in Mcf) of Fuel used in the Facilities;

(e) the volume (in Mcf) and Gross Heating Value of components of Customer's Gas delivered to the Plant for processing;

(f) the volume (in Mcf) of Residue Gas and the volume (in gallons) of Plant Products purchased and sold by REP that are attributable to Customer's Gas;

(g) the volume (in gallons) of TIK Plant Products that are taken in-kind by Customer, if any;

(h) the volume (in Mcf) of TIK Residue Gas that is taken in-kind by Customer, if any;

(i) the Gathering and Processing Fee;

(j) if applicable, the Bypass Fee;

(k) if applicable, the Blending Fee; and

(l) the amount in dollars of any other fees, charges, deductions, and/or credits by REP to Customer authorized pursuant to this Agreement.

In addition, REP shall remit amounts owed to Customer, concurrently with the invoice and statement; provided, that REP may deduct from its payment to Customer any amounts due to REP from Customer under the terms of this Agreement. Customer shall cause proper settlement and accounting to be made and shall make proper distribution of proceeds to all owners of interest in the proceeds from the sale of Customer's Gas delivered to REP hereunder. CUSTOMER HEREBY INDEMNIFIES AND HOLDS REP HARMLESS OF AND FROM ANY AND ALL CLAIMS, DEMANDS, ACTIONS, CAUSES OF ACTION, COSTS, DAMAGES AND EXPENSES RELATED TO, ARISING OUT OF OR IN ANY WAY STEMMING FROM THE DISTRIBUTION OF REVENUE BY CUSTOMER OR THIRD-PARTY OWNERS OF CONTROLLED GAS TO OWNERS OF INTEREST IN ANY CUSTOMER'S GAS PROCESSED BY REP.

13.02 Billing Disputes.

If a good faith dispute arises as to any amount payable hereunder, REP shall nevertheless pay when due the amount not in dispute. Such payment shall not be deemed to be a waiver of the right by REP to recoup any overpayment. If REP withholds payment of any disputed amount as authorized herein, REP shall, within ten (10) Days after the due date of the statement for the Month to which the disputed amount pertains, submit to Customer a written explanation of the dispute and any available supporting documentation. The Parties shall then cooperate in good faith to resolve such dispute as expeditiously as possible.

13.03 Audit Rights.

Each Party or its designated Representatives shall, upon reasonable notice to the other Party, have the right, no more frequently than one (1) time per twelve (12) consecutive Months, at its own expense, at reasonable times and during normal business hours, to examine the books and records of such other Party to the extent necessary to verify the accuracy of any statement, charge, computation, or demand made under or pursuant to this Agreement. Each Party agrees to keep

records and books of the account in accordance with generally accepted accounting principles and practices in the industry. Each invoice and statement shall be final as to both Parties unless questioned in writing within twenty-four (24) Months following such invoice and statement.

13.04 Setoff and Recoupment.

Notwithstanding anything in this Agreement to the contrary, upon the occurrence of an event of default on the part of Customer, REP shall have the right, in its sole discretion and without limiting any other rights and remedies, to undertake any one or all of the following actions: (a) REP may exercise recoupment by retaining, freezing, holding, and/or liquidating Customer's Gas in the possession of REP (or any proceeds held by REP from the sale thereof), or any other substance or amount that would be otherwise deliverable or payable to Customer under this Agreement to satisfy and apply to any amounts owed by Customer under this Agreement or applicable law as of the time of such recoupment or at any later time; and/or (b) REP may exercise set off by retaining, freezing, holding, and liquidating Customer's Gas or any other substance or amount that would be otherwise deliverable or payable to Customer under this Agreement as a setoff or offset against any amounts that are due or may become due from Customer to REP under this Agreement or applicable law as of the time of the setoff or offset or at any later time. Should REP elect to exercise its rights under this Section 13.04, REP shall notify Customer in writing, within ten (10) Days after such recoupment, setoff, and/or offset; *provided, however,* REP shall not be required to provide Customer with any advance notice whatsoever before exercising the rights of recoupment, setoff, and/or offset as set forth herein. Customer does hereby agree to (i) a lifting of the automatic stay in bankruptcy under 11 U.S.C. § 362 and other applicable law to the extent necessary to allow for the recoupment, setoff, and/or offset provided for under this Agreement and (ii) not oppose a motion by REP seeking authority to do same. Each Party further agrees that, without limiting the scope of any recoupment that may be exercised under the terms of this Section 13.04, that any recoupment exercised as provided for herein shall be considered to be within a single transaction. The rights granted to REP pursuant to this Section 13.04 are in addition to any rights of recoupment, setoff, and/or offset to which REP may be otherwise entitled.

13.05 Breach.

In the event that either Party materially breaches this Agreement (other than any failure to accept Customer's Gas, which is addressed in Article III), and fails to remedy such breach within thirty (30) Days after receipt of written notice of such breach from the non-breaching Party, then the non-breaching Party shall have the right, at its election, to terminate this Agreement by providing written notice of such termination to the breaching Party (with such termination effective as of the date such termination notice is received by the breaching Party); provided, that such termination shall not release either Party from obligations accruing under this Agreement prior to the date of such termination.

ARTICLE XIV.
FORCE MAJEURE

14.01 Suspension of Obligations.

(a) Subject to Section 3.11, if either Customer or REP is rendered unable, wholly or in part, by reason of Force Majeure, from carrying out its obligations under this Agreement (other than the obligation to make payment of amounts due hereunder), then upon said Party's giving written notice and reasonably full particulars of such Force Majeure to the other Party, which shall be done as soon as reasonably practicable after the occurrence of the cause relied on, the obligations of the Party giving such notice (other than the obligation to make payment of amounts due hereunder), so far as they are affected by such Force Majeure, shall be suspended during the continuance of any inability so caused, but for no longer period, and such cause shall be remedied with all reasonable dispatch.

(b) The term "Force Majeure," as used herein, shall mean acts of God, strikes, lockouts or industrial disputes or disturbances, civil disturbances, arrest and restraint of rulers or people, interruptions by government or court orders, administrative or legislative proceedings, necessity for compliance with any present and future valid orders of court, or any law, statute, ordinance or regulation promulgated by any governmental or regulatory authority having proper jurisdiction, acts of the public enemy, wars, riots, blockades, insurrections, including inability to secure materials by reason of allocations promulgated by authorized governmental agencies, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, inclement weather which necessitates extraordinary measures and expense to construct facilities or maintain operations, explosions, partial or entire failure of Gas supply, electric power shortages, breakage or accident to machinery or lines of pipe, freezing of wells or pipelines, inability to obtain or delays in obtaining any easements, rights-of-way or permits (in each case only to the extent that the claiming Party used (and continues to use) all commercially reasonable efforts to obtain such easements, rights-of-way or permits), the shutting in of facilities or the making of non-routine repairs, alterations or maintenance to wells, pipelines or plants, and any other cause, whether of the kind herein enumerated or otherwise, not reasonably within the control of the Party claiming Force Majeure and unable to be prevented or overcome by such Party by the exercise of due diligence.

14.02 Strikes.

The settlement of strikes or lockouts shall be entirely within the discretion of the Party having the difficulty. The requirement that any Force Majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of the opposing party, when such is deemed inadvisable in the discretion of the Party

having the difficulty.

14.03 Interruption of Operations.

Subject to Section 3.05, either Party may, without liability to the other Party, interrupt the operations of its facilities for performing inspections, pigging, maintenance, testing, alterations, modifications, expansions, connections, repairs or replacements, but such interruption shall be for only such time as may be reasonable. The Party interrupting its operations shall give the other Party advance written notice, except in case of emergency, of its intention to interrupt operations and of the estimated time thereof. The foregoing shall not relieve either of the Parties of any obligation to make payment of amounts due hereunder.

14.04 Exceptions.

Neither Party shall be entitled to the benefit of the provisions of this Article XIV under any of the following circumstances:

(a) To the extent that the failure was caused by the Party claiming suspension having failed to remedy the condition by taking all commercially reasonable acts, short of litigation, if such remedy requires litigation, and having failed to resume performance of such commitments or obligations with reasonable dispatch; or

(b) If the failure was caused by such Party's lack of funds, or with respect to the payment of any amount or amounts then due hereunder.

ARTICLE XV.
CONTROL AND POSSESSION; INDEMNITY

15.01 Control and Possession of Customer's Gas.

As between Customer and REP, Customer shall be deemed to be in control and in possession of the Customer's Gas upstream of the Receipt Points, and with respect to TIK Volumes, following the redelivery to Customer or its designee of such Plant Products or Residue Gas, as applicable, at the tailgate of the Plant, and shall be responsible for any Claims or Losses caused thereby while the Customer's Gas is in its control and possession. As between Customer and REP, REP shall be deemed to be in control and in possession of the Customer's Gas at and downstream of the Receipt Points, and with respect to TIK Volumes, upstream of the tailgate of the Plant, and, except as provided in Section 8.02, shall be responsible for any Claims or Losses caused thereby while the Gas is in its control and possession.

15.02 REP Indemnity.

REP COVENANTS THAT IT WILL RELEASE, INDEMNIFY, AND HOLD HARMLESS CUSTOMER GROUP FROM AND AGAINST ANY AND ALL CLAIMS OR LOSSES ARISING OUT OF OR RELATED TO: (I) REP'S OPERATION OF ITS FACILITIES AND (II) THE BREACH BY REP OF ANY REPRESENTATION OR WARRANTY OR COVENANT OR AGREEMENT MADE BY REP HEREUNDER.

15.03 Customer Indemnity.

CUSTOMER COVENANTS THAT IT WILL RELEASE, INDEMNIFY AND HOLD HARMLESS REP FROM AND AGAINST ANY AND ALL CLAIMS OR LOSSES ARISING FROM OR RELATED TO: (I) CUSTOMER'S OPERATION OF ITS FACILITIES, AND (II) THE BREACH BY CUSTOMER OF ANY REPRESENTATION OR WARRANTY OR COVENANT OR AGREEMENT MADE BY CUSTOMER HEREUNDER.

15.04 Limitation of Liability.

NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY EXEMPLARY OR PUNITIVE DAMAGES OR ANY SPECIAL, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES OF ANY CHARACTER, INCLUDING LOSS OF USE, LOST PROFITS OR REVENUES, COST OF CAPITAL, OR CANCELLATION OF PERMITS (COLLECTIVELY, "SPECIAL DAMAGES") ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ANY BREACH THEREOF, IRRESPECTIVE OF WHETHER CLAIMS FOR SUCH DAMAGES ARE BASED UPON CONTRACT, WARRANTY, NEGLIGENCE, STRICT LIABILITY OR OTHERWISE; PROVIDED, HOWEVER, THAT THE FOREGOING SHALL NOT LIMIT ANY OBLIGATION OF EITHER PARTY UNDER THIS AGREEMENT TO INDEMNIFY THE OTHER PARTY AGAINST CLAIMS ASSERTED BY THIRD PARTIES, INCLUDING SPECIAL DAMAGES CLAIMED BY SUCH THIRD PARTIES. THIS SECTION 15.04 SHALL APPLY NOTWITHSTANDING THE SOLE, JOINT OR CONCURRENT NEGLIGENCE, FAULT OR RESPONSIBILITY OF THE PARTY WHOSE LIABILITY IS LIMITED BY THIS PROVISION, OR ANY OTHER EVENT OR CONDITION, WHETHER ANTICIPATED OR UNANTICIPATED, AND REGARDLESS OF WHETHER PRE-EXISTING PRIOR TO THE DATE OF THIS AGREEMENT.

ARTICLE XVI.
MISCELLANEOUS

16.01 Customer's Operational Control.

Nothing contained in this Agreement shall limit Customer's ability to develop its properties in a commercially reasonable manner, including Customer's ability to forfeit leases, sell or otherwise transfer leases, pool or unitize leases; subject, however, at all times, to the Dedication pursuant to this Agreement.

16.02 Agreement Subject to Laws.

This Agreement is subject to all applicable state and federal laws and to all applicable orders, rules, and regulations of any Governmental Authority having jurisdiction. If either Party is ordered or required to do any act inconsistent with the provisions of this Agreement, then this Agreement shall continue nevertheless and shall be deemed modified to conform to the requirements of such law or regulation. If at any time during the Term, any duly constituted Governmental Authority takes any action with respect to REP that causes the delivery, receipt, handling, or delivery of Gas, as contemplated hereunder, to be subjected to terms, conditions or restraints that are too burdensome, or unacceptable, in REP's sole opinion, and REP determines,

in its sole opinion, to permanently cease operation of the Facilities as a result of such action, then REP, upon thirty (30) Days advance written notice to Customer, may terminate this Agreement.

16.03 Federal Jurisdiction.

It is the intent of the Parties that REP provide all gathering and processing services to Customer on a negotiated contract basis only. Neither Party will proactively seek for the Gathering System to be subject to FERC regulation under the Natural Gas Act or Section 311 of the Natural Gas Policy Act. The Parties acknowledge, however, that notwithstanding the preceding sentence, the Gathering System may in the future be subject to FERC regulation under the Natural Gas Act or Section 311 of the Natural Gas Policy Act and that to the extent that FERC exercises such authority, the Parties may be obligated to modify this Agreement as a result of a FERC order or that portions of this Agreement may be superseded by a FERC Order; in such event, the Parties agree that (a) to the maximum extent permitted by law, it is the intent of the Parties that the rates and terms and conditions established by FERC shall not alter the rates or terms and conditions set forth in this Agreement and the Parties will in good faith defend and support the enforceability of the rates and the terms and conditions set forth in this Agreement; (b) the Parties agree to enter into such amendments to this Agreement to give effect, to the greatest extent possible, to the rates and other terms and conditions set forth herein, and (c) in the event the Parties are unable to accomplish the objectives set forth in the foregoing clauses (a) and (b) such that they are each in substantially the same economic position they were in prior to the exercise of FERC jurisdiction, then either Party may elect to terminate this Agreement upon the delivery of at least thirty (30) Days' prior written notice to the other Party.

16.04 Reports to Governmental Authorities.

REP does not assume the responsibility for the making of any reports to any Governmental Authorities that are required to be made by or on behalf of Customer.

16.05 Assignment.

This Agreement may not be assigned, disposed of, alienated or otherwise transferred by either Party, in whole or in part, without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed; *provided, however,* that (i) either Party may assign this Agreement, in whole but not in part, without the consent of the other Party in connection with the sale or transfer of all or substantially all of its assets in the geographic area of the Dedicated Properties, and (ii) either Party may assign this Agreement without the other Party's consent as collateral in connection with obtaining financing or a loan. If any such transfer occurs, (a) the transferor shall remain responsible and liable for all obligations and liabilities under this Agreement; (b) the transferee (other than any grantee under any lien, pledge, encumbrance or security interest) shall assume the obligations and liabilities of the transferor under this Agreement; and (c) no transfer or succession to the interest of Customer hereunder, wholly or partially, shall affect or bind REP until the first of the month following the date REP has received a copy of the recorded transfer document or other proof reasonably satisfactory to REP that the claimant is legally entitled to such interest. Any assignment or transfer in violation of this Section 16.05 shall be void *ab initio*.

16.06 Headings.

The headings and captions in this Agreement have been inserted for convenience of reference only and shall not define or limit any of the terms and provisions hereof.

16.07 Joint Preparation.

Customer and REP acknowledge and mutually agree that this Agreement and all contents herein were jointly prepared by the Parties.

16.08 Confidentiality.

Each Party agrees that the existence and terms of this Agreement and all documents exchanged by the Parties pursuant to or in connection with this Agreement (excluding any information and data which: (a) at the time of disclosure, is generally available to the public; (b) after disclosure becomes published or generally available to the public, other than through any unauthorized disclosure; (c) is rightfully received from a third party on a non-confidential basis; or (d) is independently developed in each case as evidenced by written record) shall be held strictly confidential and shall not be disclosed to any other Person (excluding the Affiliates of each Party, such Party's and its Affiliates' directors, officers, employees, agents, consultants, contractors, advisers and attorneys ("Representatives") who have a need to know such information, and the working interest and royalty interest owners with respect to the Customer's Gas) without the prior written consent of the other Party, which consent shall not be unreasonably withheld, except to the extent disclosure is required by applicable laws or the rules and regulations of any state or federal regulatory agency or any applicable stock exchange provided that, prior to making any such required disclosure, such Party shall cooperate with the other Party to maintain the confidentiality of this Agreement and the terms hereof. In addition, a Party may disclose the terms of this Agreement in accordance with this Section 16.08 in the following circumstances: (A) to financial institutions requiring such disclosure as a condition precedent to making, continuing or renewing a loan; (B) to prospective partners or joint venturers or purchasers or trade partners of assets of, or an equity interest in, either Party; (C) to independent certified public accountants for purposes of obtaining a financial audit; (D) to any other Person to whom such information is required to be disclosed in order for each Party to perform its respective obligations hereunder or as may be necessary in connection with REP's ownership and operation of the Facilities or Customer's ownership and operation of Interests in the Dedicated Properties, as applicable; and, in each case, to respective Representatives of the Person to whom such disclosures are made. Before making disclosure in accordance with the preceding sentence, the disclosing Party will ensure that such Person is bound by a written confidentiality agreement substantially similar or more stringent than the terms of this Section 16.08. Each Party shall be deemed solely responsible and liable for the actions of its Representatives and affiliates for maintaining the confidentiality commitments of this Section 16.08.

16.09 Counterpart Execution.

This Agreement may be executed in any number of counterparts, each of which shall be considered an original, and all of which shall be considered one and the same instrument. Any signature delivered by a Party by facsimile transmission or electronically shall be deemed an

original signature.

16.10 Expenses.

Each Party shall pay its own legal fees and other costs and expenses incurred by it in connection with the execution and delivery of this Agreement.

16.11 Governing Law.

This Agreement is entered into in the State of Colorado and shall be governed, interpreted and construed in accordance with the laws of the State of Colorado without regard to the conflicts of laws provisions thereof.

16.12 Venue.

Exclusive venue for any suit, action or proceeding brought by either Party in connection with this Agreement or arising out of the terms or conditions hereof shall be in the state or federal courts situated in Denver, Colorado. The Parties hereby irrevocably and unconditionally waive, to the fullest extent they may legally and effectively do so, any objection they may now or hereafter have to the laying of venue of any suit, action, or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby in the state and federal courts situated in Denver, Colorado.

16.13 Negotiation.

Prior to submitting any dispute for resolution by a court, a Party shall provide written notice to the other of the occurrence of such dispute. If the Parties have failed to resolve the dispute within fifteen (15) Business Days after such notice was given, the Parties shall seek to resolve the dispute by negotiation between senior management personnel of each Party. Such personnel shall endeavor to meet and attempt to amicably resolve the dispute. If the Parties are unable to resolve the dispute for any reason within thirty (30) Business Days after the original notice of dispute was given, then either Party shall be entitled to pursue any remedies available at law or in equity; *provided, however,* this Section 16.13 shall not limit a Party's right to initiate litigation prior to the expiration of the time periods set forth in this Section 16.13 if application of such limitations would prevent a Party from filing a lawsuit or claim within the applicable period for filing lawsuits (including statutes of limitation and prescription).

16.14 No Third-Party Beneficiaries.

Except for Persons indemnified hereunder, this Agreement is not for the benefit of any third party and nothing herein, expressed or implied, confers any right or remedy upon any Person not a party hereto other than Persons which become successors or assigns pursuant to Section 16.05 hereof.

16.15 Notice.

Any notice, statement, payment, claim or other communication required or permitted hereunder shall be in writing and shall be: (i) delivered by hand; (ii) sent by United States mail

with all postage fully prepaid; or (iii) delivered by courier with charges paid in accordance with the customary arrangements established by such courier, in each of the foregoing cases addressed to the applicable Party at the addresses set forth for such Party in Exhibit B. Such notices, statements, payments, claims or other communications shall be deemed received as follows: (a) if delivered personally, upon delivery; (b) if sent by United States mail, whether by express mail, registered mail, certified mail or regular mail, the notice shall be deemed to have been received on the earlier of (y) the day receipt is refused or is confirmed orally or in writing by the receiving Party, and (z) two (2) Business Days after it was sent; or (c) if sent by a courier service, upon delivery. Notices of change of address of either of the Parties shall be given in writing to the other Party in the manner aforesaid and shall be observed in the giving of all future notices, statements, payments, claims or other communications required or permitted to be given hereunder.

16.16 Severability.

The invalidity of any one or more provisions of this Agreement will not affect the validity of this Agreement as a whole, and in case of any such invalidity, this Agreement will be construed as if the invalid provision had not been included herein so long as the economic and legal substance of the transactions contemplated by this Agreement is not affected in any manner materially adverse to any Party. Upon such determination that one or more provisions of this Agreement are invalid, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in an acceptable manner to the end that the transactions contemplated hereby are fulfilled to the extent possible.

16.17 Waiver.

Any failure by either Party to comply with any of its obligations, agreements or conditions herein contained may only be waived in writing in an instrument specifically identified as a waiver and signed by the Party to whom such compliance is owed. No waiver of, or consent to a change in, any provision of this Agreement shall be deemed or shall constitute a waiver of, or consent to a change in, any other provisions hereof, nor shall such waiver constitute a continuing waiver unless expressly provided in the waiver.

16.18 Material Adverse Change.

Without limiting REP's rights under Section 16.03, or elsewhere in this Agreement, if a federal or state statute or regulation or order by a Governmental Authority effects a change to a substantive provision of this Agreement that has a material adverse impact upon the performance or benefits of either Party under this Agreement, including, without limitation, the imposition of terms, conditions, or rate restrictions that materially adversely affect the economic positions of the Parties under this Agreement, then the Parties will enter into good faith negotiations to attempt to revise this Agreement and any other ancillary agreements between Customer and REP so that (a) performance under this Agreement is no longer impacted in a material adverse fashion and (b) this Agreement and any other ancillary agreements between Customer and REP are revised in a manner that preserves, to the maximum extent possible, the respective economic positions of the Parties. Each Party will provide reasonable and prompt notice to the other Party as to any proposed law, regulations or any regulatory proceeding or actions that could cause such Party to invoke its rights under this Section 16.18. If, despite their good faith efforts, the Parties are unable to revise this

Agreement in accordance with the above within ninety (90) Days from written notice of the occurrence, then the Party whose performance and/or benefits is impacted in a material adverse fashion will have the right to suspend or terminate this Agreement upon written notice delivered to the other Party with thirty (30) Days after expiration of the ninety (90) Day period. Until such time as this Agreement is suspended or terminated, each Party will meet all obligations under this Agreement, unless otherwise prohibited by law.

16.19 Contract Interpretation.

In this Agreement, unless a clear contrary intention appears:

(a) the singular number includes the plural number and vice versa;

(b) reference to any Person includes such Person's successors and assigns but, if applicable, only if such successors and assigns are not prohibited by this Agreement, and reference to a Person in a particular capacity excludes such Person in any other capacity or individually;

(c) reference to any gender includes each other gender;

(d) reference to any agreement, document or instrument means such agreement, document or instrument as amended or modified and in effect from time to time in accordance with the terms thereof;

(e) reference to any law means such law as amended, modified, codified, replaced or reenacted, in whole or in part, and in effect from time to time, including rules and regulations promulgated hereunder, and reference to any section or other provision of any law means that provision of such law from time to time in effect and constituting the substantive amendment, modification, codification, replacement or reenactment of such section or other provision;

(f) "hereunder," "hereof," "hereto," "herein," "hereby," and words of similar import shall be deemed references to this Agreement as a whole and not to any particular Article, Section or other provision hereof;

(g) "including" (and with correlative meaning "include") means including without limiting the generality of any description preceding such term;

(h) "or" is used in the inclusive sense of "and/or";

(i) with respect to the determination of any period of time, "from" means "from and including" and "to" means "to but excluding";

(j) references to documents, instruments or agreements shall be deemed to refer as well to all addenda, exhibits, schedules or amendments thereto;

(k) examples shall not be construed to limit, expressly or by implication, the matter they illustrate; and

(l) all references in this Agreement to an "Article," "Section," "subsection," or "Exhibit" shall be to an Article, Section, subsection, or Exhibit of this Agreement, unless the context requires otherwise.

16.20 Entire Agreement.

This Agreement, including any attachments, constitutes the entire agreement between the Parties pertaining to the subject matter hereof, supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, of the Parties with respect thereto, and may not be amended or modified except by a written instrument signed by both Parties expressly identifying it as an amendment or modification hereof.

16.21 No Partnership.

It is not the intention of the Parties to create, nor is there created hereby, a partnership, trust, joint venture or association. The status of each Party hereunder is solely that of an independent contractor.

16.22 Further Assurances.

Each Party shall take such acts and execute and deliver such documents as may be reasonably required to effectuate the purposes of this Agreement.

16.23 No Inducements.

No director, employee, or agent of any Party shall give or receive any commission, fee, rebate, gift, or entertainment of significant cost or value in connection with this Agreement.

16.24 Survival.

The respective indemnification obligations of the Parties set forth in this Agreement shall survive the expiration of the Term and any termination of this Agreement.

[*Signature page follows*]

This Agreement is executed by the authorized representatives of the Parties, to be effective as of the Effective Date.

REP:

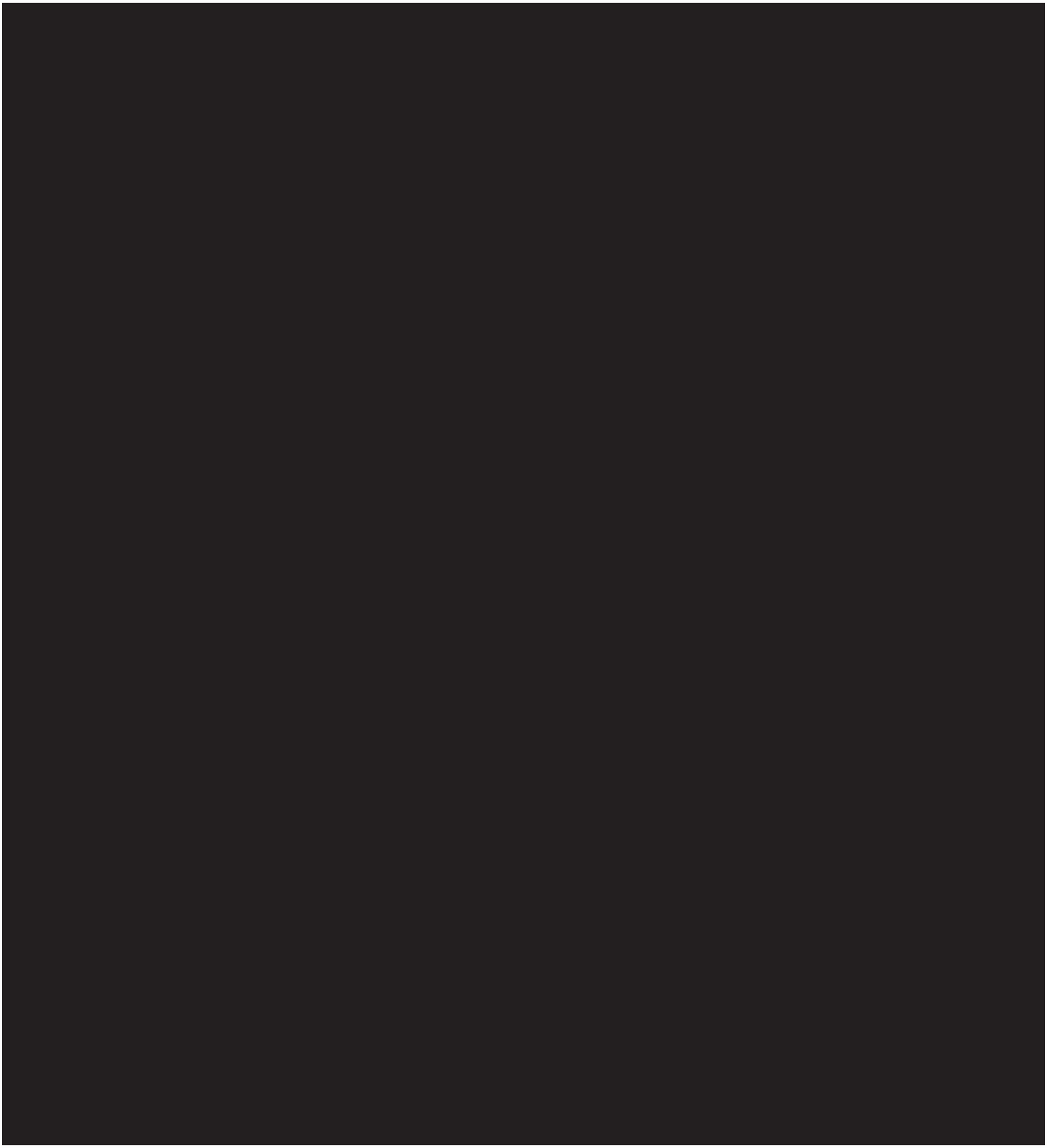
REP Processing, LLC

By: _____
Name: Josh Couzan
Title: President

CUSTOMER

Extraction Oil & Gas, Inc.

By: _____
Name: MATT OWENS
Title: President



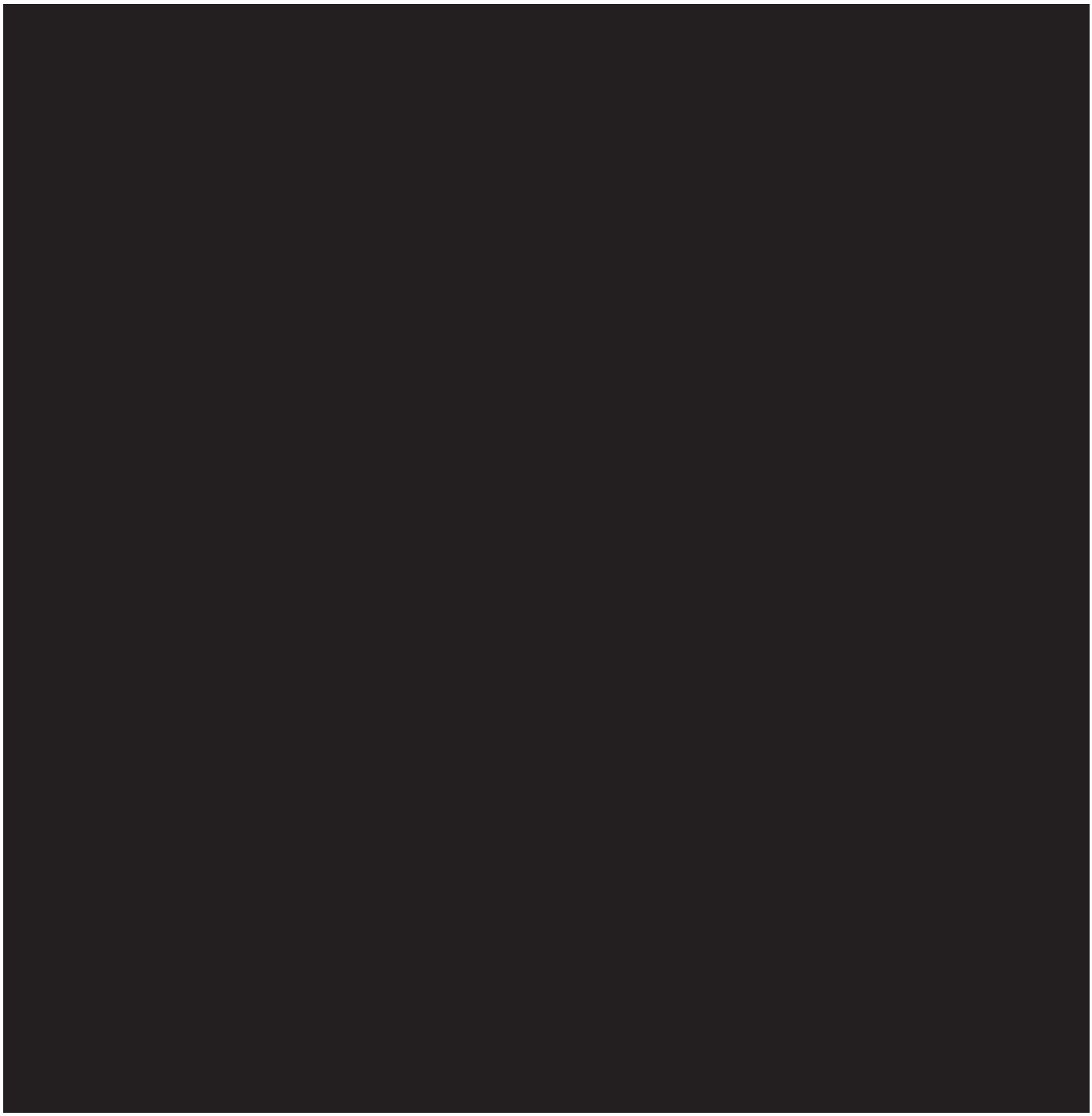


EXHIBIT B

NOTICES

Customer:

Extraction Oil & Gas, Inc
Attn: Marketing & Midstream
370 17th St., Ste 5300
Denver, CO 80202

REP:

Attn: President with copy to General Counsel
5956 Sherry Lane, Suite 825
Dallas, Texas 75225
Email: notices@rimrockenergy.com

For Correspondence and Notice:

Extraction Oil & Gas, Inc
Attn: Marketing & Midstream
370 17th St., Ste 5300
Denver, CO 80202

For Correspondence, Notice and Bill Purposes:

Attn: CFO
5956 Sherry Lane, Suite 825
Dallas, Texas 75225
Email: accounting@rimrockenergy.com

For Dispatching and Scheduling:

Extraction Oil & Gas, Inc
Attn: Marketing & Midstream
370 17th St., Ste 5300
Denver, CO 80202

For Dispatching and Scheduling:

Attn: Scheduling
5956 Sherry Lane, Suite 825
Dallas, Texas 75225
Email: scheduling@rimrockenergy.com

For Invoices/Statement:

Extraction Oil & Gas, Inc
Attn: Accounting
370 17th St., Ste 5300
Denver, CO 80202
Email: Revenue@extractionog.com

EXHIBIT C-1

DEDICATED PROPERTIES

Township	Range	Section	Qtr/Qtr
7N	67W	7	All
7N	67W	8	All
7N	67W	15	N/2
7N	67W	15	SE/4
7N	67W	16	All
7N	67W	17	All
7N	67W	18	All
7N	67W	19	N/2
7N	67W	19	SW/4
7N	67W	20	N/2
7N	67W	20	SW/4
7N	67W	21	All
7N	67W	22	SE/4
7N	67W	23	N/2
7N	67W	23	SE/4
7N	67W	24	NW/4
7N	67W	24	SE/4
7N	67W	29	W/2
7N	67W	30	All
7N	67W	31	S/2
7N	67W	32	W/2
7N	68W	36	All

EXHIBIT C-2

EXCLUDED INTERESTS

Township	Range	Section	Qtr/Qtr	Excluded Wells
7N	67W	15	SW/4	MSH Farms 12-15, 13-15 & 34-15 and
7N	67W	19	SE/4	Blehm 9-19 & 16-19
7N	67W	20	SE/4	Heckman 9-20 & 16-20
7N	67W	22	NE/4	Gilbert 17-22
7N	67W	22	SW/4	Ranchero 13-22 & 14-22
7N	67W	23	SW/4	Schlotthauer 13-23, 14-23, 3-26 & 4-26
7N	67W	24	N/2	Hirsch 6-24, 11-24 & 17-24
7N	67W	29	SW/4	Winter 1-29 & 8-29

EXHIBIT D

MEMORANDUM OF AGREEMENT

STATE OF COLORADO)
) **KNOW ALL MEN BY THESE PRESENTS THAT:**
COUNTY OF WELD)

This MEMORANDUM OF AGREEMENT (this "Memorandum") is entered into by and between Extraction Oil and Gas, Inc., a Delaware whose address is 370 17th Street, Suite 5300, Denver, Colorado 80202 ("Grantor"), and REP Processing, LLC, a Delaware limited liability company, whose address is 1625 Broadway, Suite 2075 Denver, CO 80202 ("Grantee"). Grantor and Grantee are individually referred to herein as a "Party" and collectively as "Parties."

WHEREAS, the Parties hereto have entered into that certain Gas Gathering and Processing Agreement dated April __, 2019 (the "Agreement") whereby Grantee has agreed to construct, own, operate, and maintain a certain gas gathering and processing Facilities;

WHEREAS, Grantor holds certain oil and gas leases and wells located within the Dedicated Properties as described in Exhibit C-1 to the Agreement and which is attached hereto as Annex A; and

WHEREAS, the Parties have executed this Memorandum for the purpose of imparting notice to all persons of Grantor's granting and conveyance, unto Grantee, of the sole and exclusive right to receive the gas produced from the Dedicated Properties subject to the provisions of the Agreement.

NOW, THEREFORE, the Parties agree as follows:

1. All capitalized terms used but not defined herein and defined in the Agreement shall have the meaning ascribed to them in the Agreement.

2. The Parties have entered into the Agreement, to provide for, among other things, the granting and conveyance by Grantor, unto Grantee, of the sole and exclusive right, for the term of the Agreement and subject to the provisions of the Agreement (including Grantor's reservations enumerated in Section 2.05 of the Agreement), to receive all of the gas produced from the Dedicated Properties owned or Controlled by Grantor as of the Effective Date, which Dedicated Properties are more particularly described in Exhibit C-1 to the Agreement which is attached hereto as Annex A.

3. As agreed by the Parties under the Agreement, for the term thereof, the Dedication is a covenant running with the land. Subject to Grantor's reservations enumerated in Section 2.05 of the Agreement, any transfer by Grantor of the Dedicated Properties and the Dedicated Production will be subject to the Agreement. The Agreement may not be assigned, disposed of,

alienated or otherwise transferred by either Party, in whole or in part, without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed; provided, however, that (i) either Party may assign the Agreement, in whole but not in part, without the consent of the other Party in connection with the sale or transfer of all or substantially all of its assets subject to the Agreement, and (ii) Grantee may assign the Agreement without Grantor's consent in connection with the sale or transfer of the Facilities or as collateral in connection with a financing.

4. Should any person or firm desire additional information, said person or firm should contact Grantee, whose address is 1675 Broadway, Suite 2075, Denver, CO 80202, and, subject to the confidentiality terms contained in Section 16.08 of the Agreement, any person may receive a copy of the Agreement upon written request to Grantee's General Counsel at such address.

5. The term of the Agreement, as set forth in Article VII of the Agreement, is for fifteen (15) years beginning on the In-Se ssive year-to-year terms unless terminated by mutual agreement of the Parties or by either Party on written notice delivered ninety (90) days prior to the end of the applicable term. Following termination of the Agreement, upon Grantor's request, Grantee shall file of record a release and termination of the Agreement and this Memorandum.

6. This Memorandum shall be binding upon and shall inure to the benefit of the Parties hereto, and to their respective heirs, devises, legal representatives, successors, and permitted assigns.

7. In the event of any conflict between this Memorandum and the Agreement, the Agreement will govern and control.

IN WITNESS WHEREOF, this Memorandum shall be effective as of the 16 th day of April, 2019.

"Grantor"	"Grantee"
Extraction Oil & Gas, Inc.	**REP Processing, LLC**
Signature:	Signature:
Name: Matt Owens	Name: Josh Cruzan
Title: President	Title: President
Date: 4/16/2019	Date: 04/16/19

STATE OF COLORADO §
§
COUNTY OF Denver §

The foregoing instrument was acknowledged before me by Josh Cruzan, an authorized signatory of REP PROCESSING, LLC, on behalf of said limited liability company, this 16th day of April, 2019.

BRYAN MICHAEL C INTON
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20184045824
MY COMMISSION EXPIRES NOVEMBER 29, 2022

Notary Public in and for: State of Colorado

Bryan M. Clinton
Commission Expires 11/29/2022

STATE OF COLORADO §
§
COUNTY OF Denver §

The foregoing instrument was acknowledged before me by Matt Owens, an authorized signatory of EXTRACTION OIL & GAS, INC., on behalf of said corporation, this 16th day of April, 2019.

AMANDA EWING
Notary Public
State of Colorado
Notary ID # 20114024382
My Commission Expires 04-20-2023

Notary Public in and for: State of Colorado

Amanda Ewing
Commission Expires 4/20/23

EXHIBIT E

SPECIFICATIONS

Customer's Gas received at each Receipt Point shall meet the most stringent of (i) the quality specification of the Downstream Carriers, as may be amended from time to time, or (ii) the specifications set forth below:

Customer's Gas shall be commercially free of objectionable odors, dust, rust, gum, gum forming constituents, free liquids, corrosion inhibitors, chemicals, treating chemicals, antifreeze agents, and other matter that might adversely affect its merchantability or the gathering thereof or would be classified as a contaminant or hazardous waste or substance under state of federal environmental laws or regulations which interfere with proper operation of the Facilities and will conform to the following:

Carbon Dioxide	Not more than 2.5 mole percent (2.5%)
Free water, dust, rust, or other solids	None
Hydrogen Sulfide	Not more than 3 parts per million (3 ppm)
Mercaptan Sulfur	Not more than 4 parts per million (4 ppm)
Total Sulfur	Not more than 4 grains per 100 Cubic Feet
Oxygen	Not more than 8 parts per million (8 ppm)
Total Inerts	Not more than 3 mole percent (3%), including Nitrogen
Hydrocarbon Constituents	Not less than 94%
Temperature	Not less than 40 degrees Fahrenheit or more than 120 degrees Fahrenheit

Exhibit 2

Brief in Support of Plaintiff's Motion for Summary Judgment

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*,[1]	)	Case No. 20-11548 (CSS)
Debtors.	)	(Jointly Administered)
EXTRACTION OIL & GAS, INC.,	)	Chapter 11
Plaintiff,	)	Adv. Proc. No. 20-50813 (CSS)
v.	)	
REP PROCESSING, LLC,	)	
Defendant.	)	

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

KIRKLAND & ELLIS LLP
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-AND-

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Extraction Oil & Gas, Inc. (3923); 7N, LLC (4912); 8 North, LLC (0904); Axis Exploration, LLC (8170); Extraction Finance Corp. (7117); Mountaintop Minerals, LLC (7256); Northwest Corridor Holdings, LLC (9353); Table Mountain Resources, LLC (5070); XOG Services, LLC (6915); and XTR Midstream, LLC (5624). The location of the Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
Anna Rotman, P.C. (admitted *pro hac vice*)
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Co-Counsel to Debtors and Debtors in Possession

Dated: August 14, 2020

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NATURE AND STAGE OF THE REJECTION PROCEEDINGS

On June 14, 2020 (the "Petition Date"), Debtors filed the *Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief* [Docket No. 14] (the "Motion to Reject"), which included requested relief to reject the Gas Gathering, Processing, and Purchase Agreement dated April 16, 2019 (the "REP Gathering Agreement") entered into with Defendant REP Processing, LLC ("REP"), pursuant to section 365 of the Bankruptcy Code.

On August 12, 2020, Extraction filed its Complaint for Declaratory Judgment, seeking a declaration that the REP Gathering Agreement does not create covenants that run with the land in order to support the Motion to Reject. Extraction simultaneously seeks the relief requested in the Complaint and rejection of the REP Gathering Agreement because bankruptcy courts have expressed a preference for the simultaneous adjudication of the issues raised in this adversary proceeding with a motion to reject the underlying executory contract. *In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 73 (Bankr. S.D.N.Y. 2016), *aff'd*, 567 B.R. 869 (S.D.N.Y. 2017), *aff'd*, 734 F. App'x 64 (2d Cir. 2018) ("[B]ifurcating the motion to reject and further proceedings to finally resolve the underlying property law dispute is an inefficient use of judicial and private resources; it would have been far preferable for the Court to hear the two together.").

SUMMARY OF ARGUMENT

Extraction files this Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure (the "Federal Rules") made applicable to this adversary proceeding by Rules 7001 and 7056 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for entry of an order granting summary judgment in Extraction's favor and against REP. Extraction is entitled to

summary judgment because, as a matter of law, the REP Gathering Agreement does not create covenants that run with the land under Colorado law.

The REP Gathering Agreement is exactly what its name suggests: an agreement governing the gathering of produced gas. The agreement governs the provision of services to (and sale of) Extraction's chattel, here, produced gas, and benefits Extraction as the owner of that produced gas, not as the owner of any particular real property. Extraction owns interests in certain mineral estates, and these interests allow Extraction to search for and reduce the minerals covered by the REP Gathering Agreement, specifically gas, to chattel. REP, however, is a complete stranger to those interests in the mineral estates, and the REP Gathering Agreement does not affect Extraction's interests in the mineral estates. Under the agreement, REP is a mere service provider, just like any other service provider Extraction uses to process and transport produced gas. REP provides services in exchange for a fee, which is subtracted from the price of the gas purchased. REP has no real interest in Extraction's mineral estate, no right to develop or explore that mineral estate, no right to divest the estate of gas, and no right to otherwise affect Extraction's legal rights to these mineral interests. Thus, REP's personal, contractual interests for the exclusive provision of services are insufficient to create a covenant running with the land.

Specifically, Extraction is entitled to summary judgment because Colorado allows the creation of a covenant running with the land only when all of the following are established by the covenant's proponent: (1) the parties intended the covenant to run with the land; (2) the covenant touches and concerns the land; and (3) there is privity of estate between the parties to the dispute. REP cannot satisfy either the privity of estate or touch and concern elements. As a result, the Court should grant summary judgment and declare that Extraction's agreement with REP does not create a covenant running with the land under Colorado law.

STATEMENT OF FACTS

I. THE REP GAS GATHERING, PROCESSING, AND PURCHASE AGREEMENT

Extraction is a party to the REP Gathering Agreement. This contract, as its name suggests, is merely an agreement wherein the parties provided for the gathering, processing, and purchase of gas between themselves. A true and correct copy of the REP Gathering Agreement is attached as **Exhibit A**. The REP Gathering Agreement is construed in accordance with, and is governed by, Colorado law, without regard to Colorado's conflict of laws provisions. Ex. A § 16.11.

The REP Gathering Agreement commenced on April 16, 2019 and (unless terminated sooner) continued "in full force and effect until the fifteenth (15th) anniversary of the In-Service Date . . . and year to year thereafter . . . until cancelled by either Party upon forty-five (45) Days' written notice . . . prior to the end of the Primary Term or any Extended Term." *Id.* at Art VII.

Under the REP Gathering Agreement, REP agreed to [redacted] Extraction agreed to "deliver and sell to REP, and REP shall receive and purchase, (i) all of Customer's Dedicated Production, subject to [certain reservations] and Customer's then in effect Firm Capacity, and, (ii) Customer's Undedicated Production, on an Interruptible basis." *Id.* § 3.03.

The REP Gathering Agreement further states Extraction purportedly granted:

> [A] servitude in the nature of real covenants burdening all of the Interests of Customer . . . in and to the Dedicated Properties and the Dedicated Production . . ., which covenants are (i) deemed to be covenants running with the land with respect to the Dedicated Properties and the Dedicated Production and (ii) binding on the respective successors and assigns of the Interests of Customer and its Controlled Affiliates in and to the Dedicated Properties and the Dedicated Production[.]"

Id. § 2.01(b). The Dedicated Properties are:

> All Interests owned and operated by Customer and its Controlled Affiliates (and its and their successors and assigns), INSOFAR AND ONLY INSOFAR as such Interests are (a) owned on the Effective Date, and (b) are within the lands described on Exhibit C-1; *provided, however,* the term "Dedicated Properties" does not include any of the Interests described on Exhibit C-2.

Id. at Art. I ("Dedicated Properties") (emphasis in original).[1] The Dedicated Properties provisions exclusively concern Colorado land. *Id.* at 1 (First Recital). Dedicated Production means "[a]ll Gas owned by Customer or its Controlled Affiliates (and its and their successors and assigns) on, in and under the Dedicated Properties and that is produced through wells thereon, subject to Section 2.02." *Id.* at Art. I ("Dedicated Production") (emphasis in original).

Under the REP Gathering Agreement's terms, Extraction:

> [R]eserves the right to operate the wells located within the Dedicated Properties free from any control by REP and in such manner as Customer, in its sole discretion, deems advisable, including, without limitation, the right to determine the maximum efficient rate of flow for such wells, to repair and rework such wells, to abandon such wells or terminate or surrender any Interest, and to pool, unitize, or communitize the Dedicated Properties with other Interests inside or outside of the Dedicated Properties.[2]

LEGAL STANDARD

Under Rule 56(a) of the Federal Rules—made applicable to this adversary proceeding by Rule 7056 of the Bankruptcy Rules—the "[C]ourt shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). The existence of ***some*** factual dispute will not defeat summary judgment; rather, the requirement is that no ***genuine*** issue of ***material*** fact exists. *Anderson v.*

---

[1] Interests are defined as "[a]ny right, title, or interest in lands, wells, or leases and the right to produce oil and/or Gas therefrom whether arising from fee ownership, working interest ownership, mineral ownership, leasehold ownership, farm-out or arising from any pooling, unitization or communitization of any of the foregoing rights." Ex. A at Art. I ("Interest").

[2] Ex. A § 2.05.

Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); *Celotex Corp.*, 477 U.S. at 327. A genuine dispute of material fact exists only if a reasonable trier of fact could enter a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 252; *Celotex Corp.*, 477 U.S. at 327 (holding when a movant's evidence demonstrates the lack of a genuine issue the burden shifts to the opposing party to demonstrate the existence of a genuine issue for trial). "[I]t is a fundamental principle of contract law that 'disputes involving the interpretation of unambiguous contracts are resolvable as a matter of law, and are, therefore, appropriate cases for summary judgment.'" *Tamarind Resort Associates v. Gov't of Virgin Islands*, 138 F.3d 107, 110 (3d Cir. 1998) (quoting *Hadley v. Gerrie*, 124 B.R. 679, 683 (D.V.I. 1991), aff'd sub nom. *Gas House, Inc. v. Unicorp Am. Corp.*, 952 F.2d 1392 (3d Cir. 1991)).

ARGUMENT

The Court should grant summary judgment and enter an Order declaring that the REP Gathering Agreement does not create covenants that run with the land. Summary judgment is appropriate because there is no genuine issue of material fact. As a matter of law, the unambiguous terms of the REP Gathering Agreement fail to satisfy two of the elements necessary to create a covenant running with the land under Colorado law: privity of estate and touch and concern.

I. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE EXTRACTION SEEKS DECLARATORY JUDGMENT CONCERNING A QUESTION OF COLORADO LAW

Extraction's claim for declaratory judgment is ripe for summary judgment because the REP Gathering Agreement does not create a covenant that runs with the land under Colorado law.

The Complaint seeks relief under the Declaratory Judgement Act. Under 28 U.S.C. § 2201(a), "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations

of any interested party seeking such declaration, whether or not further relief is or could be sought." Further, "[a]ny such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." *Id.*

The substantive legal questions in this case are all governed by Colorado law.[3] The REP Gathering Agreement expressly adopts Colorado law, without regard to Colorado's conflict of law provisions. *See* Ex. A § 16.11. Likewise, the lands covered by the REP Gathering Agreement are located in Colorado. *Id.* at 1 (First Recital). Issues concerning Colorado real property are governed by Colorado law. *Wolf v. Burke*, 32 P. 427, 429 (Colo. 1893) ("[T]he rights and titles to real property are governed by the law of the situs . . . ."); *see also United States v. Novotny*, 184 F. Supp. 2d 1071, 1087 (D. Colo. 2001) ("Colorado law applies to issues relating to the conveyance and ownership or real property located within Colorado.") (citation simplified) (citing Restatement (Second) Conflict of Laws § 223 cmt. g (Am. Law. Inst. 1971)).

In Colorado, "contract interpretation is a question of law." *Ad Two, Inc. v. City & County of Denver ex rel. Manager of Aviation*, 9 P.3d 373, 376 (Colo. 2000) (citing *Fibreglas Fabricators, Inc. v. Kylberg*, 799 P.2d 371, 374 (Colo. 1990)). Likewise, the "[i]nterpretation and construction of covenants is a question of law." *Holiday Acres Prop. Owners Ass'n, Inc. v. Wise*, 998 P.2d 1106, 1108 (Colo. App. 2000), as modified on denial of reh'g (July 6, 2000); *accord Pulte Home Corp., v. Countryside Cmty. Ass'n, Inc.*, 382 P.3d 821, 826 (Colo. 2016) (noting covenants and other recorded instruments, like contracts, should be construed as a whole "seeking to harmonize and give effect to all provisions so that none will be rendered meaningless.").

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[3] Questions about the ***construction*** of a real property conveyance should be decided by the law chosen under a choice of law clause. *See* Restatement (Second) Conflict of Laws § 224 (Am. Law Inst. 1971). The ***validity*** of the conveyance and the ***nature*** of the interest conveyed, however, are governed by the law that would be applied by the courts of the real property situs. *Id.* § 223. Here, both are governed by Colorado law.

Accordingly, this Court can resolve the issues in the Complaint as a matter of law, and no factual dispute exists to preclude summary judgment. *See Celotex Corp.*, 477 U.S. at 327 ("The Federal Rules . . . have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact.").

II. THE REP GATHERING AGREEMENT DOES NOT CREATE A COVENANT THAT RUNS WITH THE LAND UNDER COLORADO LAW

The REP Gathering Agreement does not create covenants that run with the land. Under Colorado law, "[t]o create a real covenant, the parties must intend for the covenant to run with the land and bind their successors in interest, and the covenant must 'touch and concern' the land." *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 440 (Colo. App. 2016) (citing *Cloud v. Ass'n of Owners, Satellite Apartment Bldg., Inc.*, 857 P.2d 435, 440 (Colo. App. 1992)).[4] Privity of estate between the original covenanting parties at the time of the creation of the covenant (sometimes called "horizontal privity") is also required. *See Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 92 P. 290, 293 (Colo. 1907); *see also Taylor v. Melton*, 274 P.2d 977, 982 (Colo. 1954) (considering whether parties were in privity of estate for purposes of enforcing a covenant running with the land). The REP Gathering Agreement neither touches and concerns the land nor satisfies privity of estate. Specifically, the covenants do not directly benefit or burden the land they are intended to run with and are not contained in a grant of any real property interest in that land. Summary judgement is, therefore, appropriate.

[4] Although intent is necessary, it is not sufficient to create a covenant that runs with the land. *See Cloud*, 857 P.2d at 440 ("Even if there is an intent to make a covenant run with the land, the covenant must still 'touch and concern' the land, that is, it must closely relate to the land, its use, or its enjoyment.") (citation omitted)).

A. The REP Gathering Agreement Does Not Touch And Concern The Land Because It Does Not Directly Benefit or Burden Extraction's Real Property Interests.

The REP Gathering Agreement does not create any covenants that run with the land because the purported covenants do not touch and concern the land. *Farmers' High Line Canal & Reservoir Co.*, 92 P. at 293. Under Colorado law, "[a] covenant touches and concerns the land if it 'closely relate[s] to the land, its use, or its enjoyment.'" *Reishus*, 409 P.3d at 440 (quoting *Cloud*, 857 P.2d at 440); *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 74 (Colo. App. 1993); *see also Bigelow v. Nottingham*, 833 P.2d 764, 767 (Colo. App. 1991), *rev'd in part sub nom. on other grounds Haberl v. Bigelow*, 855 P.2d 1368 (Colo. 1993) ("The 'touch and concern' requirement is fulfilled when the covenant operates to benefit the physical use of the land.").

Here, the only thing within the REP Gathering Agreement that purports to run with the land is the dedication itself, which allegedly runs with Extraction's mineral estate. *See* Ex. A at Ex. D § 3 ("As agreed by the Parties under the Agreement, . . . the Dedication is a covenant running with the land."). Therefore, the REP Gathering Agreement's dedication must touch and concern Extraction's mineral estate.

Colorado courts have not often elaborated on the state's touch and concern doctrine. The state's close relationship test, however, is based on general real property principles. *See* 3 Tiffany Real Property § 854 (3d ed. 2015) ("An important test for distinguishing a real or running covenant from a merely personal or collateral one, is whether or not the covenant so closely relates to the land or estate granted . . . that it may be said to 'touch and concern' it."). These principles are, in turn, largely derived from the test originally conceived by noted real property scholar and legal

professor Dean Bigelow.[5] As Dean Bigelow described, the inquiry turns on whether a covenant materially affects the promisor's ***legal relationship to the land itself***, as measured by whether the covenant makes the estate more or less valuable. *See* Harry Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. 639, 652 (1914) (emphasis added).

In *Reishus*, the Colorado Court of Appeals concluded that an ownership agreement between tenants in common concerning the use of a ranch touched and concerned the land. *See Reishus v. Bullmasters, LLC*, 409 P.3d at 441. The court noted that the agreement's intent was to "have an agricultural property that would also provide a quality hunting experience." *Id.* The court further explained that the agreement contained provisions restricting the types of buildings that could be built on the land. *Id.* Finally, the court observed that the agreement contained "use restrictions involving tree-cutting, motor vehicles, and guest visitation." *Id.* The court concluded that these restrictions concerning the ranch "are closely tied with the use, possession, and enjoyment of the ranch." *Id.* (citing *Lookout Mountain Paradise Hills Homeowners' Ass'n*, 867 P.2d at 74–75). The covenant at issue directly affected the parties' legal relationship to the physical use and enjoyment of land.

Other covenants Colorado courts have found to touch and concern the land similarly directly affect the parties' legal relationship to the use and enjoyment of the land. *See Lookout Mountain Paradise Hills Homeowners' Ass'n*, 867 P.2d at 75 (concluding a restriction on the types of buildings that may be built upon the land touched and concerned the land); *Cloud*, 857 P.2d at 441 (holding a covenant for the division of gross receipts from the use of 80 "guest rooms" that are commonly owned by condominium owners touched and concerned the land); *accord Bigelow*,

[5] Indeed, "[t]he majority of courts and writers now accept the test for the 'touching and concerning of covenants' proposed by Dean Harry Bigelow, an eminent authority on the subject of covenants." 9 Richard R. Powell, Powell on Real Property § 60.04(3)(a) (citation omitted).

833 P.2d at 767 (holding a subordination rider in a deed of trust did not touch and concern the land because "the parties' entitlement to physical use of the land was not increased nor was the land improved") (citations omitted); Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. at 640–41 ("Among the covenants to refrain from acting which have been held enforceable . . . are the following: to let part of the land lie fallow every year; not to use for a particular business; not to conduct the business in a specified way; not to remove the fixtures; not to sell off the wood.") (footnotes omitted).

Here, unlike covenants that have been found to run with the land, the REP Gathering Agreement's dedication fails to touch and concern Extraction's mineral estate because it does not directly or closely affect the physical use or enjoyment of the land. ***First***, the dedication simply identifies the parties' contractual rights and obligations. ***Second***, the REP Gathering Agreement is a mere service contract wherein REP agrees to provide services to Extraction's produced gas in exchange for a fee and the contractual right to provide such services and purchase chattel, *i.e.*, the produced gas; the covenants to provide services and purchase chattel purely relate to (and affect) personal property, not the land. ***Third***, even assuming, *arguendo*, that the purported covenants indirectly relate to real property, they do not directly benefit or burden the land.

1. The REP Gathering Agreement's Dedication does not touch and concern Extraction's mineral estate; it merely identifies the parties' contractual rights and obligations.

The REP Gathering Agreement's "dedications" do not touch and concern—and do not even implicate—Extraction's real property interests.[6] In relevant part, the REP Gathering Agreement—Ex. A § 2.01—states:

[6] To be clear, notwithstanding Extraction's arguments, REP bears the burden of showing how the dedication language created a covenant running with the land. *See In re Sabine Oil & Gas Corp.*, 567 B.R. at 875 ("Given that HPIP does not identify what kind of property interest it might have obtained in the leases from the HPIP Agreements' vague 'dedication' of them to Sabine's performance of those agreements, the Court is

2.01 Dedication.

Subject to the terms and conditions of this Agreement, Customer hereby, irrevocably and unconditionally, and through last Day of the last Term hereunder:

(a) exclusively dedicates and commits to the performance of this Agreement the Dedicated Properties and the Dedicated Production, which includes the exclusive right to receive from, gather, and process, in accordance with the terms of this Agreement, all Dedicated Production on, in and under the Dedicated Properties that is produced or producible therefrom;

(b) grants a servitude in the nature of real covenants burdening all of the Interests of Customer, its Controlled Affiliates and its and their respective successors and assigns in and to the Dedicated Properties and the Dedicated Production (expressly including any and all rights granted by Customer to REP under Section 6.04), which covenants are (i) deemed to be covenants running with the land with respect to the Dedicated Properties and the Dedicated Production and (ii) binding on the respective successors and assigns of the Interests of Customer and its Controlled Affiliates in and to the Dedicated Properties and the Dedicated Production;

(c) exclusively commits to the performance of this Agreement the Controlled Production;

Considered in the context of the totality of the REP Gathering Agreement, these provisions' purposes are twofold. First, they identify ***which*** minerals, from ***what*** property, are the subject of the contractual rights under the agreement. Second, the provisions memorialize the parties' intent to create a covenant running with the land. But intent, alone, is insufficient for Colorado law to recognize the creation of a burden on property within the state. *See Cloud*, 857 P.2d at 440 ("Even if there is an intent to make a covenant run with the land, the covenant must still 'touch and concern' the land, that is, it must closely relate to the land, its use, or its enjoyment.") (citing *Bigelow*, 833 P.2d at 764).

To be clear, in the private real property context, a "dedication" is utterly ineffectual and is not a conveyance or grant of anything; Colorado recognizes the difference between dedications

unable to conclude that HPIP's legal interest in the leases did in fact increase. Therefore, the Court concludes that the Agreements did not increase appellants' real property interests, but rather granted them the merely contractual right to be the exclusive providers of certain services for gas and condensate produced in certain areas.").

and conveyances. *See Stagecoach Prop. Owners Ass'n v. Young's Ranch*, 658 P.2d 1378, 1381 (Colo. App. 1982) ("This regulation clearly contemplates a 'conveyance' and not a 'dedication' which terms are not synonymous.") (citing *City of Leadville v. Coronado Min. Co.*, 86 P. 1034 (Colo. 1906)). Furthermore, the legal definition of the word "dedication" is "[t]he donation of land or creation of an easement ***for public use***." *See* Dedication, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). This is also how Colorado law views "dedication" language. *See Stagecoach Prop. Owners Ass'n*, 658 P.2d at 1381 ("[A] dedication has been defined as an appropriation of land by the owner of the fee to some public use and the adoption thereof by the public.") (citing *Hand v. Rhodes*, 245 P.2d 292 (Colo. 1952)). The parties clearly did not intend the REP Gathering Agreement to set apart or donate Extraction's mineral interests for public use.

Instead, the Court must construe the REP Gathering Agreement's language "in harmony with the plain and generally accepted meaning of the words employed." *Ad Two, Inc.*, 9 P.3d at 376 (citing *USI Properties E., Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997)).

Extraction dedicated the Dedicated Production and Dedicated Properties and committed the Controlled Production. Ex. A § 2.01. The plain meaning of the word "dedicate" is "to set apart to a definite use." *Dedicate*, Merriam-Webster's Collegiate Dictionary 324 (11th ed. 2003). The plain meaning of "commit" is "to pledge . . . to some particular course or use." *Commit*, Merriam-Webster's Collegiate Dictionary 324 (11th ed. 2003). The plain meanings make sense in the context of the REP Gathering Agreement. Extraction merely pledged and set apart its gas in a particular area to the performance of the contractual and personal obligations of the REP Gathering Agreement, a services and purchase agreement relating solely to Extraction's personal property. Throughout the agreement, the Dedicated Production, Dedicated Properties, and Controlled Production are terms used to identify ***what*** minerals ***from which area***

are subject to the contract's obligations.[7] In other words, the dedication merely identifies the parties' contractual rights and obligations respecting Extraction's produced gas. The REP Gathering Agreement ***does not*** convey REP an interest in that gas in place and does not affect Extraction's legal rights to its mineral estate: REP may not compel production and it may not explore or develop Extraction's mineral estate.

2. The REP Gathering Agreement concerns only personal property and does not directly affect the rights to or use of the land.

The REP Gathering Agreement also does not touch and concern the land because it affects only personal property. Under Colorado law, produced gas is personal property. *See Smith v. El Paso Gold Mines, Inc.*, 720 P.2d 608–09 (Colo. App. 1985) ("[A]t some point after they are severed form the land, minerals lose their character as realty and 'become' personalty.") (citing 2 Tiffany Real Property § 587 (3d ed. 1939)). Produced gas is the only thing REP has an interest in under the agreement.

Under the REP Gathering Agreement, Extraction granted "the exclusive right to receive from, gather, and process . . . all Dedicated Production on, in and under the Dedicated Properties that is produced or producible therefrom." Ex. A § 2.01(a). Dedicated Production means "[a]ll Gas owned by Customer . . . on, in and under the Dedicated Properties and ***that is produced***

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[7] *See, e.g.*, Ex. A § 2.01 ("[Extraction] exclusively dedicates and commits to the performance of this Agreement the Dedicated Properties and the Dedicated Production, which includes the exclusive right to receive from, gather, and process . . . all Dedicated Production on, in and under the Dedicated Properties that is produced or producible therefrom); *id.* § 2.02(a) ("REP acknowledges that Customer . . . may have Interests within the Dedicated Properties that are subject to a prior dedication or commitment for gathering and/or processing services."); *id.* at Art. I ("Dedicated Properties." All Interests owned and operated by Customer . . . INSOFAR AND ONLY INSOFAR as such Interests are (a) owned on the Effective Date, and (b) are within the lands described on Exhibit C-1; *provided, however*, the term "Dedicated Properties" does not include any of the Interests described on Exhibit C-2."); *id.* ("Dedicated Production." All Gas owned by Customer or its Controlled Affiliates . . . on, in and under the Dedicated Properties and that is produced through wells thereon . . . ."); *id.* ("Controlled Production." All Gas that is Controlled, but that is not owned, by Customer . . . and that is produced through wells located in, on, and under the Dedicated Properties, and which Customer . . . has the right to deliver to REP.").

through wells thereon, subject to Section 2.02." *Id.* at Art. I ("Dedicated Production") (first emphasis added). Accordingly, if the REP Gathering Agreement conveyed any property interest at all it failed to convey "a property interest in subject land (in this case, the mineral estate). Accordingly, [it] fail[s] to establish horizontal privity of estate and therefore . . . fail[s] to create a real covenant." *See In re Sabine Oil & Gas Corp.*, 734 Fed. Appx. at 67.

The REP Gathering Agreement's glancing references to "producible" gas do not transform the service contract into one concerning real property. *See* Ex. A § 2.01(a). As a matter of common sense, REP cannot gather or process unproduced gas that is only hypothetically producible; the gas must be reduced to possession before REP can do anything with it. Furthermore, as discussed *supra*, the reference to producible gas in the dedication simply identifies the particular gas that will be subject to the REP Gathering Agreement once produced.

Thus, the covenants to gather, process, and purchase contained within the REP Gathering Agreement concern only produced gas, which is personal property. While the gas remains in the ground, REP has no interest in it whatsoever, and REP's contractual rights under the REP Gathering Agreement do not affect Extraction's rights concerning that gas in the ground. Indeed, this is clear from the REP Gathering Agreement, which states:

> Customer reserves the right to operate the wells located within the Dedicated Properties free from any control by REP and in such manner as Customer, in its sole discretion, deems advisable, including, without limitation, the right to determine the maximum efficient rate of flow for such wells, to repair and rework such wells, to abandon such wells or terminate or surrender any Interest . . . .

Ex. A § 2.05. If Extraction can unilaterally decide to abandon the unproduced gas without any input from REP whatsoever, it is self-evident that REP has no interest in the gas. In sum, REP received no right to any share of Extraction's minerals in the ground, instead it is entitled only to provide services (and purchase) related to those minerals once produced in exchange for a fee;

accordingly, the touch and concern element is not met. *See In re Sabine Oil & Gas Corp.*, 567 B.R. at 875.

In sum, the REP Gathering Agreement does not implicate any real property interest and does not touch and concern the land. Extraction's "obligation under the [REP Gathering Agreement] is simply to use [REP's] gathering and processing services when it does produce and deliver [its minerals], and that restriction does not limit [Extraction's] enjoyment of the land itself." *In re Sabine Oil & Gas Corp.*, 567 B.R. at 876. No covenant running with the land was created and summary judgment in Extraction's favor is appropriate.

3. Even if the REP Gathering Agreement indirectly concerns real property, an indirect effect is insufficient to touch and concern the land.

Even if the REP Gathering Agreement indirectly benefits or burdens the land (it does not), an indirect benefit is insufficient to satisfy the touch and concern element. The critical point of the touch and concern element is that a covenant runs with the land only when the benefit or burden is so related to the land that the covenant essentially becomes part of the land itself. *See Reishus*, 409 P.3d at 440 (quoting *Cloud*, 857 P.2d at 440); 20 Am. Jur. 2d Covenants, Conditions and Restrictions § 30. This analysis is based on the inquiry conceived by real property scholar and legal professor Dean Bigelow. 9 Richard R. Powell, Powell on Real Property § 60.04(3)(a) (citation omitted) ("The majority of courts and writers now accept the test for the 'touching and concerning of covenants' proposed by Dean Harry Bigelow, an eminent authority on the subject of covenants.").

As Dean Bigelow described, the inquiry turns on whether a covenant materially affects the promisor's legal relationship to the land itself, as measured by whether the covenant makes the estate more or less valuable. *See* Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. at 652. This affect upon the land, however, must be direct. As Dean Bigelow explained, "[i]t is

easy to suggest covenants that will indirectly or mediately operate to the benefit of the covenantee with respect to his rights as owner of the soil, which clearly do not run." *Id.* Elaborating, he said "a covenant by a lessor of farm lands that he will sell for the lessee all grain that shall be raised on the land and shipped to him would seem clearly to be a personal covenant." *Id.* Dean Bigelow explained, as a "***fundamental***" point, that this is so because the "covenant operates primarily to benefit the covenantee not in the exercise of his privilege as owner of the soil but in the privilege that he has as owner of a chattel, of selling it." *Id.* (emphasis added). As a result, there is no covenant running with the land because, even if the covenant offers some indirect benefit to the land, the covenant really only benefits an individual as the owner of chattel. *See id.*

These fundamental observations apply with equal force to the seller of gas, who is indistinguishable from the seller of grain. While it grows, grain, like gas, is real property until it is ripened and no longer draws sustenance from the land; afterward, it becomes personal property. *Wood v. Wood*, 183 P.2d 889, 890-91 (Colo. 1947); *see also Womach v. Thomas*, 486 A.2d 15, 18 (Del. Ch. 1984) (discussing general law pertaining to unharvested crops, including instances of Colorado law). A gas owner, like a farmer, might desire to sell some of his "crop," and might arrange for various services to assist him in that sale (*e.g.*, transportation services, processing, and marketing). Covenants for the provision of these services and the sale of this severed gas, however, do not directly affect the lessee's legal rights to the land or the value thereof. As a result, they not touch and concern the land. As a result, the REP Gathering Agreement benefits Extraction as the owner of personal property. Even if the REP Gathering Agreement affects the land at all (it does not), it is nevertheless the exact sort of instrument that is too indirectly beneficial or burdensome to run with the land.

B. Extraction and REP Are Not in Privity of Estate Because the REP Gathering Agreement Does Not Convey REP Any Real Property Interest in Extraction's Mineral Estate.

The REP Gathering Agreement fails to create any covenants running with the land for the additional and independent reason that Extraction and REP never shared privity of estate. For a covenant to run with the land under Colorado law, there must be privity of estate between the parties to the covenant. *See Farmers' High Line Canal & Reservoir Co.*, 92 P. at 293; *see also Taylor*, 274 P.2d at 982. Privity of estate requires the transfer of some real property interest in the land with which the covenant runs at the time of the alleged covenant's creation. *See* 3 Tiffany Real Property § 851 (3d ed. 2015) (describing the concept of horizontal privity as "privity of estate between the covenantor and the covenantee at the time the covenant was created").[8] Here, Extraction and REP are not in privity of estate as a matter of Colorado law. The REP Gathering Agreement does not purport to convey any recognized interest in real property.

1. Colorado requires privity of estate between the original covenanting parties for a covenant to run with the land.

The Colorado Supreme Court has explicitly required privity of estate between the original covenanting parties in an unbroken line of cases stretching backward more than a century. The Colorado Supreme Court has said "the requisite privity exists in the case of a covenant ***by a grantor*** to do or not to do something on land retained by him, adjoining that conveyed, so that one to whom the former is subsequently conveyed by him may be bound by the covenant." *Taylor*, 274 P.2d at 982 (emphasis added) (quotation omitted); *see also Farmers' High Line Canal & Reservoir Co.*, 92 P. at 293 ("[W]here there is the requisite privity of estate, and the covenant is connected with or concerns the land or estate conveyed, then a covenant imposing a burden will run with the land

[8] The Colorado Supreme Court has approvingly cited this exact section of this treatise for its explanation of privity. *See Taylor*, 274 P.2d at 982.

as readily as one conferring a benefit.") (citation omitted); *Hottell v. Farmers' Protective Ass'n*, 53 P. 327, 330 (Colo. 1898) (concluding a covenant running with the land was created, in part, because privity of estate was not denied). Colorado's intermediate courts have also long recognized this requirement. *Fisk v. Cathcart*, 33 P. 1004, 1005 (Colo. App. 1893) ("Under these circumstances, there is no privity between him as a grantee from Beecher and the prior grantors subsequent to Parker which entitles him to maintain his suit upon his covenant.").

Indeed, even Colorado statutory law acknowledges this privity requirement. Colorado, by statute, identifies several covenants that necessarily run with the land, but each and every single one of those acknowledged covenants is, nevertheless, still required to satisfy privity of estate. The statute states: "Covenants of seisin, peaceable possession, freedom from encumbrances, and warranty ***contained in any conveyance of real estate, or any interest therein***, shall run with the premises and inure to the benefit of all subsequent purchasers and encumbrancers." Colo. Rev. Stat. § 38-30-121 (emphasis added).

2. The REP Gathering Agreement does not satisfy privity of estate because it does not convey to REP *any* real interest in Extraction's mineral estate.

Privity of estate requires that covenants that allegedly run with the land be contained within a grant of an interest in ***the purportedly burdened estate*** in real property. *See Taylor*, 274 P.2d at 982; *accord In re Sabine Oil & Gas Corp.*, 734 F. App'x at 67 (2d Cir. 2018) (holding horizontal privity was not satisfied, under Texas law, by conveyance of an easement in an agreement separate from the one purportedly creating the covenant); 9 Richard R. Powell, Powell on Real Property § 60.04(3)(c)(iii) ("'Horizontal privity' typically exists when the original covenanting parties make their covenant in connection with the conveyance of an estate in fee from one of the parties to the other. The covenant and the conveyance must be made at the same time . . . ."). Here, the

dedication purports to run with Extraction's mineral estate. *See* Ex. A § 2.01(b) (purporting to burden Extraction's interests in the Dedicated Properties and Dedicated Production). Thus, for the dedication to run with Extraction's mineral estate, the REP Gathering Agreement must convey to REP a real property interest in Extraction's mineral estate. *See Taylor*, 274 P.2d at 982; *accord In re Sabine Oil & Gas Corp.*, 734 F. App'x at 67. Extraction did not.

REP may argue that Extraction conveyed real property interests in the form of a right of access to the surface or via an easement. The REP Gathering Agreement—Ex. A § 6.04—does not grant any such real property right:

> 6.04 Rights of Way.
>
> REP shall use reasonable good faith efforts to negotiate with surface owners to obtain its own easements and other access agreements necessary for the construction and operation of the Facilities. If REP is unable to obtain access to the surface for construction and operation of the Facilities, then to the extent Customer may do so without incurring any expense or impairing its own rights, Customer hereby grants to REP, at REP's expense, at each of the Receipt Points, the right to use Customer's oil and gas leases and other interests, on an as-needed basis, for the sole purpose of constructing, installing, commissioning, maintaining, operating, testing, witnessing, and removing the Facilities and related facilities at the Receipt Point (the "Access Rights"). The

Instead, the provision says Extraction would—at a later time, in the event of certain conditions that were not present at the time of the covenant, and to the extent possible—provide REP with a right to use Extraction's surface access ability on an as-needed basis. Accordingly, the covenants at issue are not contained in the conveyance of a real property interest.

Moreover, even if this language purported to grant some right of co-usage to Extraction's right of ingress and egress upon the surface estate, Extraction did not have the ability to convey that right to REP under Colorado law. In Colorado, "a severed mineral owner has the right to use that portion of the surface estate that is reasonably necessary to develop the severed mineral interest." *Notch Mountain Corp. v. Elliot*, 898 P.2d 550, 556 (Colo. 1995) (citing *Rocky Mountain Fuel Co. v. Heflin*, 366 P.2d 577, 580 (Colo. 1961)). Critically, "[t]hough the privilege to use the

surface is recognized at law, this right ***does not create an ownership interest*** in the surface estate . . . but merely a ***right of access***." *Id.* (citing *Smith v. Moore*, 474 P.2d 794 (Colo. 1970) (emphasis added)). Extraction's surface access rights are not real property interests, they are incidental rights. Colorado considers the incidental surface access right to be like an implied easement appurtenant. *See Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 927 (Colo. 1997), *as modified on denial of reh'g* (Oct. 20, 1997) ("In this sense, the right of access to the mineral estate is in the nature of an implied easement, since it entitles the holder to a limited right to use the land in order to reach and extract the minerals.") (citing Restatement (First) of Property § 450 (Am. Law Inst. 1944)). An easement appurtenant "runs with [the burdened] land and ***is incapable of existence*** separate and apart from the particular land to which it is annexed." *Lewitz v. Porath Family Tr.*, 36 P.3d 120, 122 (Colo. App. 2001), as modified on denial of reh'g (Apr. 26, 2001) (emphasis added) (citing 7 Thompson on Real Property § 60.06(f)(1) (Thomas ed. 1994)).

In other words, the right of access to the surface estate cannot be conveyed separately from the dominant mineral estate itself. Accordingly, Extraction lacked the power to convey its right of surface access without also conveying the dominant mineral estate itself, which nobody contends Extraction did. *See id.*

Additionally, to the extent the REP Gathering Agreement can be construed as granting a real property interest (it did not), any conveyance identified in the agreement implicates only the surface estate and is not a grant of any interest in Extraction's allegedly burdened mineral estate. Colorado has "long recognized that a conveyance which severs a mineral interest from the surface estate creates a separate and distinct estate." *Notch Mountain Corp.*, 898 P.2d at 556 (citing *Radke v. Union Pac. R. Co.*, 334 P.2d 1077 (Colo. 1959)). Extraction's possession of the mineral estate

under its leases caused such a severance. *See* Ex. A at First Recital (stating Extraction owns interests in various lands pursuant to certain leases).

Thus, even if the REP Gathering Agreement is construed as granting an easement (it should not be) the grant could only be of a surface easement entirely unrelated to the mineral estate. *See* Ex. A § 6.04 ("If REP is unable to obtain access ***to the surface*** . . . then to the extent Customer may do so . . . Customer hereby grants to REP . . . the right to use Customer's oil and gas leases and other interests . . . for the sole purpose" of building the facilities) (emphasis added). An easement is "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose . . . ." Easement, *Black's Law Dictionary* (11th ed. 2019); *see also Allen v. Nickerson*, 155 P.3d 595, 598 (Colo. App. 2006) ("An easement is a right conferred by grant, prescription, or necessity authorizing one to do or maintain something on the land of another.") (citing *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229 (Colo. 1998)). ***Surface*** easements are burdens on the surface estate, and cannot implicate Extraction's real property interests in the ***mineral*** estate; indeed, "***[a]s the owner of property subject to the easement, the surface owner*** 'continues to enjoy all the rights and benefits of proprietorship *consistent with the burden of the easement*.'" *Gerrity Oil & Gas Corp.*, 946 P.2d at 927 (bold emphasis added) (quoting *Bijou Irr. Dist. v. Empire Club*, 804 P.2d 175, 183 (Colo. 1991)). It is unclear what thing could even constitute a mineral estate easement.

Finally, the commitments and dedications are not grants of interests in the mineral estate.[9] To interpret this language so would result in a grant of ***all*** Extraction's rights in the Dedicated

[9] To the extent the REP Gathering Agreement purports to "grant[] a servitude in the nature of real covenants," this cannot satisfy privity of estate. The covenant itself cannot be the interest in the conveyed-thing with which the covenant runs; if it were, privity of estate would be meaningless because it would always be satisfied by the grant of the covenant itself.

Properties ***to the REP Gathering Agreement***. Ex. A § 2.01. This is an absurd result. Consider the owner of an apple orchard that "dedicates and commits" its orchard (the "Dedicated Property") in an identified area (the "Dedicated Area") exclusively to an apple picking agreement, as well as all harvested or harvestable apples therefrom (the "Dedicated Apples"). The law would not interpret such language to be a conveyance of the orchard owner's apples in place to the apple-picker; nor would the apple-picker have a real interest in the apples before harvesting. Instead, the dedication merely identifies the apples that are ultimately subject to the picking service if harvested, and regarding which the apple picker has a personal, contractual right because apples (like gas) are personal property once separated from the land. *Compare Wood* 183 P.2d at 890–91 (discussing property law concerning crops) *with El Paso Gold Mines, Inc.*, 720 P.2d at 609 ("[A]t some point after they are severed from the land, minerals lose their character as realty and 'become' personalty.").

The plain language of the REP Gathering Agreement makes clear that Extraction did not grant REP any interest in the allegedly burdened mineral estate. *See In re Sabine Oil & Gas Corp.*, 734 F. App'x at 67 (holding horizontal privity is not satisfied by the conveyance of any land involved with the covenant, but only by an interest in the land intended to be burdened by the purported covenant). Indeed, if REP were to decide to drill well to produce gas from the mineral estate tomorrow, it would be liable for trespass. Thus, REP and Extraction were never in privity of estate and no covenant running with the land was created, and the Court must grant summary judgment in Extraction's favor.

CONCLUSION

Extraction's claim for declaratory judgment is ripe for summary judgment as a matter of law. REP is a stranger to Extraction's mineral interests, and the REP Gathering Agreement merely

provides REP with a personal, contractual right to provide services to (and purchase) Extraction's severed gas, as designated by the agreement's dedication. As a result, the parties are not in privity of estate and the REP Gathering Agreement does not touch and concern the land. Thus, the REP Gathering Agreement does not create covenants that run with the land, and the Court should enter a declaratory judgment so holding as a matter of law.

[*Remainder of page intentionally left blank*]

Dated: August 14, 2020
Wilmington, Delaware

/s/ Stephen B. Gerald

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[10] Whiteford, Taylor & Preston LLC operates as Whiteford Taylor & Preston L.L.P. in jurisdictions outside of Delaware.

EXHIBIT A

REP Gathering Agreement – See Exhibit A to the Complaint

CERTIFICATE OF SERVICE

I, Stephen B. Gerald, do hereby certify that on August 17, 2020, I caused a copy of the Notice of Filing of Proposed Redacted Version of Plaintiff's Complaint and Brief in Support of Motion for Summary Judgment to be served on the parties listed below by first-class mail.

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