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,	
v.	Adv. Proc. No. 20-50816 (CSS)
	Re: Docket No. 1, 2 and 5
GRAND MESA PIPELINE, 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 21, 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 Brief in Support of Motion* [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 Plaintiff's 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 21, 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.	
GRAND MESA PIPELINE, LLC,	Adv. Proc. No. 20-_____ (CSS)
Defendant.	

COMPLAINT FOR DECLARATORY JUDGMENT

Extraction Oil & Gas, Inc. ("Extraction") files this Complaint for Declaratory Judgment against Grand Mesa Pipeline, LLC ("Grand Mesa"). As the basis for its complaint, Extraction states the following:

Nature of the Action

1. On June 14, 2020, the above-captioned debtors and debtors in possession (collectively, the "Debtors") each filed a voluntary petition for relief under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors are operating their businesses

[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.

and managing their properties as debtors-in-possession under sections 1107(a) and 1108 of the Bankruptcy Code.

2. On June 15, 2020, the 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"). On August 4, 2020, Grand Mesa filed its Objection to the Motion to Reject [Docket No. 363].

3. In connection with the Debtors' chapter 11 cases, this adversary proceeding seeks a declaration that certain covenants contained in the agreements between Grand Mesa and certain of the Debtors do not "run with the land."

Jurisdiction and Venue

4. 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 Grand Mesa and certain of the Debtors do not run with the land. This is a core proceeding under 28 U.S.C. § 157(b)(2).

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

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

Parties

7. 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.

8. Defendant Grand Mesa, upon information and belief, is a Delaware limited liability company with its principal place of business at 6121 South Yale Avenue, Suite 805, Tulsa, Oklahoma 74136.

Factual Allegations

A. The Amended and Restated Transportation Services Agreement.

9. On June 21, 2016, Grand Mesa entered into the Amended and Restated Transportation Services Agreement (the "Transportation Agreement") with Bayswater Exploration & Production, LLC. A true and correct copy of the Transportation Agreement is attached as **Exhibit A**.

10. Extraction Oil & Gas, LLC is the successor-in-interest to Bayswater Exploration & Production, LLC under the Transportation Agreement. Extraction Oil & Gas, Inc. is the successor-in-interest to Extraction Oil & Gas, LLC.

11. The initial term of the Transportation Agreement commenced as of the Commencement Date[2] and the contract [redacted] unless terminated earlier under the contract's terms. *See* Ex. A § 6.1.

12. Under the Transportation Agreement, Extraction agreed to [redacted] *Id.* § 4.1. The "Committed Volume" is a set amount of crude petroleum within given timeframes. *Id.* § 2. Grand Mesa agreed to transport tendered crude oil up to a certain volume from Lucerne, Weld County, Colorado to

[2] [redacted] Ex. A § 2.

Cushing, Oklahoma via its 20-inch interstate pipeline. *Id.* §§ 2 ("Services"), 3.1, Ex. A. Extraction retained exclusive control and possession of all crude petroleum until its delivery into the Pipeline System. *Id.* § 8.5. Extraction retains title to the crude petroleum throughout Grand Mesa's transportation and redelivery of its crude. *Id.*

13. Extraction's commitments under the Transportation Agreement can be satisfied in full either by: (1) shipping certain amounts of crude petroleum within certain timeframes ***or*** (2) [redacted] *Id.* § 4.1. The Total Financial Commitment [redacted] *Id.* § 2. At Extraction's option, it may accelerate the satisfaction of the Total Financial Commitment, and its obligations under the Transportation Agreement, through payment. *Id.* § 8.2 ([redacted]).

14. In accordance with their agreement to transport Extraction's produced oil, the parties agreed to dedicate and commit certain mineral interests to the performance of the Transportation Agreement—*id.* § 1.1—stating:

[redacted]

15. This dedication and commitment is so broad that Extraction would now be a stranger on its own land if the parties intended the dedication to function as a conveyance. *See id.* The Subject Leases are [redacted] *Id.* § 2. The Wells are [redacted] *Id.* The Dedicated Reserves are [redacted] *Id.*

16. The parties, however, were careful to clarify that this dedication and commitment was not intended to convey any of its mineral interests to Grand Mesa. The dedication and commitment was subject to various reservations. *Id.* § 1.1. Those reservations include the following rights:

[redacted]

17. Indeed, the parties clearly intended that Extraction retain its rights, titles, and interests in the Dedicated Interests because the parties contemplated situations wherein Extraction could transfer its mineral interests subject to the Transportation Agreement. *See id.* § 1.4 ("[redacted]

[3] Ex. A § 2.

[redacted]); *id.* § 8.4 (warranting that Extraction possesses title to all of the crude petroleum delivered under the Transportation Agreement).

18. The parties also included a provision that purported to contractually render the dedication—and ***only*** the dedication—a covenant running with Extraction's mineral interests in the Dedicated Area, making it enforceable against subsequent owners of Extraction's mineral interests in the Dedicated area by virtue of the privity of estate between the parties. *Id.* § 1.2.

19. Specifically, the parties provided:[4]

[redacted]

20. The Transportation Agreement is to be construed in accordance with the laws of Texas, without regards to Texas's conflict of laws rules. *Id.* § 15.14. The real property implicated by the Transportation Agreement is located within Colorado. *See id.* § 2 (defining the Dedication Area).

Claims for Relief

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

22. 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*

[4] Ex. A § 1.2.

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).

23. Although intent that the covenant run with the land 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
(Transportation Agreement – Declaratory Judgment under 28 U.S.C. § 2201(a))

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

25. The parties dispute whether the Transportation Agreement creates any covenants that run with the land.

26. The Transportation Agreement does not create covenants that run with the land under Colorado law. In particular, Extraction's purely contractual promise to deliver to Grand Mesa certain amounts of gas for shipping is not a covenant that runs with the land.

27. First, the Transportation Agreement does not grant Grand Mesa an interest in Extraction's real property sufficient to satisfy privity of estate under Colorado law. Indeed, the Transportation Agreement does not actually grant any interest in Extraction's allegedly burdened mineral estate. *See* Ex. A § 2 (concerning dedication reservations); *id.* § 8.5 (concerning custody of crude petroleum). Instead, the Transportation Agreement 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). Thus, the original contracting parties were not in privity of estate, the current parties were

never in privity of estate, and the covenants within the Transportation Agreement do not run with the land.

28. Second, the covenants in the Transportation Agreement do not "touch and concern" the land. Instead of benefitting or burdening Extraction's mineral estate, the Transportation Agreement benefits or burdens only the parties personally. The Transportation Agreement's covenants relate solely to Extraction's produced crude petroleum, which Grand Mesa is to transport via its interstate pipeline from Weld County, Colorado to Cushing Oklahoma. *See generally* Ex. A. Moreover, Extraction can satisfy its obligations under the Transportation Agreement by paying its remaining Total Financial Commitment, meaning that Grand Mesa cannot compel Extraction to do anything with its produced crude petroleum, let alone with its mineral estates.

29. 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.

30. A judicial declaration is necessary and appropriate so that Extraction may ascertain its rights and obligations regarding the Transportation Agreement.

31. For the foregoing reasons, Extraction is entitled to a judicial declaration that the covenants contained in the Transportation Agreement fail to run with the land.

32. Such a declaration will serve 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.[5] It will also serve a useful purpose by enabling the Court to determine

[5] On June 15, 2020, the Debtors filed the Motion to Reject to reject the Transportation Agreement pursuant to section 365 of the Bankruptcy Code and have adjourned adjudication of such to date. 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 Transportation Agreement and all obligations thereunder may be rejected under section 365 of the Bankruptcy Code.

Prayer for Relief

WHEREFORE, Extraction respectfully request that the Court enter judgment in Extraction's favor as follows:

(a) Declaring that the covenants contained in the Transportation 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 19, 2020
Wilmington, Delaware

/s/ Richard W. Riley

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

EXHIBIT A

Transportation Agreement Filed Under Seal

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.,	)	
Plaintiff,	)	
v.	)	Adv. Proc. No. 20-50816 (CSS)
GRAND MESA PIPELINE, LLC,	)	
Defendant.	)	

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Dated: August 19, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... **II**

NATURE AND STAGE OF THE REJECTION PROCEEDINGS **1**

SUMMARY OF ARGUMENT **1**

STATEMENT OF FACTS **3**

I. THE AMENDED AND RESTATED TRANSPORTATION SERVICES AGREEMENT **3**

LEGAL STANDARD **6**

ARGUMENT **7**

I. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE EXTRACTION SEEKS DECLARATORY JUDGMENT CONCERNING A PURELY LEGAL QUESTION OF COLORADO LAW **7**

II. THE TRANSPORTATION AGREEMENT DOES NOT CREATE A COVENANT THAT RUNS WITH THE LAND UNDER COLORADO LAW **9**

A. Extraction and Grand Mesa Are Not in Privity of Estate Because the Transportation Agreement Does Not Convey to Grand Mesa Any Real Property Interest in Extraction's Mineral Estate. 9

1. Colorado requires privity of estate between the original covenanting parties for a covenant to run with the land. 10

2. The Transportation Agreement does not satisfy privity of estate because it does not convey to Grand Mesa *any* interest in Extraction's mineral estate. 11

B. The Transportation Agreement Does Not Touch and Concern the Land Because It Does Not Directly Benefit or Burden Extraction's Real Property Interests. 15

1. The Transportation Agreement's Dedication does not touch and concern Extraction's mineral estate or affect the use or enjoyment of that estate. 18

2. Even if the Transportation Agreement indirectly concerns real property, an indirect effect is insufficient to touch and concern the land. 21

CONCLUSION **23**

TABLE OF AUTHORITIES

Page(s)

Cases

Ad Two, Inc. v. City & County of Denver ex rel. Manager of Aviation,
9 P.3d 373 (Colo. 2000) 13

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 6

Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.,
109 P.3d 604 (Colo. 2005) 16

Atl. Richfield Co. v. Whiting Oil & Gas Corp.,
320 P.3d 1179 (Colo. 2014) 16

Bigelow v. Nottingham,
833 P.2d 764 (Colo. App. 1991) ..... *passim*

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 6, 8

City of Leadville v. Coronado Min. Co.,
86 P. 1034 (Colo. 1906) 13

Cloud v. Ass'n of Owners, Satellite Apartment Bldg., Inc.,
857 P.2d 435 (Colo. App. 1992) ..... *passim*

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92 P. 290 (Colo. 1907) 9, 10, 15

Fed. Deposit Ins. Corp. v. Mars,
821 P.2d 826 (Colo. App. 1991) 10

Fisk v. Cathcart,
33 P. 1004 (Colo. App. 1893) 11

Gas House, Inc. v. Unicorp Am. Corp.,
952 F.2d 1392 (3d Cir. 1991) 7

Hadley v. Gerrie,
124 B.R. 679 (D.V.I. 1991) 7

Hand v. Rhodes,
245 P.2d 292 (Colo. 1952) 13

TABLE OF AUTHORITIES (CONT'D)

Page(s)

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998 P.2d 1106 (Colo. App. 2000) 8

Hottell v. Farmers' Protective Ass'n,
53 P. 327 (Colo. 1898) 10

Lazy Dog Ranch v. Telluray Ranch Corp.,
965 P.2d 1229 (Colo. 1998) 16

Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.,
867 P.2d 70 (Colo. App. 1993) 15, 17

Pulte Home Corp., v. Countryside Cmty. Ass'n, Inc.,
382 P.3d 821 (Colo. 2016) 8

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409 P.3d 435 (Colo. 2016) ..... *passim*

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547 B.R. 66 (Bankr. S.D.N.Y. 2016), *aff'd*, 567 B.R. 869 (S.D.N.Y. 2017),
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734 F. App'x (2d Cir. 2018) 11, 12, 15

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720 P.2d 608 (Colo. App. 1985) 19

Stagecoach Prop. Owners Ass'n v. Young's Ranch,
658 P.2d 1378 (Colo. App. 1982) 13

Tamarind Resort Associates v. Gov't of Virgin Islands,
138 F.3d 107 (3d Cir. 1998) 7

Taylor v. Melton,
274 P.2d 977 (Colo. 1954) ..... *passim*

United States v. Novotny,
184 F. Supp. 2d 1071 (D. Colo. 2001) 8

USI Properties E., Inc. v. Simpson,
938 P.2d 168 (Colo. 1997) 13

TABLE OF AUTHORITIES (CONT'D)

Page(s)

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32 P. 427 (Colo. 1893).....8

Womach v. Thomas,
486 A.2d 15 (Del. Ch. 1984).....22

Wood v. Wood, 183 P.2d 889 (Colo. 1947).....22

Statutes

Colo. Rev. Stat. § 38-30-121.....11

28 U.S.C § 2201(a).....7, 8

Rules

Federal Rule of Bankruptcy Procedure 7056.....1, 6

Federal Rule of Banktuptcy Procedure 7001.....1

Federal Rule of Civil Procedure 1.....6

Federal Rule of Civil Procedure Rule 56.....1, 6

Other Authorities

2 Thompson on Real Property § 8.03.....16

2 Tiffany Real Property § 587 (3d ed. 1939).....19

3 Tiffany Real Property § 851 (3d ed. 2015).....10, 11, 17

3 Tiffany Real Property § 854 (3d ed. 2015).....16

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ALI Committee on Property, Restatement (First) of Property Committee
(Am. Law. Inst. 1936).....16

20 Am. Jur. 2d Covenants, Conditions and Restrictions § 30.....21

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TABLE OF AUTHORITIES (CONT'D)

Page(s)

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Restatement (First) of Property § 395 cmt. a (Am. Law. Inst. 1936) 16

Restatement (First) of Property § 483 (Am. Law. Inst. 1936).....16

Restatement (Second) Conflict of Laws § 223 cmt. g (Am. Law. Inst. 1971) 8

Restatement (Second) Conflict of Laws § 224 (Am. Law Inst. 1971.....8

NATURE AND STAGE OF THE REJECTION PROCEEDINGS

On August 19, 2020, Extraction filed its Complaint for Declaratory Judgment, seeking a declaration that the Transportation Agreement (as defined below) does not create covenants that run with the land in order to support *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"). Extraction simultaneously seeks the relief requested in the Complaint and rejection of the Transportation 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 and Rules 7001 and 7056 of the Federal Rules of Bankruptcy Procedure, for entry of an order granting summary judgment in Extraction's favor and against Grand Mesa Pipeline, LLC ("Grand Mesa"). Extraction is entitled to summary judgment because, as a matter of law, the Amended and Restated Transportation Services Agreement, dated June 21, 2016, with Grand Mesa (the "Transportation Agreement") does not create covenants that run with the land under Colorado law.

The Transportation Agreement is exactly what its name suggests: an agreement governing contractual services to transport chattel. The agreement governs the transportation of Extraction's

chattel—its produced crude petroleum—from Lucerne, Weld County, Colorado to Cushing, Oklahoma, and it benefits Extraction as the owner of that chattel, not as the owner of real property. Extraction owns interests in certain mineral estates, and these interests allow Extraction to search for and reduce hydrocarbons to chattel. Grand Mesa, however, is a complete stranger to those mineral interests, and the Transportation Agreement does not affect Extraction's interests in the mineral estates.

Under the agreement, Grand Mesa is simply a service provider, just like any other service provider that contractually agrees to transport a merchant's personal property in exchange for a fee. Grand Mesa agreed to transport a certain volume of Extraction's crude oil in exchange for a fee and 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 minerals, and no right to otherwise affect Extraction's legal rights to these mineral interests. In fact, by its terms, Extraction can meet its obligations under the Transportation Agreement in full without providing any of its crude oil to Grand Mesa by opting to pay a defined total financial commitment. Thus, Grand Mesa's personal, contractual interests for the 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. Grand Mesa cannot satisfy at least either the privity of estate or touch and concern elements as a matter of law. As a result, the Court should grant summary judgment and declare that Extraction's agreement with Grand Mesa does not create a covenant running with the land under Colorado law.

STATEMENT OF FACTS

I. THE AMENDED AND RESTATED TRANSPORTATION SERVICES AGREEMENT

On June 21, 2016, Grand Mesa entered into the Amended and Restated Transportation Services Agreement (the "Transportation Agreement") with Bayswater Exploration & Production, LLC. A true and correct copy of the Transportation Agreement is attached as **Exhibit A**. Extraction Oil & Gas, LLC is the successor-in-interest to Bayswater Exploration & Production, LLC under the Transportation Agreement. Extraction Oil & Gas, Inc. is the successor-in-interest to Extraction Oil & Gas, LLC.

The Transportation Agreement, as its name suggests, is merely an agreement wherein the parties provided for the transportation of crude petroleum in exchange for a fee. The Transportation Agreement is construed in accordance with, and is governed by, Texas law, without regards to Texas's conflict of laws provisions. Ex. A § 15.14. The real property implicated by the Transportation Agreement is located within Colorado. *See id.* § 2 (defining the Dedication Area).

The Transportation Agreement commenced as of the Commencement Date[1] and the contract [redacted] unless terminated earlier under the contract's terms. *See* Ex. A § 6.1.

Under the Transportation Agreement, Extraction agreed to [redacted] *Id.* § 4.1. The "Committed Volume" is a set number of barrels of crude petroleum over the seven-year term or additional five-year extension.

[1] "'Commencement Date' means the first day of the first Month after the Month in which Shipper has received not less than forty-five (45) calendar days' prior written notice from Grand Mesa that construction of the Pipeline System is substantially complete and that the Pipeline System is operational." Ex. A § 2.

Id. § 2. Extraction retains exclusive control and possession of all crude petroleum until its delivery into the Pipeline System. *Id.* § 8.5. Title to the crude petroleum transported, however, always remains with Extraction or another person for whom Extraction has the right to transport. *Id.* Grand Mesa does not obtain title to the crude oil at any point. *Id.*

Extraction's commitments under the Transportation Agreement can be satisfied by ***either***: (1) shipping certain amounts of crude petroleum within certain timeframes ***or*** (2) [redacted] *Id.* § 4.1. The Total Financial Commitment [redacted] *Id.* § 2. At Extraction's option, it may accelerate the satisfaction of the Total Financial Commitment, and its obligations under the Transportation Agreement, through payment. *Id.* § 8.2 [redacted]

As part of the Transportation Agreement, Extraction dedicated and committed certain of its mineral interests to the performance of the Transportation Agreement:

[redacted]

Id. § 1.1. This dedication and commitment, however, was not intended as a conveyance of any such interest; if so, Extraction would now be a stranger on its own land. *See id.* The Subject

Leases are [redacted] *Id.* § 2. The Wells are [redacted] *Id.* The Dedicated Reserves are [redacted] *Id.* The contract gives "Crude Petroleum" the "meaning set forth in the Tariff." Ex. A § 2. A true and correct copy of the Tariff is attached as **Exhibit B**. The Tariff, in turn, defines Crude Petroleum as "the direct liquid product of oil wells, or the indirect liquid petroleum products of oil or gas wells, or a mixture of such products." Ex. B § 5.

Thus, the parties were careful to clarify that this commitment did not convey any part of Extraction's mineral interests or a title to its crude oil (in place or severed) to Grand Mesa. The dedication was subject to various reservations. *Id.* § 1.1. Those reservations include the following:

[redacted]

Indeed, the parties intended that Extraction retain its rights, titles, and interests in the Dedicated Interests because the parties contemplated situations wherein Extraction could transfer

[2] Ex. A § 2.

such rights, titles, and interests subject to the Transportation Agreement. *See id.* § 1.4 [redacted] *id.* § 8.4 (warranting that Extraction possesses title to all of the crude petroleum delivered under the Transportation Agreement).

The parties also included a provision that purported to contractually render the dedication—and ***only*** the dedication—a covenant running with Extraction's mineral interests in the Dedicated Area, making it enforceable against subsequent owners of Extraction's mineral interests in the Dedicated Area by virtue of the privity of estate between the parties. *Id.* § 1.2. Specifically, the parties provided:[3]

[redacted]

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(a)—made applicable to this action under Federal Rule of Bankruptcy Procedure 7056—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. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Celotex Corp.*, 477 U.S. at 327. A genuine dispute

[3] Ex. A § 1.2.

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 Transportation 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 Transportation 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 PURELY LEGAL QUESTION OF COLORADO LAW

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

Extraction 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 governed by Colorado law.[4] The lands covered by the Transportation Agreement are located in Colorado. *See* Ex. A § 2 (defining the Dedication Area). 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, 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) ("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.").

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.").

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[4] 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.

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

The Transportation 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. 2016) (citing *Cloud v. Ass'n of Owners, Satellite Apartment Bldg., Inc.*, 857 P.2d 435, 440 (Colo. App. 1992)).[5] 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 Transportation Agreement neither satisfies privity of estate nor touches and concerns the land. Specifically, the covenants are not contained in a grant of any real property interest in that land and do not directly benefit or burden the land with which they are intended to run. Summary judgement in Extraction's favor is, therefore, appropriate.

A. Extraction and Grand Mesa Are Not in Privity of Estate Because the Transportation Agreement Does Not Convey to Grand Mesa Any Real Property Interest in Extraction's Mineral Estate.

The Transportation Agreement fails to create any covenants running with the land because Extraction and Grand Mesa are not in 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

[5] 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.") (citing *Bigelow v. Nottingham*, 833 P.2d 764 (Colo. App. 1991)).

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").[6] Here, Extraction and Grand Mesa are not in privity of estate as a matter of Colorado law. The Transportation Agreement does not even 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 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. *Fed. Deposit Ins. Corp. v. Mars*, 821 P.2d 826, 829 (Colo. App. 1991) ("For contractual obligations between a lessor and lessee to pass to a successor in title of the lessee, there must be either privity of contract or privity of estate between the lessor and that

[6] 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.

successor in title."); *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 the 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).

Finally, even secondary sources note that Colorado law continues to require privity of estate between the covenanting parties. *See* 3 Tiffany Real Property § 851 n. 27 (3d ed. 2015) (citing *Taylor v. Melton* for the proposition that privity of estate is required); *see also* 9 Richard R. Powell, Powell on Real Property § 60.04 n. 123 (citing *Farmers' High Line Canal & Reservoir Co.* for the proposition that either mutual or horizontal privity are required for a covenant to run with the land).

2. The Transportation Agreement does not satisfy privity of estate because it does not convey to Grand Mesa *any* 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 is the only contractual covenant intended to be a covenant running with the land, and it is intended to run with Extraction's oil and gas interests in the Dedicated Area. *See* Ex A § 1.2. Thus, for the dedication to run with Extraction's mineral interests in the Dedicated Area, the Transportation Agreement must ***actually***[7] convey to Grand Mesa a real property interest in those mineral estates. *See Taylor*, 274 P.2d at 982; *accord In re Sabine Oil & Gas Corp.*, 734 F. App'x at 67. Here, Extraction simply did not do so; Grand Mesa has no right to divest Extraction's mineral estates of minerals, no right to compel production of crude petroleum, no right to drill on Extraction's mineral estates, and no title to the crude oil in place.

Grand Mesa may advance the circular argument that the dedication—the very thing purporting to be a covenant running with the land—is somehow also a conveyance sufficient to satisfy privity of estate. In relevant part, the Transportation Agreement states:

[redacted]

[7] The Transportation Agreement states the covenant is [redacted] *See* Ex. A § 1.2. That is not how the law works. *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)).

Ex. A § 1.1. Considered in the context of the totality of the Transportation Agreement, this provision's purpose is clear: it merely identifies ***what*** crude petroleum, from ***which*** property, are the subject of Grand Mesa's contractual right to transport Extraction's severed crude oil from Weld County, Colorado to Cushing, Oklahoma. [8]

The legal definition of the word "dedication" in the real property context 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 interprets "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)). Colorado courts have also recognized the difference between a dedication and an actual conveyance in real property. *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)). The parties clearly did not intend the Transportation Agreement to donate Extraction's mineral interests for public use or to convey Extraction's mineral leases, wells, mineral reserves, or produced crude from the Dedicated Area to Grand Mesa.

Instead, the Court must construe the Transportation Agreement's language "in harmony with the plain and generally accepted meaning of the words employed." *Ad Two, Inc. v. City & County of Denver ex rel. Manager of Aviation*, 9 P.3d 373, 376 (Colo. 2000) (citing *USI Properties E., Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997)).

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[8] The dedication is, on its face, entirely circular. *See* Ex. A § 1.1 [redacted] (emphasis added)).

Extraction dedicated and committed to the performance of the Transportation Agreement its Subject Leases, Wells, Dedicated Reserves, and its crude petroleum within or produced from the Dedication Area. *See* Ex. A § 1.1. 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 Transportation Agreement. Extraction merely pledged and set apart its crude petroleum within a particular area to the performance of the Transportation Agreement, a contract related solely to the transportation of Extraction's personal property from Weld County, Colorado to Cushing, Oklahoma, or payment of a set financial commitment. Throughout the Transportation Agreement, the Subject Leases, Wells, and Dedicated Reserves are terms used to identify ***what*** crude petroleum ***from which area*** is subject to the contract's obligations.[9] In other words, the dedication merely identifies what produced crude petroleum would be subject to the parties' contractual rights and obligations. The Transportation Agreement ***does not*** convey to Grand Mesa an interest in that crude petroleum in place and does not affect Extraction's legal rights to its mineral estate.

None of this means that Extraction granted Grand Mesa any interest in its real property. For example, consider the owner of widget factories that "dedicates and commits" its factories (the "Dedicated Factories") as well as all widgets produced therefrom (the "Dedicated Widgets") in an

[9] *See, e.g.*, Ex. A § 2 (describing the Subject Leases [redacted]; *id.* (describing the wells as [redacted] (emphasis added)); *id.* (describing the Dedicated Reserves as [redacted] (emphasis added))

identified area (the "Dedicated Area") exclusively to a trucking company's transportation services agreement. Under this contract, the owner agreed to deliver a certain number of Dedicated Widgets produced in the Dedicated Factories to the trucking company's Colorado facility, and, in turn, the trucking company agreed to truck those widgets from that facility to a designated location in Cushing, Oklahoma in exchange for a fee. The law would not interpret such language to be a conveyance of the factory owner's factories or widgets to the trucking company; nor would the trucking company have a real interest in the factories from which the widgets were being produced. Instead, the dedication merely identifies the widgets that are ultimately subject to the trucking service if produced, and regarding which the trucking company has a personal, contractual right.

The plain language of the Transportation Agreement makes clear that Extraction did not grant Grand Mesa any interest in Extraction's 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 just any land involved with the covenant, but only by an interest in the land intended to be burdened by the purported covenant). Indeed, if Grand Mesa were to decide to drill wells to produce crude petroleum from Extraction's mineral estate tomorrow, it would be liable for trespass. Grand Mesa has no right or title to any crude petroleum, produced or in place. Thus, Grand Mesa and Extraction were never in privity of estate and no covenant running with the land was created. As a result, the Court should grant summary judgment in Extraction's favor.

B. The Transportation Agreement Does Not Touch and Concern the Land Because It Does Not Directly Benefit or Burden Extraction's Real Property Interests.

The Transportation Agreement does not create any covenants that run with the land for the additional, and independently sufficient, reason that the purported covenants do not touch and concern the land. *See 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 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). "The 'touch and concern' requirement is fulfilled when the covenant operates to benefit the physical use of the land." *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).

Here, the only thing within the Transportation Agreement that purports to run with the land is the dedication itself, which allegedly runs with Extraction's mineral estate. *See* Ex. A § 1.2 ("The dedication by [Extraction] . . . shall be a covenant running with the land . . . ."). Therefore, the Transportation 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. *Compare Reishus*, 409 P.3d at 440 (noting "[a] covenant touches and concerns the land if it 'closely relate[s] to the land, its use, or enjoyment.'") (citation omitted) *with* 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.[10] As

[10] "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." 9 Richard R. Powell, Powell on Real Property § 60.04(3)(a) (citation omitted). Indeed, Dean Bigelow was one of the reporters for the Restatement (First) of Property. *See* ALI Committee on Property, Restatement (First) of Property Committee (Am. Law. Inst. 1936); *see also* 2 Thompson on Real Property § 8.03 (discussing Dean Bigelow's contributions to the Restatement). Thus, the Supreme Court of Colorado has repeatedly cited Dean Bigelow's work with approval. *See Atl. Richfield Co. v. Whiting Oil & Gas Corp.*, 320 P.3d 1179, 1191 (Colo. 2014) (citing Restatement (First) of Property § 373 cmt. a); *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 615 (Colo. 2005) (citing Restatement (First) of Property § 395 cmt. a); *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1236 (Colo. 1998), as modified on denial of reh'g (Oct. 19, 1998) (citing Restatement (First) of Property § 483)).

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); *see also* 3 Tiffany Real Property § 851 (3d ed. 2015) (noting, regarding touch and concern, "it has been said, in order that a covenant may run with the land its performance or nonperformance must affect the nature, quality or value of the property independent of collateral circumstances, or must affect the mode of enjoyment") (footnotes omitted).

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*, 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 Transportation 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 land. ***First***, the dedication simply identifies the parties' contractual rights and obligations and the Transportation Agreement is simply a service contract wherein Grand Mesa agrees to provide transportation services to Extraction's produced crude petroleum in exchange for a fee; the covenants to provide services purely relate to (and affect) personal property, not land. ***Second***, even assuming, *arguendo*, that the purported covenants indirectly relate to real property, they do not directly benefit or burden the land.

1. The Transportation Agreement's Dedication does not touch and concern Extraction's mineral estate or affect the use or enjoyment of that estate.

The Transportation Agreement's dedication does not touch and concern—and does not even implicate—Extraction's real property interests.[11] In relevant part, the Transportation Agreement—Ex. A § 1.1—states:

[11] To be clear, notwithstanding Extraction's arguments, Grand Mesa 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.

[redacted]

As discussed *supra*, if this dedication can be rationally interpreted to have any legal effect at all it is merely to identify the crude petroleum from particular lands that are subject to the Transportation Agreement.

Moreover, the Transportation Agreement does not touch and concern the land because it affects only personal property. Under Colorado law, produced crude petroleum is personal property. *See Smith v. El Paso Gold Mines, Inc.*, 720 P.2d 608, 609 (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)). Grand Mesa's contractual rights and obligations relate entirely to Extraction's produced crude petroleum.

Under the Transportation Agreement, Extraction agreed to [redacted] Ex. A § 4.1. The "Committed Volume" is a set amount of crude petroleum within given timeframes. *Id.* § 2. Extraction retained exclusive control and possession of all crude petroleum until its delivery into the Pipeline System, and title to the crude petroleum throughout the transportation of the oil. *Id.* § 8.5. Furthermore, as a matter of

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 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.").

common sense, crude petroleum must be produced from the ground before it can be delivered to Weld County, Colorado to be transported to Cushing, Oklahoma.

Thus, the covenants within the Transportation Agreement relate only to produced crude petroleum, which is personal property. Grand Mesa's contractual rights to transport Extraction's severed crude oil to Cushing, Oklahoma under the Transportation Agreement do not affect Extraction's rights, use, or enjoyment of that crude petroleum in the ground. Indeed, this is clear from the Transportation Agreement's own language, which carved out from the dedication and reserved to Extraction the right:



Ex. A § 2. If Extraction can unilaterally decide to abandon the unproduced crude petroleum without any input from Grand Mesa whatsoever, it is self-evident that Grand Mesa has no interest in the crude petroleum.

Moreover, pursuant to the Transportation Agreement, Extraction has the choice of performance by either (1) providing a certain number of barrels of its produced crude oil to Grand Mesa for transportation to Oklahoma or (2) paying part of its monthly financial commitment. *See id.* at §§ 8.1, 8.2. As a result, Extraction can always opt not to provide any produced oil to Grand Mesa and, instead, simply pay Grand Mesa the remaining Total Financial Commitment to satisfy all of its remaining obligations. *Id.* at § 4.1 In addition, the barrels of crude oil transported need not have been produced from the Dedicated

Area in order to satisfy the requirements of the volume commitment.[12] In other words, Extraction could fulfill its commitment under the Transportation Agreement by purchasing oil from another producer and transporting the purchased oil via Grand Mesa's pipeline to Oklahoma.

In other words, Grand Mesa has no right to direct Extraction to provide it with its produced oil for transportation, let alone affect its enjoyment or use of its mineral interests themselves. Certainly, the payment of money from Extraction to Grand Mesa is a personal commitment burdening and benefiting the parties individually, and not Extraction's land. *Bigelow*, 833 P.2d at 767 (holding that a subordination agreement was a personal covenant that did not run with the land because "the parties' entitlement to physical use of the land was not increased, nor was improvement made to the land as a result of subsequent loan proceeds" (citations omitted)).

In sum, Extraction's dedication and commitment to the transportation of its personal property, its produced oil, in exchange for a fee does not closely relate to Extraction's use and enjoyment of its mineral interests themselves, or its legal right to those interests; accordingly, the touch and concern element is not met. *See In re Sabine Oil & Gas Corp.*, 567 B.R. at 875. No covenant running with the land was created and summary judgment in Extraction's favor is appropriate.

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

Even if the Transportation 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

[12] Ex. A § 4.1 [redacted]; *id.* at § 2 [redacted]; *id.* [redacted].

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. As discussed *supra*, this analysis is based on the inquiry conceived by real property scholar and legal professor Dean Bigelow. *See* 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 effect upon the land, however, must be direct, or "closely" relate to or benefit the land. 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 even greater force to one who desires to transport crude petroleum, who is one step further removed from any real property than the seller of grain. While it grows, grain, like crude petroleum, is real property until ripened and no longer drawing 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 crude petroleum owner, like a farmer, might desire to arrange for services to assist him in the sale or transportation of the resource. Covenants for the provision of these shipping services, however, do not directly affect any legal rights to the land, its enjoyment or use, or the value thereof. As a result, they do not touch and concern the land. Thus, the Transportation Agreement benefits Extraction as the owner of personal property. Even if the Transportation 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.

CONCLUSION

Extraction's claim for declaratory judgment is ripe for summary judgment as a matter of law. Grand Mesa is a stranger to Extraction's mineral interests, and the Transportation Agreement merely provides Grand Mesa with a personal, contractual right to provide transportation services to Extraction's crude petroleum across state lines, as designated by the contract's dedication, or to be paid a financial commitment. As a result, the parties are not in privity of estate and the Transportation Agreement does not touch and concern the land. Thus, the Transportation 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.

Dated: August 19, 2020
Wilmington, Delaware

/s/ Richard W. Riley

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

EXHIBIT A

Transportation Agreement

(Redacted in full)

EXHIBIT B

GRAND MESA PIPELINE, LLC

LOCAL TARIFF
CONTAINING
RULES AND REGULATIONS

Governing the Interstate Transportation of

CRUDE PETROLEUM BY PIPELINE

FROM ORIGINS IN
WELD COUNTY, COLORADO

TO A DESTINATION IN
LINCOLN COUNTY, OKLAHOMA

GENERAL APPLICATION

The Rules and Regulations published herein apply only under tariffs making specific reference by FERC number to this tariff: such references will include supplements hereto and successive issues hereof. Specific rules and regulations published in individual tariffs will take precedence over Rules and Regulations published herein.

The provisions published herein will, if effective, not result in an effect on the quality of the human environment.

ISSUED: September 30, 2016 **EFFECTIVE: November 1, 2016**

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TABLE OF CONTENTS

SUBJECT	ITEM NO.	PAGE NO.
DEFINITIONS	5	3
NOMINATIONS; MINIMUM QUANTITY	10	4
TITLE	15	5
REQUIRED SHIPPER INFORMATION	20	5
LINE FILL AND TANK BOTTOM REQUIREMENTS	25	5
QUALITY SPECIFICATIONS	30	5
GAUGING, TESTING AND DEDUCTIONS	35	7
DESTINATION FACILITIES REQUIRED	40	7
NOTICE OF ARRIVAL, DELIVERIES AND DEMURRAGE	45	7
MIXING IN TRANSIT	50	8
APPLICATION OF RATES AND CHARGES	55	8
INTENTIONALLY LEFT BLANK	60	8
PAYMENT OF TRANSPORTATION AND OTHER CHARGES	65	8
LIABILITY OF CARRIER	70	9
WARRANTIES	75	10
DUTY OF CARRIER	80	10
CLAIMS AND TIME FOR FILING	85	10
ADDITIVES	90	11
PIPEAGE OR OTHER CONTRACTS	95	11
PRORATION OF PIPELINE CAPACITY	100	11
STORAGE IN TRANSIT	105	11
COMMODITY	110	11
CONNECTION REQUIREMENTS	115	11

5. DEFINITIONS

"Affiliate" as herein used means, with respect to any Person, any Person directly or indirectly Controlling, Controlled by or under common Control with such Person.

"API" as herein used means American Petroleum Institute.

"Applicable Laws" means all federal, state or local laws, rules, orders or regulations applicable to these rules and regulations, the parties, the System and the operation thereof.

"Barrel" as herein used means forty-two (42) United States gallons at sixty degrees (60°) Fahrenheit and zero (0) gauge pressure if the vapor pressure of the Crude Petroleum is at or below atmospheric pressure, or at equilibrium pressure if the vapor pressure of the Crude Petroleum is above atmospheric pressure.

"Carrier" as herein used means Grand Mesa Pipeline, LLC.

"Control," "Controlling" or **"Controlled"** means the possession, directly or indirectly, of the right or power to direct or cause the direction of the management and policies of another Person, whether through the ownership of voting securities, partnership interests, management authority, by contract or otherwise; and without limiting the foregoing, it shall be deemed that the ownership of more than 50% of the voting securities, partnership interests, member interests or percentage interest of another Person shall be deemed to meet such control test.

"Crude Petroleum" as herein used means the direct liquid product of oil wells, or the indirect liquid petroleum products of oil or gas wells, or a mixture of such products.

"FERC" as herein used means the Federal Energy Regulatory Commission or any commission, agency or other governmental body succeeding to the powers of such commission.

"FERC Index" means the current "Multiplier to Use" as identified in the "Oil Pipeline Index" published annually by the FERC at: http://www.ferc.gov/industries/oil/gen-info/pipeline-index.asp.

"Force Majeure" as herein used means an event that is beyond the reasonable control of a party and could not have been prevented through the exercise of reasonable diligence, including, without limitation, strikes; lockouts; work stoppages, or other labor disputes or shortages; riots; civil disturbances or disorders; war; acts of the public enemy; terrorism; espionage; nuclear disaster; act of God; fire; explosion; breakage or accident to machinery, equipment, or pipelines; severe weather; earthquakes; floods; epidemics; embargoes; material shortage or unavailability at reasonable cost not resulting from Carrier's failure to timely place orders or take other necessary actions therefor; inability to obtain necessary rights-of-way at reasonable costs; inability or delay in obtaining governmental permits; government codes, ordinances, laws, rules, regulations, or restrictions; or actions that block or prohibit performance. For the avoidance of doubt, a shutdown of the System or any part thereof due to planned maintenance, Shipper's decision to cease or materially reduce or change its operations in the market area served by the System, or Shipper's financial condition or the obligation to pay amounts that have become due under a transportation services agreement, shall not constitute a Force Majeure event.

"Nomination" as herein used means a written (physical or electronic) designation by a Shipper to Carrier of a stated quantity of Crude Petroleum for transportation from a specified origin point or points of Carrier to a specified destination point or points of Carrier over a period of one Operating Month in accordance with these rules and regulations.

"Operating Month" as herein used means a month that shall be deemed to begin the first day of such month at 0700 hours until the first day of the succeeding month at 0659 hours (Central Standard or Central Daylight Savings Time, as applicable).

"Person" means any individual, partnership, corporation, limited liability company, unincorporated organization or association, trust (including the trustees thereof, in their capacity as such) or other entity.

"Royalties" has the meaning assigned to such term in Item No. 70.

"Shipper" as herein used means a party who contracts with Carrier for transportation of Crude Petroleum, as defined under the terms of these rules and regulations.

"System" as herein used means the pipeline that Carrier owns an interest in and to which these rules and regulations are applicable.

"Tender" as herein used means an offer by a Shipper to Carrier in accordance with this tariff for the transportation of a stated quantity of Crude Petroleum from a specified origin of Carrier to specified destination point.

10. NOMINATIONS; MINIMUM QUANTITY

Unless otherwise stated on a tariff making reference to these rules and regulations, Nominations for the transportation of Crude Petroleum for which Carrier has facilities will be accepted into Carrier's System under these rules and regulations in quantities of not less than seventy-five thousand (75,000) Barrels aggregate from one or more Shippers as operations permit and provided such Crude Petroleum is of similar quality and characteristics as is being transported from receipt point to destination point; except that Carrier reserves the right to accept any quantity of Crude Petroleum from other facilities to which Carrier's facilities are connected if such quantity can be consolidated with other Crude Petroleum such that Carrier can make a single delivery of not less than seventy-five thousand (75,000) Barrels, and Carrier will not be obligated to make an single delivery of less than seventy-five thousand (75,000) Barrels, unless Carrier's operations dictate otherwise. The term "single delivery" as used herein means a delivery of Crude Petroleum in one continuous operation into a single facility to which Carrier is connected.

Crude Petroleum will be transported only under a Nomination accepted by the Carrier from origins (or facilities connected to Carrier's gathering System if and when gathering service is to be performed by the Carrier) to destinations when a tariff covering the movement is lawfully in effect and on file with the FERC as to interstate traffic and with the appropriate state commission covering intrastate traffic.

Any Shipper desiring to Tender Crude Petroleum for transportation shall make a Nomination to the Carrier in writing before 5:00 p.m. Central Standard Time/Central Daylight Saving Time, whichever is applicable, on the twenty-fifth (25th) of the month preceding the movement. Within forty-eight (48) hours after its receipt of such Nomination (or by the end of the next business day if received on a non-business day), Carrier shall, by written notice to Shipper, confirm the Nomination as proposed or notify Shipper of any necessary revisions to such Nomination. Carrier shall furnish Shipper with a final Nomination at least two days prior to the first day of such following Month. In the event Shipper's Nomination for its initial shipment of Crude Petroleum on the System falls on a day after the 25th day of a Month, the above deadline shall be extended and the Parties shall coordinate with each other to allow shipments to commence the next Month. Unless such notification is made, the Carrier will be under no obligation to accept Crude Petroleum for transportation.

When Nominations submitted by Shippers to Carrier on or before the twenty-fifth (25th) day of the month preceding the Operating Month do not exceed the capacity of the System or any line segment thereof, additional Nominations may be accepted by the Carrier to fill capacity. Carrier is under no obligation to accept such incremental Nominations, and such additional Nominations will be accepted only if they do not impair the movement of Crude Petroleum nominated before the twenty-fifth (25th) day of the preceding month.

15. TITLE

The Carrier shall have the right to reject any Crude Petroleum, when nominated for transportation, which may be involved in litigation, or the title of which may be in dispute, or which may be encumbered by a lien or charge of any kind, and it may require the Shipper to provide satisfactory evidence of unencumbered title prior to accepting deliveries of Crude Petroleum from Shipper. By Tendering Crude Petroleum, the Shipper warrants and guarantees that the Shipper has good title thereto and agrees to hold Carrier harmless for any and all loss, cost, liability, damage and/or expense resulting from failure of title thereto; provided, that acceptance for transportation shall not be deemed a representation by the Carrier as to title.

20. REQUIRED SHIPPER INFORMATION

At any time, upon written request of the Carrier, on a non-discriminatory basis, any prospective or existing Shipper shall provide to the Carrier information that will enable the Carrier to enforce the terms of this tariff. Such information may include, but is not limited to, the names of any Affiliates of the Shipper or prospective Shipper, the legal business name of the Shipper or prospective Shipper and the registered business address of the Shipper or prospective Shipper. Additionally, upon Carrier's written request, Shipper shall provide any financial information reasonably required by Carrier to determine creditworthiness, including, but not limited to, financial statements and credit reports.

The Carrier shall not be obliged to accept Crude Petroleum for transportation from an existing or prospective Shipper if the Shipper or prospective Shipper fails to provide to the Carrier any information requested in accordance with this Item No. 20 within three (3) days of the Carrier's written request, or if the Carrier reasonably determines that any of the information provided pursuant to this Item No. 20 is false.

25. LINE FILL AND TANK BOTTOM REQUIREMENTS

Prior to delivering Barrels out of Carrier's System, each Shipper will be required to supply a pro rata share of Crude Petroleum necessary for pipeline and tankage fill to ensure efficient operation of Carrier's System. Crude Petroleum provided by Shippers for this purpose may be withdrawn only after: (1) shipments have ceased and the Shipper has notified Carrier in writing of its intention to discontinue shipments in Carrier's System, and (2) Shipper balances have been reconciled between Shipper and Carrier. Carrier may require advanced payment of transportation charges on the volumes to be cleared from Carrier's System, and any unpaid accounts receivable, before final delivery will be made. Carrier shall have a reasonable period of time from the receipt of said notice, not to exceed six months, to complete administrative and operational requirements incidental to Shipper withdrawal.

30. QUALITY SPECIFICATIONS

No Crude Petroleum will be accepted for transportation except merchantable Crude Petroleum which is properly settled and contains not more than one percent (1%) of basic sediment, water, and other impurities, and has a temperature not in excess of one hundred and twenty degrees (120°) Fahrenheit and

its gravity, viscosity, pour point, and other characteristics are such that it will be readily susceptible to transportation through the Carrier's existing facilities, and will not materially affect the quality of other shipments or cause disadvantage to other Shippers and/or the Carrier.

Notwithstanding the preceding sentence, Carrier may at its discretion accept Crude Petroleum from a Shipper that does not meet the foregoing specifications due to unusual circumstances, emergencies, or events of Force Majeure. In such case, however, Shipper must notify Carrier fully in writing of the characteristics of such Crude Petroleum and Shipper shall then secure from the producer or connecting carrier or shall provide itself, in writing, to Carrier an assumption of all liability and agree to hold Carrier harmless from and against any loss, cost or disadvantage to other Shippers, and other pipelines, or to Carrier arising from such transportation.

In addition, Carrier reserves the right to reject (any and all of, but not limited to) the following shipments: (1) the Reid vapor pressure of the Crude Petroleum exceeds twelve pounds (12 lbs.) at one hundred degrees Fahrenheit (100°F): and/or (2) Crude Petroleum where the Shipper has failed to comply with Applicable Laws regulating shipment of Crude Petroleum; (3) Crude Petroleum that does not meet the specifications below:

Station	Maximum Sulfur (%)	Minimum Gravity (API)	Maximum Gravity (API)
Lucerne and Riverside	0.35	≥ 34	≤ 42
Lucerne (only)	0.15	> 42	≤ 55

and/or (4) if Carrier determines that a Shipper has delivered to Carrier's facilities Crude Petroleum that has been contaminated by the presence of excessive metals, including but not limited to chlorinated and/or oxygenated hydrocarbons and salt. Any liability associated with the contamination or disposal of any Crude Petroleum shall be borne by responsible Shipper.

Quality specifications of a connecting carrier may be imposed upon Carrier when such limits are less than that of Carrier, in which case the limitations of the connecting carrier will be applied.

If Carrier determines that a Shipper has delivered to Carrier's facilities Crude Petroleum that has been contaminated by the existence of and/or excess amounts of impure substances, including but not limited to, water, salt, chlorinated and/or oxygenated hydrocarbons, arsenic, lead and/or other metals, such Shipper will be excluded from further entry into applicable segments of the System until such time as quality specifications are met to the satisfaction of Carrier. Further, Carrier reserves the right to dispose of any contaminated Crude Petroleum blocking its System. Disposal thereof, if necessary, may be made in any reasonable commercial manner, and any liability associated with the contamination or disposal of any Crude Petroleum shall be borne by the Shipper introducing the contaminated Crude Petroleum into Carrier's System.

Carrier may, from time to time, undertake to transport other or additional grades of Crude Petroleum and if, in the opinion of Carrier, sufficient quantities are not nominated or facilities are not available to justify continued transportation of other or additional grades, Carrier may, after giving reasonable notice to Shippers who may be affected, cease transporting particular grades of Crude Petroleum.

35. GAUGING, TESTING AND DEDUCTIONS

Crude Petroleum shipped hereunder shall be measured and tested by a representative of the Carrier or by automatic equipment approved by the Carrier. Quantities shall be determined by dynamic or static measurement methods in accordance with appropriate API standards, latest revision, and adjusted to base (reference or standard) conditions. Corrections will be made for temperature from observed degrees Fahrenheit to 60 degrees Fahrenheit and the full percentage of water or other impurities as ascertained by a centrifuge machine or other tests will be deducted from the corrected volume.

Shipper or its representative shall have the privilege of being present or represented during the gauging or metering and testing performed by Carrier. Shipper shall grant access to Shipper's facility to Carrier's representative and to any connecting carrier's representative for witnessing meter or gauge readings or meter proving and for any other required inspection incidental to measurement and transportation of Crude Petroleum.

All receipts of Crude Petroleum shall be subject to a deduction of two-tenths of one percent (0.2%) to cover line loss due to shrinkage and evaporation.

After consideration of all the factors set forth in this Item No. 35, a net balance will be determined as the quantity deliverable by Carrier, and transportation charges will be assessed on this net balance.

40. DESTINATION FACILITIES REQUIRED

Carrier will accept Crude Petroleum for transportation only when the Shipper has made the necessary arrangements for shipment beyond, or has provided the necessary facilities for receiving said Crude Petroleum as it arrives at, the destination and has advised Carrier of such arrangements on or before the Nomination date.

45. NOTICE OF ARRIVAL, DELIVERIES AND DEMURRAGE

The obligation of the Carrier is to deliver the quantity of Crude Petroleum to be transported, less deductions noted in Item No. 35 (GAUGING, TESTING AND DEDUCTIONS), at the specified destination. Such delivery may be made upon twenty-four (24) hours' notice to Shipper who shall accept and receive said Crude Petroleum from the Carrier with all possible dispatch into tanks or receptacles arranged for or provided by the Shipper.

Commencing after the first seven o'clock a.m. notice after expiration of said 24-hour notice, Carrier shall assess a demurrage charge on any part of said Crude Petroleum offered for delivery and not taken by Shipper. The demurrage charge will be 50.0 cents per Barrel per day for each day of 24 hours or fractional part thereof. After expiration of said 24-hour notice, Carrier's liability for loss, damage or delay with respect to Crude Petroleum offered for delivery but not taken by Shipper shall be that of a warehouseman only.

If the Shipper is unable or refuses to receive said Crude Petroleum as it arrives at the specified destination, the Carrier reserves the right to make whatever arrangements for disposition of the Crude Petroleum it deems appropriate in order to clear its pipeline. Any additional expenses incurred by the Carrier in making such arrangements shall be borne by the Shipper.

50. MIXING IN TRANSIT

Crude Petroleum will be accepted for transportation only on condition that it shall be subject to normal changes in general characteristics while in transit as may result from the mixture of such Crude Petroleum with other similar Crude Petroleum in the pipeline and/or tanks of Carrier or connecting carrier. Carrier will not be liable for variations of gravity or quality of Crude Petroleum occurring while in its custody and is under no obligation to deliver the identical Crude Petroleum as received. There shall be no adjustment for downgrading or upgrading of Crude Petroleum Tendered for transportation as a result of mixing in transit.

55. APPLICATION OF RATES AND CHARGES

Crude Petroleum accepted for transportation shall be subject to the rates and charges in effect on the date of receipt of such Crude Petroleum by Carrier. Transportation and all other lawful charges will be collected on the basis of net quantities of Crude Petroleum delivered as determined in the manner provided in Item No. 35 (GAUGING, TESTING AND DEDUCTIONS).

60. INTENTIONALLY LEFT BLANK

65. PAYMENT OF TRANSPORTATION AND OTHER CHARGES

Shipper shall be responsible for payment of transportation and all other charges applicable to the shipment, and may be required to prepay such charges or furnish a guaranty of payment satisfactory to Carrier. Payments not received by Carrier in accordance with invoice terms shall be subject to a late charge equivalent to 125% of the prime rate as quoted by The Wall Street Journal, or the maximum rate allowed by Applicable Laws, whichever is less. Carrier shall have a lien on all Crude Petroleum accepted for transportation to cover payment of all charges, including demurrage and late charges and may refuse to make delivery of the Crude Petroleum until all charges have been paid. If said charges, or any part thereof, shall remain unpaid for thirty days after notice of readiness to deliver, the Carrier may sell the Crude Petroleum in an arm's length transaction. Carrier shall have a lien on Crude Petroleum when there shall be failure to take the Crude Petroleum at the point of destination as provided in Item No. 45 (NOTICE OF ARRIVAL, DELIVERIES AND DEMURRAGE). Carrier shall have the right to sell said Crude Petroleum, in an arm's length transaction for cash. The sale will occur not less than twenty-four hours after the Shipper has been notified of the time and place of such sale and the quantity, general description, and location of the Crude Petroleum to be sold. Carrier's affiliates may purchase the Crude Petroleum at such sale. Out of the proceeds of said sale, Carrier shall pay itself for all transportation, demurrage, and other lawful charges, expenses of notice, advertisement, sale and other necessary expenses, and expenses of caring for and maintaining the Crude Petroleum, and the balance shall be held for whomsoever may be lawfully entitled thereto after the auction. If the proceeds of said sale do not cover all expenses incurred by Carrier, the Shipper is liable to Carrier for any deficiency.

When reasonable grounds for insecurity of payment or performance arise, or as otherwise required by a transportation services agreement, Carrier may demand from Shipper adequate assurance of performance. Adequate assurance means sufficient security in the form and for the term specified by Carrier, including, but not limited to, a standby, irrevocable letter of credit, a prepayment, or a guaranty by a creditworthy entity.

70. LIABILITY OF CARRIER

As a condition to Carrier's acceptance of Crude Petroleum under this tariff, each Shipper agrees to defend, indemnify and hold harmless Carrier against claims or actions for injury and/or death of any and all persons whomever and for damage to property of or any other loss sustained by Carrier, Shipper, and/or any third party resulting from or arising out of (1) any breach of or failure to adhere to any provision of this tariff by Shipper, its agents, employees, or representatives or (2) the negligent act(s) or failure(s) to act of Shipper, its agents, employees or representatives in connection with delivery or receipt of Crude Petroleum.

No waiver by either Party of any default by the other in the performance of any provision, condition, or requirement in this tariff will be deemed to be a waiver of, or in any manner release the other Party from, performance of any other provision, condition, or requirement in this tariff, nor be deemed to be a waiver of, or in any manner release the other Party from, future performance of the same provision, condition, or requirement; nor will any delay or omission of either Party to exercise any right under this tariff in any manner impair the exercise of any such right or like right accruing to it thereafter.

Shipper will pay or cause to be paid, and agrees to indemnify and hold harmless Carrier from and against the payment of, all excise, gross production, severance, sales, occupation, and all other taxes, charges, or impositions of any and every kind and character required by statute or by any governmental authority with respect to the Crude Petroleum and the handling thereof prior to and at receipt and then at and after delivery. Neither Party will be responsible or liable for any taxes or other statutory charges levied or assessed against the facilities or the other Party used for the purpose of carrying out the provisions of this tariff. Any Party entitled to an exemption from any such taxes or charges will furnish the other Party any necessary documentation thereof.

Shipper will be solely responsible for the payment of all royalties, overriding royalties, bonus payments, production payments, payments for interests in production, or other similar payments due on production (collectively, "**Royalties**") relating to the Crude Petroleum in accordance with the terms of the applicable oil and Gas leases, Applicable Laws and other instruments affecting production of the Crude Petroleum. Shipper assumes full responsibility and liability for said payments, and hereby agrees to indemnify, defend, and hold Carrier and its Affiliates harmless from any and all liability or loss of any kind or character incident to the payment of Royalties.

The Shipper shall be liable for the payment of gathering and transportation charges, fees, and other lawful charges accruing to or due Carrier by Shipper, including but not limited to, penalties, interest and late payment charges on Crude Petroleum delivered by Carrier. All accrued charges are due on delivery of Crude Petroleum by Carrier. Carrier may, at its option, require Shipper to pay all such charges and fees in advance or to provide an irrevocable letter of credit satisfactory to Carrier.

The Carrier while in possession of any of the Crude Petroleum herein described shall not be liable for any loss thereof, damage thereto, or delay, caused by: fire, storm, flood, epidemics, Act of God, terrorism, vandalism, criminal acts, landslides, land collapses, riots, civil disorder, strikes, insurrection, rebellion, war, act of the public enemy, quarantine, the authority of law, requisition or necessity of the Government of the United States in time of war, default of Shipper or Owner, earthquakes, sinkholes, or from any other cause not due to the negligence of Carrier and in no event shall Carrier be liable to Shipper for consequential, incidental or exemplary damages to Shipper. In case of loss of Crude Petroleum in a segregated shipment, the Shipper thereof shall bear the entire loss, damage, or delay that occurs. In case of loss of Crude Petroleum that is not in a segregated shipment, each Shipper of the grade of Crude Petroleum so lost shall share such loss in the proportion that the amount of such grade of Crude

Petroleum then in the custody of Carrier for the account of such Shipper bears to the total amount of such grade of Crude Petroleum then in the custody of Carrier in such System.

Carrier will be obligated to deliver only that portion of a Crude Petroleum shipment remaining after deducting such loss. Transportation charges will be made only on quantities of Crude Petroleum delivered.

If Crude Petroleum is lost in transit, while in the custody of Carrier, due to causes other than those described in the first paragraph of this Item No. 70, Carrier may obtain and deliver to Shipper other Crude Petroleum of the same quantity and grade as that which was lost, but Carrier shall not be obligated to do so. In the alternative, Carrier may compensate Shipper for such loss in money. If Carrier compensates Shipper for such loss in money, the price per Barrel shall be determined as of the date of the loss based on the value of the lost Crude Petroleum.

EXCEPT AS MAY BE PROVIDED IN A TRANSPORTATION SERVICES AGREEMENT, REGARDLESS OF CAUSE, IRRESPECTIVE OF WHETHER FORESEEABLE, CARRIER WILL NOT BE LIABLE TO A SHIPPER FOR LOSS OF PRODUCTION, LOSS OF USE, LOSS FROM BUSINESS INTERRUPTION, LOSS OF PROFIT OR ANTICIPATED PROFIT, LOSS OF REVENUE, LOSS OF BUSINESS, LOSS OF GOODWILL OR REPUTATION, OR WASTED EXPENDITURE, OR FOR FINES OR PENALTIES, OR FOR ANY INCIDENTAL, INDIRECT, SPECIAL, CONSEQUENTIAL, EXEMPLARY, OR PUNITIVE COST, EXPENSE, LOSS, OR DAMAGE OF ANY KIND ARISING OUT OF OR RELATING TO THIS TARIFF, ANY OF THE TRANSACTIONS CONTEMPLATED BY THIS TARIFF, OR ANY CONTRACT ENTERED INTO COVERING THE TRANSACTIONS CONTEMPLATED BY THIS TARIFF.

75. WARRANTIES

Shipper warrants that the Crude Petroleum Tendered to Carrier will conform to the specifications stated in Item No. 30 (QUALITY SPECIFICATIONS), will be merchantable, and will not be contaminated. Shipper will be liable to Carrier and/or other Shippers for any damage, including special, incidental, and consequential, arising from a breach of this warranty. The transportation of the Crude Petroleum will be refused or canceled if Carrier determines or is advised that the Crude Petroleum does not meet the requirements of these Rules and Regulations.

80. DUTY OF CARRIER

Carrier shall not be required to transport Crude Petroleum except with reasonable diligence, considering the quality of the Crude Petroleum, the distance of transportation and other material elements. Carrier cannot commit to delivering Crude Petroleum to a particular destination, at a particular time.

85. CLAIMS AND TIME FOR FILING

As a condition precedent to recovery for loss, damage, or delay of shipments, claims must be filed in writing with the Carrier within nine (9) months after the delivery of the Crude Petroleum, or, in case of failure to make delivery, then within nine (9) months after a reasonable time for delivery has elapsed. Suits arising out of such claims must be instituted against Carrier within two (2) years from the time when the Carrier delivers, or Tenders delivery of the Crude Petroleum or, in case of failure to make or Tender delivery, within two (2) years after a reasonable time for delivery has elapsed. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, Carrier will not be liable and such claims will not be paid.

90. ADDITIVES

Carrier reserves the right to require, approve, or reject the injection of corrosion inhibitors, viscosity or pour point depressants, drag reducing agents, or other such additives in Crude Petroleum to be transported.

95. PIPEAGE OR OTHER CONTRACTS

Separate pipeage and other contracts between Shipper and Carrier, in accordance with the applicable tariff and theses rules and regulations, may be required before any duty of transportation by the Carrier shall arise.

100. PRORATION OF PIPELINE CAPACITY

When there shall be tendered to Carrier, for transportation, more Crude Petroleum than can be immediately transported, the transportation by Carrier shall be apportioned among Shippers as provided in Carrier's Pipeline Proration Procedures. Carrier's Pipeline Proration Procedures dated July 7, 2016, are available upon request.

105. STORAGE IN TRANSIT

Storage services may be provided by Carrier to Shippers as specifically stated in a tariff making reference to these rules and regulations.

110. COMMODITY

Carrier is engaged primarily in the transportation of Crude Petroleum and will not accept any other commodity for transportation under tariffs making reference hereto.

115. CONNECTION REQUIREMENTS

Connections to Carrier's System will only be considered if made by formal written notification to Carrier. All connections will be subject to design requirements necessary to protect the current and future safety, security, integrity and efficient operation of Carrier's pipeline(s) in accordance with generally accepted industry standards. Acceptance of any request for connection will be subject to compliance with governmental regulations. All connection costs shall be paid by the connecting party.