Docket #0008 Date Filed: 9/10/2020

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.	
ELEVATION MIDSTREAM, LLC,	Adv. Proc. No. 20-50839 (CSS)
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 September 4, 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. 5] (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.

[*Remainder of Page Intentionally Left Blank*]

Dated: September 10, 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

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
Debtors.	(Jointly Administered)
EXTRACTION OIL & GAS, INC.,	
Plaintiff,	Adversary Proceeding
v.	
ELEVATION MIDSTREAM, LLC,	Adv. Proc. No. 20-_____ (CSS)
Defendant.	

COMPLAINT FOR DECLARATORY JUDGMENT

Extraction Oil & Gas, Inc. ("Extraction") files this Complaint for Declaratory Judgment against Elevation Midstream, LLC ("Elevation"). 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 August 10, 2020, Debtors filed the *Notice of Rejection of Certain Executory Contracts And/Or Unexpired Leases* [Docket No. 377] (the "Rejection Notice").

3. In connection with the Debtors' chapter 11 cases, this adversary proceeding seeks a declaration that certain covenants contained in the agreements between Elevation 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 Elevation 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. Extraction is a debtor in the above-captioned bankruptcy proceedings by virtue of filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1532, on June 14, 2020.

8. Defendant Elevation, upon information and belief, is a Delaware limited liability company with its principal place of business at 1225 17th Street, Suite 1750, Denver, CO 80202.

Factual Allegations

I. THE COMMERCIAL AGREEMENTS.

9. On July 3, 2018, Extraction and Elevation entered the Gas Gathering and Compression Agreement (the "Gas Agreement"). A true and correct copy of the Gas Agreement is attached as **Exhibit A**.

10. On July 3, 2018, Extraction and Elevation entered the Crude Oil Gathering and Stabilization Agreement (the "Oil Agreement"). A true and correct copy of the Oil Agreement is attached as **Exhibit B**.

11. On July 3, 2018, Extraction and Elevation entered the Produced Water Gathering Agreement (the "Water Agreement"). A true and correct copy of the Water Agreement is attached as **Exhibit C**.

12. When referenced collectively herein, the Gas Agreement, Oil Agreement, and Water Agreement shall be referred to as the "Commercial Agreements."

II. DURATION OF THE COMMERCIAL AGREEMENTS.

13. Each of the Commercial Agreements became effective on July 3, 2018 and each remains [redacted] and continues year to year thereafter unless terminated under the contract. Ex. A § VII; Ex. B § VII; Ex. C § VII.

III. PERFORMANCE OF THE COMMERCIAL AGREEMENTS.

14. Each of the Commercial Agreements' obligations largely mirror one another.

15. Under the Gas Agreement, [redacted]

[redacted]

Ex. A § 2.5. The Delivery Points [redacted] as identified on Exhibit B to the Gas Agreement. *Id.* § 4.1. Meanwhile, Gas [redacted] *Id.* (Ex. A) § I(kkk).

16. Similarly, under the Oil Agreement, [redacted] Ex. B § 2.5. The Delivery Points [redacted] as identified on Exhibit B to the Oil Agreement. *Id.* § 4.1. Meanwhile, Crude Oil [redacted] *Id.* (Ex. A) § I(nn).

17. Finally, under the Water Agreement, [redacted] Ex. C § 2.5. The Delivery Points [redacted] as identified on Exhibit B to the Water Agreement. *Id.* § 4.1. Meanwhile, Water [redacted] *Id.* (Ex. A) § I(xxxxx).

IV. DEDICATIONS.

18. Each of the Commercial Agreements includes dedications and commitments of certain interests.

19. As part of the Gas Agreement, the parties agreed to dedicate and commit certain interests to the performance of the Gas Agreement—Ex. A § 2.1—stating in relevant part:

[redacted]

20. As part of the Oil Agreement, the parties agreed to a nearly identical dedication and commitment—Ex. B § 2.1—stating in relevant part:

[redacted]

21. As part of the Water Agreement, the parties agreed to another dedication and commitment—Ex. C § 2.1—stating in relevant part:

[redacted]

22. Under the Gas Agreement, the Dedicated Interests are Extraction's [redacted] and Extraction's [redacted] Ex. A (Ex. A) § I(vv).

23. The Dedicated Interests in the Oil Agreement are nearly identical, simply swapping the word "Gas" for "Crude Oil." *See* Ex. B (Ex. A) § I(ss). The Dedicated Interests in the Water Agreement also simply swaps the word "Gas" for "Water." *See* Ex. C (Ex. A) § I(qq).

24. Under the Gas Agreement, the Other Interests are [redacted] but excluding [redacted] Ex. A (Ex. A) § I(zzzz).

25. The definition of "Other Interests" in the Oil Agreement is nearly identical, simply swapping the word "Gas" for "Crude Oil." *See* Ex. B (Ex. A) § I(uuuu). Likewise, in the Water Agreement, which swaps the word "Gas" for "Water." *See* Ex. C (Ex. A) § I(rrrr).

26. Under each of the Commercial Agreements, the Dedicated Area is [redacted] Ex. A (Ex. A) § I(uu); Ex. B (Ex. A) § I(rr); Ex. C (Ex. A) § I(pp).

V. RESERVATIONS FROM DEDICATIONS.

27. Each of the Commercial Agreements reserved important rights from the scope of the dedications. *See* Ex. A § 2.2; Ex. B § 2.2; Ex. C § 2.2.

28. In each Commercial Agreement, the reservations include the following:[2]

[redacted]

29. The Drilling Commitment [redacted] Ex. A (Ex. A) § I(aaa); Ex. B (Ex. A) §I(xx); Ex. C (Ex. A) § I(vv).

VI. CONDITIONAL GRANTS OF EASEMENTS.

30. Under each of the Commercial Agreements, Elevation was [redacted] as needed for its surface facilities. Ex. A (Ex. A) § XVI(d); Ex. B (Ex. A) § XVI(d); Ex. C (Ex. A) § XVI(d).

31. However, Extraction granted [redacted] for the construction, operation, and maintenance of the Delivery Point facilities. Ex. A (Ex. A) § XVI(d); Ex. B (Ex. A) § XVI(d); Ex. C (Ex. A) § XVI(d).

[2] Ex. A § 2.2; Ex. B § 2.2; Ex. C § 2.2.

VII. PURPORTED COVENANTS RUNNING WITH THE LAND.

32. Each Commercial Agreement purports to create covenants running with the land.

33. In the Gas Agreement, the parties included a provision that purported to render certain contractual promises into covenants running with the Dedicated Interests. Ex. A § 2.4. Specifically, the parties stated that:[3]



34. In the Oil Agreement, the parties stated:[4]



[3] Ex. A § 2.4.

[4] Ex. B § 2.4.

35. In the Water Agreement, the parties stated:[5]



VIII. THE RATIFICATION AGREEMENT.

36. Meanwhile, on July 3, 2018, the parties entered the Ratification Agreement. A true and correct copy of the Ratification Agreement is attached as Exhibit D.

37. The parties "desire[d] to enter into [the] [Ratification] Agreement to clarify certain responsibilities and obligations" respecting the Commercial Agreements. Ex. D at Recital 2. The Ratification Agreement was "executed solely for the purpose of the ratification contemplated [t]herein and shall not amend or modify the Commercial Agreements in any way. In the event of a conflict between this this [sic] [Ratification] Agreement and the Commercial Agreements, the Commercial Agreements shall govern in all respects." *Id.* § 5.

38. First, the Ratification Agreement ratified and confirmed the dedications of the Commercial Agreements. Ex. D § 2(a). Next, the Ratification Agreement restated the parties' intent and language concerning covenants running with the land. *Id.* § 2(b). The Ratification Agreement is governed by Colorado law. *Id.* § 3.

[5] Ex. C § 2.4.

IX. THE AMENDMENTS.

39. Sections of the Commercial Agreements were amended throughout the years. The amendments do not impact the provisions discussed above or the covenant running with the land analysis. True and correct copies of each of the amendments are attached as Exhibit E.

X. CHOICE OF LAW.

40. The Commercial Agreements are construed in accordance with the laws of Colorado, without regards to Colorado's conflict of laws rules. Ex. A (Ex. A) § XIII; Ex. B (Ex. A) § XIII; Ex. C (Ex. A) § XIII. The real property interests implicated by the Commercial Agreements are also located in Colorado. *See* Ex. A at Recital 1 (reciting that Extraction owns certain lands in Colorado); Ex. B at Recital 1 (same); Ex. C at Recital 1 (same).

Claims for Relief

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

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

43. 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)).

44. Courts assess whether a particular covenant runs with the land on a particularized covenant-by-covenant basis. *See MidCities Metro. Dist. No. 1 v. U.S. Bank Nat. Ass'n*, 12-CV-03322-LTB, 2013 WL 3200088, at *6 (D. Colo. June 24, 2013) (applying Colorado law and concluding certain covenants ran with the land but that the covenant at issue in the same deed did not); *see also Pennaco Energy, Inc. v. KD Co. LLC*, 363 P.3d 18, 34 (Wyo. 2015) (applying Wyoming law and noting an older case held that a particular royalty covenant did not run with the land because, in part, "other provisions of the deed contained 'successors and assigns' language, indicating the parties deliberately omitted those words in the royalty clause") (citing *Mathisen v. Thunder Basin Coal Co., LLC*, 169 P.3d 61, 66 (Wyo. 2007)).

COUNT I
(Gas Agreement – Declaratory Judgment under 28 U.S.C. § 2201(a))

45. The allegations in paragraphs 1 through 44 are incorporated herein by reference.

46. The parties dispute whether the Gas Agreement creates any covenants that run with the land.

47. The Gas Agreement does not create covenants that run with the land under Colorado law. In particular, Extraction's purely contractual promise to deliver to Elevation certain amounts of produced gas is not a covenant that runs with the land.

48. First, the covenants in the Gas Agreement—other than the Drilling Commitment—do not "touch and concern" the land. Instead of benefitting or burdening Extraction's mineral estate, the Gas Agreement benefits or burdens the parties personally. The Gas Agreement's covenants relate solely to Extraction's produced gas and not Extraction's land. *See generally* Ex. A. Accordingly, none of the covenants—other than the Drilling Commitment—touch and concern the land and, thus, fail to run with the land on this basis.

49. Second, the Gas Agreement does not grant Elevation an interest in Extraction's real property sufficient to satisfy privity of estate under Colorado law. Indeed, the Gas Agreement does not actually grant any interest in Extraction's allegedly burdened mineral estate. *See* Ex. A § 2 (concerning dedication reservations). Instead, the Gas 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 parties were never in privity of estate, and none of the covenants—including the Drilling Commitment—run with the land.

50. 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.

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

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

53. 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.[6] It will also serve a useful purpose by enabling the Court to determine whether the Gas Agreement and all obligations thereunder may be rejected under section 365 of the Bankruptcy Code.

[6] On August 10, 2020, the Debtors filed the Rejection Notice to reject the Gas 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.").

COUNT II
(Oil Agreement – Declaratory Judgment under 28 U.S.C. § 2201(a))

54. The allegations set forth in paragraphs 1 through 44 are incorporated herein by reference.

55. The parties dispute whether the Oil Agreement creates any covenants that run with the land.

56. The Oil Agreement does not create covenants that run with the land under Colorado law. In particular, Extraction's purely contractual promise to deliver to Elevation certain amounts of produced oil is not a covenant that runs with the land.

57. First, the covenants in the Oil Agreement—other than the Drilling Commitment—do not "touch and concern" the land. Instead of benefitting or burdening Extraction's mineral estate, the Oil Agreement benefits or burdens the parties personally. The Oil Agreement's covenants relate solely to Extraction's produced oil and not Extraction's land. *See generally* Ex. B. Accordingly, none of the covenants—other than the Drilling Commitment—touch and concern the land and, thus, they fail to run with the land on this basis.

58. Second, the Oil Agreement does not grant Elevation an interest in Extraction's real property sufficient to satisfy privity of estate under Colorado law. Indeed, the Oil Agreement does not actually grant any interest in Extraction's allegedly burdened mineral estate. *See* Ex. B § 2 (concerning dedication reservations). Instead, the Gas Agreement merely "identif[ies] and delineat[es] the [parties'] contractual rights and obligations." *In re Sabine Oil & Gas Corp.*, 547 B.R. at 76. Thus, the parties were never in privity of estate, and none of the covenants—including the Drilling Commitment—run with the land.

59. 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.

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

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

62. 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.[7] It will also serve a useful purpose by enabling the Court to determine whether the Oil Agreement and all obligations thereunder may be rejected under section 365 of the Bankruptcy Code.

COUNT III
(Water Agreement – Declaratory Judgment under 28 U.S.C. § 2201(a))

63. The allegations set forth in paragraphs 1 through 44 are incorporated herein by reference.

64. The parties dispute whether the Water Agreement creates any covenants that run with the land.

65. The Water Agreement does not create covenants that run with the land under Colorado law. In particular, Extraction's purely contractual promise to deliver to Elevation certain amounts of produced water is not a covenant that runs with the land.

66. First, the covenants in the Water Agreement—other than the Drilling Commitment—do not "touch and concern" the land. Instead of benefitting or burdening

[7] On August 10, 2020, the Debtors filed the Rejection Notice to reject the Oil 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.").

Extraction's mineral estate, the Water Agreement benefits or burdens the parties personally. The Water Agreement's covenants relate solely to Extraction's produced water and not Extraction's land. *See generally* Ex. C. Accordingly, none of the covenants—other than the Drilling Commitment—touch and concern the land and, thus, they fail to run with the land on this basis.

67. Second, the Water Agreement does not grant Elevation an interest in Extraction's real property sufficient to satisfy privity of estate under Colorado law. Indeed, the Water Agreement does not actually grant any interest in Extraction's allegedly burdened mineral estate. *See* Ex. C § 2 (concerning dedication reservations). Instead, the Water Agreement merely "identif[ies] and delineat[es] the [parties'] contractual rights and obligations." *In re Sabine Oil & Gas Corp.*, 547 B.R. at 76. Thus, the parties were never in privity of estate, and none of the covenants—including the Drilling Commitment—run with the land.

68. 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.

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

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

71. 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.[8] It will also serve a useful purpose by enabling the Court to determine

[8] On August 10, 2020, the Debtors filed the Rejection Notice to reject the Water 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 Water 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 Gas Agreement do not run with the land.

(b) Declaring that the covenants contained in the Oil Agreement do not run with the land.

(c) Declaring that the covenants contained in the Water Agreement do not run with the land.

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

[Remainder of Page Intentionally Left Blank]

Dated: September 4, 2020
Wilmington, Delaware

/s/ Richard W. Riley

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

EXHIBIT A

Filed Under Seal

EXHIBIT B

Filed Under Seal

EXHIBIT C

Filed Under Seal

EXHIBIT D

RATIFICATION AGREEMENT

THIS RATIFICATION AGREEMENT (this "Agreement") is dated as of July 3, 2018 and is entered into by and among 8 North, LLC ("8 North"), Axis Exploration, LLC ("Axis", and together with 8 North, the "Ratifying Parties"), Extraction Oil & Gas, Inc. ("Producer") and Elevation Midstream, LLC ("Elevation"). 8 North, Axis, Producer and Elevation are referred to herein individually as a "Party" and collectively as the "Parties".

RECITALS

WHEREAS, Producer and Elevation entered into (i) that certain Gas Gathering and Compression Agreement dated as of the date hereof (the "Gas Gathering Agreement"), (ii) that certain Crude Oil Gathering and Stabilization Agreement (the "Crude Gathering Agreement") dated as of the date hereof, and (iii) that certain Produced Water Gathering Agreement dated as of the date hereof (the "Water Gathering Agreement", and together with the Gas Gathering Agreement and the Crude Gathering Agreement, the "Commercial Agreements"); and

WHEREAS, the Parties desire to enter into this Agreement to clarify certain responsibilities and obligations of the Ratifying Parties with respect to the Commercial Agreements.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree and covenant as follows:

1. Definitions. Capitalized terms used herein without definition shall have the meanings given to such terms in the Commercial Agreements.

2. Dedication.

(a) The Ratifying Parties hereby ratify and confirm the dedication of all of their interests in (i) the Dedicated Interests and other Property Rights and Other Interests and (ii) the dedicated Gas, Crude Oil and Water, as the case may be, under the Commercial Agreements to the extent provided for in the Commercial Agreements (including with respect to any after acquired interests) and agree that such interests will be dedicated to Elevation and to the performance of the Commercial Agreements, subject to the terms in the Commercial Agreements.

(b) The Dedication and the Delivery Obligation, the grant of servitude provided and other Property Rights and Producer's covenants under Section 2.3 of each of the Commercial Agreements, together with all other related commitments in the Commercial Agreements and the matters set forth in GTC Section XV(a), GTC Section XV(b) and GTC Section XV(c) of each of the Commercial Agreements are not merely contract rights but are covenants running with (and touching and concerning) all of the Dedicated Interests (including the underlying Gas, Crude Oil, Water, lands, leases and wells) and, in addition, are binding upon the successors and assigns of Dedicated Interests and/or the undersigned's Gas, Crude Oil and Water, as the case may be. The undersigned acknowledges and agrees that the Dedication and Delivery Obligation made

hereunder and under the Commercial Agreement assigns and conveys to Elevation a servitude in the nature of a real covenant which touches and concerns the Dedicated Interests and are for the benefit of Elevation and its successors and permitted assigns, without which, Elevation would be unwilling to enter into or perform under the Commercial Agreements.

3. Choice of Law. This Agreement shall be construed and enforced in accordance with the laws of the State of Colorado, without reference to conflicts of law principles thereof that might apply the laws of another jurisdiction.

4. Assignment. No Party shall have the right to assign this Agreement without the prior written consent of the other Parties, except for assignments permitted under the Commercial Agreements.

5. Conflict. The Parties have agreed that this Agreement is executed solely for the purpose of the ratification contemplated herein and shall not amend or modify the Commercial Agreements in any way. In the event of a conflict between this this Agreement and the Commercial Agreements, the Commercial Agreements shall govern in all respects.

6. Counterparts. This Agreement may be executed in one or more counterparts, including those delivered by facsimile or other electronic means, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument, and shall become effective when each of the Parties has received this Agreement duly executed by the other Parties.

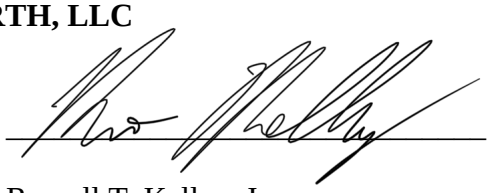
7. Several Liability. Notwithstanding anything else contained in this Agreement, all obligations of the Ratifying Parties and Producer under this Agreement shall be several and not joint.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties hereto execute this Agreement as of the date first written above.

8 NORTH:

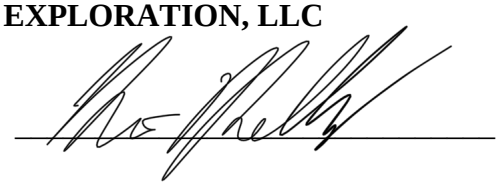
8 NORTH, LLC

By: 

Name: Russell T. Kelley, Jr.
Title: Chief Financial Officer

AXIS:

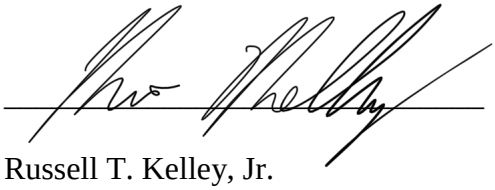
AXIS EXPLORATION, LLC

By: 

Name: Russell T. Kelley, Jr.
Title: Chief Financial Officer

PRODUCER:

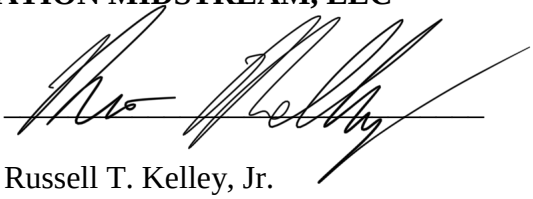
EXTRACTION OIL & GAS, INC.

By: 

Name: Russell T. Kelley, Jr.
Title: Chief Financial Officer

ELEVATION:

ELEVATION MIDSTREAM, LLC

By: 

Name: Russell T. Kelley, Jr.
Title: Chief Financial Officer

EXHIBIT E

Filed Under Seal

EXHIBIT 2

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.	)	
ELEVATION MIDSTREAM, LLC,	)	Adv. Proc. No. 20-50839 (CSS)
Defendant.	)	

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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-AND-

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

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Co-Counsel to Debtors and Debtors in Possession

Dated: September 4, 2020

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NATURE AND STAGE OF THE REJECTION PROCEEDINGS

On August 10, 2020, Debtors filed the *Notice of Rejection of Certain Executory Contracts And/Or Unexpired Leases* [Docket No. 377] (the "Rejection Notice"), which included requested relief to reject: (1) the Gas Gathering and Compression Agreement dated July 3, 2018 (the "Gas Agreement")[1] entered into with Defendant Elevation Midstream, LLC ("Elevation"); (2) the Crude Oil Gathering and Stabilization Agreement dated July 3, 2018 (the "Oil Agreement")[2] entered into with Elevation; and (3) the Produced Water Gathering Agreement dated July 3, 2018 (the "Water Agreement")[3] entered into with Elevation, pursuant to section 365 of the Bankruptcy Code. The Gas Agreement, Oil Agreement, and Water Agreement are jointly the "Commercial Agreements."

On September 4, 2020, Extraction filed its Complaint for Declaratory Judgment, seeking a declaration that the Commercial Agreements do not create covenants that run with the land in order to support the Rejection Notice. Extraction simultaneously seeks the relief requested in the Complaint and rejection of the Commercial Agreements 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.").

[1] A true and correct copy of the Gas Agreement is attached as **Exhibit A**.
[2] A true and correct copy of the Oil Agreement is attached as **Exhibit B**.
[3] A true and correct copy of the Water Agreement is attached as **Exhibit C**.

SUMMARY OF ARGUMENT

1. Extraction files this Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure (the "Federal Rules") made applicable to this adversary proceeding by Rules 7001 and 7056 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for entry of an order granting summary judgment in Extraction's favor and against Elevation. Extraction is entitled to summary judgment because, as a matter of law, the Commercial Agreements do not create covenants that run with the land under Colorado law. All covenants, save one, fail to touch and concern the land, and, accordingly, do not run with the land. Moreover, the parties were never in privity of estate so ***none*** of the covenants run with the land.

2. The Gas Agreement, Oil Agreement, and Water Agreement are exactly what their names suggest: agreements governing the provision of services to Extraction's chattel—here, produced gas, produced oil, and produced water. The Commercial Agreements benefit Extraction as the owner of that chattel, not as the owner of any particular real property. Extraction owns interests in certain mineral estates, and these interests allow Extraction to search for and reduce the minerals and water covered by the Commercial Agreements to chattel. Elevation, however, is a stranger to those mineral estates, and the Commercial Agreements do not grant Elevation any interest therein. Under the contracts, Elevation is a simple service provider, just like any other service provider Extraction uses to process and transport chattel. Elevation provides services in exchange for a fee. Elevation has no real interest in Extraction's mineral estate, no right to develop or explore that mineral estate, and no right to divest the estate of gas, oil, or water. Thus, Elevation's personal, contractual interests for the provision of services are insufficient to create covenants running with the land under Colorado law.

3. Specifically, Extraction is entitled to summary judgment because Elevation cannot satisfy Colorado's requirements to establish the creation of a covenant running with the land.

Elevation must satisfy each the following elements: (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. Elevation, however, cannot satisfy either the privity of estate or touch and concern[4] elements. Thus, the Court should grant summary judgment and declare that the Commercial Agreements do not create covenants running with the land under Colorado law.

STATEMENT OF FACTS

I. THE COMMERCIAL AGREEMENTS.

Extraction and Elevation are parties to several contracts concerning services to Extraction's chattel. The three contracts are: the Gas Agreement, the Oil Agreement, and the Water Agreement. The parties entered into the three Commercial Agreements on July 3, 2018.[5]

The Commercial Agreements are to be construed in accordance with the laws of Colorado, without regard to Colorado's conflict of laws rules. Ex. A (Ex. A) § XIII; Ex. B (Ex. A) § XIII; Ex. C (Ex. A) § XIII. The real property interests implicated by the Commercial Agreements are also located in Colorado. *See* Ex. A at Recital 1 (reciting that Extraction owns certain lands in Colorado); Ex. B at Recital 1 (same); Ex. C at Recital 1 (same).

The Commercial Agreements became effective on July 3, 2018 and they remain [redacted] and continues year to year thereafter unless terminated under the contract. Ex. A § VII; Ex. B § VII; Ex. C § VII.

Under the Gas Agreement, [redacted]

[4] Extraction acknowledges that the Drilling Commitment (as defined below) touches and concerns the land. This is the ***only*** covenant that does so.

[5] The Commercial Agreements were amended several times. True and correct copies of the amendments are attached as **Exhibit E**.

[redacted] Ex. A § 2.5. The Delivery Points [redacted] as identified on Exhibit B to the Gas Agreement. *Id.* § 4.1. Gas [redacted] *Id.* (Ex. A) § I(kkk).

Similarly, under the Oil Agreement, [redacted] Ex. B § 2.5. The Delivery Points [redacted] as identified on Exhibit B to the Oil Agreement. *Id.* § 4.1. Crude Oil [redacted] *Id.* (Ex. A) § I(nn).

Finally, under the Water Agreement, [redacted] Ex. C § 2.5. The Delivery Points [redacted] as identified on Exhibit B to the Water Agreement. *Id.* § 4.1. Water [redacted] *Id.* (Ex. A) § I(xxxxx).

II. THE DEDICATIONS AND COMMITMENTS TO THE PERFORMANCE OF THE COMMERCIAL AGREEMENTS.

The Commercial Agreements contain dedications and commitments of certain of Extraction's interests to the performance of the agreements. ***First***, the Gas Agreement dedicated and committed certain interests to the performance of the Gas Agreement stating, in pertinent part:



Ex. A §2.1. ***Second***, as part of the Oil Agreement, the parties agreed to a nearly identical dedication and commitment stating, in pertinent part:



Ex. B § 2.1. ***Third***, as part of the Water Agreement, the parties agreed to another dedication and commitment—Ex. C § 2.1—stating, in pertinent part:



Under the Gas Agreement, the Dedicated Interests are Extraction's [redacted] and Extraction's [redacted] Ex. A (Ex. A) § I(vv).

The definition of "Dedicated Interests" in the Oil Agreement is nearly identical, simply swapping the word [redacted] for [redacted] Ex. B (Ex. A) § I(ss). The definition of "Dedicated Interests" in the Water Agreement also simply swaps the word [redacted] for [redacted] Ex. C (Ex. A) § I(qq).

Under the Gas Agreement, the Other Interests are [redacted] but excluding [redacted] Ex. A (Ex. A) § I(zzzz). Again, the definition of "Other Interests" in the Oil Agreement is nearly identical, simply swapping the word [redacted] for [redacted] Ex. B (Ex. A) § I(uuuu). Likewise, the Water Agreement swaps the word [redacted] for [redacted] Ex. C (Ex. A) § I(rrrr).

[6] Notably, Exhibit C to the Gathering Agreement fails to list the particular leases that are purportedly dedicated; instead, Exhibit C lists entire townships without reference to the particular interests Extraction possesses in the listed townships. *See generally* Ex. A (Ex. C). The same is true for the Oil Agreement and the Water Agreement. *See generally* Ex. B (Ex. C); Ex. C (Ex. C).

Under all of the Commercial Agreements, the Dedicated Area is [redacted] Ex. A (Ex. A) § I(uu); Ex. B (Ex. A) § I(rr); Ex. C (Ex. A) § I(pp). Importantly, each of the Commercial Agreements expressly reserved rights to Extraction from the scope of the dedications. *See* Ex. A § 2.2; Ex. B § 2.2; Ex. C § 2.2. Specifically, the reservations include the following:[7]

[redacted]

III. CONDITIONAL GRANTS OF EASEMENTS.

Under each of the Commercial Agreements, Elevation was [redacted] as needed for its surface facilities. Ex. A (Ex. A) § XVI(d); Ex. B (Ex. A) § XVI(d); Ex. C (Ex. A) § XVI(d). However, Extraction granted [redacted] for the construction, operation, and maintenance of the Delivery Point facilities. Ex. A (Ex. A) § XVI(d); Ex. B (Ex. A) § XVI(d); Ex. C (Ex. A) § XVI(d).

[7] Ex. A § 2.2; Ex. B § 2.2; Ex. C § 2.2.

[8] The Drilling Commitment [redacted] Ex. A (Ex. A) § I(aaa); Ex. B (Ex. A) §I(xx); Ex. C (Ex. A) § I(vv).

IV. PURPORTED COVENANT RUNNING WITH THE LAND.

Each of the Commercial Agreements purports to render certain obligations therein covenants running with the land. In the Gas Agreement, the parties stated:[9]



Ex. A § 2.4. In the Oil Agreement, the parties stated:



Ex. B § 2.4. In the Water Agreement, the parties stated:



[9] Ex. A § 2.4.

Ex. C § 2.4. Accordingly, the parties intended the Commercial Agreements' dedications, the delivery obligations, and the related commitments to run with the land.

In accordance with this intent, the parties entered a Ratification Agreement. A true and correct copy of the Ratification Agreement is attached as **Exhibit D**. The Ratification Agreement was "executed solely for the purpose of the ratification contemplated [t]herein and shall not amend or modify the Commercial Agreements in any way. In the event of a conflict between this this [sic] [Ratification] Agreement and the Commercial Agreements, the Commercial Agreements shall govern in all respects." Ex. D § 5. The Ratification Agreement restated the parties' intent to create covenants running with the land. *See id.* § 3.

LEGAL STANDARD

Under Rule 56(a) of the Federal Rules—made applicable to this adversary proceeding under Rule 7056 of the Bankruptcy Rules—the "[C]ourt shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). The existence of ***some*** factual dispute will not defeat summary judgment; rather, the requirement is that no ***genuine*** issue of ***material*** fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Celotex Corp.*, 477 U.S. at 327. A genuine dispute of material fact exists only if a reasonable trier of fact could enter a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 252; *Celotex Corp.*, 477 U.S. at 327 (holding when a movant's evidence demonstrates the lack of a genuine issue the burden shifts to the opposing party to demonstrate the existence of a genuine issue for trial). "[I]t is a fundamental principle of contract law that 'disputes involving the interpretation of unambiguous contracts are resolvable as a matter of law, and are, therefore, appropriate cases for summary judgment.'" *Tamarind Resort Associates v. Gov't of Virgin Islands*, 138 F.3d 107, 110 (3d Cir. 1998) (quoting *Hadley v. Gerrie*,

124 B.R. 679, 683 (D.V.I. 1991), aff'd sub nom. *Gas House, Inc. v. Unicorp Am. Corp.*, 952 F.2d 1392 (3d Cir. 1991)).

ARGUMENT

The Court should grant summary judgment and enter an Order declaring that the Commercial Agreements do 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 Commercial Agreements 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 Commercial Agreements do not create covenants that run with the land under Colorado law.

Extraction's Complaint seeks relief under the Declaratory Judgment Act. Under 28 U.S.C. § 2201(a), "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Further, "[a]ny such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." *Id.*

The substantive legal questions in this case are all governed by Colorado law.[10] The Commercial Agreements expressly adopt Colorado law, without regard to Colorado's conflict of law provisions. *See* Ex. A (Ex. A) § XIII; Ex. B (Ex. A) § XIII; Ex. C (Ex. A) § XIII. Likewise,

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

the lands covered by the Commercial Agreements are located in Colorado. *See* Ex. A at Recital 1 (reciting that Extraction owns certain lands in Colorado); Ex. B at Recital 1 (same); Ex. C at Recital 1 (same). Issues concerning Colorado real property are governed by Colorado law. *Wolf v. Burke*, 32 P. 427, 429 (Colo. 1893) ("[T]he rights and titles to real property are governed by the law of the situs . . . ."); *see also United States v. Novotny*, 184 F. Supp. 2d 1071, 1087 (D. Colo. 2001) ("Colorado law applies to issues relating to the conveyance and ownership or real property located within Colorado.") (citation simplified) (citing Restatement (Second) Conflict of Laws § 223 cmt. g (Am. Law. Inst. 1971)).

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

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

II. THE COMMERCIAL AGREEMENTS DO NOT CREATE COVENANTS THAT RUN WITH THE LAND UNDER COLORADO LAW

The Commercial Agreements do not create covenants that run with the land. Under Colorado law, "[t]o create a real covenant, the parties must intend for the covenant to run with the

land and bind their successors in interest, and the covenant must 'touch and concern' the land." *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 440 (Colo. App. 2016) (citing *Cloud v. Ass'n of Owners, Satellite Apartment Bldg., Inc.*, 857 P.2d 435, 440 (Colo. App. 1992)).[11] Privity of estate between the original covenanting parties at the time of the creation of the covenant 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). Finally, whether a particular contractual covenant runs with the land is a covenant-by-covenant analysis. *See MidCities Metro. Dist. No. 1 v. U.S. Bank Nat. Ass'n*, 12-CV-03322-LTB, 2013 WL 3200088, at *6 (D. Colo. June 24, 2013) (applying Colorado law and concluding certain covenants ran with the land but that the covenant at issue did not); *see also Pennaco Energy, Inc. v. KD Co. LLC*, 363 P.3d 18, 34 (Wyo. 2015) (applying Wyoming law and noting an older case held that a particular royalty covenant did not run with the land because, in part, "other provisions of the deed contained 'successors and assigns' language, indicating the parties deliberately omitted those words in the royalty clause") (citing *Mathisen v. Thunder Basin Coal Co., LLC*, 169 P.3d 61, 66 (Wyo. 2007)).

Every covenant, save one,[12] in the Commercial Agreements fails to touch and concern the land. Accordingly, these covenants fail to run with the land.

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

[12] Extraction acknowledges that the Drilling Commitment touches and concerns the land. As discussed in greater detail below, no other covenant touches and concerns the land. Despite meeting the touch and concern element, however, the successors to title in Extraction's mineral estates in the Dedicated Area that do not assume the Commercial Agreements are not bound by the obligations in the Drilling Commitment because Elevation is a stranger to these interests and neither Elevation nor Extraction, or by extension Elevation and any successor in title to Extraction, are in privity of estate. As a result, this contractual commitment cannot be enforced through privity of estate.

Independently, the parties were never in privity of estate because the covenants are not contained in a grant of any real property interest in Extraction's land; thus, ***none*** of the covenants run with the land. Summary judgment is, therefore, appropriate.

A. The Covenants in the Commercial Agreements Do Not Touch and Concern the Land Because They Do Not Directly Affect the Use or Enjoyment of Extraction's Real Property Interests.

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

Here, the Commercial Agreements' covenants purport to run with Extraction's mineral estate. *See* Ex. A § 2.4 (stating the covenants run with [redacted]); Ex. B § 2.4 (same); Ex. C § 2.4 (same). Therefore, the Commercial Agreements' covenants must touch and concern Extraction's mineral estate.

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

professor Dean Harry Bigelow.[13] As Dean Bigelow described, the inquiry turns on whether a covenant materially affects the promisor's ***legal relationship to the land itself***. *See* Harry Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. 639, 652 (1914) (emphasis added).

In *Reishus*, the Colorado Court of Appeals concluded an ownership agreement between tenants in common concerning the use of a ranch touched and concerned the land. *See Reishus*, 409 P.3d at 441. The court noted 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 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 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). In sum, the covenant directly affected the parties' legal relationship to the physical use and enjoyment of land.

Other covenants that Colorado courts have found to touch and concern the land similarly directly affected 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 eighty "guest rooms"

[13] "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)).

that were 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 Commercial Agreements' covenants—other than the Drilling Commitment—fail to touch and concern Extraction's mineral estates because they do not directly or closely affect the physical use or enjoyment of the land. ***First***, the dedications simply identify the parties' contractual rights and obligations. ***Second***, the Commercial Agreements are mere service contracts wherein Elevation agreed to provide services to Extraction's produced gas, produced oil, or produced water in exchange for a fee; the covenants purely relate to (and affect) personal property, not the land. ***Third***, even assuming, *arguendo*, that the purported covenants indirectly relate to real property, they do not directly affect the use or enjoyment of the land.

1. The Commercial Agreements' Dedications do not touch and concern Extraction's mineral estate; it merely identifies the parties' contractual rights and obligations.

The Commercial Agreements' "dedications" do not touch and concern Extraction's real property interests.[14] In relevant part, the Gas Agreement states:

[14] To be clear, Elevation bears the burden of showing how the contracts created covenants running with the land. *See In re Sabine Oil & Gas Corp.*, 567 B.R. at 875.



Ex. A § 2.1. The Oil Agreement is similar:



Ex. B § 2.1. As is the Water Agreement:



These provisions' purposes are twofold. First, they identify ***which*** minerals, from ***what*** property, are the subject of the contractual obligations to be performed under the Commercial Agreements. Second, the provisions were drafted to support the parties' intent to create covenants running with the land. But intent, alone, is insufficient for Colorado law to recognize the creation of a burden on property within the state. *See Cloud*, 857 P.2d at 440 ("Even if there is an intent to make a covenant run with the land, the covenant must still 'touch and concern' the land, that is, it must closely relate to the land, its use, or its enjoyment.") (citing *Bigelow*, 833 P.2d at 764).

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

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

Extraction dedicated and committed the Dedicated Interests, the the right to receive gas, oil, and water, and the obligation to connect wells and deliver gas, oil, and water to the performance of the Commercial Agreements. *See* Ex. A § 2.1; Ex. B § 2.1; Ex. C § 2.1. The plain meaning of "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 Commercial Agreements. Extraction merely pledged and set apart its gas, oil, and water in a particular area to the performance of the

contractual obligations of the Commercial Agreements. Throughout the contracts, the Dedicated Interests and Delivery Obligation are terms used to identify ***what*** minerals ***from which area*** are subject to the contracts' obligations.[15] In other words, the dedications merely identify the parties' contractual rights and obligations respecting Extraction's produced gas, oil, and water. The Commercial Agreements ***do not*** convey to Elevation an interest in gas in place, oil in place, or water in place. In short, the dedications do not affect Extraction's legal rights to its mineral estates: Elevation may not compel production and may not explore or develop Extraction's mineral estates.

2. The Commercial Agreements concern only personal property and do not directly affect the right to or use of Extraction's mineral estates.

The Commercial Agreements do not touch and concern the land because they affect only personal property. Under Colorado law, produced minerals are personal property. *See Smith v. El Paso Gold Mines, Inc.*, 720 P.2d 608–09 (Colo. App. 1985) ("[A]t some point after they are severed form the land, minerals lose their character as realty and 'become' personalty.") (citing 2 Tiffany Real Property § 587 (3d ed. 1939)). Likewise, Colorado law is clear that "[w]ater in possession is personal property." *W. End Irr. Co. v. Garvey*, 184 P.2d 476, 479 (Colo. 1947). Indeed, as a matter of black letter law, "[i]n Colorado, water rights ***are separate from interests in land***." *WRWC, LLC v. City of Arvada*, 107 P.3d 1002, 1005 (Colo. App. 2004) (emphasis added)

[15] *See, e.g.*, Ex. A § 2.2(a) (reserving to Extraction [redacted]); Ex. B § 2.2(a) (same); Ex. C § 2.2(a) (same); Ex. A § 2.3 (containing Extraction's agreement [redacted] but noting Extraction [redacted] Ex. B § 2.3 (same); Ex. C § 2.3 (same); Ex. A § 2.6(b) (noting [redacted]); Ex. B § 2.6(b) (similar); Ex. C § 2.6(b) (similar); Ex. A § 2.1 (defining the "Delivery Obligation" as the agreement to connect certain wells to Delivery Points and to [redacted] Ex. B § 2.1 (similar); Ex. C § 2.1 (similar).

(citing *Bd. of County Com'rs of County of Park v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693, 707 (Colo. 2002)).

In fact, it is impossible for any of the Commercial Agreements' covenants to touch and concern water in place because, as a matter of Colorado law, Extraction does not own the water in place. *See Grand Valley Water Users Ass'n v. Busk-Ivanhoe, Inc.*, 386 P.3d 452, 461 (Colo. 2016) (noting water rights are usufructuary and afford owners the right to use the waters of the state, and, thus "[o]ne does not 'own' water, but owns the right to use water within the limitations of this doctrine") (citing *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 661 (Colo. 2011), as modified on denial of reh'g (June 20, 2011)). In sum, produced gas, produced oil, and produced water—personal property—are the only things affected by the obligations and services provided by the Commercial Agreements.

The remaining aspects of the dedications confirm that the only things implicated by the Commercial Agreements are personal property. Neither the exclusive rights to receive gas, oil, and water that has been produced nor the Delivery Obligation touch and concern the land.

First, Elevation possesses [redacted] Ex. A § 2.1 (emphasis added). Extraction also possesses the exclusive [redacted] Ex. B § 2.1; Ex. C § 2.1. The Commercial Agreements' glancing reference to minerals in the ground do not transform this personal contract into one concerning real property. As a matter of common sense, Elevation cannot receive gas, oil, or water until it has been produced and reduced to possession. *See* Ex. A § 2.1; Ex. B § 2.1; Ex. C § 2.1. This practical consequence is all that matters; touch and concern is an objective analysis that turns on what the contractual covenant actually ***accomplishes*** not what the parties

said. *See* 9 Richard R. Powell, Powell on Real Property § 60.04(3)(a) ("The touch and concern requirement is the only essential requirement for the running of covenants which focuses on an objective analysis of the contents of the covenant itself rather than the intentions of and relationships between the parties.").

Second, the Delivery Obligation also concerns only personal property. This obligation is to connect Extraction's wells to the gathering system and to deliver [redacted] Ex. A § 2.1 (emphasis added). The same is true for oil and water. *See* Ex. B § 2.1; Ex. C § 2.1. By its terms, the contracts only concern produced gas, oil, or water; *i.e.*, personal property and not the use or enjoyment of the mineral estate. *See Smith*, 720 P.2d 608–09 (citation omitted); *W. End Irr. Co.*, 184 P.2d at 479.

Indeed, the reference to Other Interests undoes any argument that the dedications relate to or affect the use or enjoyment of real property. Under the Gas Agreement, the Other Interests are [redacted] but excluding [redacted] Ex. A (Ex. A) § I(zzzz) (emphasis added). The Other Interests definitions in the Oil Agreement and Water Agreement are nearly identical, simply swapping [redacted] or [redacted] for [redacted] *See* Ex. B (Ex. A) § I(uuuu); Ex. C (Ex. A) § I(rrrr). Extraction patently lacks the ability to convey or burden lands or real property interests that belong to third-parties, although it may contract for services for the produced minerals it controls; thus, this provision makes clear that only personal property is implicated. Indeed, this is doubly clear because Other Interests excludes interests wherein a

third-party has exercised its take-in-kind right because Extraction cannot deliver produced gas a third-party has already opted to take-in-kind. *See* Ex. A (Ex. A) § I(zzzz); Ex. B (Ex. A) § I(uuuu); Ex. C (Ex. A) § I(rrrr).

Thus, the covenants—other than the Drilling Commitment—within the Commercial Agreements concern only personal property. This is clear from the Commercial Agreements' reservations, which state:



Ex. A § 2.2; Ex. B § 2.2; Ex. C § 2.2. If Extraction can unilaterally decide to cease production without any input from Elevation, it is self-evident that Elevation has no interest in unproduced gas, oil, or water.

In sum, Elevation received no right or interest in Extraction's unproduced minerals. Instead, Elevation is entitled only to provide services related to personal property in exchange for a fee; accordingly, the touch and concern element is not met. *See In re Sabine Oil & Gas Corp.*, 567 B.R. at 875. The Commercial Agreements do not implicate any real property interest and do not touch and concern the land. Extraction's "obligation under the [Commercial Agreements] [are] simply to use [Elevation's] gathering and processing services when it does produce and deliver [its minerals], and that restriction does not limit [Extraction's] enjoyment of the land itself." *In re Sabine Oil & Gas Corp.*, 567 B.R. at 876. No covenant running with the land was created and summary judgment in Extraction's favor is appropriate.

3. Even if the Commercial Agreements indirectly affect real property, an indirect effect is insufficient to touch and concern the land.

Even if the Commercial Agreements indirectly affect the use or enjoyment of Extraction's mineral estates (they do not), an indirect effect is insufficient to satisfy the touch and concern element. The critical point of the touch and concern element is that a covenant runs with the land only when the effect on the use or enjoyment 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 mentioned, this analysis is based on the inquiry conceived by real property scholar and legal professor Dean Bigelow. 9 Richard R. Powell, Powell on Real Property § 60.04(3)(a) (citation omitted).

As Dean Bigelow described, the inquiry turns on whether a covenant materially affects the promisor's legal relationship to the land itself. *See* Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. at 652. This effect, however, must be direct. As Dean Bigelow explained, "[i]t is easy to suggest covenants that will indirectly or mediately operate to the benefit of the covenantee with respect to his rights as owner of the soil, which clearly do not run." *Id.* Elaborating, he said "a covenant by a lessor of farm lands that he will sell for the lessee all grain that shall be raised on the land and shipped to him would seem clearly to be a personal covenant." *Id.* Dean Bigelow explained, as a "***fundamental***" point, that this is so because the "covenant operates primarily to benefit the covenantee not in the exercise of his privilege as owner of the soil but in the privilege that he has as owner of a chattel, of selling it." *Id.* (emphasis added). As a result, there is no covenant running with the land because, even if the covenant offers some indirect effect on the land, the covenant really only affects an individual as the owner of chattel. *See id.*

These fundamental observations apply with equal force to sellers of gas, oil, and water who are indistinguishable from sellers of grain. While it grows, grain is real property until it is ripened

and no longer draws sustenance from the land; afterward, it becomes personal property. *Wood v. Wood*, 183 P.2d 889, 890-91 (Colo. 1947); *see also Womach v. Thomas*, 486 A.2d 15, 18 (Del. Ch. 1984) (discussing general law pertaining to unharvested crops, including instances of Colorado law). Gas and oil owners, like farmers, might desire to sell some of their "crop," and might arrange for various services to assist in that sale (*e.g.*, gathering services, processing, and marketing). Covenants for the provision of these services and the sale of this personal property, however, do not directly affect legal rights to the land or the value thereof. As a result, they do not touch and concern the land. Thus, the Commercial Agreements directly relate to and affect Extraction as the owner of personal property. Even if the Commercial Agreements affect the land (they do not), these contracts are nevertheless the exact sorts of instrument that too indirectly relate to or affect the land to run with it.

By contrast, the only covenant that satisfies the touch and concern analysis and that the parties intended to run with the land is the Drilling Commitment. Unlike all other covenants in the Commercial Agreements, the Drilling Commitment directly affects the use or enjoyment of Extraction's mineral estates because it obligates Extraction to take particular actions—drilling—with respect to its lands, thereby lessening a legal right respecting the land that Extraction would otherwise have. *See* Ex. A (Ex. A) § I(aaa) (defining Drilling Commitment as [redacted] Ex. B (Ex. A) §I(xx) (same); Ex. C (Ex. A) § I(vv) (same). The Drilling Commitment simply highlights how the remaining covenants relate solely to personal property and do not directly affect the parties' legal relationship to Extraction's land. While the Drilling Commitment may touch and concern the land, none of the other covenants

satisfy this test and, accordingly, do not run with the land. *See MidCities Metro. Dist. No. 1*, 2013 WL 3200088, at *6 (illustrating the covenant-by-covenant analysis when assessing whether covenants run with the land); *see also Pennaco Energy, Inc.*, 363 P.3d at 34 (Wyo. 2015) (similar under Wyoming law).

B. Extraction and Elevation Are Not in Privity of Estate Because the Commercial Agreements Did Not Convey to Elevation Any Real Property Interest in Extraction's Mineral Estate.

The Commercial Agreements fail to create any covenants running with the land for the additional and independent reason that Extraction and Elevation never shared privity of estate. For a covenant to run with the land under Colorado law, there must be privity of estate between the parties to the covenant. *See Farmers' High Line Canal & Reservoir Co.*, 92 P. at 293; *see also Taylor*, 274 P.2d at 982. Privity of estate requires the transfer of some real property interest in the land with which the covenant runs at the time of the alleged covenant's creation. *See* 3 Tiffany Real Property § 851 (3d ed. 2015) (describing the concept of horizontal privity as "privity of estate between the covenantor and the covenantee at the time the covenant was created").[16] Here, Extraction and Elevation are not in privity of estate as a matter of Colorado law. The Commercial Agreements do not purport to convey any recognized interest in Extraction's mineral estates.

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 back 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

[16] 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.

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 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 this privity requirement. Colorado, by statute, identifies several covenants that necessarily run with the land, but each one of those acknowledged covenants is nevertheless 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).

Real property treatises also note that Colorado law continues to require privity of estate. *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 Commercial Agreements do not satisfy privity of estate because they do not convey to Elevation *any* real interest in Extraction's mineral estate.

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

Here, the covenants purport to run with Extraction's mineral estates. *See* Ex. A § 2.4 (purporting to run with [redacted] Ex. B § 2.4 (same); Ex. C § 2.4 (same). Thus, for the covenants to run with Extraction's mineral estates, the Gas Agreement, Oil Agreement, and Water Agreement must each convey to Elevation a real property interest in Extraction's mineral estate. *See Taylor*, 274 P.2d at 982; *accord In re Sabine Oil & Gas Corp.*, 734 F. App'x at 67. None of the Commercial Agreements do so here.

Elevation may argue that Extraction conveyed real property interests in the form of a right of access to the surface or an easement. The Commercial Agreements do not grant any such rights in the mineral estate:



Ex. A (Ex. A) § XVI(d); Ex. B (Ex. A) § XVI(d); Ex. C (Ex. A) § XVI(d). Instead, these provisions simply state that Extraction provided Elevation—to the extent it had the capability—with a right to access, or an easement upon, ***the surface estate*** for limited purposes.

Accordingly, the covenants at issue are not contained in the conveyance of any interest in Extraction's mineral estate. ***First***, the right to access the surface estate is not an interest in real property, but a personal right. ***Second***, neither a surface easement nor a surface access right are interests in Extraction's mineral estate.

First, in Colorado, "a severed mineral owner has the right to use that portion of the surface estate that is reasonably necessary to develop the severed mineral interest." *Notch Mountain Corp. v. Elliot*, 898 P.2d 550, 556 (Colo. 1995) (citing *Rocky Mountain Fuel Co. v. Heflin*, 366 P.2d 577, 580 (Colo. 1961)). "Though the privilege to use the surface is recognized at law, this right ***does not create an ownership interest*** in the surface estate . . . but merely a ***right of access***." *Id.* (citing *Smith v. Moore*, 474 P.2d 794 (Colo. 1970) (emphasis added)). Extraction's surface access rights flatly are not real property interests; they are a privilege recognized by law.

Second, Colorado has "long recognized that a conveyance which severs a mineral interest from the surface estate creates a separate and distinct estate." *Notch Mountain Corp.*, 898 P.2d at 556 (citing *Radke v. Union Pac. R. Co.*, 334 P.2d 1077 (Colo. 1959)). Extraction's possession of

the mineral estate under its leases caused such a severance and, therefore, any surface access rights or easements are entirely unrelated to the mineral estate. An easement is "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose . . . ." Easement, *Black's Law Dictionary* (11th ed. 2019); *see also Allen v. Nickerson*, 155 P.3d 595, 598 (Colo. App. 2006) ("An easement is a right conferred by grant, prescription, or necessity authorizing one to do or maintain something on the land of another.") (citing *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229 (Colo. 1998)). ***Surface*** easements are burdens on the surface estate, and cannot implicate Extraction's real property interests in the ***mineral*** estate; indeed, "[a]s the owner of property subject to the easement, the surface owner 'continues to enjoy all the rights and benefits of proprietorship *consistent with the burden of the easement.*'" *Gerrity Oil & Gas Corp.*, 946 P.2d at 927 (emphasis in original) (quoting *Bijou Irr. Dist. v. Empire Club*, 804 P.2d 175, 183 (Colo. 1991)); *cf. In re Sabine Oil & Gas Corp.*, 734 F. App'x at 67 (2d Cir. 2018) (holding privity of estate is not satisfied, under Texas law, by an easement in property separate from the property purportedly creating the covenant)

Finally, the commitments and dedications are not grants of interests in Extraction's mineral estate.[17] To interpret this language to the contrary would result in a grant of ***all*** of Extraction's rights in the Dedicated Interests ***to the Commercial Agreements***. Ex. A § 2.1 (noting Extraction made its dedications and commitments [redacted]; Ex. B § 2.1 (same); Ex. C § 2.1 (same). This is an absurd result.

Consider the owner of an apple orchard that "dedicates and commits" its orchard (the "Dedicated Property") in an identified area (the "Dedicated Area") exclusively to the performance

[17] To the extent the Commercial Agreements recite [redacted] this cannot satisfy privity of estate. *See* Ex. A § 2.4; Ex. B § 2.4; Ex. C § 2.4. The covenant itself cannot be the interest in the conveyed-thing with which the covenant runs; if it were, privity of estate would be meaningless because it would always be satisfied by the grant of the covenant itself.

of an apple gathering agreement, as well as all harvested or harvestable apples therefrom (the "Dedicated Apples"). In this gathering agreement, the orchard owner commits exclusively to deliver apples it has picked from the Dedicated Area to a certain location on the ground. Once on the ground, the gathering service provider will gather them, wash them, shine them, and return the apples in bushels to the orchard owner at a designated delivery point. At no time does the apple gatherer own or have title to the apples or the orchard. The law would not interpret such language to be a conveyance of the orchard owner's apples in place to the apple-gatherer; nor would the apple-gatherer have a real property interest in the unharvested apples. Instead, this dedication merely identifies the apples that are ultimately subject to the gathering service if the orchard owner harvests apples, and regarding which the apple gatherer has a personal, contractual right because apples (like gas) are personal property once separated from the land. *Compare Wood* 183 P.2d at 890–91 (discussing property law concerning crops) *with El Paso Gold Mines, Inc.*, 720 P.2d at 609 ("[A]t some point after they are severed from the land, minerals lose their character as realty and 'become' personalty.").

The plain language of the Commercial Agreements makes clear that Extraction did not grant Elevation any interest in its allegedly burdened mineral estate. *See In re Sabine Oil & Gas Corp.*, 734 F. App'x at 67 (holding horizontal privity is not satisfied by the conveyance of any land involved with the covenant, but only by an interest in the land intended to be burdened by the purported covenant). Thus, Elevation and Extraction were never in privity of estate and no covenant running with the land was created nor can one be enforced against third parties not party to the Commercial Agreements. This makes sense, as there would otherwise be no basis at law to hold third parties accountable for obligations to which they did not assent and are not bound by privity of contract. Strangers to the land, such as Elevation, do not have the right to obligate

owners of property as to the use or enjoyment of their land (such as to uneconomically drill a certain number of wells in a given time) without a recognized legal relationship between the parties (*i.e.*, privity of contract or privity of estate). The Court must, therefore, grant summary judgment in Extraction's favor.

CONCLUSION

Extraction's claims for declaratory judgment are ripe for summary judgment as a matter of law. Elevation is a stranger to Extraction's mineral interests, and the Commercial Agreements merely provide Elevation with personal, contractual rights concerning Extractions produced gas and oil, and the water produced during production of these hydrocarbons. As a result, the parties are not in privity of estate and the covenants contained in the Commercial Agreements do not touch and concern the land (the latter excepting the Drilling Commitment). Thus, the Commercial Agreements do not create covenants that run with the land, and the Court should enter a declaratory judgment so holding as a matter of law.

[Remainder of page intentionally left blank]

Dated: September 4, 2020
Wilmington, Delaware

/s/ Stephen B. Gerald

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Co-Counsel to the Debtors and Debtors in Possession

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

EXHIBIT A

Filed Under Seal

EXHIBIT B

Filed Under Seal

EXHIBIT C

Filed Under Seal

EXHIBIT D

RATIFICATION AGREEMENT

THIS RATIFICATION AGREEMENT (this "Agreement") is dated as of July 3, 2018 and is entered into by and among 8 North, LLC ("8 North"), Axis Exploration, LLC ("Axis", and together with 8 North, the "Ratifying Parties"), Extraction Oil & Gas, Inc. ("Producer") and Elevation Midstream, LLC ("Elevation"). 8 North, Axis, Producer and Elevation are referred to herein individually as a "Party" and collectively as the "Parties".

RECITALS

WHEREAS, Producer and Elevation entered into (i) that certain Gas Gathering and Compression Agreement dated as of the date hereof (the "Gas Gathering Agreement"), (ii) that certain Crude Oil Gathering and Stabilization Agreement (the "Crude Gathering Agreement") dated as of the date hereof, and (iii) that certain Produced Water Gathering Agreement dated as of the date hereof (the "Water Gathering Agreement", and together with the Gas Gathering Agreement and the Crude Gathering Agreement, the "Commercial Agreements"); and

WHEREAS, the Parties desire to enter into this Agreement to clarify certain responsibilities and obligations of the Ratifying Parties with respect to the Commercial Agreements.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree and covenant as follows:

1. Definitions. Capitalized terms used herein without definition shall have the meanings given to such terms in the Commercial Agreements.

2. Dedication.

(a) The Ratifying Parties hereby ratify and confirm the dedication of all of their interests in (i) the Dedicated Interests and other Property Rights and Other Interests and (ii) the dedicated Gas, Crude Oil and Water, as the case may be, under the Commercial Agreements to the extent provided for in the Commercial Agreements (including with respect to any after acquired interests) and agree that such interests will be dedicated to Elevation and to the performance of the Commercial Agreements, subject to the terms in the Commercial Agreements.

(b) The Dedication and the Delivery Obligation, the grant of servitude provided and other Property Rights and Producer's covenants under Section 2.3 of each of the Commercial Agreements, together with all other related commitments in the Commercial Agreements and the matters set forth in GTC Section XV(a), GTC Section XV(b) and GTC Section XV(c) of each of the Commercial Agreements are not merely contract rights but are covenants running with (and touching and concerning) all of the Dedicated Interests (including the underlying Gas, Crude Oil, Water, lands, leases and wells) and, in addition, are binding upon the successors and assigns of Dedicated Interests and/or the undersigned's Gas, Crude Oil and Water, as the case may be. The undersigned acknowledges and agrees that the Dedication and Delivery Obligation made

hereunder and under the Commercial Agreement assigns and conveys to Elevation a servitude in the nature of a real covenant which touches and concerns the Dedicated Interests and are for the benefit of Elevation and its successors and permitted assigns, without which, Elevation would be unwilling to enter into or perform under the Commercial Agreements.

3. Choice of Law. This Agreement shall be construed and enforced in accordance with the laws of the State of Colorado, without reference to conflicts of law principles thereof that might apply the laws of another jurisdiction.

4. Assignment. No Party shall have the right to assign this Agreement without the prior written consent of the other Parties, except for assignments permitted under the Commercial Agreements.

5. Conflict. The Parties have agreed that this Agreement is executed solely for the purpose of the ratification contemplated herein and shall not amend or modify the Commercial Agreements in any way. In the event of a conflict between this this Agreement and the Commercial Agreements, the Commercial Agreements shall govern in all respects.

6. Counterparts. This Agreement may be executed in one or more counterparts, including those delivered by facsimile or other electronic means, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument, and shall become effective when each of the Parties has received this Agreement duly executed by the other Parties.

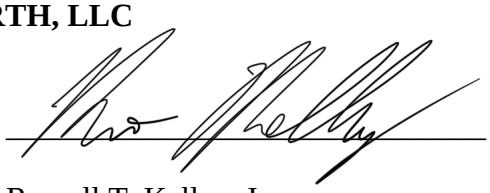
7. Several Liability. Notwithstanding anything else contained in this Agreement, all obligations of the Ratifying Parties and Producer under this Agreement shall be several and not joint.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties hereto execute this Agreement as of the date first written above.

8 NORTH:

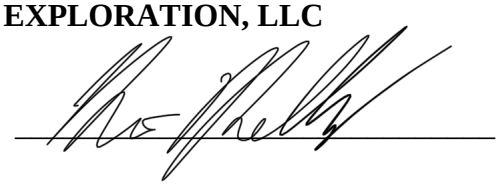
8 NORTH, LLC

By: 

Name: Russell T. Kelley, Jr.
Title: Chief Financial Officer

AXIS:

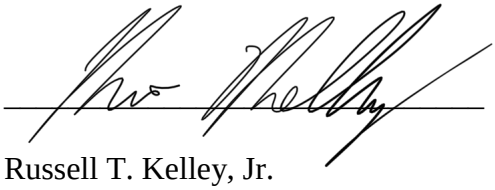
AXIS EXPLORATION, LLC

By: 

Name: Russell T. Kelley, Jr.
Title: Chief Financial Officer

PRODUCER:

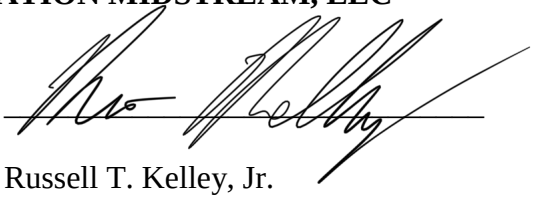
EXTRACTION OIL & GAS, INC.

By: 

Name: Russell T. Kelley, Jr.
Title: Chief Financial Officer

ELEVATION:

ELEVATION MIDSTREAM, LLC

By: 

Name: Russell T. Kelley, Jr.
Title: Chief Financial Officer

EXHIBIT E

Filed Under Seal