Docket #0010 Date Filed: 9/11/2020

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.	
ROCKY MOUNTAIN MIDSTREAM LLC,	Cass No. 20-50840 (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 Motion for Summary Judgment* [Docket No. 9] (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*

[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.

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for Summary Judgment and the exhibits thereto under 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 11, 2020
Wilmington, Delaware

/s/ *Richard W. Riley*

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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.	)	
ROCKY MOUNTAIN MIDSTREAM LLC,	)	Adv. Proc. No. 20-_____ (CSS)
Defendant.	)	

COMPLAINT FOR DECLARATORY JUDGMENT

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

Nature of the Action

1. In connection with the Debtors' chapter 11 cases, this adversary proceeding seeks a declaration that certain covenants (if any) contained in the agreements between Rocky Mountain and certain of the Debtors do not "run with the land."

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

Jurisdiction and Venue

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

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

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

Parties

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

6. Defendant Rocky Mountain, upon information and belief, is a Texas limited liability company with its principal place of business at One Williams Center, Tulsa, Oklahoma 74172.

Factual Allegations

A. The Gas Gathering, Processing, and Purchase Agreements.

7. On February 8, 2019, Extraction and Rocky Mountain entered into a Gas Gathering, Processing, and Purchase Agreement (the "East Greeley Agreement"). A true and correct copy of the East Greeley Agreement is attached as **Exhibit A**.

8. On March 6, 2018, Extraction and Discovery DJ Services LLC entered into a Gas Gathering, Processing, and Purchase Agreement (the "Broomfield Agreement"). A true and

correct copy of the Broomfield Agreement is attached as **Exhibit B**. Rocky Mountain is successor-in-interest to Discovery DJ Services LLC under the Broomfield Agreement.

9. When referred to collectively, the East Greeley Agreement and the Broomfield Agreement shall be referenced as the "Gathering Agreements."

10. The Broomfield Agreement became [redacted] unless terminated by either party. Ex. B § 7. After that initial primary term, the Broomfield Agreement continues year to year until terminated. *See id.*

11. Similarly, the East Greeley Agreement became [redacted] unless terminated by either party. Ex. A § 7.1. After that initial primary term, the East Greeley Agreement continues year to year until terminated. *See id.*

12. Under the Broomfield Agreement, Rocky Mountain [redacted] and will use commercially reasonable efforts to service gas exceeding the MDQ. Ex. B § 2.5. The Delivery Points(s) are [redacted] the Broomfield Agreement. Ex. B § 4.1. Pointedly, unless the contract states otherwise elsewhere, a party's sole remedy for the breach of the contract of any other claim arising out of or in relation to the contract [redacted] *Id.* (Ex. A) § XII(d) (emphasis in original).

13. Similarly, under the East Greeley Agreement, Extraction [redacted] Ex. A § 2.5(b). The Delivery Point(s) are [redacted] to the East Greeley Agreement [redacted] *Id.* § 4.1. If Extraction ever chose not to deliver this volume of gas, or failed to do so, Extraction was obligated to pay a contractual fee. *See id.* § 2.5(c). Otherwise, and unless provided for differently elsewhere in the contract, a party's sole remedy for the breach of the contract of any other claim arising out of or in relation to the contract [redacted] *Id.* (Ex. A) § XII(d) (emphasis in original).

14. Under both Gathering Agreements, until Extraction's gas is delivered to the Delivery Point(s), it remains under Extraction's control and possession. Ex. A (Ex. A) § X(c); Ex. B (Ex. A) § X(c). Rocky Mountain only gains control and possession once gas is delivered at the Delivery Point(s). Ex. A (Ex. A) § X(d); Ex. B (Ex. A) § X(d).

15. Under both Gathering Agreements, Extraction agreed [redacted] Ex. A (Ex. A) § XVI(d); Ex. B (Ex. A) § XVI(d).

16. The instant dispute is necessitated by allegations that the Gathering Agreements created a real property interest called a covenant running with the land and whether that renders the Gathering Agreements incapable of rejection in bankruptcy.

17. Specifically, the Gathering Agreements purported to render [redacted] into [redacted] Ex. A § 2.4; Ex. B § 2.4. The contracts also recite that Extraction [redacted] Ex. A § 2.4; Ex. B § 2.4.

18. ***First***, the referenced dedications state, in relevant part:

[redacted]

Ex. A § 2.1; *see also* Ex. B § 2.1 (containing identical language but referencing Rocky Mountain's predecessor-in-interest).

19. Under the East Greeley Agreement, the Dedicated Interests are defined as:

[redacted]

Ex. A (Ex. A) § I(bb).

20. Under the Broomfield Agreement, the Dedicated Interests are defined as:

[redacted]

[redacted]

Ex. B (Ex. A) § I(x).

21. Under both Gathering Agreements, the Other Interests are defined as [redacted] Ex. A (Ex. A) § I(uuu); Ex. B (Ex. A) § I (bbb).

22. The dedications are subject to Extraction's reservation of several rights. *See* Ex. A § 2.2; Ex. B § 2.2. One of the rights Extraction reserved was [redacted] Ex. A § 2.2(d); Ex. B § 2.2(d).

23. ***Second***, the other prong of the purported covenant running with the land is Extraction's agreement that any sales, assignments or pledges of any portion of the Dedicated Interests would be made subject to the Gathering Agreement. *See* Ex. A § 2.3; Ex. B § 2.3.

24. Finally, concerning governing law, the Gathering Agreement is governed by Texas law, without regard to its conflict of laws principles. Ex. A (Ex. A) § XIV(b); Ex. B (Ex. A) § XIV(b). However, the real property that is purportedly burdened exists within Colorado. *See* Ex. A (Ex. B); Ex. B (Ex. B).

Claims for Relief

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

26. 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).

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

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

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

29. The parties dispute whether the Gathering Agreements create any covenants that run with the land.

30. The Gathering Agreements do not create covenants that run with the land under Colorado law. In particular, Extraction's promise to deliver certain volumes of gas for processing services is not a covenant that runs with the land.

31. First, the Gathering Agreements do not grant Rocky Mountain an interest in Extraction's real property sufficient to satisfy privity of estate under Colorado law. Instead, each Gathering 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). Furthermore, any interest Rocky Mountain potentially has under the Gathering Agreements concerns only personal property. Thus, the parties never shared privity of estate and the covenants within the Gathering Agreements do not run with the land.

32. Second, the covenants in the Gathering Agreements do not "touch and concern" the land. Instead of affecting the use or enjoyment of Extraction's mineral estate, the Gathering Agreements affect only the parties personally. The only interest at issue in the Gathering Agreements is produced gas—not real property.

33. 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.

34. A judicial declaration is necessary and appropriate so that Extraction may ascertain its rights and obligations regarding the Gathering Agreements.

35. For the foregoing reasons, Extraction is entitled to a judicial declaration that the covenants contained in the Gathering Agreements fail to run with the land.

36. Such a declaration serves the twin interests of judicial efficiency and cost-effectiveness by terminating the substantial and actual controversy between the parties, or resolving some part of it.[2] It will also serve a useful purpose by enabling the Court to determine whether the Gathering Agreements and all obligations thereunder may be rejected under section 365 of the Bankruptcy Code.

[2] On August 11, 2020, Debtors filed the *Second 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. 412], which included requested relief to reject the Gathering Agreements pursuant to section 365 of the Bankruptcy Code. Bankruptcy courts have expressed a preference for the simultaneous adjudication of the issues raised in this adversary proceeding with a motion to reject the underlying executory contract. *In re Sabine Oil & Gas Corp.*, 547 B.R. at 73 ("[B]ifurcating the motion to reject and further proceedings to finally resolve the underlying property law dispute is an inefficient use of judicial and private resources; it would have been far preferable for the Court to hear the two together.").

Prayer for Relief

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

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

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

Dated: September 8, 2020
Wilmington, Delaware

/s/ Stephen B. Gerald

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EXHIBIT A

Filed Under Seal

EXHIBIT B

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

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Dated: September 8, 2020

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NATURE AND STAGE OF THE REJECTION PROCEEDINGS

On June 14, 2020 (the "Petition Date"), each Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. On August 11, 2020, Debtors filed the *Debtors' Second 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. 412] (the "Motion to Reject"), which included requested relief to reject the Gathering Agreements, as defined below, pursuant to section 365 of the Bankruptcy Code.

On September 8, 2020, Extraction filed its Complaint for Declaratory Judgment, seeking a declaration that the Gathering Agreements do not create covenants that run with the land in order to support the Motion to Reject. Extraction simultaneously seeks the relief requested in the Complaint and rejection of the Gathering 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.").

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 and 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 Rocky Mountain. Extraction is entitled to summary judgment because, as a matter of law, the Gathering Agreements do not create covenants that run with the land under Colorado law.

2. The Gathering Agreements are exactly what their names suggest: agreements governing the gathering of, and services provided to, produced gas. The agreements govern the provision of services to (and sale of) Extraction's chattel, here, produced gas, and affects Extraction as the owner of that produced gas, not as the owner of any particular real property. Extraction owns interests in certain mineral estates, and these interests allow Extraction to search for and reduce the minerals covered by the Gathering Agreements, specifically gas, to chattel. Rocky Mountain is a complete stranger to those interests in the mineral estates, and the Gathering Agreements do not affect Extraction's interests in the mineral estates. Under the agreements, Rocky Mountain is a mere service provider, just like any other service provider Extraction uses to process and transport produced gas; Rocky Mountain provides services in exchange for a fee. Rocky Mountain 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. Thus, Rocky Mountain's personal, contractual interests for the exclusive provision of services are insufficient to create a covenant running with the land.

3. 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. Rocky Mountain cannot satisfy either the privity of estate or touch and concern elements.

As a result, the Court should grant summary judgment and declare that Extraction's agreements with Rocky Mountain do not create covenants running with the land under Colorado law.

STATEMENT OF FACTS

I. THE GAS GATHERING, PROCESSING, AND PURCHASE AGREEMENTS

Extraction is a party to two Gas Gathering, Processing, and Purchase Agreements. These contracts, as their names suggest, are merely agreements wherein the parties provided for the gathering, processing, and purchase of gas between themselves. A true and correct copy of the Gas Gathering, Processing, and Purchase Agreement entered on February 8, 2019 between Extraction and Rocky Mountain (the "East Greeley Agreement") is attached as **Exhibit A**. A true and correct copy of the March 6, 2018 Gas Gathering, Processing, and Purchase Agreement entered on March 6, 2018 between Extraction and Discovery DJ Services LLC (the "Broomfield Agreement") is attached as **Exhibit B**. Rocky Mountain is the successor-in-interest to Discovery DJ Services LLC under the Broomfield Agreement. When referenced collectively, the East Greeley Agreement and the Broomfield Agreement shall be referred to as the "Gathering Agreements."

The Gathering Agreements are construed in accordance with, and are governed by, Texas law, without regard to Texas's conflict of laws provisions. Ex. A (Ex. A) § XIV(b); Ex. B (Ex. A) § XIV(b). However, the real property that is purportedly burdened exists within Colorado. *See* Ex. A (Ex. B); Ex. B (Ex. B).

A. Duration of the Gathering Agreements

The Broomfield Agreement became [redacted] unless

terminated by either party. Ex. B § 7. After that initial primary term, the Broomfield Agreement continues year to year until terminated. *See id.*

Similarly, the East Greeley Agreement became [redacted] unless terminated by either party. Ex. A § 7.1. After that initial primary term, the East Greeley Agreement continues year to year until terminated. *See id.*

B. Extraction's Contractual Obligations Under the Gathering Agreements

Each of the Gathering Agreements contain purely contractual obligations that do not implicate any real property interests. The provisions of each Gathering Agreement mirror the other and neither create interests in Extraction's real property interests.

Under the Broomfield Agreement, Rocky Mountain [redacted] and will use commercially reasonable efforts to service gas exceeding the MDQ. Ex. B § 2.5. The Delivery Points(s) are [redacted] the Broomfield Agreement. Ex. B § 4.1. Pointedly, unless the contract states otherwise elsewhere, a party's sole remedy for the breach of the contract of any other claim arising out of or in relation to the contract [redacted] *Id.* (Ex. A) § XII(d) (emphasis in original).

Similarly, under the East Greeley Agreement, Extraction [redacted] Ex. A § 2.5(b). The Delivery Point(s) are [redacted]

[redacted] to the East Greeley Agreement [redacted] *Id.* § 4.1. If Extraction ever chose not to deliver this volume of gas, or failed to do so, Extraction was obligated to pay a contractual fee. *See id.* § 2.5(c). Otherwise, and unless provided for differently elsewhere in the contract, a party's sole remedy for the breach of the contract of any other claim arising out of or in relation to the contract [redacted] *Id.* (Ex. A) § XII(d) (emphasis in original).

Under both Gathering Agreements, until Extraction's gas is delivered to the Delivery Points, it remains under Extraction's control and possession. Ex. A (Ex. A) § X(c); Ex. B (Ex. A) § X(c). Rocky Mountain only gains control and possession once gas is delivered at the Delivery Points. Ex. A (Ex. A) § X(d); Ex. B (Ex. A) § X(d).

Under both Gathering Agreements, Extraction agreed [redacted] Ex. A (Ex. A) § XVI(d); Ex. B § (Ex. A) § XVI(d).

C. The Parties Purported to Create a Covenant Running with the Land But Failed to Actually Create Such a Real Property Interest

The instant dispute is necessitated by allegations that the Gathering Agreements created a real property interest called a covenant running with the land and whether that renders the Gathering Agreements incapable of rejection in bankruptcy.

Specifically, the Gathering Agreements purported to render [redacted] into [redacted] Ex. A § 2.4; Ex. B § 2.4. The

contract also recites that Extraction [redacted] Ex. A § 2.4; Ex. B § 2.4.

First, the referenced dedications state, in relevant part:

[redacted]

Ex. A § 2.4; *see also* Ex. B § 2.4 (containing identical language but referencing Rocky Mountain's predecessor-in-interest).

Under the East Greeley Agreement, the Dedicated Interests are defined as:

[redacted]

Ex. A (Ex. A) § I(bb). Meanwhile, under the Broomfield Agreement, the Dedicated Interests are defined as:

[redacted]

Ex. B (Ex. A) § I(x).

Under both Gathering Agreements, the Other Interests are defined as [redacted] Ex. A (Ex. A) § I(uuu); Ex. B (Ex. A) § I (bbb).

Importantly, the dedications are subject to Extraction's express reservation of several rights. *See* Ex. A § 2.2; Ex. B § 2.2. One of the rights Extraction reserved was [redacted] Ex. A § 2.2(d); Ex. B § 2.2(d).

Second, the other prong of the purported covenant running with the land is Extraction's agreement that any sales, assignments or pledges of any portion of the Dedicated Interests would be made subject to the Gathering Agreement. *See* Ex. A § 2.3; Ex. B § 2.3.

LEGAL STANDARD

Under Rule 56(a) of the Federal Rules—made applicable to this adversary proceeding by 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 Gathering 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 Gathering 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 PURELY LEGAL QUESTIONS OF COLORADO LAW

Extraction's claim for declaratory judgment is ripe for summary judgment because the Gathering Agreements do not create covenants that run with the land under Colorado law.

The 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 governed by Colorado law.[1] The lands covered by the Gathering Agreements are located in Colorado. *See* Ex. A (Ex. B); Ex. B (Ex. B). 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) (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

[1] 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.

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 GATHERING AGREEMENTS DO NOT CREATE COVENANTS THAT RUN WITH THE LAND UNDER COLORADO LAW

The Gathering 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)).[2] 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 Gathering Agreements neither touch and concern the land nor satisfy privity of estate. Specifically, the covenants do not directly affect the use or enjoyment of the land they are intended to run with and are not contained in a grant of any real property interest in that land. Summary judgment is, therefore, appropriate.

A. The Gathering 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 Gathering Agreements do not create covenants that run with the land because the purported covenants do not touch and concern the land. *Farmers' High Line Canal & Reservoir*

[2] 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)).

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.").

The only things within the Gathering Agreements that purport to run with the land are [redacted] Ex. A § 2.4; Ex. B § 2.4. Accordingly, the parties purportedly burdened Extraction's mineral estates; thus, the Gathering Agreements must touch and concern Extraction's mineral estates.

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

[3] "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)).

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 that 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 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 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 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); Harry 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 Gathering Agreements' dedications fail to touch and concern Extraction's mineral estate 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 Gathering Agreements are simply service contracts wherein Rocky Mountain agrees to provide services to Extraction's produced gas in exchange for a fee and the contractual right to provide such services, and to purchase chattel, *i.e.*, the produced gas; the covenants to provide services and purchase chattel purely relate to (and affect) personal property, not 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 Dedications do not touch and concern Extraction's mineral estate; they merely identify the parties' contractual rights and obligations.

The Gathering Agreements' dedications and covenants do not touch and concern—and do not even implicate—Extraction's real property interests.[4]

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

In relevant part, the Gathering Agreements' dedications state:



Ex. A § 2.1 (redaction added); *see also* Ex. B § 2.1 (containing identical language but referencing Rocky Mountain's predecessor-in-interest). The other prong of the purported covenant running with the land is Extraction's agreement that sales, assignments or pledges of any portion of the Dedicated Interests would be subject to the Gathering Agreements. *See* Ex. A § 2.3; Ex. B § 2.3.

Considered in the context of the totality of the Gathering Agreements, these provisions' purpose is merely to identify ***which*** minerals, from ***what*** property, are the subject of the contractual obligations to be performed under the agreement.

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 Gathering Agreements to set apart or donate Extraction's mineral interests for public use.

Instead, the Court must construe the Gathering 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 to the performance of the Gathering Agreement. *See* Ex. A § 2.1; Ex. B § 2.1. 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 Gathering Agreements. Extraction merely pledged and set apart its gas in a particular area to the performance of the contractual and personal obligations of the Gathering Agreements, services and purchase agreements relating solely to Extraction's personal property. Throughout the agreements, the term Dedicated Interests is used to identify ***what*** minerals ***from which area*** are subject to the contract's obligations.[5]

This is made most clear by the dedications' reference to Other Interests. Specifically, the Gathering Agreements purport to render Extraction's agreement to deliver gas from the Other

[5] *See, e.g.*, Ex. A § 2.3 [redacted] Ex. B § 2.3 (similar); Ex. A § 2.6(a) [redacted] Ex. B § 2.6(a) (similar); Ex. A § 3.4 [redacted]

Interests to Rocky Mountain a covenant running with the land. *Compare* Ex. A § 2.4 *and* Ex. B § 2.4 *with* Ex. A § 2.1 and Ex. B § 2.1. The Other Interests, however, are [redacted] Ex. A (Ex. A) § I(uuu); Ex. B (Ex. A) § I (bbb). Extraction patently lacks the ability to convey or burden land 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 the dedication merely identifies what minerals from which area are subject to the contract. This is doubly clear because the term Other Interests excludes any interest wherein a third-party has exercised its take-in-kind right because Extraction ***cannot deliver*** produced gas that a third-party has already opted to take-in-kind. *See* Ex. A (Ex. A) § I(uuu); Ex. B (Ex. A) § I (bbb).

In other words, the dedications merely identify the parties' contractual rights and obligations respecting Extraction's produced gas. The Gathering Agreements ***do not*** convey to Rocky Mountain an interest in that gas in place and do not affect Extraction's legal rights to its mineral estate: Rocky Mountain may not compel production and it may not explore or develop Extraction's mineral estate.

2. The Gathering Agreements concern only personal property and do not directly affect the rights to or use of the land.

The Gathering Agreements do not touch and concern the land because they affect only personal property. Under Colorado law, produced gas is personal property. *See Smith v. El Paso Gold Mines, Inc.*, 720 P.2d 608, 608–09 (Colo. App. 1985) ("[A]t some point after they are severed form the land, minerals lose their character as realty and 'become' personalty.") (citing 2 Tiffany

Real Property § 587 (3d ed. 1939)). Produced gas is the only thing Rocky Mountain has an interest in under the agreements.

Under the Gathering Agreements, Extraction [redacted] and agreed [redacted] Ex. A § 2.1 (emphasis added); *see also* Ex. B § 2.1.

The Gathering Agreements' other terms further clarify that produced gas is the only thing Rocky Mountain has an interest in. Under the Broomfield Agreement, the Delivery Points are [redacted] the Broomfield Agreement. Ex. B § 4.1. Under the East Greeley Agreement, the Delivery Points [redacted] to the Gathering Agreement [redacted] Ex. A § 4.1. Until Extraction's gas is delivered to the Delivery Points, it remains under Extraction's control and possession. Ex. A (Ex. A) § X(c); Ex. B (Ex. A) § X(c). Rocky Mountain only gains control and possession once gas is delivered at the Delivery Points. Ex. A (Ex. A) § X(d); Ex. B (Ex. A) § X(d).

Thus, the covenants contained within the Gathering Agreements concern only produced gas, which is personal property. *See El Paso Gold Mines, Inc.*, 720 P.2d at 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)). While the gas

remains in the ground, Rocky Mountain has no interest in it whatsoever, and Rocky Mountain's contractual rights under the Gathering Agreements do not affect Extraction's rights concerning that gas in the ground. This is, again, made clear from the Gathering Agreements, which reserve to Extraction:



Ex. A § 2.2(d); Ex. B § 2.2(d); *see also* Ex. A § 2.5(c) (stating Extraction is under no obligation to produce gas; instead, if it does not, it must pay a contractual fee). In sum, Rocky Mountain received no right to any share of Extraction's minerals in the ground. Instead, it is entitled only to provide services related to those minerals once produced in exchange for a fee; accordingly, the touch and concern element is not met. *See In re Sabine Oil & Gas Corp.*, 567 B.R. at 875.

The Gathering Agreements do not implicate any real property interest and do not touch and concern the land. Extraction's "obligation under the [Gathering Agreements] is simply to use [Rocky Mountain'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 Gathering Agreements indirectly concern real property, an indirect effect is insufficient to touch and concern the land.

Even if the Gathering Agreements indirectly affect the use of or enjoyment of Extraction's mineral estates (they do not), an indirect affect 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 affect on 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. *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. *See* Harry Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. at 652. This affect upon the land, however, must be direct. As Dean Bigelow explained, "[i]t is easy to suggest covenants that will indirectly or mediately operate to the benefit of the covenantee with respect to his rights as owner of the soil, which clearly do not run." *Id.* Elaborating, he said "a covenant by a lessor of farm lands that he will sell for the lessee all grain that shall be raised on the land and shipped to him would seem clearly to be a personal covenant." *Id.* Dean Bigelow explained, as a "***fundamental***" point, that this is so because the "covenant operates primarily to benefit the covenantee not in the exercise of his privilege as owner of the soil but in the privilege that he has as owner of a chattel, of selling it." *Id.* (emphasis added). Thus, 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 the seller of gas, who is indistinguishable from the seller of grain. While it grows, grain, similar to gas, is real property until it is ripened and no longer draws sustenance from the land; afterward, it becomes personal property. *Wood v. Wood*, 183 P.2d 889, 890-91 (Colo. 1947); *see also Womach v. Thomas*, 486

A.2d 15, 18 (Del. Ch. 1984) (discussing general law pertaining to unharvested crops, including instances of Colorado law). A gas owner, like a farmer, might desire to sell some of his "crop," and might arrange for various services to assist him in that sale (*e.g.*, transportation services, processing, and marketing). Covenants for the provision of these services and the sale of this severed gas, however, do not directly affect the lessee's legal rights to the land itself. As a result, they do not touch and concern the land. Thus, the Gathering Agreements benefit Extraction as the owner of personal property. Even if the Gathering Agreements affect the land (they do not), they are nevertheless the exact sort of instruments that have too indirect an effect to run with the land.

B. Extraction and Rocky Mountain Are Not in Privity of Estate Because the Gathering Agreements Do Not Convey to Rocky Mountain Any Real Property Interest in Extraction's Mineral Estate.

The Gathering Agreements fail to create any covenants running with the land for the additional, and independent, reason that Extraction and Rocky Mountain 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").[6] Here, Extraction and Rocky Mountain are not in privity of estate as a matter of Colorado law. The Gathering Agreements do not convey any recognized interest in real property.

[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.

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 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 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).

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 Gathering Agreements do not satisfy privity of estate because they do not convey to Rocky Mountain *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 alleged covenants purport to run with Extraction's mineral estate. *See* Ex. A § 2.4 (purporting to burden Extraction's interests in the Dedicated Interests); Ex. B §2.4 (same). Thus, for the dedications to run with Extraction's mineral estates, the Gathering Agreements must convey to Rocky Mountain a real property interest in Extraction's mineral estates. *See Taylor*, 274 P.2d at 982; *accord In re Sabine Oil & Gas Corp.*, 734 F. App'x at 67. Extraction did not make any such conveyance.

Rocky Mountain may argue that Extraction conveyed real property interests in the form of a right of access to the surface or via an easement. The Gathering Agreements do not grant any such real property right. Instead, the contract states Extraction agreed [redacted] Ex. A (Ex. A) § XVI(d) (emphasis added); Ex. B (Ex. A) § XVI(d) (emphasis added). Even if this language is construed as the attempted grant of some right of co-usage to Extraction's right of ingress and egress upon the surface estate, Extraction did not have the ability to convey that right under Colorado law. In Colorado, "a severed mineral owner has the right to use that portion of the surface estate that is reasonably necessary to develop the severed mineral interest." *Notch Mountain Corp. v. Elliot*, 898 P.2d 550, 556 (Colo. 1995) (citing *Rocky Mountain Fuel Co. v. Heflin*, 366 P.2d 577, 580 (Colo. 1961)). Critically, "[t]hough the privilege to use the surface is recognized at law, this right ***does not create an ownership interest*** in the surface estate . . . but merely a ***right of access***." *Id.* (emphasis added) (citing *Smith v. Moore*, 474 P.2d 794 (Colo. 1970)).

Extraction's surface access rights are not real property interests, they are a privilege recognized by law. Indeed, Colorado considers the incidental surface access right to be like an implied easement appurtenant. *See Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 927 (Colo. 1997), *as modified on denial of reh'g* (Oct. 20, 1997) ("In this sense, the right of access to the mineral estate is in the nature of an implied easement, since it entitles the holder to a limited right to use the land in order to reach and extract the minerals.") (citing Restatement (First) of Property § 450 (Am. Law Inst. 1944)). An easement appurtenant "runs with [the burdened] land and ***is incapable of existence*** separate and apart from the particular land to which it is annexed." *Lewitz*

v. Porath Family Tr., 36 P.3d 120, 122 (Colo. App. 2001), as modified on denial of reh'g (Apr. 26, 2001) (emphasis added) (citing 7 Thompson on Real Property § 60.06(f)(1) (Thomas ed. 1994)).

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

Additionally, to the extent the Gathering Agreements can be construed as granting a real property interest (they did not), any conveyance identified in the agreements implicates only the surface estate and is not a grant of any interest in Extraction's allegedly burdened mineral estate. Colorado has "long recognized that a conveyance which severs a mineral interest from the surface estate creates a separate and distinct estate." *Notch Mountain Corp.*, 898 P.2d at 556 (citing *Radke v. Union Pac. R. Co.*, 334 P.2d 1077 (Colo. 1959)). Extraction's possession of the mineral estate under its leases caused such a severance. *See* Ex. A at First Recital (stating Extraction owns interests in various lands pursuant to certain leases); Ex. B at First Recital (similar). Thus, even if the Gathering Agreements are construed as granting easements, the grant could only be of surface easements 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*, 965 P.2d 1229). ***Surface*** easements are burdens on the surface estate, and cannot implicate Extraction's real

property interests in the ***mineral*** estate; indeed, "***[a]s the owner of property subject to the easement, the surface owner*** 'continues to enjoy all the rights and benefits of proprietorship *consistent with the burden of the easement.*'" *Gerrity Oil & Gas Corp.*, 946 P.2d at 927 (bold emphasis added) (quoting *Bijou Irr. Dist. v. Empire Club*, 804 P.2d 175, 183 (Colo. 1991)). It is unclear what thing could even constitute a mineral estate easement.

Finally, as discussed *supra*, the commitments and dedications are not grants of interests in the mineral estate because they only identify ***what*** minerals, from ***which*** property, are subject to the contract. 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 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 Gathering Agreements makes clear that Extraction did not grant Rocky Mountain any interest in the allegedly burdened mineral estate. *See In re Sabine Oil & Gas Corp.*, 734 F. App'x at 67 (holding horizontal privity is not satisfied by the conveyance of any land involved with the covenant, but only by an interest in the land intended to be burdened by the purported covenant). Indeed, if Rocky Mountain were to decide to drill wells to produce gas from the mineral estates tomorrow, it would be liable for trespass. Thus, Rocky Mountain and Extraction were never in privity of estate and no covenants running with the land were created, and the Court must grant summary judgment in Extraction's favor.

CONCLUSION

Extraction's claim for declaratory judgment is ripe for summary judgment as a matter of law. Rocky Mountain is a stranger to Extraction's mineral interests, and the Gathering Agreements merely provide Rocky Mountain with personal, contractual rights to provide services to Extraction's severed gas, as designated by the agreements' dedications. As a result, the parties are not in privity of estate and the covenants contained in the Gathering Agreements do not touch and concern the land. Thus, the Gathering 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.

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Dated: September 8, 2020
Wilmington, Delaware

/s/ Stephen B. Gerald

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

EXHIBIT A

Filed Under Seal

EXHIBIT B

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