Docket #0026 Date Filed: 9/23/2020

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*,[1] Debtors.	)	Case No. 20-11548 (CSS) Jointly Administered
EXTRACTION OIL & GAS, INC. Plaintiff,	)	Adversary Proceeding Case No. 20-50839(CSS)
v.	)	
ELEVATION MIDSTREAM, LLC Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Dated: September 23, 2020

[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 ("8 North") (0904); Axis Exploration, LLC ("Axis") (8170k); 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 ("XTR") (5624). The location of the Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

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Elevation Midstream, LLC ("Elevation") respectfully files this Brief in Response to Extraction Oil & Gas, Inc.'s ("Extraction") Motion for Summary Judgment:[2]

NATURE AND STATE OF THE PROCEEDINGS

1. The Court has jurisdiction over these jointly administered Chapter 11 cases and this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157. On August 10, 2020, in the main bankruptcy case, Extraction filed its Notice of Rejection of Certain Executory Contracts and/or Unexpired Leases (the "Rejection Notice," D.I. #377), concerning the three Gathering Agreements[3] between Elevation and Extraction, as ratified by certain other Debtors. On September 4, 2020, Extraction initiated this Adversary Proceeding by filing its Complaint for Declaratory Judgment (Adv.D.I. 1) and Motion for Summary Judgment (Adv.D.I. 3), seeking a declaration that the Gathering Agreements do not run with the land. Elevation filed a Cross-Motion for Summary Judgment on September 10, 2020 (Adv.D.I. 11), requesting a declaration that they do run with the land.

SUMMARY OF ARGUMENT

2. Extraction seeks to reject three Gathering Agreements that are part of a set of integrated transactions arising from GSO EM Holdings LP's ("GSO") investment. In connection with this rejection, Extraction asks this Court to declare that the Gathering Agreements do not run with the land under applicable Colorado law. Two elements under Colorado law are required to

[2] Elevation incorporates its Brief in Support of Defendant's Cross-Motion for Summary Judgment (the "Cross-MSJ Brief") [Adv.D.I. 12], and the exhibits attached thereto, in this Response, and any references herein to Exhibit A and Exhibits 1-17 are intended to reference those exhibits attached and filed with the Cross-MSJ Brief. Exhibit 18, which is attached to this Response, was not included as an exhibit to the Cross-MSJ Brief.

[3] The "Gathering Agreements" include: (1) the Gas Gathering and Compression Agreement (the "Gas Agreement"); (2) the Crude Oil Gathering and Stabilization Agreement (the "Oil Agreement"); and (3) the Produced Water Gathering Agreement (the "Water Agreement"), each between Elevation and Extraction, dated July 3, 2018, and amended September 20, 2018, April 18, 2019, and December 16, 2019. Ex. 1, 2, 3, 4, 5, 6. An invalid fourth amendment was purportedly executed by Extraction and Elevation on March 15, 2020, which Elevation contests for the reasons stated in its Addendum to Proof of Claim of Elevation Midstream, LLC, which Elevation incorporates herein. The validity of this invalid amendment has no impact on if the Gathering Agreements run with the land.

create covenants that run with the land: (1) intent that covenants run with the land, and (2) covenants that touch and concern the land. Extraction does not actually contest these elements.

3. Extraction does not contest intent; indeed, the express language of the Gathering Agreements makes clear that they run with the land and bind successors and assigns. Extraction also admits that an integral covenant in the Gathering Agreements—the "Drilling Commitment," by which Extraction agreed to drill hundreds of wells—touches and concerns the land. The Drilling Commitment was and is critical to the Gathering Agreements. Without it, GSO would not have invested hundreds of millions of dollars to construct and operate the gathering facilities. This covenant is sufficient by itself to establish that the Gathering Agreements touch and concern the land, and therefore the Gathering Agreements run with the land.

4. The Gathering Agreements touch and concern the land in several other ways. Without limitation, Extraction (i) dedicated to Elevation all of the lands, mineral interests, easements, leases, wells, and the oil, gas and water *therein and thereunder* contained in the Dedicated Area[4] (the "Dedication"); (ii) agreed to deliver to Elevation all of the oil, gas, and water from the Dedicated Area (the "Delivery Obligation"); and (iii) granted easements and rights-of-way to Elevation upon the lands in the Dedicated Area in connection with the gathering, compression and stabilization systems, along with related pipelines, infrastructure, equipment, fixtures, and improvements (collectively, the "Midstream Facilities") used to gather, process, and transport oil, gas, and water on, under, and through the Dedicated Area.

5. While the case law is clear that these factors alone are sufficient to establish that the Gathering Agreements run with the land, Extraction asserts that a third element—privity of

[4] The "Dedicated Area" means "the Hawkeye Dedicated Area and the Broomfield Dedicated Area," described in Exhibit C to the Gathering Agreements. Ex. 1 at Ex. A, §§ I(m), (uu), (qqq); Ex. 2 at Ex. A, §§ I(n), (rr), (ooo); Ex. 3 at Ex. A, §§ I(m), (pp), (lll). Exhibit C details the specific geographic locations in the Broomfield and Hawkeye areas of Colorado dedicated, identifying the land directly by township and range descriptions. Ex. 1, 2, 3 at Ex. C.

estate—must also be met. Modern Colorado cases do not require privity of estate. But even if they did, privity is met here because the Gathering Agreements bind successors and assigns, grant easements, and dedicate real property interests.

6. The Court should therefore deny summary judgment to Extraction, grant it to Elevation, and enter a declaration that the Gathering Agreements run with the land.

STATEMENT OF FACTS

7. The Gathering Agreements were entered into as part of GSO's 2018 investment after Extraction sought third party investors to fund the construction and installation of the Midstream Facilities in the Broomfield, Southwest Wattenberg, and Hawkeye areas of Colorado. Ex. A, Declaration of Anindya Mishra ("Dec.") ¶¶ 3-4. GSO understood the investment to enable Extraction to focus capital dollars on the drilling and completion of wells, while using third party capital (specifically, that of GSO) to fund construction of the Midstream Facilities. *Id.* Among other things, under the Gathering Agreements, Extraction: is required to drill a defined number of wells by 2022; expressly dedicated to Elevation the lands, mineral interests, easements, leases, wells, and oil, gas, and water therein and thereunder in the Dedicated Area; is required to deliver to Elevation all crude oil, gas, and produced water in those areas; granted easements to Elevation; and assigned and conveyed to Elevation a servitude in the nature of a real covenant touching and concerning the land. Ex. 1, 2, 3 at §§ 2.1, 2.4, Ex. A § XV(c), Ex. F. These covenants were critical to GSO agreeing to invest in Elevation and integral to the consideration provided by Extraction in exchange for which Elevation agreed to construct the Midstream Facilities. Dec. ¶ 21.

8. The Gathering Agreements require Elevation to design, construct, own, operate, and maintain the Midstream Facilities, including all related appurtenances and facilities, needed to gather, stabilize, and compress Extraction's oil, gas, and water from the Dedicated Interests. Ex. 1, 2, 3 at § 3.1. Pursuant to the Gathering Agreements, Elevation constructed the Midstream

Facilities, and commenced moving the crude oil, natural gas and water through certain of the Midstream Facilities in October 2019. Dec. ¶¶ 3, 21. Without access to the Midstream Facilities, there is no reasonably available alternative for Extraction to gather, compress, stabilize, or transport the oil, gas and water in the Dedicated Area, or market such hydrocarbons. Dec. ¶ 28.[5]

9. The Gathering Agreements are necessarily related to Extraction's oil and gas leases in the Broomfield and Hawkeye areas of Colorado. Dec. ¶ 25. Elevation understands that the Midstream Facilities gather approximately 25% of Extraction's total production and that percentage of overall production is expected to grow materially over the next few years as Extraction's development activities are likely to increase materially in the Dedicated Area in relation to the other assets of Extraction. *Id.* Further, Extraction's oil and gas assets within the City of Broomfield are subject to a myriad of unique development requirements and considerations, including Extraction's obligations to adhere to the terms and conditions of the Amended and Restated Oil and Gas Operator Agreement between Extraction and the City and County of Broomfield, dated October 24, 2017 (the "Broomfield OA"). Ex. 15.[6] The requirements to use facilities essentially identical to the ones Elevation constructed pursuant to the Gathering Agreements was a critical component of the City of Broomfield approving the Broomfield OA. Extraction is required to "utilize pipelines" under the Broomfield OA, and the specific geographic locations where pipelines are to be built and easements are located are set forth therein. Ex. 15 at §§ 3, 13, Ex. F, Ex. H. That agreement includes an Easement Grant setting forth the exact pipeline

[5] Extraction admitted in its most recent Form 10-K that gathering, stabilization and compression facilities are needed for it to process and deliver hydrocarbons and water and that it "rel[ies] (and expect[s] to rely in the future) on facilities developed and owned by third parties in order to store, process, transmit and sell our oil and gas production." Ex. 16 at 34, *available at* https://ir.extractionog.com/static-files/52d890b8-4786-456f-b116-c6fe9fae47ec. Elevation requests that the Court take judicial notice of the publicly available documents cited herein. FED. R. EVID. 201.

[6] *Available at* https://www.broomfield.org/DocumentCenter/View/25064/Resolution-2017-186-and-Agreement?bidId=

route over the land Extraction is required to use, and a Surface Use Agreement that granted rights to use the surface at designated locations. Ex. 15 at Ex. F, Ex. H. The locations of flowline and pipeline easements may only be changed with the City's agreement. Ex. 15 at § 13. Extraction also assigned to Elevation easements and rights-of-way pursuant to which Elevation relied to lay its pipe and construct the Midstream Facilities. Ex. 12. Extraction is contractually required to use the pipelines placed in the Dedicated Area (where the Midstream Facilities are located) to flow its product, without utilizing trucks.[7] Dec. ¶¶ 25-26.

LEGAL STANDARD

10. Rule 56 of the Federal Rules of Civil Procedure 56, made applicable by Rule 7056 of the Federal Rules of Bankruptcy Procedure, permits the granting of summary judgment only when the moving party demonstrates that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). "The standard for granting summary judgment on a request for a declaratory judgment is the same as for any other type of relief." *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Mktg. Bd.*, 298 F.3d 201, 210 n.12 (3d Cir. 2002). A moving party on summary judgment bears the initial burden of making a prima facie showing of entitlement as to the relief sought. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The burden then shifts to the non-moving party to "go beyond the pleadings" and "designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324.

ARGUMENT

11. Extraction seeks a declaration that the Gathering Agreements do not contain covenants running with the land, and, therefore, it may reject them pursuant to 11 U.S.C. § 365(a).

[7] The Broomfield OA also requires Extraction to minimize trucking. Ex. 15 at Ex. B. Natural gas cannot be trucked in any event, and must be flowed in pipelines. Dec. ¶ 29. Accordingly, any trucking alternatives pursued by Extraction in the future, even if actually allowed by the City of Broomfield, necessarily fails to account for natural gas.

The parties agree that Colorado law applies to the property rights here. Adv.D.I. 4 at 10. Under Colorado law, a real property covenant is created based on two elements: (1) the intent of the parties to create a covenant that runs with the land and binds successors in interest; and (2) whether the covenant "touches and concerns" the land. *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 440 (Colo. App. 2016). The Gathering Agreements meet this test and run with the land.

A. The intent element is met in the Gathering Agreements.

12. Extraction does not contest that the parties clearly expressed their intent that the Gathering Agreements, and the covenants contained therein, run with the land. Nor could it, as the Gathering Agreements plainly state that the parties intended to create covenants running with the land, create real property interests and servitudes, and bind their successors and assigns. Section 2.4 of each Gathering Agreement, entitled "Covenant Running with the Land," expresses the parties' intent that, among other things, the Dedication, the Delivery Obligation, the grant of servitude, the Drilling Commitment, the Corporate Opportunity covenant, and all other related commitments "are covenants running with (and touching and concerning) all of the Dedicated Interests," which includes the land, mineral interests, easements, leases, wells, oil, gas, and water therein and thereunder, and "are binding upon the successors and assigns." Ex. 1, 2, 3 at § 2.4

13. Express contract language identifying the covenant as one running with the land is generally the most straightforward indication of intent. *See Reishus* 409 P.3d at 441 (noting intent was clear from statement in contact that "explicitly state[d]" that the provisions run with the land and are binding upon legal representatives, heirs, successors, and assigns); *Cloud v. Ass'n of Owners, Satellite Apt. Bldg., Inc.*, 857 P.2d 435, 440 (Colo. App. 1992) (express language in covenant was dispositive of intent). Other provisions of the Gathering Agreements—including Section 2.1, 2.3(a), 9.3 and Exhibit A, § XII—and other documents between the parties—including twenty-four publicly filed Memoranda (defined below) and a Ratification Agreement—confirm

the parties' intent to bind successors and assigns, and that the Gathering Agreements run with the land as well. Ex. 1, 2, 3, 7, 8, 9, 10. The intent element is met here.

B. The covenants in the Gathering Agreements touch and concern the land.

14. The second element of the analysis is whether the covenants touch and concern the land. *See Reishus*, 409 P.3d at 440. Colorado cases finding that covenants touch and concern the land generally rely on provisions in the contract that in some way relate to specific aspects of the land or specific uses of the land. *See id.* at 441 (detailed provisions regarding location, structure type, and maintenance of residential dwellings touched and concerned the land); *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App. 1993) (requirement to submit building and improvement plans for approval). Recent Bankruptcy Court decisions applying law from other producing-state jurisdictions, under substantially identical circumstances, have focused on: (i) if the benefits and burdens are logically related to the underlying real property interest, and (ii) if the covenants increase or decrease the value of the burdened estate. *See In re Alta Mesa Resources, Inc.*, 613 B.R. 90 (Bankr. S.D. Tex. 2019); *In re Badlands Energy, Inc.*, 608 B.R. 854 (Bankr. D. Colo. 2019).

15. Extraction claims that a covenant must *directly* affect the use or enjoyment of the land. Adv.D.I. 4 at 22-23.[8] However, Colorado considers whether a covenant "*closely relate[s]*

[8] For this point, Extraction relies on a century-old article, which appears not to have been cited by any Colorado court. Harry Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639 (1914). That article refers to a covenant to sell matured grain after it has been harvested and shipped as personal. *Id.* at 652; *see also Wood v. Wood*, 183 P.2d 889, 890-91 (Colo. 1947). But the personal nature of mature crops is neither surprising nor relevant. Mature crops do not need the land to exist. This is not the same for oil and gas, which do not sit on top of the soil waiting to be harvested by driving movable equipment across the surface and removing such chattel. Hydrocarbons are buried and trapped under the ground, sometimes a mile or more, awaiting extraction. As in the Gathering Agreements, the extraction, accumulation, processing, gathering and transportation of such hydrocarbons requires substantial and expensive infrastructure, much of which is attached to or constructed beneath the surface. The Gathering Agreements burden and benefit numerous aspects of the real property interests. But even concerning the produced oil, gas, and water, as discussed more substantively herein, the dedication of such interests can still run with the land because the question is not what is conveyed by the covenant but whether it affects the use or enjoyment of the land itself. These reasons are the very essence of why the unique bodies of oil, gas and mineral law exist in producing jurisdictions.

to the land, its use, or its enjoyment." *Reishus*, 409 P.3d at 440 (quotation omitted; emphasis added). The Gathering Agreements both *directly affect* and *closely relate to* the use and enjoyment of Extraction's mineral interests.

16. Applying Colorado law and the tenets that Bankruptcy Courts have recently applied to similar gathering contracts, it is plain that the Gathering Agreements touch and concern the land. There are numerous obligations within the Gathering Agreements that create benefits and burdens logically and closely connected to the ownership, development, use and enjoyment of Extraction's underlying real property interests, and that have both positive and negative impacts on the value thereof. The covenants in the Gathering Agreements run with "*all* of the Dedicated Interests," which includes Extraction's held and after-acquired "lands, mineral interests, easements, leases, wells and [oil, gas, and water] therein and thereunder" in the Dedicated Area. Ex. 1, 2, 3 at § 2.4 (emphasis added), Ex. 1 at Ex. A § I(vv); Ex. 2 at Ex. A § I(ss); Ex. 3 at Ex. A § I(qq). As shown herein, the Gathering Agreements do that through the intimate connection between the Dedicated Interests and the contracts' covenants, along with the Midstream Facilities constructed thereunder.

1. Extraction admits that the Drilling Commitment in the Gathering Agreements touches and concerns the land.

17. Extraction admits that each Gathering Agreement contains a critical covenant that touches and concerns the land—the Drilling Commitment. (Adv.D.I. 1 at ¶¶ 29, 48, 57, 66; Adv.D.I. 4 at 3 n.4, 12 n.12, 13, 15, 21, 23). This covenant—Exhibit A, Section XV(c) and Exhibit F of each Gathering Agreement—requires Extraction to drill, complete and equip a defined number of wells in the Dedicated Area by the end of 2022. Ex. 1, 2, 3 at Ex. A § XV(c), Ex. F. The Drilling Commitment touches and concerns the land, requiring Extraction to drill the land for oil and gas.

18. The Drilling Commitment acts as a limitation on Extraction's reservation under Section 2.2 as to the drilling and operating of wells. It was the most important covenant to

Elevation and GSO, as substantially all of Elevation's income is dependent on Extraction's continued hydrocarbon production from actively drilling in the Dedicated Area. Dec. ¶ 20. The Drilling Commitment was a critical part of the agreement to construct and operate the Midstream Facilities, and is integral and cannot be separated from other covenants in the Gathering Agreements. The fact that Extraction was required to drill a set number of wells by 2022 underlies the entirety of the Dedication and Delivery Obligation covenants. The Drilling Commitment is closely related to the use and enjoyment of Extraction's mineral interests and leases, including concerning the required implied covenants under Colorado law on producers "to drill," "to develop after discovery of oil and gas in paying quantities" and "to operate diligently and prudently." *Garman v. Conoco, Inc.*, 886 P.2d 652, 659 (Colo. 1994); *see also Davis v. Cramer*, 808 P.2d 358, 361 (Colo. 1991) (implied covenant to operate diligently and prudently includes "implied covenant to market"). Extraction selectively references sections and argues without full context that Section 2.2 of the Gathering Agreements allows it to "unilaterally decide to cease production without any input from Elevation." D.I. 4 at 21. But Section 2.2 is expressly subject to the terms of the Drilling Commitment. Ex. 1 at 2.2(d); Ex. 2, 3 at § 2.2(b).

19. The Drilling Commitment on its own is sufficient to establish that the Gathering Agreements run with the land. It is not necessary for every covenant to run with the land for the contract as a whole to do so; a contract may still run with the land as a whole even where certain covenants do not. *See Cloud*, 857 P.2d at 440-41. In *Cloud*, the court held that a covenant granting 90% of the gross receipts from a condominium complex was a real property covenant, and that while a separate covenant reserving 10% of the gross receipts would generally be a personal covenant standing alone, it was integrally related to the 90% property covenant and therefore ran with the land as well. 857 P.2d at 441. Similarly, in *Reishus*, the court held that it was irrelevant

that one provision in the contract did not touch and concern the land because other provisions did, making the contract as a whole run with the land. 409 P.3d at 441. And in *Lookout Mountain*, the court found that where one obligation in a covenant requiring owners to submit plans for approval to the homeowners' association was "an integral part of the whole contract," then the entire covenant would run with the land. 867 P.2d at 75. It is therefore sufficient here that the Drilling Commitment—the most integral and critical covenant in the agreements—touches and concerns the land for the Gathering Agreements as a whole to run with the land.[9]

2. Extraction dedicated interests under the Gathering Agreements affecting the use and enjoyment of the land.

a) The Dedication and Delivery Obligation under Section 2.1, as confirmed under other documents, touch and concern the land.

20. Multiple other covenants also run with the land. Section 2.1 of the Gathering Agreements contains the "Dedication," by which Extraction, on its own and its Affiliates' behalf, "commits and dedicates the Dedicated Interests (whether now owned or hereafter acquired) and the exclusive right to receive from [Extraction] and its Affiliates at the Delivery Points all [oil, gas, and water] *therein and thereunder* and as may be produced therefrom to the performance of this Agreement." Ex. 1, 2, 3 at § 2.1 (emphasis added). The "Dedicated Interests" include Extraction's and/or its Affiliates' held and after-acquired "interests … in lands, mineral interests, easements, leases, wells and [oil, gas, and water], *therein and thereunder*" to the extent not already dedicated or committed. Ex. 1 at Ex. A § I(vv); Ex. 2 at Ex. A § I(ss); Ex. 3 at Ex. A § I(qq) (emphasis

[9] Extraction cites *MidCities Metropolitan District No. 1 v. U.S. Bank National Association*, No. 12-cv-03322-LTC, 2013 WL 3200088 (D. Colo. 2013), as endorsing a stand-alone review of covenants, but that is not the holding of that case. The court held that a covenant reserving certain payments was not a personal covenant because the parties did not intend it to be. The structure of the contract made clear that this covenant was set apart from other "Restrictions" that were stated as intended to "impose a burden on the Property." *Id.* at *4. In contrast, Section 2.4 of each Gathering Agreements specifically identifies the Drilling Commitment as intended to be a covenant running with the land, and Extraction does not contest intent. *MidCities* provides no support to find that the Gathering Agreements do not run with the land. The Drilling Commitment is related to numerous other covenants in the Gathering Agreements. But even if it were not, Extraction is not seeking to declare that all covenants except the Drilling Covenant do not run with the land. Extraction has no good answer for what the result here of a covenant-by-covenant approach would even be.

added). The Dedication touches and concerns the land by dedicating all of Extraction's real property interests conveyed under the leases, including the minerals in place ("therein and thereunder"), and the lands, easements, leases and wells—quintessential real property interests.

21. Improperly manipulating dictionary definitions of "dedicate" and "commit," Extraction argues that the Dedication under each Gathering Agreement only "identif[ies] the parties' contractual rights and obligations" and does not grant Elevation an interest in the oil, gas, and water in place. Adv.D.I. 4 at 15, 18. However, nothing about definitions of "dedicate" as "to set aside" and "commit" as "to pledge" translates into "identifying contract rights." Moreover, in the highly specialized oil and gas context, the usage of the terms "dedicate" and "dedication" is not new or novel, and certainly does not mean simply identifying contract rights. Indeed, references to the "dedication" of hydrocarbons as providing rights to third parties as to the actual hydrocarbons in place dates back many decades. *See Greenshields v. Warren Petroleum Corp.*, 248 F.2d 61, 68-69 (10th Cir. 1957) ("The requirement of the gas purchase contracts for a dedication of all gas reserves for the life of the oil and gas leases lying within [certain geographic locations] was reasonable and necessary in order to induce the gas purchasers to make the investments necessary to gather, process and compress the gas and pay the expenses of operating those facilities."); *Warrior Gas Co. v. Valero Hydrocarbons, L.P.* 04-95-00825-CV, 1996 WL 512035, at *2-3 (Tex. App. 1996) ("Dedicated Gas" in gas processing and transportation contracts "defined in present tense as 'certain oil, gas and mineral leases and certain oil and gas wells' that [producer] owned, controlled, or had acquired the right to process"). The use of the term "dedicate" in the Gathering Agreements does not merely "identify contract rights," it provides Elevation with exclusive property rights in the Dedicated Interests. Extraction's strawman argument does nothing to preclude finding that the Dedication touches and concerns the land.

22. The Memoranda of Agreement for each Gathering Agreement (each a "Memorandum" and collectively the "Memoranda") also confirmed that Extraction (and other Debtors) "dedicated and committed, and do hereby dedicate and commit, to Elevation … the Dedicated Interests (whether now owned or hereafter acquired) and the exclusive right to receive from [Extraction] and its Affiliates all [crude oil, gas, and water] produced from the Dedicated Interests and the Other Interests … within the dedicated area described in the attached Schedule A [to each of the Memoranda]…" Ex. 7, 8, 9 at 1 (as to each Memoranda).[10] The Memoranda, which were filed in the eight Colorado counties and two cities covering the Dedicated Area, placed potential successors and assigns on public notice as to the Dedication. Ex. 7, 8, 9.

23. Further, the "Delivery Obligation" in Section 2.1 also touches and concerns the land. Ex. 1, 2, 3 at § 2.1. Therein, Extraction agreed, on its behalf and on behalf of its Affiliates, to "connect all of [Extraction's] wells within the Dedicated Area to the [Midstream Facilities] and deliver to Elevation at the Delivery Points one hundred percent (100%) of the [crude oil, gas, and water] produced from the Dedicated Interests and from the Other Interests." Ex. 1, 2, 3 at § 2.1.

24. Extraction claims that the reference to "Other Interests" within the definition of Delivery Obligation "undoes any argument that the dedications relate to or affect the use or enjoyment of real property" because the Other Interests are supposedly those of third parties. Adv.D.I. 4 at 20. But this is a red herring. The Other Interests at issue under Section 2.1 are those of third parties "represented and controlled by Extraction or in respect of which [Extraction] has the right to market or otherwise deal with their [oil, gas, or water]." Ex. 1 at Ex. A § I(zzzz), Ex.

[10] Within the Memoranda, "Dedicated Interests" is defined substantively identical to "Dedicated Interests" under the Gathering Agreements. Ex. 7, 8, 9 at 1 (as to each Memoranda). Schedule A to the Memoranda corresponds to Exhibit C in the Gathering Agreements, which, as noted above, defines the Dedicated Area.

2 at Ex. A § I(uuuu), Ex. 3 at Ex. A § I(rrrr). These are interests in which Extraction has an interest, and Extraction can burden its own interests in these Other Interests. That is what it has done here.

25. Extraction also asserts that no real property interest is created by the Delivery Obligation (or any covenant in the Gathering Agreements other than the Drilling Commitment) because Colorado considers "produced" oil, gas and water as personal property after they are taken out of the ground. Adv.D.I. 4 at 19-20. The produced nature of hydrocarbons delivered under the Delivery Obligation is irrelevant to whether the Gathering Agreements as a whole touch and concern the land. It is not only the oil, gas and water produced from the leased mineral estate that is dedicated to Elevation, but *also* the oil, gas and water "therein and thereunder." Ex. 1, 2, 3 at § 2.1. That means those interests are dedicated to Elevation while still in the ground and before they have been "produced." The Colorado Bankruptcy Court in *Badlands Energy* emphasized language in similar gathering agreements dedicating "*the interest of Producer in all Gas reserves in and under*" and found that such dedication encompassed real property because under Utah law "'real property' includes non-extracted minerals." *Badlands Energy*, 608 B.R. at 869 (emphasis in original). Similar to Utah, in Colorado, "an oil and gas lessee has an interest in real property." *Maralex Resources, Inc. v. Chamberlain*, 320 P.3d 399, 403 (Colo. App. 2014). The inclusion of the oil, gas, and water "therein and thereunder" in the Dedication is a dedication of real property interests and touches and concerns the land. *See Alta Mesa,* 613 B.R. at 103-04 (where producer dedicated nearly all of its production to the midstream company, it burdened its interests under the mineral leases by restricting its right to seek a different gatherer or build its own gathering system).

26. The appropriate analysis is not on whether produced oil, gas, and water themselves are personal property or real property interests. Instead it is on whether there is a sufficient "logical connection between both the burden and benefit of the covenants and [the underlying] real

property." *Alta Mesa*, 613 B.R. at 102. "This simple fact persists even though [the midstream company] is not entitled to possession until after the hydrocarbons become personal property." *Id.* Extraction cites to *In re Sabine Oil & Gas Corp.*, 547 B.R. 66 (Bankr. S.D.N.Y. 2016), to argue that the Gathering Agreements relate only to produced hydrocarbons. But *Alta Mesa* and *Badlands Energy*, which came after and expressly considered *Sabine*, have made clear that *Sabine*'s conclusion is readily distinguishable when the dedication applies to more than just produced hydrocarbons. *Sabine* involved a contract that dedicated gas and condensate "produced and saved" and "concern[ed] only minerals extracted from the ground." *Id.* Like the Gathering Agreements here, however, the contracts in *Alta Mesa* and *Badlands Energy* concerned more than just produced hydrocarbons; they also dedicated the hydrocarbons in the ground. *Alta Mesa*, 613 B.R. at 103; *Badlands Energy*, 608 B.R. at 869. The Gathering Agreements here actually contain even *stronger* dedications, applying to the lands, leases, easements, wells, and oil, gas, and water therein and thereunder under the definition of "Dedicated Interests." Ex. 1 at § 2.1, Ex. A § I(vv); Ex. 2 at § 2.1, Ex. A § I(ss); Ex. 3 at § 2.1, Ex. A § I(qq). For such contracts, the ultimate treatment of produced hydrocarbons as personal property does not alter the test. *See Badlands Energy*, 608 B.R. at 869 ("The Court is not persuaded the Agreements cannot be said to touch-and-concern the land simply because one of the objectives of the Agreements is indeed the gathering, processing and disposal of 'produced gas' and water, which are not real property interests.") "The question is not *what* is conveyed by the covenant, but viewed in the context of its purpose, does the performance or nonperformance of it affect the use, value or enjoyment of the land itself." *Id.* (emphasis in original). The Gathering Agreements do exactly that here. Accordingly, even if the Gathering Agreements applied only to dedicated produced hydrocarbons (which is not the case), they would still be closely related to, and directly affect, Extraction's use and enjoyment of the

mineral estate by providing for the gathering, compression and stabilization of the oil, gas and water. This is the only way the hydrocarbons within the mineral estate can be marketed and sold.[11]

b) Other provisions in the Gathering Agreements also burden Extraction's mineral interests.

27. Exhibit A, Section XV(a) also burdens Extraction's mineral interests by providing that so long as Preferred Units are outstanding, Extraction "covenants to, and agrees with, [GSO] to comply with, and to cause each of [Extraction's] Contracting Party Affiliates to comply with, the covenants, agreements, and other provisions of Sections 6.6(a) and 6.6(b) of the LLC Agreement." Ex. 1, 2, 3 at Ex. A § XV(a). Section 6.6(a) of the LLC Agreement requires Extraction to *exclusively* use Elevation's midstream services in the gathering of Extraction's hydrocarbons in the Dedicated Area. Ex. 11 at § 6.6(a). Gathering is part of the implied covenant to market under Colorado law. *Garman*, 886 P.2d at 654 ("Transportation is required when gas is moved from the wellhead to a central location to prepare it for transmission and consumption, commonly referred to as gathering."). Breach of this requirement would be "irreparable" and money damages would not be an adequate remedy. Ex. 1, 2, 3 at Ex. A § XV(a). Elevation is entitled to specific performance. *Id.* Thus, Extraction is precluded from simply transferring its services to another gatherer and providing Elevation with a damages claim, which is what Extraction is trying to do with the rejection of the Gathering Agreements.

28. Section 2.8 of the Gathering Agreements also touches and concerns the land by requiring Extraction and any affiliates owning Dedicated Interests to execute the Ratification

[11] Even if a covenant such as the Delivery Obligation were a personal one on its own, like in *Sabine*, it would still not preclude the Gathering Agreements as a whole from running with the land. As noted, Colorado law holds that where a personal covenant is related to a real property covenant, the contract as a whole will run with the land. *See Cloud*, 857 P.2d at 441. Covenants in the Gathering Agreements concerning the produced oil, gas, and water are interconnected with covenants concerning real property, such as the Drilling Commitment, the Dedication, and the easements, and therefore touch and concern the land. Without drilling and access to the land, leases, easements, wells, and oil, gas, and water in the ground, there would be no produced oil, gas, and water. The Gathering Agreements *as a whole* therefore touch and concern the land.

Agreement. Ex. 1, 2, 3 at § 2.8. The Ratification Agreement itself "ratif[ied] and confirm[ed] 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 … to Elevation and to the performance of the [Gathering] Agreements …." Ex. 10 at § 2(a). Further, Section 2(b) of the Ratification Agreement confirmed that the Dedication, the Delivery Obligation, the grant of servitude, the other Property Rights, and the covenants and related commitments in the Gathering Agreements (including under Exhibit A, Section XV), 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) …." Ex. 10 at § 2(b).

29. Moreover, Section 2.4 of the Gathering Agreements also reinforces that the Dedication and the Delivery Obligation, the grant of servitudes (*i.e.*, the covenants that run with the land), the other Property Rights, the covenants under Section 2.3, the other related commitments, and the matters in Exhibit A, Section XV are covenants that touch and concern all of the Dedicated Interests, including the underlying crude oil, gas, and water, as well as the lands, mineral interests, easements, leases and wells. Ex. 1, 2, 3 at § 2.4. Section 2.4 also makes clear that a servitude was "assign[ed] and convey[ed]" to Extraction. *Id.*

c) Extraction's actions and admissions confirm that the Gathering Agreements touch and concern the land.

30. Extraction's other actions and admissions also confirm that the Gathering Agreements touch and concern the land. Extraction sought GSO's approval pursuant to Section 2.3 of the Gathering Agreements to release certain Dedicated Interests from the valid dedications at issue in connection with Extraction's consummation of acreage swaps wherein new leasehold interests were acquired from a third party in exchange for existing, burdened leasehold interests (and thereafter dedicated pursuant to the after-acquired dedication language). Ex. 13, 14. Such a

release would not be necessary if Extraction's obligations under the Gathering Agreements were mere personal obligations and did not attach to and run with the underlying real property interests.

31. In addition, on September 14, 2020, Extraction initiated litigation in Colorado against the City and County of Broomfield in which it made multiple key admissions concerning the touch and concern analysis. Ex. 18.[12] First, Extraction admitted that, pursuant to the Broomfield OA, it "has entered burdensome contractual commitments in order to cause the construction of an approximate $240 million pipeline system and central gathering facility so oil and gas from the wells can be produced into a closed-loop system without permanent tanks and processed miles away from Broomfield in rural Weld County, minimizing the Project's footprint, environmental impact, and noise." Ex. 18 at ¶ 48. Extraction further admitted in the Complaint that the "pipeline system was built solely to support" Extraction's drilling in Broomfield. Ex. 18 at ¶ 110. These admissions by Extraction demonstrate that the Gathering Agreements are closely related to Extraction's use and enjoyment of its mineral interests in Broomfield in terms of both burdening and benefitting what Extraction is able to accomplish when extracting the oil and gas from the ground. The Gathering Agreements, therefore, closely relate to the use and enjoyment of the land by minimizing the footprint and the environmental impact of Extraction's use of its leases.

d) The connections between the Gathering Agreements and the Broomfield OA further confirm that the Gathering Agreements affect the use and enjoyment of the land.

32. Extraction's admissions highlight that the Gathering Agreements are closely related to Extraction's underlying real property interests, and touch and concern those interests, due to the substantial connection between the Gathering Agreements (and the Midstream Facilities built pursuant thereto) and the Broomfield OA. The best management practices described in the

[12] The factual statements in the Complaint were verified as true by one of Extraction's officers. Ex. 18 at 41.

Broomfield OA expressly require that Extraction "agrees to build pipelines for the transport of oil, gas and produced water" and include substantial restrictions on trucking. Ex. 15 at Ex. B, § 3. In permitting Extraction's exploration and development activities, the Broomfield OA demanded an infrastructure of the exact type and in the exact locations as provided by the Midstream Facilities and, now that the Midstream Facilities are built, the Gathering Agreements and the Broomfield OA are inextricably integrated and closely affect Extraction's use and enjoyment of its mineral interests. Extraction simply cannot adhere to its Broomfield OA obligations in connection with its development of its leasehold interests without performing its obligations under the Gathering Agreements. No alternative system could now be feasibly constructed that would provide Extraction an equivalent midstream solution to satisfy the rigorous Broomfield OA requirements (including placement in the exact same location in which Elevation now holds easements and has underground pipe installed). The many negotiated restrictions imposed upon Extraction's development of its oil and gas interests by the Broomfield OA, and the magnitude by which Elevation's provision of the midstream services under the Gathering Agreements both benefits and burdens Extraction's underlying real property interests by providing the midstream services demanded by the Broomfield OA, all confirm that there should be no doubt that the covenants in the Gathering Agreements touch and concern Extraction's underlying real property interests.

3. The easements, rights-of-way, and other rights granted to Elevation under the Gathering Agreements are closely related to the use and enjoyment of the land.

33. In addition to the Dedication and Delivery Obligation, Extraction also granted to Elevation easements and rights of way upon the Dedicated Area "for the purpose of constructing, operating, repairing, replacing, maintaining, and removing measurement facilities …." Ex. 1, 2, 3 at Ex. A § XVI(d). Extraction has also transferred to Elevation, through public instruments, easements and rights-of-way in anticipation of the Gathering Agreements and Elevation's

performance thereunder. *See, e.g.*, Ex. 12. Elevation relied upon these real property interests to lay miles of midstream infrastructure and pipe and otherwise connect the Midstream Facilities to Extraction's well sites, relying wholly upon Extraction's underlying leasehold interest, its access rights arising thereunder, and the grant of easements contained in the Gathering Agreements. Dec. ¶ 23. In several instances, pipelines have been installed on Extraction's leasehold interest that are part of Elevation's Midstream Facilities. *Id.* Extraction and its affiliates took every action towards binding the underlying oil and gas properties with Elevation's Midstream Facilities.

34. The easements and rights of way granted to Extraction unquestionably touch and concern the land, including because they encumber and are closely and logically related to Extraction's Dedicated Interests, and result in both benefits and burdens as between the covenants and the oil and gas leases. Ex. 1 at Ex. A § I(vv), Ex. 2 at Ex. A § I(ss), Ex. 3 at Ex. A § I(qq). Extraction's continued development of its assets in the Broomfield Dedicated Area cannot proceed without such a comprehensive midstream solution. The Broomfield OA expressly requires Extraction to use pipelines, rather than trucks, to transport oil, gas and water, and grants easements and surface use rights in specific geographic locations in the Broomfield Dedicated Area. Ex. 15 at § 13. Extraction's grants of easements and rights-of-way to Elevation provide Elevation with co-extensive rights to use those areas in order to construct, operate, and maintain the Midstream Facilities, including the pipelines that Extraction is required to use under the Broomfield OA. In fact, Extraction has itself argued to the City of Broomfield that the "design that involves pipelines and eliminates oil trucks and permanent tanks" provides "benefits to the City," specifically the City's land. Ex. 17[13]; *see also* Ex. 18. Even outside Broomfield, it is unlikely that Extraction's alternatives for third party connections and service would be adequate if midstream providers are

[13] *Available at* https://www.broomfield.org/DocumentCenter/View/26964/Notice-of-Breach---June-15-2018?bidId= Elevation requests that the Court take judicial notice of the public documents cited herein. FED. R. EVID. 201

not able to obtain the economic benefit of attaching to the wells in the City. The Gathering Agreements, the oil and gas leases, and the benefits and burdens related thereto, are not simply logically connected, they are impossible to logically disconnect from the Dedicated Interests.

35. The court in *Alta Mesa* observed that the same granting of easements in the gathering agreements to the midstream company "reduces [the producer's] real property interest under the leases … and directly burden[s] [the producer's] interest in the reserves because they restrict [the producer's] use of the surface land for drilling or exploration." *Id.* at 104; *see also id.* ("[I]n the context of an oil and gas lease, the surface easement is integral to the lessee's ability to realize the value of its mineral reserves."). In *Badlands Energy*, the court also referenced the same type of easement granted to the midstream company as a conveyance that burdens the underlying real property interest of the producer. 608 B.R. at 874. The same analysis applies here.

36. Extraction argues that a lessee under an oil and gas lease holds incidental rights to the surface only, as opposed to real property interests, and thus cannot transfer any rights to the surface without also conveying an undivided interest in the underlying oil and gas leases. Adv.D.I. 4 at 27. This position is contrary to Colorado law and common industry practice—Extraction had the ability to, and through the Gathering Agreements did, grant such real property interests to Elevation. Easements are interests in real property. *See Wright v. Horse Creek Ranches*, 697 P.2d 384, 387 (Colo. 1985) ("An easement is an interest in property which, though distinct from an ownership interest in the land itself, nevertheless confers upon the holder of the easement an enforceable right to use property of another for specific purposes."); *Strole v. Guymon*, 37 P.3d 529, 533 (Colo. App. 2001) (easements are "a privilege existing distinct from the ownership of the land itself; nevertheless it is an interest in land"). Colorado oil and gas leases include and are linked with the right to use the surface land as necessary for operation. *See Notch Mountain Corp.*

v. Elliott, 898 P.2d 550, 557 (Colo. 1995) ("[S]evered minerals cannot be developed absent access to the surface estate."); *Frankfurt Oil Co. v. Abrams*, 413 P.2d 190, 194 (Colo. 1966) ("[A] mineral lessee has a right to use so much of the surface as may be reasonably necessary for operation.").

37. Easements are interpreted in the same manner as any contract creating a servitude. *See Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1235 (Colo. 1998). "[T]he language used in creating a servitude ordinarily should be interpreted to accord with the meaning an ordinary purchaser would ascribe to it in the context of the parcels of land involved." *Id.* (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.1 cmt. c (Tentative Draft No. 4 1994)). The language in the Gathering Agreements "assigns and conveys to Elevation a servitude" (including the easements and rights-of-way) "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 …." Ex. 1, 2, 3 at § 2.4. "[A] servitude should be interpreted to give effect to and be consistent with the intentions of the parties …." *Lazy Dog Ranch*, 965 P.2d at 1235 (quotation omitted). The intent of the parties here was to create a servitude touching and concerning the land.

38. By granting the easements and rights-of-way in the Dedicated Area to install and maintain the Midstream Facilities, Extraction burdened and granted an interest in the underlying property interests, including its rights to lay pipe under the terms of its leases and the Broomfield OA. Ex. 15 at Ex. F at 1, Ex. F at ¶ 13; *see Badlands Energy*, 608 B.R. at 874 ("Moreover, the [gathering contract] granted Monarch a floating easement across the Leases and lands in which Producer may have an interest…. [T]he easement and Dedication are conveyances that simultaneously burden the same real property interest."); *Alta Mesa*, 613 B.R. at 105 (finding easement granted to gatherer "integrally tied to the purpose of an oil and gas lease"). Extraction did not simply grant Elevation a personal property right when it granted the easements in

conjunction with granting the Dedication. Gatherers granted easements to install and maintain equipment have "some interest in the leasehold binding on the assignee thereof with notice." *Sw. Pipe Line Co. v. Empire Nat. Gas Co.*, 33 F.2d 248, 252 (8th Cir. 1929); *see also Greenshields*, 248 F.2d at 70 ("Where, as here, the owner of an oil and gas lease contracts for the sale of oil and gas from the wells thereon, giving the vendee the right to go upon the land and place the necessary structures to connect the well with its pipe line an interest in the leasehold is thus granted.").

39. The easements, rights-of-way and other rights granted to Elevation therefore affect Extraction's use and enjoyment of its mineral interests, and touch and concern the land.

4. Any assignee of Extraction's working interest or oil and gas leases is expressly subject to the Dedications under the Gathering Agreements, which closely relates to the use and enjoyment of the land.

40. The assignment provisions in the Gathering Agreements also closely relate to the use and enjoyment of Extraction's real property interests. Section 2.3 of the Gathering Agreements provides that any sale, assignment or pledge of all or any portion of the Dedicated Interests will be made expressly subject to the Gathering Agreements. Ex. 1, 2, 3 at § 2.3. Section XII of the General Terms and Conditions further requires that the Gathering Agreements "will be binding upon and inure to the benefit of the Parties and their respective successors and assigns" and "may not be transferred or assigned, in whole or in part, by either Party without the prior written consent of the other Party." Ex. 1, 2, 3 at Ex. A § XII. Any assignee is required to ratify the Gathering Agreements and assume the obligations of the assigning Party. *Id.* These provisions would only make sense if the Gathering Agreements affect real property interests that run with the land.

41. The requirements under Section 2.4 of the Gathering Agreements and the publicly filed Memoranda that the Dedication is binding upon successors and assigns of the oil and gas properties, and that a servitude is "assign[ed] and convey[ed]" in the nature of a covenant that touches and concerns the real property interests are additional evidence that these agreements

touch and concern the land. Ex. 1, 2, 3 at § 2.4; Ex. 7, 8, 9 at 1. Without these assignment restrictions, Extraction would have a fully transferrable right in the property with no notice of the Gathering Agreements to any third parties. Instead, Extraction is expressly prohibited from making full use of its oil and gas interests within the Dedicated Area, about which third parties are on notice due to the recordation of the twenty-four Memoranda. Such an assignment restriction "impact[s] the owner's interest in the pipeline" and "the pipeline's value in the eyes of prospective buyers." *In re Energytec, Inc.*, 739 F.3d 215, 224 (5th Cir. 2013). Indeed, "Elevation would be unwilling to enter into or perform under this Agreement" without such covenants. Ex. 1, 2, 3 at § 2.4. The Gathering Agreements thus touch and concern the leases and other Dedicated Interests.

5. The Gathering Agreements place obligations on Elevation to provide the Midstream Facilities in order to support Extraction's operations, directly affecting the use and enjoyment of the mineral interests.

42. As further evidence that the covenants in the Gathering Agreements touch and concern the land, the obligations placed on Elevation to provide and construct the Midstream Facilities are for the purpose of Extraction producing and transporting its hydrocarbons to market. Article III of each Gathering Agreement details the obligations placed on Elevation to timely plan, construct and maintain the critical midstream infrastructure within the Dedicated Area in order to facilitate Extraction's oil and gas development.

43. Section 3.1 requires Elevation to "design, construct, own, operate, and maintain" the Midstream Facilities, and the Initial Delivery Points, in the Broomfield and Hawkeye areas, in order to gather, compress and/or stabilize Extraction's crude oil, gas, and water from the Dedicated Interests. Ex. 1, 2, 3 at § 3.1. Elevation is also required under Section 3.2 to deliver to the required facility, as applicable, condensate, gas, and water attributable to Extraction's crude oil, gas, and water. Ex. 1, 2, 3 at § 3.2. Section 3.3 requires Elevation to commence and complete with due diligence the installation of subsequent pipeline and other facilities necessary to enable Elevation

to receive deliveries of crude oil, gas, and water, and Section 3.4 grants Elevation the right to elect to construct New Delivery Points outside the Dedicated Area. Ex. 1, 2, 3 at §§ 3.3, 3.4.

44. There is simply no question that the Gathering Agreements significantly affect and enhance the value of Extraction's underlying oil and gas leasehold interests by providing Extraction, through the Midstream Facilities, a reliable and permanent means of gathering, transporting, and otherwise servicing the oil and gas to market, and redelivering the produced water while meeting stringent regulatory standards set by the City and County of Broomfield. Extraction is required to use the Midstream Facilities rather than other gathering strategies such as building a system itself or engaging another third party under alternative financial arrangements. These requirements placed on Elevation were necessary to facilitate the production of crude oil, gas, and water by Extraction, and both benefit and burden Extraction's mineral interests. *See Alta Mesa*, 613 B.R. at 103-04 (finding midstream gathering system "enhances the value of [the producer's] unproduced reserves" as "[o]nce a well is linked to an accessible gathering system, the system not only benefits the produced reserves as they travel towards collection, it enhances the value of unproduced reserves which may be extracted in the future").

45. Elevation did, in fact, lay pipeline and install the other Midstream Facilities in compliance with the Gathering Agreements, in reliance on the fact that it acquired an interest in the Dedicated Area and on the enforceability of the Gathering Agreements as covenants running with the land. Dec. ¶¶ 21, 23. Elevation continues to perform under the Gathering Agreements. Dec. ¶ 21. By installing the Midstream Facilities, Elevation affects the use and enjoyment of the Dedicated Interests by facilitating the extraction of oil, gas, and water (which would otherwise not be marketable), and increased the value of the underlying real property by providing a thorough, reliable and efficient midstream solution. Without Elevation's services, Extraction's dedicated oil,

gas and water could not be sold. Dec. ¶ 28. Also, because Extraction provided Elevation the right to gather, compress, and/or stabilize *all* of Extraction's crude oil, gas and water in the Dedicated Area, the Gathering Agreements are closely related to Extraction's use and enjoyment of the land, and are a necessary part of Extraction's full use of its mineral estate.

6. The fixed fee provision in the Gathering Agreements also benefit and burden Extraction's real property interests.

46. Finally, the fixed fee requirement under Section 4.3(a) of each Gathering Agreement also touches and concerns the land. Ex. 1, 2, 3 at § 4.3(a). Fixed fees are required for the oil, gas, and water gathered, compressed and/or stabilized by the Midstream Facilities. Such fixed fees can be either a burden or benefit to Extraction's real property interests, depending on the status of the market. *See Alta Mesa*, 613 B.R. at 103 ("[T]he fixed fee arrangements diminish the value of [the producer's] reserves in a depressed hydrocarbon market … [but] [i]n favorable market conditions this might benefit [the producer]."). The payment obligation is a covenant running with the land. *See Badlands Energy*, 608 B.R. at 868; *see also Energytec*, 739 F.3d at 225.

47. Accordingly, the Gathering Agreements touch and concern the land.

C. Privity of estate is not required under Colorado law, but nonetheless is met.

48. Extraction argues that Colorado requires a third element of "privity of estate" to create a covenant running with the land. However, modern Colorado cases concerning the creation of covenants running with the land do not even mention privity. *See Reishus*, 409 P.3d at 441 (listing only two elements of intent and touching and concerning the land, and not mentioning privity); *Lookout Mountain*, 867 P.2d at 74 (same); *Cloud*, 857 P.2d at 440 (same); *In re Banning Lewis Ranch Co.*, 532 B.R. 335, 345 n.11 (Bankr. D. Colo. 2015) (same); *see also TBI Expl. v. Belco Energy Corp.*, No. 99-10872, 2000 WL 960047, at *4 (5th Cir. June 14, 2000) (under Colorado law, "privity of contract is not necessary for a real covenant to bind a successor-in-

interest"). Colorado courts also generally follow the Third Restatement of Property, Section 2.4 of which provides "[n]o privity relationship between the parties is necessary to create a servitude."[14] Thus, the proper application of Colorado law is that privity of estate is not required.[15]

49. Extraction asserts that "horizontal privity" applies based on a purported "unbroken line of cases" in Colorado. Adv.D.I. 4 at 24. But Extraction's cases do not provide any substantive analysis that would support applying horizontal privity, as Extraction asserts. For example, there is no elaboration beyond the statement of "requisite privity of estate" in *Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 92 P. 290, 293 (Colo. 1907). And in *Taylor v. Melton*, privity was found in the context of an instrument that conveyed an interest in land. 274 P.2d 977, 982 (Colo. 1954); *see also Hottell v. Farmers' Protective Ass'n*, 53 P. 327, 330 (Colo. 1898) (noting only that privity was "not denied" with no substantive analysis); *Fisk v. Cathcart*, 33 P. 1004, 1005 (Colo. App. 1893) (mentioning "privity" but providing no substantive discussion on the relevant analysis for covenants running with the land). While Extraction argues that these cases require application of the concept of "horizontal privity," no such concept is mentioned. And none of these cases has been cited by Colorado courts as requiring a privity analysis. Extraction's only relatively recent case, *Federal Deposit Insurance Corp. v. Mars*, 821 P.2d 826, 829 (Colo. App. 1991), further does not apply any aspect of the traditional framework as to covenants running with the land—there is no mention of intent or touch and concern—and it actually holds that privity

[14] Extraction argues that Colorado courts would follow Professor Bigelow's formulations on covenants running with the land because he was an author of the First Restatement of Property. D.I. 4 at 14 n.13. However, by taking the position that no privity of estate is required to create a servitude, the current authors of the Third Restatement of Property have clearly repudiated Professor Bigelow's formulations in the First Restatement. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.4, Note (AM. LAW. INST. 2000) ("This section changes the rule stated in § 534 of the first Restatement."). As Colorado cases have adopted the Third Restatement on related issues, *see, e.g.*, *Lazy Dog*, 965 P.2d at 1235, it is likely a far better expression of Colorado law all around than the views of Professor Bigelow.

[15] Many jurisdictions and commentators have also increasingly advocated against the requirement of horizontal privity in this context. *See Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618, 628 (Utah 1989) ("Modern legal writers unanimously favor the abolition of at least mutual and horizontal privity ….").

of estate is met when an assignee is in possession of the premises. *Id.* Elevation is in possession of the easements Extraction granted. These cases do not support Extraction's privity argument.[16]

50. However, even if horizontal privity applies, it is met here by the Gathering Agreements burdening and benefiting successors, granting easements to Elevation, and dedicating the Dedicated Interests. *See Lookout Mountain*, 867 P.2d at 74 (covenants run with the land when they bind successors and assigns). Even *Sabine* acknowledges that "the underlying purpose of the horizontal privity of estate requirement … is to ensure that a covenant that binds successors is formally recorded in connection with the real property that is being burdened by the covenant." 550 B.R. at 69. That is met here. The Gathering Agreements are clear that successors and assigns are burdened by the covenants therein. Ex. 1, 2, 3 at § 2.4, Ex. A § XII. Confirming Memoranda have been publicly filed. Ex. 7, 8, 9, 10. The Granting Agreements further grant easements, rights-of-way and other surface rights to Elevation to construct and maintain the Midstream Facilities, and dedicate the Dedicated Interests to Elevation. Ex. 1, 2, 3 at § 2.1, Ex. A § XVI(d).[17]

51. Extraction circularly refers to horizontal privity as "privity of estate between the covenantor and covenantee at the time the covenant was created" and focuses on whether "the original covenanting parties make their covenant in connection with the conveyance of an estate in fee." Adv.D.I. 4 at 24 (quoting 3 Tiffany Real Property § 851 (3d ed. 2015); 9 Richard R. Powell, Powell on Real Property § 60.04(3)(c)(iii)). However, the *Alta Mesa* court has explained

[16] Extraction also cites two treatises for its argument that Colorado law requires privity. In fact, when discussing cases that apply privity, one of these treatises does not actually mention Colorado in its list of 27 states that do, and only circularly cites *Taylor*, which in turn cites the treatise as defining the privity concept. 17 TIFFANY REAL PROPERTY § 851 n.23, n.27 (3d ed. 2015). Similarly, Extraction's other treatise cites *Farmers' High Line*, but notes it is not clear what type of privity is applicable in Colorado under that case. 9 Richard R. Powell, POWELL ON REAL PROPERTY § 60.04 n.123. Neither treatise lends weight to an argument that horizontal privity is or should be required in Colorado.

[17] Extraction also conveyed easements and rights-of-way to Elevation in the Assignment of Easement Interests in direct support of and in reliance upon the parties' obligations under the Gathering Agreements. Ex. 12. These easements are logically connected with the covenants and obligations of the parties and Extraction's underlying real property interests, further establishing horizontal privity under the Gathering Agreements.

that horizontal privity exists in the oil and gas context based on the granting of easements. 613 B.R. at 106. The court explained that although easements in gathering agreements constitute less than the conveyance of a fee simple estate, they still convey "a possessory interest in the leasehold estate." *Id.* Such granting of an easement "is enough to show horizontal privity" because the "surface easement is integrally tied to the purpose of an oil and gas lease." *Id.* Distinguishing the *Sabine* case, which "centered its analysis around fee mineral estates, not oil and gas leaseholds," the *Alta Mesa* case concluded that surface easements "spring directly from [the producer's] leasehold mineral interests," *id.*, just as they do here under the Gathering Agreements. *Sabine* is further distinguishable because the easements at issue in that case were merely contemplated, not effective under the gathering agreement. 550 B.R. at 69. In contrast, the easements contemplated in the Gathering Agreements were actually granted thereunder, upon execution. Ex. 1, 2, 3 at Ex. A § XVI(d). The easements granted in the Gathering Agreements would even meet *Sabine*'s test.

52. Extraction argues that easements do not create an ownership interest in the surface estate but merely a right of access and are therefore not "real property interests" and are merely a "privilege." Adv.D.I. 4 at 27-28. But under Colorado law, "[a]n easement is an interest in property." *Wright*, 697 P.2d at 387. And while an easement is "a privilege existing distinct from the ownership of the land itself; nevertheless it is an interest in land." *Strole*, 37 P.3d at 533. The argument that surface easements cannot burden a mineral estate fails to deny horizontal privity. As *Alta Mesa* recognized, "a surface easement is a crucial component of an oil and gas lease" and therefore an easement granted in a gathering agreement does not create privity only with the respect to the surface estate, as Extraction argues. 613 B.R. at 106. Just as in Oklahoma, whose law was applied in *Alta Mesa*, Colorado oil and gas leases include the right to use the surface land as necessary for operation. *See Frankfurt Oil*, 413 P.2d at 194. There is nothing under Colorado

law that would indicate an easement is tied exclusively to the surface estate and unrelated to the underlying mineral estate. The easements granted to Elevation in the Gathering Agreements arise and spring out of Extraction's mineral estate. The Gathering Agreements therefore constitute and include covenants "created alongside the conveyance of a property interest in [Extraction's] leasehold estate," not an unrelated surface estate. *Alta Mesa*, 613 B.R. at 106.

53. Extraction also argues that the dedication and commitment of the Dedicated Interests under the Gathering Agreements cannot create privity, likening it to the dedication of apples to an apple gatherer. Adv.D.I. 4 at 28-29. But neither the orchard owner nor Extraction could allow someone to come on to the land and simply take what has already been dedicated to the gatherer. This is the effect of the dedication. *See Sw. Pipe Line*, 33 F.2d at 252 (gatherers granted easement rights to install and maintain equipment have "some interest in the leasehold binding on the assignee thereof with notice"). The Dedication in the Gathering Agreements applies to the oil, gas, and water in and under the land, as well as the lands, leases, easements, and wells. This distinguishes the apple picker as well as Extraction's reliance on *Sabine*. That case found no privity in part because the gatherer had not been dedicated rights to the underlying gas. 550 B.R. at 69-70. Extraction's business model involves avoiding the capital expenditures required to build expensive midstream infrastructure by dedicating its oil and gas property rights and production to a gatherer to build and finance such facilities. This arrangement is precisely how and why Extraction conveyed to Elevation that ability and enabled its willingness to provide such services. Extraction acknowledged in its public filings that its "plans to develop and sell our oil and gas reserves could be materially and adversely affected by the inability or unwillingness of third parties to provide sufficient facilities and services to us on commercially reasonable terms." Ex. 16. Privity does not require Extraction to have provided Elevation a right to drill wells or transferred

title to the oil, gas, or water in place. The Dedication in the Gathering Agreements was created in connection with the conveyance of a real property interest, and therefore horizontal privity is met.

D. The Gathering Agreements are integrated such that if one agreement contains a covenant running with the land then all do.

54. Finally, Exhibit A, Section XVI(a) provides further evidence that each of the Gathering Agreements run with the land. That provision states that the Gathering Agreements and the other Basic Documents of the transaction between GSO and Extraction "taken together, collectively constitute a single, unitary, and indivisible contract." Ex. 1, 2, 3 at Ex. A § XVI(a). The result of this provision is that all of the underlying agreements between the applicable Debtors, Elevation and/or GSO are to be read together to incorporate the covenants running with the land.

55. Therefore, even if one of the Gathering Agreements did not contain covenants running with the land, as integrated contracts, the fact that one agreement contains covenants running with the land requires finding that each of them does. *See In re Buffets Holdings, Inc.*, 387 B.R. 115, 122 (Bankr. D. Del. 2008) (holding where "the parties entered a multi-part contract, that contract cannot be severed after the fact if the parties entered it as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out" (quotation omitted)); *In re Plaza*, 363 B.R. 517, 522 (Bankr. S.D. Tex. 2007) (holding single, inseverable contract "must be assumed or rejected in its entirety"); *see also JDB Med., Inc. v. The Sorin Grp., S.p.A.*, No. 07-CV-00350-REB-CBS, 2008 WL 10580039, at *7 (D. Colo. June 11, 2008) (finding it undisputed that an integrated contract was "valid and enforceable").

CONCLUSION AND PRAYER

Elevation therefore respectfully requests that the Court deny Extraction's motion for summary judgment on the declaratory judgment claims, declare that the Gathering Agreements run with the land, and grant Elevation such other and further relief to which it is entitled.

Dated: September 23, 2020
Wilmington, Delaware

Respectfully submitted,

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EXHIBIT 18

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

I, the undersigned, Clerk of the United States District Court for the District of Colorado, do certify that the foregoing is a true copy of an original document remaining on file and record in my office.
WITNESS my hand and SEAL of said Court this day of *Sep 16, 2020*
JEFFREY P. COLWELL
By *s/J. Salzman*
Deputy

Civil Action No. 20-2779_

EXTRACTION OIL & GAS, INC.

Plaintiff,

v.

THE CITY AND COUNTY OF BROOMFIELD, including the Broomfield City Council, and all other governmental officers, persons and entities who act on behalf of the City and County of Broomfield;

Defendants.

VERIFIED COMPLAINT

I. INTRODUCTION

1. Plaintiff Extraction Oil & Gas, Inc. ("Extraction") operates six multi-well oil and gas well sites in Broomfield, pursuant to a contract with the City and County of Broomfield – the 2017 Operator Agreement. To date, Extraction has invested over one hundred million dollars in its Broomfield Project. Extraction's contract and property rights are vested and may not be retroactively impaired by Broomfield.

2. Many Broomfield residents oppose all oil and gas development, and want to shut down Extraction's operations. In response to these shutdown demands, Defendant Broomfield is using its regulatory and police powers in bad faith to illegally and unconstitutionally shut down Extraction's operations. Broomfield's current shut-down tactic is a municipal noise ordinance that Broomfield enacted specially for Extraction, which applies only to Extraction, which Broomfield has enforced only against Extraction, and is which designed to be impossible to comply with. The Broomfield Municipal Court

has refused to consider Extraction's legal and constitutional defenses to this prosecution, ruling that such matters are for a different court. Hence this lawsuit.

In this action, Extraction seeks:

- damages for Broomfield's breaches of Extraction's 2017 Operator Agreement with Broomfield, and related constitutional torts;
- declaratory judgments regarding its rights under the 2017 Operator Agreement and Broomfield's obligations under that contract;
- equitable relief including an injunction enjoining Broomfield from using its police or regulatory powers in bad faith (*e.g.* in a manner that is in any way illegal or unconstitutional) to shut down Extraction's operations or otherwise impair its vested rights; and
- a determination that if Broomfield can use its police and regulatory powers to shut down or impair Extraction's operations, then such action constitutes a regulatory taking for which Broomfield must pay just compensation, as determined in this action; and enjoining Broomfield from shutting down any Well Site until it has deposited a just compensation bond with the Court equal to the value of the oil and gas development rights it will take through its proposed shutdown.

II. PARTIES, JURISDICTION AND VENUE

3. Plaintiff Extraction is a Delaware corporation with its principal place of business in Denver, Colorado. Extraction is authorized to conduct business in Colorado by the Colorado Secretary of State.

4. Defendant the City and County of Broomfield ("Broomfield" or the "City") is a home-rule municipality of the State of Colorado.

5. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 1343 based on 42 U.S.C. § 1983 and questions of federal constitutional law. Jurisdiction also exists under the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) and 2202. This Court exercises supplemental jurisdiction over Extraction's state law claims pursuant to 28 U.S.C. § 1367.

6. Venue is appropriate in this Court because the action concerns real property in Broomfield, Colorado, Extraction conducts business in Colorado, and all actions occurred in Colorado.

III. FACTUAL BACKGROUND

7. Because this complaint seeks extraordinary equitable relief, Extraction provides a commensurately detailed and thorough explanation of the facts to justify why such relief is warranted. Extraction develops the history of its dealings with Broomfield regarding the 2017 Operator Agreement in full detail in order to establish how Broomfield's repeated efforts to shut down the Project are not legitimate exercises of its police and regulatory powers, but illegal and bad faith attempts to shut Extraction down and drive it out of town by any means necessary.

A. Extraction's Project and its constituent agreements

a. Predecessor agreements

8. Extraction is the successor-in-interest to two prior agreements and associated use by special review permits approved by Broomfield.

9. First, Extraction is the successor-in-interest to the August 27, 2013 Oil and Gas Operator Agreement between Sovereign Operating Company and Broomfield (the "Sovereign Operator Agreement"), which allowed Sovereign to drill and develop oil and gas wells from ten well pad sites in the City.

10. In 2014, in response to Broomfield's attempt to enact a moratorium on hydraulic fracturing, the Broomfield District Court adjudicated Sovereign's rights under the Sovereign Operator Agreement. The court held that Sovereign's mineral development rights were vested contract and property rights that Broomfield could not impair through a later-enacted hydraulic fracturing moratorium. *See* 9/25/2014 order in *Sovereign*

Operating Co. LLC v. City and County of Broomfield, Case No. 14 CV 30092. **Exhibit 1**.

11. The Broomfield District Court specifically discussed how Sovereign's investment of resources in its Broomfield project (which is now Extraction's Project), in justifiable reliance on its bargained-for contract rights with the City, prevented the City from impairing these rights through later legislation. *Id.* at 11-12.

12. The Court so held despite the "Future Regulations" provision of the Sovereign Operator Agreement (which is nearly identical to the parallel Future Regulations provision in Extraction's 2017 Operator Agreement), which allowed Broomfield to enact more stringent regulations, so long as the regulations applied generally to all oil and gas activities. *Id.* at 5.

13. Broomfield did not appeal this judgment.

14. The Broomfield District Court's judgment applies to Extraction's current 2017 Operator Agreement with Broomfield through principles of issue preclusion. *Foster v. Plock*, 2017 CO 39, ¶ 13, 394 P.3d 1119, 1123.

15. The second prior agreement is the November 13, 2012 Noble Energy, Inc. Surface Use Agreement ("Noble Agreement"), which provided rights to develop two well pad sites. The Noble Agreement governed what is now the current Livingston Well Site, which (under the current 2017 Operator Agreement) is subject to numerous best management practices ("BMPs") involving every aspect of operations in order to minimize its impact on nearby residents. Under the Noble Agreement, only minimal BMPs were required.

16. In combination, the Sovereign Operator Agreement and the Noble Agreement authorized 12 well sites from which Extraction could drill as many horizontal wells as a COGCC spacing order permitted.

b. Extraction and Broomfield amend and restate the Sovereign and Noble Agreements in the 2017 Amended and Restated Operator Agreement and the related Settlement and Surface Use Agreements.

17. Until 2019, local government attempts to ban or regulate oil and gas development were largely preempted by Colorado state law. *See, e.g.*, *Longmont v. COGCC*, 369 P.3d 573, 585-86 (Colo. 2016) (local bans on hydraulic fracturing were operationally preempted by state law, despite citizens' rights under the Colorado Constitution to secure their safety and happiness).

18. Broomfield's Municipal Code in 2015 did not purport to ban oil and gas development, but provided two avenues for developing oil and gas: through a Use by Special Review (USR) process (the traditional permitting process); or through a contract between the operator and the City (called a memorandum of understanding or operator agreement) that covers the requirements of USR permitting, and allows the parties to further tailor the project as they see fit. *See* Broomfield Municipal Code (BMC) §§ 17-54-050 *et seq*. (USR) and 17-54-200 (operator agreement); *see also* § 17-54-280 (discussing enforcement for "special review permits, memorandums of understandings or operator agreements").

19. After acquiring the Sovereign and Noble interests, Extraction could have developed those interests according the terms of the Sovereign Operator Agreement and Noble SUA. These agreements had already been approved by Broomfield through these code processes; the Broomfield District Court had adjudicated Sovereign's rights as vested; and while the Noble rights had not been similarly adjudicated, the same analysis applied to them.

20. Instead of proceeding to develop its vested rights under the existing

agreements, Extraction agreed to work with Broomfield to accommodate concerns of Broomfield residents by redesigning its Broomfield development plans to consolidate well sites, minimize the footprint and maximize protections for Broomfield residents (the "Project").

21. Starting in 2015, the revised Broomfield Project underwent years of review, revision, debate, public comment and negotiations. Broomfield held a town hall meeting at the 1STBANK Center about the Project, and appointed a special Oil and Gas Task Force that issued a series of recommendations that were ultimately incorporated into the 2017 Operator Agreement.

22. As Broomfield knew during these negotiations and public engagements, Extraction cannot shut down its operations at night, but must drill, complete, equip and operate its Well Sites continuously (24/7) in order to develop its assets in an economically viable manner. Extraction's night operations were discussed with the Broomfield Task Force in negotiating the Operator Agreement; they were discussed in Extraction's planned operational schedules; and they are reflected in other aspects of the negotiated Operator Agreement like the prohibition on unloading pipe at night (which only makes sense if there are night operations otherwise taking place).

23. Throughout these years of public engagement, Broomfield never sought to impose a noise limit for Extraction's night operations that would be impossible to comply with, like the 40 dBA limit in the 2020 Noise Ordinance that Broomfield recently enacted to shut down Extraction's operations (discussed below).

24. Had Broomfield demanded an impossible-to-comply-with night noise limit, Extraction would have terminated negotiations and developed its assets per the terms of the existing Sovereign and Noble agreements and the default state-wide noise mitigation

regime imposed by the Colorado Oil and Gas Conservation Commission ("COGCC"): Rule 802, which imposes a night noise limit of 75 dBA during the construction, drilling and completion phases. *See* https://cogcc.state.co.us/documents/reg/Rules/LATEST/800Series.pdf

25. After going through the Task Force process, undertaking noise studies with third-party noise consultants, Broomfield did not insist on a 40 dBA or other impossible night noise limit. Rather, Broomfield agreed to a noise mitigation regime that limited Extraction's operational noise to "4 dBA higher than baseline ambient sound" measured at 1,000 feet from the sound walls at a Well Site, for both day and night operations. *See* **Exhibit 2**, 2017 Amended and Restated Oil and Gas Operator Agreement ("Operator Agreement") at PDF pages 38-39, BMP 31. That was a noise limit that Extraction, with the implementation of specialized equipment and associated extra cost, could nevertheless work with.

26. Broomfield also required many other noise mitigation measures (like sound walls, special restrictions on non-essential traffic during the morning and afternoon rush hours, use of pipelines instead of trucks to transport oil from the well sites) which, along with the other BMPs, required significantly more investment than would have been required to develop under the terms of the prior Sovereign and Noble agreements. This significant reliance on Broomfield's express agreements, including the BMP 31 noise limit of ambient + 4 dBA, made Extraction's already-vested property and contract rights independently vested under controlling Colorado law.

27. Based on all of these express understandings and agreements, in October 2017 the Broomfield City Council formally voted to approve the 2017 Amended and Restated Oil and Gas Operator Agreement, and related Surface Use Agreement and

Settlement Agreement. **Exhibit 2** (with irrelevant attachments and exhibits omitted). Because these three Agreements were enacted together and reference each other, they are properly construed together. Extraction will refer to the three Agreements collectively as the 2017 Operator Agreement, unless circumstances require differentiation.

28. The inter-related 2017 Operator Agreement, Surface Use Agreement and Settlement Agreement contain a jury waiver as noted in Exhibit 2, Surface Use Agreement ¶ 6:

> Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Colorado. The Parties waive the right to trial by jury with respect of any action, suit or proceeding arising out of or relating to this Agreement or any contemplated transaction.

29. Extraction paid Broomfield over $4.4 million in cash and conveyance of land for property rights and other accommodations required by the 2017 Operator Agreement, which Extraction would not have been required to pay had it developed under the approved and vested Sovereign and Noble Agreements.

30. The 2017 Operator Agreement begins by re-affirming the vested nature of Extraction's rights:

> WHEREAS, the Parties agree that Operator's rights and duties set out in the Operator Agreement, as Supplemented have been and **remain vested** as determined by the Court in *Sovereign Operating Co. LLC v. City and County of Broomfield*, Case No. 2014CV30092 and that the Operator Agreement, as Supplemented remains in full force and effect; ...
>
> WHEREAS, the Parties agree that the Parties each have rights and duties set forth in the [prior Noble agreement], **which are also fully vested and may not altered or diminished without express agreement between the Parties**;
>
> WHEREAS, the City and Operator value a balanced approach to oil and gas development that is protective of public health, safety, and welfare, including the environment and wildlife resources. To that end, **in order to achieve those goals in a cooperative manner,** the City and the Operator enter into this Agreement pursuant to Chapter 1-54 of the

> Broomfield Municipal Code ("BMC") allowing for this Agreement to adopt the best management practices set forth in Exhibit B (hereinafter referred to as "BMPs") for Operator's oil and gas operations at the Well Sites set forth on Exhibit A;

Exhibit 2, 2017 Operator Agreement at 1-2 (emphases added).

31. The 2017 Operator Agreement takes the 12 well sites with about 200 wells contemplated by the prior Sovereign and Noble Agreements, and reduces them to six well sites with 84 wells. The 2017 Operator Agreement thus reduced the footprint of oil and gas development in Broomfield by half, both in terms of wells and Well Sites.

32. The locations of the six Well Sites were determined in full consultation with the City after conducting an extensive alternative site analysis utilizing criteria on setback distances and other items recommended by the City's oil and gas Task Force composed of Broomfield citizens.

33. The 2017 Operator Agreement also includes 57 categories of BMPs, many with numerous subparts, for New Wells at Well Sites. These BMPs meet or exceed all federal, state and local standards. The 2017 Operator Agreement also conforms to the Broomfield Municipal Code and incorporated the Task Force's recommendations.

34. The 2017 Operator Agreement has numerous provisions and BMPs addressing noise. For example the 2017 Operator Agreement requires Extraction to use grid-based electric power instead commonly-used diesel-generated power for operations; it prohibits unloading of pipe at night (an acknowledgement that Extraction would be operating at night); and it requires Extraction to use quieter and cleaner Tier 2 engines to operate pumps and the use of Tier 4 engines if those were to become commonly available.

35. Most importantly, the 2017 Operator Agreement's BMP 31 on Noise Mitigation incorporates the existing COGCC noise regulation Rule 802, but imposes a

lower noise limit of "4 dB(A) higher than baseline ambient sound measured at 1,000 feet from the sound walls at the Well Site." **Exhibit 2** at BMP pages 16-17.

36. Per COGCC Rule 802(c)(5), which is incorporated into BMP 31, this ambient +4 dBA noise limit is the limit for Extraction's operational noise. It is not the limit for all noise (both Extraction's and ambient). Extraction cannot control ambient noise levels from sources like traffic, plane overflights, geese, etc.

37. Per the 2017 Operator Agreement and its detailed Comprehensive Drilling Plan (a 3,000+ page document approved by Broomfield after several iterations of comment and revision), the parties undertook another noise study (by a noise expert pre-approved by Broomfield) to establish ambient noise levels at the Well Sites for determining the operational noise limit under BMP 31.

38. Per the Operator Agreement and the related Surface Use Agreement, Extraction's six Well Sites were located in and along a corridor of Broomfield municipal open space surrounding the Northwest Parkway between Interstate 25 on the east and the Sheridan Parkway on the west. *See* Broomfield website maps at https://www.broomfield.org/DocumentCenter/View/29209/Extraction-Well-Distance. Extraction purchased some of this land to accommodate the City's demands to move from some of the sites included in the prior Sovereign and Noble agreements.

39. The Livingston Well Site had the highest ambient noise levels of the six Well Sites because of its location at the intersection of three busy thoroughfares: the Northwest Parkway, Sheridan Parkway, and Lowell Boulevard. The average ambient noise at this location was 61 dBA – before Extraction's operations. Broomfield thus expressly agreed to allow Extraction to operate at 65 dBA – both day and night – at this location. **Exhibit 3** (excerpt from noise study in CDP).

40. While this agreed-upon 65 dBA noise limit is the loudest of the six Well Sites, it is still 10 to 15 dBA quieter than the otherwise-applicable 80 dBA day and 75 dBA night noise limits that would have applied under COGCC Rule 802 – a good result for Broomfield residents.

B. Broomfield voters enact Charter Amendment 301.

41. Some Broomfield residents categorically oppose all oil and gas development, and therefore did not view the City's enormous gains from the Operator Agreement as a sufficient win.

42. In November 2017, about two weeks after Broomfield approved the 2017 Operator Agreement, Broomfield voters passed ballot measure 301 (the "Charter Amendment"), which amended the Broomfield City Charter to direct that Broomfield exercise its powers of local self-governance and home rule to "condition oil and gas development permits to require oil and gas development to only occur in a manner that does not adversely impact the health, safety, and welfare of Broomfield's residents in their workplaces...."

43. The Charter Amendment does not purport to repudiate the 2017 Operator Agreement.

44. The Charter Amendment does not purport to operate retroactively to impair contracts that the City entered into before its enactment.

45. In any event, the Charter Amendment or similar subsequent acts by Broomfield's government or residents cannot operate retroactively per C.R.S. § 31-2-217 and settled principles of law regarding retroactivity. *See* **Exhibit 1**, 9/25/2014 order in *Sovereign v. Broomfield*, citing and discussing *City of Golden v. Parker*, 138 P.3d 285, 290 (Colo. 2006) and related cases; *Taylor Morrison of Colorado, Inc. v. Bemas Constr.*

Inc., 2014 COA 10, ¶ 17.

46. Retroactive application aside, the Charter Amendment provides no concrete rules or regulations for oil and gas development. It only directs Broomfield's government to condition future "oil and gas development permits" on the absence of adverse impact on Broomfield residents' health, safety and welfare (emphasis added). Extraction's Project is authorized by the 2017 Operator Agreement – a contract – not a USR permit.

47. The 2017 Operator Agreement comports with the Charter Amendment. It protects the health, safety and welfare of Broomfield residents by reducing the footprint of the Project by half, and adding numerous BMPs and technological advances to protect the health, safety, and welfare of Broomfield's residents.

48. Per the 2017 Operator Agreement and approved CDP, Extraction mobilized and began drilling and completions operations. To date, Extraction has spent approximately $150 million on drilling and completion operations and has entered burdensome contractual commitments in order to cause the construction of an approximate $240 million pipeline system and central gathering facility so oil and gas from the wells can be produced into a closed-loop system without permanent tanks and processed miles away from Broomfield in rural Weld County, minimizing the Project's footprint, environmental impact, and noise.

C. Lawsuits by environmental activists have failed to halt the Project.

49. As noted, while the Project was approved in a lengthy and open political process, it has always faced opposition from some Broomfield residents and others who categorically oppose oil and gas development, or oppose oil and gas development in or near residential areas.

50. Residents of Broomfield and other self-appointed activists have attempted

to shut down the Project through several lawsuits, none of which has succeeded. *See The Broomfield Way et al v. Broomfield and Extraction*, no. 2017CV30213 (claims against Extraction dismissed, and claims against Broomfield settled); *Wildgrass Oil and Gas Committee v. COGCC*, no. 2018CV32513 (dismissed, now on appeal); *WildEarth Guardians et al v. Broomfield and Extraction*, no. 2018CV30316 (dismissed, now on appeal); *Wildgrass Oil and Gas Committee v. COGCC*, U.S. District Court no. 19-cv-00190-RBJ (dismissed by Judge Jackson).

51. There is also other pending litigation involving the Broomfield Project and all involving overlapping plaintiffs and counsel, demonstrating the level of organized opposition to Extraction's Broomfield Project. *See Wildgrass Oil and Gas Committee v. COGCC*, 2019CV33888 and *Elise Ter Harr, et al. v. COGCC and Extraction Oil & Gas, Inc.*, 2019CV34485.[1]

52. These lawsuits by organizations of Broomfield residents evidence the determination of these residents to shut down Extraction's operations in Broomfield.

53. These same residents elect Broomfield's City Council (which also operates as Broomfield's Board of Health), and can thereby direct Broomfield government to use the full extent of its power to shut down the Project.

[1] Counsel for *The Broomfield Way et al* in no. 2017CV30213 was Kate Merlin; Counsel for *Wildgrass Oil and Gas Committee* in no. 2018CV32513 was Annie Marie Byers and Kate Merlin; Counsel for *WildEarth Guardians et al* in no. 2018CV30316 was Kate Merlin and Dan Leftwich; Counsel in *Wildgrass Oil and Gas Committee* in no. 19-cv-00190-RBJ was Joe Salazar and Dan Leftwich (Ann Marie Byers was their sole witness at the hearing); Counsel for *Wildgrass Oil and Gas Committee* in no. 2019CV03388 was Joe Salazar and Kate Merlin; Elise Ter Haar is represented by Joe Salazar. The Wildgrass Oil and Gas Committee is led by Broomfield Councilmembers Jean Lim and Laurie Anderson, both of whom are leaders of Broomfield Concerned.

D. SB 19-181

54. Broomfield's power to regulate oil and gas development changed in April 2019, when Governor Polis signed SB 19-181 into law. SB 19-181 generally gives cities and counties like Broomfield greater local control over oil and gas development.

55. SB 19-181 does not apply retroactively. Specifically, section 19 of SB 19-181 states: "This act applies to conduct occurring on or after the effective date of this act, including determinations of applications pending on the effective date."

56. The 2017 Operator Agreement and CDP were both approved and adopted by Broomfield well before the effective date of SB 19-181. The 2017 Operator Agreement (which is a contract) and its associated CDP contain the comprehensive regulations governing the Project. While Extraction's operations began before and will continue after the effective date of SB 19-181, the agreed-upon conditions for those operations were set before SB 19-181 became effective.

57. While Broomfield might thus apply its new regulatory authority from SB 19-181 to *future* oil and gas development, SB 19-181 does not empower or permit Broomfield to unilaterally change the terms of the 2017 Operator Agreement or the CDP, or otherwise nullify Extraction's vested contract and property rights. *See* Colo. Const. art II § 11 (impairment of contracts); *City of Golden v. Parker*, 138 P.3d 285 (Colo. 2006); U.S. Const. Art. Article I, section 10; **Exhibit 1**, 9/25/2014 order in *Sovereign v. Broomfield*. Nor does SB 19-181 authorize Broomfield to perform its obligations under the 2017 Operator Agreement in bad faith, with the goal of thwarting Extraction's reasonable expectations under the contract.

E. Broomfield announces its intention to "penetrate" the 2017 Operator Agreement and shut down the Project.

58. Broomfield residents who oppose oil and gas development (and do not understand or care about vested rights, the Contract Clause, regulatory takings, etc.), believed that SB 19-181 finally gave Broomfield the authority it needed to shut down Extraction's operations.

59. Despite knowing that Extraction's contract and property rights are vested, and that Extraction has invested millions of dollars in its Project in reliance on these vested rights, Broomfield has publicly announced its intent to use its new powers under SB 19-181 and Charter Amendment 301 to shut down Extraction's Project – apparently without regard to the extraordinary financial consequences.

60. In August 2019, Broomfield's long-time City Manager Charles Ozaki retired. He was replaced by Jennifer Hoffman.

61. Ms. Hoffman, and other Broomfield government officials, have repeatedly stated that the City seeks to use the powers they believe have been conferred by the Charter Amendment and SB 19-181 to "penetrate" the 2017 Operator Agreement, *i.e.* to find some basis for declaring Extraction in breach, or otherwise use the City's police and regulatory powers to shut down the Project.

62. The City plainly and forthrightly declared this intent at a September 30, 2019, Broomfield "Community Meeting on Methane and Soil Gas Testing Information." https://www.broomfield.org/CivicAlerts.aspx?AID=1645. Video of this meeting is also posted on Broomfield's website, at https://drive.google.com/file/d/1Mcuf2u31dfe2fwypYakRxerV9H_wU-HC/view.

63. At this meeting, Ms. Hoffman responded to Broomfield residents' concerns

about Extraction's Project in the following language (at 1:03:18):

> So from the Operator's Agreement, and again you're not going to agree with what I'm going to say, and I'm okay with that. The Operator Agreement has been in place; it is all encompassing. So until there is a point, and again it allows us a different conversation with [Charter Amendment] 301 married to [SB 19-] 181. It is a different playing field than we had before. **We are working hard to penetrate our existing rules and regs by incorporating [SB 19-] 181 and having that be paramount. There is questions about how much [SB 19-] 181 can penetrate an existing oil and gas Operator's Agreement.** So it's not a swift, easy answer to be able to say we're hesitant, we're going to shut it down. We're not there. I can't speak to what was in the Operator's Agreement. I can speak to the folks that put that together, in my opinion, did the very best that they could do with the knowledge that they had at the time. (emphasis added)

Moments later, in response to a resident's fervent call for the City to immediately shut down Extraction's Project (at 1:05:55), Ms. Hoffman states at 1:06:22:

> They [Extraction] are not in breach. So . . . If I had an answer I would provide the answer. I don't have the answer. I don't have the answers. **I can tell you that we are working diligently. Every day we're focused on this. I've been on the job eight weeks, and from the perspective of trying to figure out where the Operator's Agreement is, how we are penetrating that Operator's Agreement with [Charter Amendment] 301 and [SB 19-] 181 is a daily task. It consumes all of my time, my energy and my effort. From the breach perspective, will we get there? I don't know.** (emphases added)

64. **This is an extraordinary admission.** City Manager Hoffman publicly announced and explained to Broomfield residents who categorically oppose the Project that, as of September 2019, the City did not yet feel that it had found an adequate basis for declaring Extraction in breach of the 2017 Operator Agreement and shutting down the Project; but the City's current and all-consuming task was to do precisely this: find some basis for declaring Extraction to be in breach, and halt the Project.

65. In November 2019, Broomfield elected a new City Council that more uniformly opposes oil and gas development in general, and Extraction's Project in

particular. Any prior division or disagreement over oil and gas development (such as enabled Broomfield City Council to narrowly vote in favor of the 2017 Operator Agreement in 2017) has now given way to uniform opposition, coupled with an evident willingness to flout the law despite the implications. As a result, Broomfield is now bringing all of its legislative and executive power to bear on its stated goal of shutting down Extraction's operations.

66. Starting September 2019, Broomfield began trying out potential bases for alleging breach and shutting down Extraction. For example:

- Broomfield asserted that Extraction must use irrigation ditch water for its cement, knowing that water with sediment cannot be safely used for making cement—the motive here was so that Extraction could not make its cement at all.
- Broomfield asserted that Extraction must use one particular (and unavailable) brand of drilling mud.
- Broomfield asserted that Extraction's hydraulic fracturing operations had to use Tier 4 engines for its pumps, which Extraction in fact has used whenever available. (The 2017 Operator Agreement only requires their use once they become "commonly available, but there is only one Tier 4 fleet available in the DJ Basin; yet Broomfield has insisted that Extraction must use the Tier 4 engines regardless of availability.)
- Broomfield sent Extraction a letter demanding that Extraction provide Material Safety Data Sheets within ten days and threatening criminal prosecution, when Extraction had already made the information available.

67. None of these complaints had any merit, and Broomfield did not follow through with any lawsuits, prosecutions or other shutdown efforts based on them. These were just initial skirmishes. These initial shutdown strategy auditions nonetheless required extensive attention from Extraction's personnel and counsel to address, at considerable expense.

68. Broomfield came much closer to shutting Extraction down through a novel and truly astonishing tactic prompted by the COVID-19 crisis. In March 2020, the

Broomfield City Council, operating as the City's Board of Health, prepared an emergency public health order to shut down Extraction's imminent flowback operations at the Livingston Well Site under the theory that these operations could pollute the air, which could pose special dangers for COVID-19 sufferers.[2]

69. Unfortunately for Broomfield, its *own experts* confirmed that Extraction's flowback operations were state-of-the-art and posed no danger to public health or safety; whereas leaving the recently-fracked wells pressurized actually could pose a genuine public safety threat. *See* audio of 3/25/2020 meeting, http://broomfield.granicus.com/MediaPlayer.php?view_id=6&clip_id=1571, at 32:00-36:39; 1:34:20.

70. So the Broomfield City Council / Board of Health changed its rationale for the proposed public health order it had prepared: it decided that the proposed shutdown was now supposedly needed to alleviate a public health crisis of "stress and anxiety" that some Broomfield residents experience from the mere existence of oil and gas development in the City.

71. To this end, Broomfield's Public Health Director testified that some Broomfield residents believe that oil and gas development is inherently dangerous and unhealthy, and it therefore causes them to experience anxiety and stress; and such anxiety and stress might cause adverse health outcomes in conjunction COVID-19. *See* audio at 3:27:30 - 3:30:00. The Public Health Director therefore recommended that Extraction's flowback operations be suspended as a public health hazard – not because they posed any

[2] Needless to say, Broomfield did not consider curbing any other sources of air emissions – just Extraction's operations.

actual health or safety risks, but because they "stress out" some Broomfield residents. *See* audio of 3/25/2020 meeting at 3:58:48 - 4:02:30. One member of the Broomfield City Council / Board of Health cheered at the recommendation. *Id.* at 4:02:00.

72. This reasoning is logically circular, and absurd. Any county board of commissioners or city government could use this rationale to shut down any politically unpopular business, or justify any impairment of any city contract, *i.e.*: *we would abide by terms of our contract, but doing so stresses out our residents; so we must disregard the contract to protect public health.* Again, needless to say, Broomfield residents do not suffer stress and anxiety over, *e.g.*, the City's contractual obligation to repay its municipal bonds. The only contract that Broomfield decided had to be abrogated to prevent a public health emergency of stress and anxiety was its 2017 Operator Agreement with Extraction.

73. Extraction sought and obtained a TRO from the Broomfield District Court to prevent being shut down by the proposed public health order, which Broomfield was scheduled to approve in a matter of days. The Court later dissolved the TRO over ripeness concerns, because the Court believed it could not enjoin Broomfield until it actually enacted the public health order. But in its order dissolving the TRO, the Court observed:

> **The court certainly is not unmindful that most, if not all, of Broomfield's City Council members will, perhaps, stop at nothing in their efforts to shut-down Extraction's oil and gas operations**, and in particular Extraction's scheduled flowback operations at its Livingston Well Site. However, the court simply reminds Broomfield that when exercising its police powers, it may not do so in an in a manner that is contrary to constitutional rights or privileges or is arbitrary and capricious and not rationally related to combating the spread of COVID-19, lest it again face Extraction's request for temporary, preliminary, and/or permanent injunctive relief.

Exhibit 4, 4/6/2020 order in *Extraction v. Broomfield*, no. 2020CV30106 at 17 (emphasis added).

74. Likely as a result of this carefully worded judicial warning, the Broomfield City Council / Board of Health tabled its proposed emergency public health order to shut down Extraction's operations; and Extraction (having successfully deflected that particular shutdown strategy) voluntarily dismissed the lawsuit.

F. Broomfield's current shutdown strategy: noise enforcement.

75. Broomfield's most concerted illegal shutdown effort is through a special noise ordinance which applies only to Extraction, and which Broomfield enacted to shut Extraction down.

76. Opposition to Extraction's Project is well organized. Websites such as Broomfield Concerned (which is run by a Broomfield City Council member) effectively tell opponents of Extraction's Project about the current strategy for shutting down the Project, and how they can participate in these shutdown efforts. *See, e.g.*, http://broomfieldconcerned.org/take-action/call-to-action-residents-urged-to-write-in-and-attend-tuesday-city-council-meeting/ (1/13/2020 "Call to Action" exhorting opponents of the Project to register noise complaints to support an emergency noise ordinance). Broomfield's own municipal website alerts residents to Extraction's operations and encourages residents to register complaints with a click. *See* https://www.broomfield.org/1820/Oil-and-Gas, with link to weekly "Look Ahead" newsletter advising Broomfield residents what they can expect to see, hear and smell at each Well Site, with links to register complaints. *E.g.* https://drive.google.com/file/d/147Vq3hCO3UjUyQ3SyWQTDHWJn2Ztm8r1/view. No surprise then, that when word spread that noise complaints provided the best likelihood of success for shutting down the Project, complaints began pouring in, some from many miles away from the actual well sites and some during periods where

Extraction had no ongoing activity. Broomfield's noise complaints are thus highly suspect.

77. To the extent that any noise complaints might be legitimate, they are a result of Broomfield's poor understanding of industrial acoustics, and in particular the fact that night noise *seems* louder than day noise.

78. Because suburban acoustic environments become much quieter at night, existing noise sources sound comparatively louder at night even if they generate no more noise than during the day. That is why some noise laws (like the COGCC's Rule 802, and C.R.S. § 25-12-103) impose separate daytime and lower nighttime noise limits. BMP 31, by contrast, imposes a single noise limit of ambient +4 dBA, with no separate lower limit for night noise.

79. The majority of noise complaints occurred in December 2019, ostensibly based on night noise at Extraction's Livingston Well Site, which is located near the intersection of three busy thoroughfares, and just across the Northwest Parkway from the Anthem residential subdivision. *See* map at https://www.broomfield.org/DocumentCenter/View/29209/Extraction-Well-Distance. Extraction's operational noise remained the same as it was during the day: within the agreed-upon ambient plus 4 dBA limit of 65 dBA; but some Anthem residents may have complained because the operational noise suddenly *seemed* louder because everything else – including traffic – quieted way down at night.[3]

80. It took Broomfield a while to figure out how the noise limit it had

[3] It is impossible to know without extensive discovery, and it may never be possible to determine, whether particular noise complaints were sincere, or were just residents' contribution to the popular effort to shut down Extraction.

contractually agreed to actually worked: *e.g.* loud noise from routine highway traffic, airplanes, coyotes, etc. might generate a spike at a noise monitor near a Well Site, but that did not mean that *Extraction* had violated the agreed-upon noise limit. As Broomfield developed a more sophisticated understanding of its agreed-upon noise regulation, and industrial acoustics generally, it realized that it should have negotiated for a noise mitigation regime with a separate lower night noise limit.

81. Broomfield could have responded to residents' night noise complaints by explaining that Broomfield had negotiated well for them by obtaining the ambient +4 dBA noise limit in the Operator Agreement (hence 65 dBA at Livingston and even less at the other Well Sites), since the alternative would have been 75 dBA at night permitted by COGCC Rule 802.

82. Broomfield could have also responded to complaints by explaining that the Operator Agreement was a binding contract on which Extraction had justifiably relied on to the tune of hundreds of millions of dollars, so residents near Well Sites would have to live with the temporarily inconvenience of this reasonable and necessary operational noise for a few months, until each Well Site was completed and quietly producing to pipelines – just like they might have to endure other temporary noisy events such as nearby residential or commercial development construction, some of which are currently underway nearby these very same neighborhoods.

83. Instead, the Broomfield City Council chose noise complaints as the basis for accomplishing its admitted goal of shutting down Extraction.

84. In January 2020 the Broomfield City Council adopted "Emergency Ordinance No. 2117, Restrictions on Noise in Residential Areas." **Exhibit 5**. The Noise Ordinance defines oil and gas operations as an "industrial use"; and provides that any

industrial use operating outside of an existing industrial zoned area, *which is not in an enclosed building with a roof*, may not operate at night (between 10:00 p.m. and 7:00 a.m.) unless and until it submits a noise modeling study showing that its night operations will not exceed 40 dBA when measured at the boundary of the nearest adjacent residentially-zoned district; and also submits five nights of actual noise data confirming that the industrial use has not exceeded the 40 dBA limit at the specified location. *Id.* That is, the Noise Ordinance effectively requires Extraction – and only Extraction (as the only industrial operation in Broomfield outside an industrial zoned area *without a roof*) – to operate at 40 dBA or less at night.

85. Forty dBA is not two-thirds as loud as 65 dBA. The decibel scale is logarithmic. Each drop of 3 dB represents a halving of sound pressure. The Ordinance's 40 dBA limit is less than one-half of 1% of the agreed-upon 65 dBA limit for Livingston. The federal Centers for Disease Control provide some useful references for decibel levels: 30 dBA is a soft whisper; 40 dBA is a refrigerator's hum.[4] No oil and gas development can comply with this 40 dBA operational noise limit, which is precisely why Broomfield adopted it – to shut Extraction down, as it had promised residents it would do.

86. The text of the emergency resolution and statements at the January 2020 City Council meeting confirms that the Ordinance was written just for Extraction. **Exhibit 5**, resolution discussing Extraction's Operator Agreement in the preamble.

87. The targeting is further evidenced by the Ordinance's absurd provision

[4] https://www.cdc.gov/nceh/hearing_loss/what_noises_cause_hearing_loss.html. This government website and data are subject to judicial notice. *United States v. Garcia*, 855 F.3d 615, 621-22 (4th Cir. 2017).

applying it only to industrial operations *without roofs* – *i.e.* only Extraction.

88. Broomfield's decision not to apply the 40 dBA night noise limit to any commercial operations also evidences the targeting: a noisy bar operating at night near a residential neighborhood could create just as much or more residential noise, but is exempt.

89. No other industrial operation has submitted a noise study to comply with the Ordinance because it was not intended to apply to anyone else – only Extraction.

90. Broomfield's pretext is further confirmed by the fact that the pre-existing average ambient noise level at the Livingston Well Site was 61 dBA, including noise spikes well over that 61 dBA average every time a semi-truck barrels down the Northwest Parkway which runs *between* the Livingston Well Site and the nearest Anthem residential subdivision. *See* Broomfield map at https://www.broomfield.org/DocumentCenter/View/29209/Extraction-Well-Distance. Yet no residents ever complained about this pre-existing and continuing traffic noise which has long been much higher than 40 dBA at night; and Broomfield has never shut down the Northwest Parkway at night to protect nearby residents from traffic noise.[5]

91. The Noise Ordinance was "unquestionably conceived, cut, [and] tailored" to shut down Extraction's operations. *In re Senate Bill No. 95*, 361 P.2d 350, 354 (Colo. 1961) (legislation that is "unquestionably conceived, cut, [and] tailored" for a particular situation violates the Colorado Constitution's Article V § 25 prohibition on special

[5] The Northwest Parkway is a privately-owned toll road business of an industrial character, without a roof. http://www.northwestparkway.org/about-us.html. But again, needless to say, Broomfield has not cited or prosecuted the Northwest Parkway for violating the Noise Ordinance, or shut down the Parkway at night.

legislation). The Noise Ordinance also violates federal "class of one" equal protection principles for this reason.

92. Extraction did not submit a noise study or data per the Emergency Noise Ordinance because the Ordinance does not apply to Extraction for several reasons. Extraction's operations are not subject to the Ordinance because they are authorized by a contract (the 2017 Operator Agreement) rather than a USR permit. **Exhibit 5**. The Ordinance is not a valid "Future Regulation" under paragraph 15 of the 2017 Operator Agreement because it is not general in nature and applicable to all commercial as well as all industrial operations. Also, the 2017 Operator Agreement prohibits Broomfield from prosecuting Extraction under the noise or nuisance chapters of the Broomfield Municipal Code for any conduct that is addressed by the 2017 Operator Agreement, like operational noise. **Exhibit 2**, Operator Agreement ¶¶ 15, 27, and BMP 31.

93. As soon as the Emergency Noise Ordinance took effect, Broomfield began issuing criminal citations to Extraction for operating at night without having previously submitted the required noise study and data. *See Broomfield v. Extraction*, Municipal Court case nos. 20M800107, 20M800108, 20M800109, 20M800120, 20M800153, 20M800169, 20M800187, 20M800188, and 20M800189. **Exhibit 6**, citations. Each prosecution constitutes a breach of 2017 Operator Agreement ¶ 27.

94. Broomfield has not prosecuted any other industrial or commercial operation under the Noise Ordinance – only Extraction.

95. When Extraction pointed out the profound and fatal defects of the Emergency Noise Ordinance by moving to dismiss the prosecutions in Broomfield Municipal Court, Broomfield began issuing citations for alleged violations of a different provision of its noise code, and a provision of its nuisance code. *See id.* The prosecutions

invoking other provisions of the noise and nuisance chapters of the Broomfield Municipal Code similarly constitute breaches of 2017 Operator Agreement ¶ 27.

96. After serving its first criminal citation to Extraction, Broomfield filed an unusual "Motion Requesting an Order Requiring Immediate Compliance" with the Emergency Noise Ordinance in Municipal Court case no. 20M800107. **Exhibit 7**. Through this motion, Broomfield hoped to obtain a judge's approval and imprimatur before taking any enforcement steps beyond issuing citations, like sending police cars out to Well Sites to compel a shutdown. Broomfield's decision to file such an unusual motion here further evidences its appreciation of how its enactment of a tailored noise ordinance, its prosecution of Extraction under this and similar nuisance ordinances, and any attempt to shut down Extraction's operations this way, are illegal and unconstitutional – Broomfield sought a judge's imprimatur as a supposed means of cloaking itself with qualified immunity. However, Broomfield's efforts to engineer and confer qualified immunity upon itself this way only serve to prove the opposite: that Broomfield is not acting in good faith (a core requirement for qualified immunity), but knows it is illegally and unconstitutionally attempting to target Extraction and deprive Extraction of its vested property rights.

97. At the first hearing on the Noise Ordinance violations, the presiding municipal court judge noted how Broomfield's motion for immediate compliance was strange, and denied it.

98. Extraction filed a motion to dismiss the criminal prosecutions. *See* **Exhibits 8-10**, Extraction's motion to dismiss, reply, and supplemental motion to dismiss filed in Broomfield Municipal Court.

99. These motions sought dismissal based on numerous legal bases, including:

Contract-based reasons for dismissal:

- **2017 Operator Agreement BMP 31.** The Noise Ordinance does not apply to Extraction because BMP 31's noise mitigation regime of ambient plus 4 dBA (*e.g.* 65 dBA at the Livingston well site) is the party's expressly agreed-upon and therefore applicable noise limit.
- **2017 Operator Agreement paragraph 27.** Broomfield and Extraction expressly agreed that any prosecution of Extraction for conduct related to the 2017 Operator Agreement would be under the oil and gas chapter of its municipal code, not the noise or nuisance chapters.
- **2017 Operator Agreement paragraph 15**. This provision permits Broomfield to enact future regulations that apply to Extraction's oil and gas development activities so long as those future regulations are "general in nature" and "applicable to all commercial and industrial operations in the City." The Noise Ordinance applies only to certain industrial operations, and no commercial operations; and it is plainly not general in nature, as illustrated by the fact that it applies only to industrial operations *without roofs*.

Constitutional bases for dismissal:

- Extraction's justifiable reliance on the 2017 Operator Agreement creates vested property and contract rights which Broomfield may not impair with subsequent legislation under state and federal law.
- The Emergency Noise Ordinance targets Extraction in violation of Colorado's constitutional prohibition on special legislation; and the similar federal "class of one" equal protection principles.
- The vested nature of Extraction's rights was determined in the prior *Sovereign*

action, and cannot be challenged now per the law of issue preclusion.

- The Ordinance fails even a deferential rational basis review because it is not reasonable and proportional: the 40 dBA limit is less than one-half of 1% of the agreed-upon 65-dBA limit at the Livingston well site.

See **Exhibits 8-10**, dismissal briefing, developing these (and other) arguments in detail, with additional authority. Additionally, Broomfield's enactment and application of the Noise Ordinance to Extraction's vested property and contract rights violates the *ex post facto* clause.

100. On April 1, 2020, the Broomfield Municipal Court issued a two-page order summarily denying Extraction's motion to dismiss in part, and not addressing it in part. **Exhibit 11**.

101. Instead of addressing Extraction's constitutional arguments, the Order simply held that Broomfield had a legitimate interest in regulating noise, and that the Noise Ordinance was rationally related to that interest. *Id.* Extraction, however, asserted numerous **as-applied** constitutional challenges rather than a facial challenge to the Ordinance, rendering this general rational basis review analysis irrelevant. The Municipal Court's order does not address Extraction's specific as-applied challenges based on vested rights, retroactivity, equal protection, or reasonableness and proportionality (40 dBA being less than 1% of the agreed-upon 65 dBA).

102. The Municipal Court's April 1, 2020 order twice stated that it was not considering Extraction's constitutional arguments "at this time," **Exhibit 11**; so Extraction understood the order as denying Extraction's motion to dismiss in part, and reserving ruling on all of the constitutional arguments for a later date. However, at the July 28, 2020 arraignment hearing, the Municipal Court clarified that it would not

address these constitutional arguments at all. The Municipal Court stated that such arguments are for another court to consider. **Exhibit 12**, 7/28/2020 hearing transcript at 4:6-10, 11:1-4, 11:12-15, 12:3-14:16.

103. The one dismissal argument that the Order does address is the future regulation provision. The Municipal Court accepted Broomfield's argument that its new Noise Ordinance complied with this requirement because even though it applied only to industrial operations, other *pre-existing* provisions in Broomfield's noise code apply to both commercial and industrial operations, so the noise code *as a whole* has some provisions that apply to both industrial and commercial operations. This argument is specious because pre-existing regulations are not and cannot be not future regulations.

104. Specifically, the noise chapter of Broomfield's Municipal Code currently has nine provisions, BMC 9-36-010 to 9-36-090. **Exhibit 13**. The first seven provisions were enacted in 1989, long before the 2017 Operator Agreement, and thus cannot be "future regulations" under the 2017 Operator Agreement. The new Noise Ordinance, enacted in January 2020 per **Exhibit 5** and codified at BMC 9-36-080 and 090, is the only potential "future regulation." Broomfield is prosecuting Extraction for allegedly violating BMC 9-36-080, for operating at night without having previously submitted a noise study and data showing that night operations will be below 40 dBA. BMC 9-36-080 obviously does not satisfy the 2017 Operator Agreement's requirement that this "future regulation" be "general in nature" and applicable to "all commercial and industrial operations" in the City.

105. Per its plain language, BMC 9-36-080 is not "generally applicable," and applies only to industrial operations (and only those without roofs), and not to commercial operations at all. Broomfield's argument, that the Noise Ordinance is a valid

"future regulation" because *other pre-existing* provisions of the noise code (BMC 9-36-010 to 070, enacted in 1989) apply to industrial operations, merits the strong term "specious." Yet the Broomfield Municipal Court accepted this argument. **Exhibit 11** at 2.

106. The Broomfield Municipal Court's order has no preclusive effect. *Rantz v. Kaufman*, 109 P.3d 132, 141 (Colo. 2005) (Colorado court judgments do not obtain issue-preclusive effect until they become final, and are affirmed if appealed); *Salida School Dist. R-32-J v. Morrison*, 732 P.2d 1160, 1164-65 (Colo. 1987) (issue preclusion does not apply where the "procedures available in the first court may have been tailored to the prompt, inexpensive determination of small claims and thus may be wholly inappropriate to the determination of the same issues when presented in the context of a much larger claim", adopting Restatement (Second) of Judgments § 28(3) and comment d).

107. On July 28, 2020, the Broomfield Municipal Court held an arraignment hearing. Extraction pled not guilty. The Municipal Court then set the first trial for September 21, 2020 – over Extraction's objections that it cannot possibly prepare to try a case worth as much as $400 million in eight weeks. **Exhibit 12**, transcript of 7/28/2020 municipal court hearing at 20:8-22:22. Additionally, Broomfield has not issued any noise citations since February 2020, and Extraction is not currently planning to start drilling or completions work on any of the remaining Well Sites for the remainder of 2020. There is no reason to hurry these Municipal Court trials.

108. The Broomfield Municipal Court nonetheless confirmed at the July 28 2020 arraignment hearing that it intended to try these prosecutions, worth hundreds of millions of dollars (if they result in shutdowns, as Extraction expects once Broomfield obtains its first conviction) like any ordinary municipal court matter.

Exhibit 12, 7/28/2020 transcript at 13:21-24 (Municipal Court's ruling that Extraction's constitutional defenses to Broomfield's prosecutions are not its concern but are for some "different Court" to deal with, because "This is a Municipal Court. We need to keep that in mind. And we're dealing with municipal ordinance violations."). *See also id.* at 4:6-10, 11:1-4, 11:12-15, 12:3-14:16 (Extraction's legal defenses are for some other court to consider).

109. Trial on the six Noise Ordinance violations is set to begin September 21, 2020. A second trial on the two other noise and nuisance citations is set to begin October 5, 2020.

110. At this point, two of Extractions six Well Sites in Broomfield are quietly producing oil and gas to the pipeline system built solely to support the Broomfield Project, but there are about 54 wells pending development at the remaining four Well Sites in Broomfield that must go through similar drilling and completion operations, and which may be subject to Noise Ordinance citations and physical shutdown by Broomfield.

111. Extraction estimates that the present value of the oil and gas to be produced from these other wells is worth over $150 million.

112. It is not economically feasible for Extraction to develop these assets if it has to shut down operations for nine hours every night, per Broomfield's special Noise Ordinance. In addition to losing those nine nighttime hours of operation, Extraction would have to spend about four hours ramping down its operations before the 10:00 pm shutdown; and would spend another four hours ramping operations back up after 7:00 am. Extraction cannot conduct an economically viable operation this way. That is, of course, Broomfield's admitted intent and goal: to shut down Extraction's operations.

FIRST CLAIM FOR RELIEF
Declaratory Judgment – Vested Rights

113. Extraction incorporates all prior paragraphs by reference.

114. Extraction's rights to develop oil and gas in Broomfield according to the terms of the 2017 Operator Agreement (and the associated Surface Use Agreement, which incorporates the 2017 Operator Agreement) are vested rights that cannot be impaired by Broomfield under state and federal law. *See* Colorado Constitution Article II Section 11; *P–W Investments, Inc. v. City of Westminster*, 655 P.2d 1365, 1371 (Colo. 1982); *City of Golden v. Parker*, 138 P.3d 285 (Colo. 2006); *Eason v Board of County Com'rs of County of Boulder*, 70 P.3d 600 (Colo.App. 2003); U.S. Constitution Article I Section 10*; United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977).

115. The vested nature of Extraction's rights has already been determined in the *Sovereign* action. **Exhibit 1**. That legal determination applies here through principles of issue preclusion. *Foster v. Plock*, 2017 CO 39, ¶ 13, 394 P.3d 1119, 1123. And even without issue preclusion, this Court's analysis in the *Sovereign* order is legally correct and applicable here.

116. To the extent that any rights in the 2017 Operator Agreement are not covered by the *Sovereign* Order, Extraction requests that the Court determine that such rights are vested per the same analysis and authority (justifiable reliance), based on the millions of dollars invested in land rights and construction of infrastructure to implement the required BMPs.

117. Extraction requests a declaratory judgment that its rights under the 2017 Operator Agreement are vested rights, and that Broomfield therefore may not impair these vested rights through subsequently adopted legislation.

SECOND CLAIM FOR RELIEF
Breach of Contract (Operator Agreement ¶ 15)

118. Extraction incorporates all prior paragraphs by reference.

119. Paragraph 15 of the 2017 Operator Agreement permits Broomfield to enact future regulations, but only if such regulations are "general in nature" and "applicable to all commercial and industrial operations in the City."

120. As set forth above, Broomfield's Emergency Noise Ordinance purports to be enacted under paragraph 15 of the 2017 Operator Agreement, but it is not generally applicable, excludes any commercial operations, excludes most other industrial operations, and specifically targets Extraction. It is designed to give Broomfield an ostensible legal basis to shut down Extraction's night operations.

121. Broomfield's enactment of a Noise Ordinance targeted at Extraction's operations, and its attempts to enforce that Ordinance against Extraction, are breaches of paragraph 15 of the 2017 Operator Agreement which have caused Extraction damages in an amount that Extraction will prove at trial.

122. Extraction is also entitled to appropriate injunctive relief, such as an injunction prohibiting further prosecutions under the Noise Ordinance, and (to the extent permissible by the *Rooker/Feldman* doctrine) enjoining Broomfield's current prosecutions.

THIRD CLAIM FOR RELIEF
Breach of Contract (Operator Agreement ¶ 27)

123. Extraction incorporates all prior paragraphs by reference.

124. Noise from Extraction's operations is addressed by the 2017 Operator Agreement.

125. Paragraph 27 of the 2017 Operator Agreement states that Broomfield may enforce violations of the 2017 Operator Agreement under the oil and gas chapter of its Municipal Code.

126. Broomfield is currently prosecuting Extraction for alleged violations of the noise and nuisance chapters of the Broomfield Municipal Code based on noise levels at the Livingston Well Site. *See* Broomfield Municipal Court matter numbers: 20M800107, 20M800108, 20M800109, 20M800120, 20M800153, 20M800169, 20M800187, 20M800188, and 20M800189; **Exhibit 6** (citations). The citations in these criminal actions charge violations of B.M.C. §§ 9-36-020 and 9-36-070, which are provisions in the noise chapter of the Broomfield Municipal Code; and also violations of B.M.C. § 8-16-010, which is a provision in the nuisance chapter of the Code.

127. Each of these prosecutions constitutes a breach of paragraph 27 of the 2017 Operator Agreement.

128. Extraction's damages for these breaches include, but are not necessarily limited to, all of its attorney fees incurred in defending against these prosecutions; and any fines that the Municipal Court might issue.

FOURTH CLAIM FOR RELIEF
Breach of Contract (implied covenant of good faith and fair dealing)

129. Extraction incorporates all prior paragraphs by reference.

130. The 2017 Operator Agreement is a contract between Extraction and Broomfield.

131. Under well-settled Colorado law, all contracts contain an implied covenant of good faith and fair dealing. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995).

132. Good faith means, *inter alia*, acting in a reasonable manner, and not trying to thwart the other contracting party's reasonable expectations. Specifically, Colorado courts have held that "each party to a contract has a justified expectation that the other will act in a reasonable manner in its performance," *Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359, 1363 (Colo.App. 1994); and that "good faith performance of a contract involves faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Miller v. Bank of New York Mellon*, 2016 COA 95 ¶ 40, 379 P.3d 342, 348 (cleaned up). *Accord Ervin*, 908 P.2d at 498 ("The good faith performance doctrine is generally used to effectuate the intentions of the parties or to honor their reasonable expectations.")

133. Broomfield's admitted goal of finding some basis for declaring Extraction to be in breach of the 2017 Operator Agreement so it can shut down the Project constitutes a breach of the covenant of good faith and fair dealing.

134. Broomfield's bad faith conduct is amply evidenced by its numerous efforts to "penetrate" the 2017 Operator Agreement (*i.e.*, to find some ostensibly legal basis to shut down Extraction's operations), including the proposed COVID-19 shutdown, and the current Noise Ordinance and prosecutions.

135. Breach of contract. Broomfield's breach of the implied covenant of good faith and fair dealing is a breach of the 2017 Operator Agreement that has caused Extraction damages in an amount that Extraction will prove at trial.

136. Injunction against further bad faith or pretextual conduct. Extraction is also entitled to and requests an injunction enjoining Broomfield from further bad faith or pretextual efforts to shut down or otherwise impair Extraction's operations, and requiring Broomfield to perform the 2017 Operator Agreement in good faith.

137. Preclearance. Extraction also asks the Court to enjoin Broomfield, including all of its organs and officials (the City Council, City Manager, Mayor, the Board of Health, etc.) from enacting any law or taking any action that would shut down, or otherwise impair or thwart Extraction's operations under the 2017 Operator Agreement without first obtaining this Court's approval for such law or action.

138. While such equitable relief might seem extraordinary, it is grounded on sound equitable principles and is entirely appropriate under the circumstances, as evidenced by Broomfield's admitted and demonstrated intent to shut down Extraction's operations through any means necessary, including illegal, pretextual and bad faith conduct.

FIFTH CLAIM FOR RELIEF
42 U.S.C. § 1983

139. Extraction incorporates all prior paragraphs by reference.

140. Broomfield has authority as a city and county to enact reasonable regulations to protect the health, safety and welfare of its residents. But such regulations must be reasonably calculated to alleviate the harm at issue, be fairly and neutrally applied, and comport with constitutional and statutory law prohibiting cities and counties from impairing contracts or vested rights, and principles of equal protection.

141. Broomfield's efforts to shut down Extraction's operations violate the U.S. Constitution Article I, section 10 prohibition on impairment of contracts.

142. Broomfield's efforts to shut down Extraction's operations, in particular through the enactment of the targeted Emergency Noise Ordinance, violate the Fourteenth Amendment's equal protection guarantees under class-of-one principles.

143. Since the Ordinance imposes a criminal penalties, Broomfield's enactment and application of the Noise Ordinance to Extraction's vested property and contract rights also violates the *ex post facto* clause.

144. Extraction is entitled to damages from Broomfield pursuant to 42 U.S.C. § 1983, including actual damages, punitive damages, and fees.

145. Extraction is also entitled to appropriate injunctive relief under 42 U.S.C. § 1983 to enjoin further violations of Extraction's constitutional rights, including but not limited to a preclearance injunction enjoining Broomfield and its officials and other organs of government (such as the City Council acting in its capacity as the Board of Health) from enacting any law or taking any action that would shut down, or otherwise impair or thwart Extraction's operations under the 2017 Operator Agreement without first obtaining this Court's approval for such law or action.

SIXTH CLAIM FOR RELIEF
Declaratory Judgment, damages and injunction for state constitutional violations)

146. Extraction incorporates all prior paragraphs by reference.

147. In addition to violating the federal constitution, Broomfield's conduct violates Colorado Constitution Article II section 11's prohibition against impairment of contracts and retrospective legislation; and Article V section 25's prohibition against special legislation.

148. Extraction requests such damages as may be available and also injunctive relief discussed above based on these state constitutional violations.

SEVENTH CLAIM FOR RELIEF
Regulatory taking under State and Federal Constitutions

149. Extraction incorporates all prior paragraphs by reference.

150. Broomfield may not use its police powers to unilaterally impose noise limits or any other regulation that contradict the terms of the 2017 Operator Agreement and thereby nullify Extraction's vested property rights. *See Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 439 (1934) (a local government's "reserved [police] power cannot be construed so as to ... permit [it] to adopt as its policy the repudiation of debts or the destruction of contracts.").

151. If this Court nonetheless determines that Broomfield's police powers provide proper authority for the Noise Ordinance, and if Broomfield uses that power to shut down or otherwise impair Extraction's operations, then Broomfield will have effected a regulatory taking for which it must pay just compensation under Colorado and federal law. *See First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 314-15 and 321 (1987) (the Fifth Amendment does not necessary prohibit local governments from properly using their police powers in a manner that interferes with property rights; it rather requires governments to pay just compensation when they do so).

152. Extraction therefore requests a declaratory judgment that any shutdown or impairment of Extraction's operations by Broomfield through its Noise Ordinance, or other similar exercise of its police powers, constitutes a regulatory taking for which Broomfield must pay just compensation.

153. Extraction requests that the Court order Broomfield to post a bond sufficient to cover the amount of any potential just compensation award before taking action to shut down or impair Extraction's operations; and enjoin Broomfield from such shut down or impairment until the Court approves the bond.

154. In the event Broomfield succeeds in shutting down or impairing Extraction's operations, Extraction asserts an action for regulatory taking and just compensation to be determined by this Court in this action.

PRAYER FOR RELIEF

WHEREFORE, Extraction requests:

- A money judgment for damages on its breach of contract, Section 1983 and other claims for damages;
- Declarations from the Court pursuant to its declaratory judgment claims;
- Temporary and permanent injunctions per its claims for equitable relief, including an injunction enjoining Broomfield from any further bad faith or pretextual conduct, and requiring Broomfield to obtain prior approval from the Court before enacting any law or taking any action that would shut down or otherwise impair or thwart Extraction's operations under the 2017 Operator Agreement;
- All other damages, costs, interest, penalties, fees and other relief that may be available and warranted by law or equity.

DATED this 14th day of September, 2020.

Respectfully submitted,

s/ *Ghislaine G. Torres Bruner*

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CERTIFICATE OF SERVICE

The Verified Complaint shall be served pursuant to F.R.C.P. 4. The below certification of service is for future use in ordinary pleadings.

I hereby certify that on this 14th day of September, 2020, I served a true and correct copy of the foregoing via CM/ECF, which will send electronic notification to all parties and their counsel.

s/ Bennett L. Cohen
Bennett L. Cohen

VERIFICATION

I, Eric J. Christ, the Vice President and General Counsel of the Plaintiff Extraction Oil & Gas, Inc., have read this Complaint and I affirm that factual statements are true to the best of my knowledge. I make this verification subject to penalties for perjury.



September 14, 2020
Date

Eric J. Christ

CERTIFICATE OF SERVICE

I, Paul N. Heath, hereby certify that on September 23, 2020, I caused copies of *Defendant's Response to Plaintiff's Motion for Summary Judgment* to be served upon the parties on the attached list in the manner indicated.

/s/ Paul N. Heath
Paul N. Heath (No. 3704)

SERVICE LIST

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