Docket #0029 Date Filed: 9/28/2020

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.	)	**Re: Adv. Docket No. 11**

DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

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Dated: September 28, 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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Defendant Elevation Midstream, LLC ("Elevation") respectfully files this Reply Brief in Support of its Cross-Motion for Summary Judgment:

SUMMARY OF ARGUMENT

1. Plaintiff Extraction Oil & Gas, Inc. ("Extraction") argues that the Gathering Agreements[2] do not run with the land. Extraction cannot, and does not, contest that the parties' state their intent to create covenants running with the land in the Gathering Agreements. It also admits that at least one integral aspect of the Gathering Agreements—the Drilling Commitment—touches and concerns the land. Unable to avoid this reality, Extraction alleges that the Court must find that (a) more than the Drilling Commitment touches and concerns the land, and (b) privity is required under Colorado law to establish a covenant running with the land. Neither is correct.

2. First, Extraction urges the Court to perform an independent covenant-by-covenant review of each covenant in the touch and concern analysis. That is not required under Colorado law. Rather, an integral covenant—like the Drilling Commitment—is sufficient to cause the Gathering Agreements as a whole to run with the land.

3. Second, Extraction's contention that the Drilling Commitment is the only covenant to touch and concern the land interprets Colorado law far too narrowly. The touch and concern test centers on whether a covenant *closely relates* to the land, its use or enjoyment. The parties plainly intended numerous covenants in addition to the Drilling Commitment to run with the land. These include, without limitation: (i) the "Dedication" in § 2.1 of all of Extraction's interests in the lands, mineral interests, easements, leases, wells, and the oil, gas and water *therein and thereunder*; (ii) the "Delivery Obligation" to deliver to Elevation all of the oil, gas, and water from the Dedicated Area; (iii) the granting of other servitudes such as easements and rights-of-way to

[2] Unless otherwise defined, capitalized terms used herein shall have the same meaning as set forth in Elevation's Brief in Support of its Cross-Motion for Summary Judgment.

Elevation; as well as (iv) all *related* commitments. All such commitments and obligations, including the Drilling Commitment, are intimately connected and intertwined such that an analysis of how closely related a single critical commitment is to Extraction's leasehold estate is impossible. Indeed, the parties' intended all of these covenants, and more, to run with the land.

4. Third, Extraction also continues to assert that the simple mention in ancient cases of "privity" demands the analysis of an additional element under the modern Colorado test to create a covenant running with the land. Extraction virtually ignores that every recent case examining the actual elements of the test under Colorado law do not even mention privity. But even if privity were required, it would be met here in multiple ways, including but not limited to, the binding of successors and assigns; the granting of easements; and the granting of the Dedication. Thus, the Court should declare the Gathering Agreements run with the land.

ARGUMENT

A. Extraction admits that the Drilling Commitment touches and concerns the land and the Gathering Agreements as a whole run with the land.

5. As it did in the Complaint and its Motion for Summary Judgment, and as it does again now, Extraction simultaneously admits that the Drilling Commitment covenant touches and concerns the land, and completely glosses over what that means in terms of the contracts as a whole. Extraction asserts that Colorado law takes a covenant-by-covenant approach to determine whether a contract runs with the land. That is not true. The only case that Extraction cites for this covenant-by-covenant approach is *MidCities Metropolitan District No. 1 v. U.S. Bank National Association*, No. 12-cv-03322-LTC, 2013 WL 3200088 (D. Colo. 2013). But the court there did not hold Colorado law permits a contracting party to pick-and-choose which covenants in its contract are real property covenants. The court held that a covenant in a special warranty deed, requiring the grantee to pay sales tax revenue to MidCities, did not apply to the grantee's successor

because it was never intended to. *Id.* at *4-6. The covenant in that instance was the only one at issue, and the court simply found it did not run with the land. *Id.* at *7. Colorado cases have held that covenants integral to the contract—like the Drilling Commitment—are sufficient by themselves such that the contract as a whole runs with the land. *See Reishus v. Bullmasters, LLC*, 409 P.3d 435, 441 (Colo. App. 2016); *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App. 1993); *Cloud v. Ass'n of Owners, Satellite Apt. Bldg.*, 857 P.2d 435, 440-41 (Colo. App. 1992).[3] *MidCities* provides no support for Extraction's argument that the Drilling Commitment is insufficient for the Gathering Agreements to satisfy the touch and concern element.

6. Further, Extraction fails to acknowledge the consequence of its admission that the Drilling Commitment touches and concerns the land—it means Extraction loses. A core tenet of bankruptcy law is that a debtor cannot reject part of a contract and accept other parts. *In re Exide Tech.*, 340 B.R. 222, 228 (Bankr. D. Del. 2006), *aff'd*, 2008 WL 522516 (D. Del. Feb. 27, 2008) ("A contract will not be bifurcated into parts that will be rejected and those that will not."). Because Extraction does not contest intent,[4] and also admits that the Drilling Commitment touches and concerns the land, this is sufficient under Colorado's two element test—(1) intent and (2) touch and concern—to establish Elevation's entitlement to summary judgment on Extraction's

[3] Extraction's attempt to distinguish *Reishus* undermines its entire argument. Extraction asserts that *Reishus* found the contract ran with the land because the parties *intended* all of the provisions to run with the land, and therefore it was irrelevant that one provision was personal. Adv.D.I. 25 at 15. But also according to Extraction, intent is not dispositive. It cannot have it both ways. Under Extraction's covenant-by-covenant argument, the personal provisions in *Reishus* should not have been enforced, despite the parties' intent. But it was sufficient in *Reishus* that the parties intended all of the provisions in the contract to run with the land for the contract as a whole to run with the land when it found multiple provisions touched and concerned the land. 409 P.3d at 441. The Drilling Commitment by itself is sufficient for the Gathering Agreements as a whole to touch and concern the land, including because it is integral to the contract and the parties intended the Drilling Commitment and all related commitments to run with the land. Ex. 1, 2, 3 at § 2.4. Extraction's admission that the Drilling Commitment touches and concerns the land is dispositive.

[4] Despite not raising any issue regarding intent before, including in the Complaint, Extraction argues a lack of intent for easements or rights-of-way to run with the land (Adv.D.I. at 22). This is not true. Section 2.4 expresses clear intent that all "servitudes" such as easements, and "all related commitments," run with the land. Ex. 1, 2, 3 at § 2.4.

declaratory judgment claim and a declaration that the Gathering Agreements contain property rights that run with the land. FED. R. CIV. P. 7001(2), (9).

7. Extraction next argues that the parties intended only that individual covenants run with the land. Adv.D.I. at 22. However, it is clear that the parties not only intended specific covenants such as (without limitation) the Dedication, the Delivery Obligation, the servitudes (including easements), the Drilling Commitment, and Commercial Opportunities covenants to run with the land, but also *all related commitments*. Ex. 1, 2, 3 at § 2.4. As noted, it is not required that every provision in an agreement touch and concern the land for the contract as a whole to run with the land. *See Reishus*, 409 P.3d at 441. The fact that a covenant in the Gathering Agreements unquestionably touches and concerns the land by itself is sufficient to preclude Extraction obtaining the relief it seeks. And the fact that the Drilling Commitment is integral to the Gathering Agreements—it ensures Extraction continues to drill sufficiently productive wells[5] and generates fees associated therewith—is sufficient to grant summary judgment in favor of Elevation and declare the Gathering Agreements as a whole are real property interests running with the land.

B. Other real property covenants also touch and concern the land.

8. As Elevation demonstrated in its previous Briefs, multiple other covenants in the Gathering Agreements, in addition to the Drilling Covenant, run with the land, based on virtually identical circumstances in other bankruptcy courts. Undaunted, Extraction argues that only the Drilling Commitment meets the test. However, its response as to these other covenants relies on misinterpretations of the law and distortions of the facts and underlying contractual provisions.

[5] Notably, the Drilling Commitment, which requires Extraction to drill a defined number of wells by the end of 2022, can only be met if Extraction drills wells that produce at a sufficient level after 90 days. Ex. 1, 2, 3 at Ex. F. A drilled dry hole is not sufficient. The Drilling Commitment ensures not only that Extraction actually drills a well, but also that it drills a valuable producing well so that Elevation is able to gather the oil, gas and water and be paid the required gathering fees. The Drilling Commitment is the most critical covenant in the Gathering Agreements and is integrally tied to the Dedication and other related commitments under the Gathering Agreements.

1. The proper focus for the touch and concern analysis focuses on the benefits and burdens on the land.

9. First, Extraction tries to confuse the applicable test largely on semantics, asserting that for a covenant to run with the land it must *directly* affect the use or enjoyment of the land. Adv.D.I. 25 at 12-13. Colorado law considers whether a covenant "*closely relate[s]* to the land, its use, or its enjoyment." *Reishus*, 409 P.3d at 440 (quotation omitted; emphasis added). Extraction asserts "closely relates" is similar to "directly affects," and contrasts that with the tests applied in *Alta Mesa* (Oklahoma law) and *Badlands Energy* (Utah law). *In re Alta Mesa Res., Inc.*, 613 B.R. 90 (Bankr. S.D. Tex. 2019); *In re Badlands Energy, Inc.*, 608 B.R. 854, 875-76 (Bankr. D. Colo. 2019). Extraction instead cites *In re Sabine Oil & Gas Corp.*, 550 B.R. 59 (Bankr. S.D.N.Y. 2016), arguing the "closely relates" test is more akin to Texas law as applied there.

10. The small distinctions between the various states' formulations of the touch and concern analysis are without a true difference, however. Colorado, like most jurisdictions, applies a benefits and burdens analysis. *See Cloud*, 857 P.2d at 440-41 ("A covenant granting a 10% reservation of receipts standing alone would be personal, because the payment would not be a benefit or burden to the land…. The proceeds of 90% of the gross receipts by the Association is a benefit to the Association which runs with the land, and we cannot separate it from the 10% reservation to the declarant."); *Bigelow v. Nottingham*, 833 P.2d 764, 767 (Colo. App. 1991), *rev'd in part on other grounds*, *Harbel v. Bigelow*, 855 P.2d 1368 (Colo. 1993) ("'[T]ouch and concern' requirement is fulfilled when the covenant operates to benefit the physical use of the land."). Similarly, the cases that Extraction criticizes—*Alta Mesa* and *Badlands Energy*—apply essentially the same test considering the benefits and burdens covenants have on the land. *See Alta Mesa*, 613 B.R. at 102 ("If the value of the owner's interest in the land itself is affected by the covenant, either positively or negatively, the covenant touches and concerns the land."); *Badlands Energy*,

608 B.R. at 868 (Utah law "requires a court to evaluate whether a covenant enhances the land's value [on the benefit side], and for the burden side, whether it diminishes the land's value" (citations omitted)). *Sabine*, applying Texas law, is in reality the furthest from "closely relates." 550 B.R. at 77. But even Texas law applies a version of the benefits and burden test.[6] And the treatise Extraction cites also focuses on the benefits and burdens the covenant has on the value of the land. 9 Richard R. Powell, POWELL ON REAL PROPERTY § 60.04[3][a].[7] Powell's formulations of the benefits and burdens analysis is the same as described in *Alta Mesa* and *Badlands Energy*, and as articulated by Elevation. *Alta Mesa* and *Badlands Energy*, analyzing substantively similar situations as at issue here, provide ample support to analyze the touch and concern test here.

2. The covenants run with *all* of the Dedicated Interests.

11. Extraction attempts to narrow the scope of the parties' intent that numerous covenants run with "all of the Dedicated Interests" (as expressed in Section 2.4) by incorrectly equating the Dedicated Interests with Extraction's "mineral estate" only. However the definition of "Dedicated Interests" is substantially broader and includes a variety of real property interests held by Extraction, including Extraction's and its affiliates' interests in "lands, mineral interests, easements, leases, wells, and [gas, oil, and water] therein and thereunder." Ex. 1 at Ex. A, § I(vv), Ex. 2 at Ex. A, § I(ss), Ex. 3 at Ex. A, § I(qq). As detailed below, Extraction conveyed the requisite interest in real property necessary to satisfy any required privity analysis and the critical covenants included in the Gathering Agreements touch and concern a variety of Extraction's real property

[6] Texas law applies two different touch and concern tests—one based on whether the covenant affects the nature, quality or value of the thing demised; the other based on whether the promisor's legal relations in respect of the land is lessened or increased. *See In re El Paso Refinery, LP*, 302 F.3d 343, 356 (5th Cir. 2002) (applying Texas law). Thus, even Texas law's formulation is still a form of a burden and benefit analysis.

[7] Powell applies this test based on the article by Dean Bigelow cited by Extraction, confirming that this semantics argument has no relevance. Contrary to Extraction's Brief, Powell says nothing to support the suggestion that the Oklahoma logical connection test is different than the "traditional" version of touch and concern.

interests included within the Dedicated Interests, including Extraction's fundamental leasehold interest in and to the underlying properties. An understanding of Extraction's actual leasehold estate and the real property interests held and dedicated confirms that the critical covenants in the Gathering Agreements touch and concern such real property interests of Extraction and satisfy the relevant touch and concern element and the covenant running with the land test as a whole.

3. Extraction fails to rebut that multiple other covenants in the Gathering Agreements touch and concern the land.

12. With that foundation, it is clear that each of the real property covenants that Elevation identified in its Briefs touches and concerns the land (*i.e.*, the Dedicated Interests):

Covenants	Scope	Benefit/burden on leasehold estate
Drilling Commitment (Ex. A, § XV(c))	Requires Extraction to drill productive wells	Extraction admits touches and concerns
Dedication of the Dedicated Interests (§ 2.1)	Extraction commits and dedicates to Elevation the Dedicated Interests—including all interests in lands, mineral interests, easements, leases, wells, gas, oil, and water therein and thereunder in the Dedicated Area.	Dedication of all property interests in the leasehold estate, including in the minerals in the ground. Extraction cannot do anything with those minerals absent Extraction's involvement as gatherer.
Delivery Obligation (§ 2.1)	Extraction agrees to connect all of its wells within the Dedicated Area to the Midstream Facilities and deliver to Elevation at the Delivery Points 100% of the oil/gas/water produced from the Dedicated Interests and the Other Interests.	Elevation's Midstream Facilities facilitate collection of Extraction's produced reserves (otherwise unable to go to market), and enhances the value of the unproduced reserves by providing a modern, efficient gathering system; Extraction cannot connect its wells in the Dedicated Area to any other system.
Easements/rights-of-way (Ex. A, § XVI(d))	Extraction granted easements and rights of way upon the Dedicated Area for the purpose of constructing, operating, repairing, replacing, maintaining, and removing measurement facilities in	Elevation built the Midstream Facilities using the easements, which permits Extraction to meet its contractual obligations to utilize pipelines. The easements reduce Extraction's real property interests under the leases and directly burden

Covenants	Scope	Benefit/burden on leasehold estate
	connection with the Midstream Facilities.	its reserves by restricting its use of the surface for exploration.[8]
Corporate Opportunities (Ex. A, § XV(a); LLC Agreement § 6.6(a))	Extraction covenants and agrees that it will exclusively use Elevation's midstream services in the gathering of Extraction's hydrocarbons and produced water.	Extraction is precluded from allowing any other provider to gather, process or connect to the Dedicated Interests.
Requirement to enter into the Ratification Agreement (§ 2.8)	Extraction and its affiliates required to ratify and confirm the dedication of all of their interests in the Dedicated Interests, Other Property Rights, Other Interests, and the dedicated gas/oil/water.	Extraction and its affiliates (8 North, LLC, and Axis International, LLC) ratified the dedication of all the interests they have in the leasehold estates, including in the minerals in the ground.
Assignment restrictions (§ 2.3; Ex. A, § XII)	Gathering Agreements are binding on and benefit successors and assigns, and may not be transferred or assigned without consent of the other party. Assignee required to ratify the Gathering Agreements and assume all obligations. Extraction is also required to obtain GSO's consent to acreage swaps.	Without assignment restrictions, Extraction would have a fully transferrable right in the property with no notice to third parties, burdening the use of Extraction's leasehold interest. Restricting Extraction's ability to conduct acreage swaps without consent burdens Extraction's leasehold estate.
Requirement to file Memoranda (§§ 2.3; 9.3)	Extraction required to file Memorandum of Agreement as to each Gathering Agreement in the 8 counties and 2 cities where Extraction dedicated its interests	Filed Memoranda puts third party successors and assigns on notice that the dedication and servitudes made in the Gathering Agreements and in the Memoranda convey a servitude in the nature of a real covenant touching and concerning the Dedicated Interests. Ex. 7, 8, 9

[8] *See Alta Mesa*, 613 B.R. at 104 (easements "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"). Easements are real property interests. *See Wright v. Horse Creek Ranches*, 697 P.2d 384, 387 (Colo. 1985); *Strole v. Guymon*, 37 P.3d 529, 533 (Colo. App. 2001). Even Extraction recognizes that an easement to access the surface is an "easement appurtenant," which is one that runs with the land. Adv. D.I. 25 at 24. Extraction purports to quote *Smith v. Moore*, 474 P.2d 794 (Colo. 1970), as stating that an easement provides "merely a right of access," but that quote appears nowhere in that case. The Colorado Supreme Court made this point in *Notch Mountain Corp. v. Elliott*, 898 P.2d 550, 556 (Colo. 1995), but that case recognized that "severed minerals cannot be developed absent access to the surface estate," meaning that such a right of access is part of the producer's leasehold estate. *Id.*

Covenants	Scope	Benefit/burden on leasehold estate
Article III covenants (§§ 3.1, 3.2, 3.3, 3.4)	Elevation designs, constructs, owns, operates and maintains the Midstream Facilities to gather, compress and/or stabilize Extraction's gas/oil/water, and deliver condensate, gas, water.	Elevation has provided Extraction with a reliable and permanent means of gathering and servicing Extraction's oil and gas, and allowed Extraction to meet strict regulatory standards. Extraction cannot use alternative gathering facilities.[9]
Fixed fees (§ 4.3)	Extraction is required to pay fixed fees to Elevation.	Fixed fees can be either a burden or benefit, depending on the market.[10]

13. By dedicating all of the Dedicated Interests, and agreeing to the Delivery Obligation, and by agreeing to pay a fixed fee for the gathering, compression, and stabilization of the gas, oil, and water, Extraction restricts the use of its leasehold estate. Without these covenants, Extraction would be able to shop for alternative solutions for the gathering, treatment, and transportation of its hydrocarbons at any time to seek out an alternative provider in the marketplace or to construct such facilities so as to perform such services itself. Instead, in exchange for Elevation's promises, Extraction dedicated its hydrocarbons to Elevation, whether in the ground or produced, and promised to pay Elevation a fixed fee. *See Alta Mesa*, 613 B.R. at 104-05.[11]

14. The Midstream Facilities themselves, constructed using easements granted in the Gathering Agreements, enhance the value of Extraction's leasehold estate as well. "Just as a home without access to a road is less valuable than one facing the street, a solitary oil and gas lease is less valuable than one attached to a gathering grid… The availability of the gathering system

[9] *See Alta Mesa*, 613 B.R. at 104 ("Once 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.")

[10] *See id.* at 103 ("[T]he fixed fee arrangements diminish the value of [the producers] reserves in a depressed hydrocarbon market … [but] [i]n favorable market conditions this might benefit [the producer].")

[11] Extraction argues separately that the Water Agreement cannot create covenants running with the land because water is inherently personal. That may be true, but the Dedication in the Water Agreement extends beyond just water in the ground and produced, to include all of Extraction's interests in the lands, mineral interests, easements, wells, in addition to the water in the ground. Ex. 3 at § 2.1, Ex. A. § I(qq). In addition, as noted, the agreements are integrated.

increases the value of [the producer's] reserves because it reduces the transportation costs associated with future production." *Alta Mesa*, 613 B.R. at 104. As a servitude, an easement "should be interpreted to give effect to and be consistent with the intentions of the parties …." *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1235 (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.1(1)(a) (Tentative Draft No. 4 1994)).[12] The intent of the parties was to create a servitude touching and concerning the land. Ex. 1, 2, 3 at § 2.4.

15. Additionally, Extraction improperly discounts any relationship between the Gathering Agreements and the Broomfield OA in the touch and concern analysis. The Gathering Agreements are closely related to Extraction's underlying real property interests in the oil and gas leases, governed by the Broomfield OA. Under that agreement, Extraction is required to utilize pipelines and minimize trucking. Ex. 15 at § 13, Ex. B, § 3. The Broomfield OA provided easements and surface use rights to Extraction, and also mapped out the pipeline route under those rights. Ex. 15 at Ex. F, Ex. H. This was accomplished through the Gathering Agreements, which granted easements to Elevation in order to facilitate construction, operation, and maintenance of the Midstream Facilities. The Gathering Agreements and the Broomfield OA are inextricably integrated and closely affect Extraction's use and enjoyment of its mineral interests.[13]

4. Extraction fails to focus on the proper scope of the Dedication.

16. Extraction argues that the Dedication and the other covenants (except the Drilling Commitment) do not touch and concern the land because they concern only produced

[12] Section § 4.1 of the adopted Third Restatement is substantively identical to the language quoted by the Colorado Supreme Court. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.1(1) (AM. LAW INST. 2000) ("A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.")

[13] Extraction has recently admitted to the close relationship between the Gathering Agreements and the Broomfield OA in a verified complaint filed in Colorado federal court. Filed as Exhibit 18 with Elevation's Response to Extraction's Motion for Summary Judgment (Adv.D.I. 26). There, Extraction admitted that the Broomfield OA both burdens and benefits what Extraction is able to accomplish when extracting the oil and gas from the ground by minimizing the footprint and the environmental impact of Extraction's use of its leases. Ex. 21 at ¶¶ 48, 110.

hydrocarbons and have no direct effect on the Dedicated Interests. This is simply wrong. Extraction argues that a "dedication" simply identifies contract rights, but the Dedication here provides Elevation with exclusive property rights in the Dedicated Interests. Ex. 1, 2, 3 at § 2.1. Extraction misdirects this Court to *Sabine* as holding that a dedication did not touch and concern the land, but in *Sabine* the dedication was only of gas and condensate "produced and saved," and "concern[ed] only minerals extracted from the ground." 550 B.R. at 66. It was not a dedication of real property interest at all. It is the exact language of the dedication language that is dispositive. In sharp contrast to *Sabine*, the dedication in *Alta Mesa* involved "all Interests within the Dedicated Area," and was co-extensive with all of the producer's rights under its leasehold estate. 613 B.R. at 103 ("The Alta Mesa gathering agreements dedicate to Kingfisher the products of oil and gas leases, not the products of fee mineral estates."). Similarly, the Colorado Bankruptcy Court in *Badlands Energy* found a dedication of "the interest of Producer in all Gas reserves in and under, and all Gas owned by Producer and produced or delivered" dedicated a real property interest. 608 B.R. at 869. Each case upheld the underlying agreements as containing real property covenants running with the land and did not even consider rejection. The Dedication here is much more akin to *Alta Mesa* and *Badlands Energy* than *Sabine*—indeed it is unquestionably stronger than all of them, which Extraction has never contested—and therefore touches and concerns the land.

17. Nothing about the fact that Colorado law considers "produced" oil, gas and water as personal property after they are taken out of the ground—this is not unique to Colorado—precludes finding that the covenants in the Gathering Agreements touch and concern the land. *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.

18. The Gathering Agreements therefore contain numerous critical and interrelated covenants that touch and concern Extraction's real property interests.[14]

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

19. Extraction continues to argue that Colorado law requires privity of estate despite every modern case to actually consider the creation of covenants running with the land not even mentioning privity in its opinion. *See Reishus*, 409 P.3d at 441; *Lookout Mountain*, 867 P.2d at 74; *Cloud*, 857 P.2d at 440; *In re Banning Lewis Ranch Co.*, 532 B.R. 335, 345 n.11 (Bankr. D. Colo. 2015); *see also* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.4 (AM. LAW. INST. 2000) ("No privity relationship between the parties is necessary to create a servitude.").[15] It is

[14] Even if the Court finds the Gathering Agreements do not contain real property covenants and/or rejects the contracts (which it should not do), Elevation would still retain its rights under the contracts, including its right to enforce by specific performance under Exhibit A, Section XV(a) if Extraction were to attempt to use another gatherer in the Dedicated Area. *See Mission Products Holdings v. Tempnology, LLC*, 139 S.Ct. 1652 (2019) (debtor cannot recapture rights already conferred under the contract). This not only reiterates the lack of business judgment in attempting to reject the contracts, it reinforces that the Gathering Agreements contain real property covenants. Even the rejected contracts would retain the dedications and other covenants.

[15] Extraction criticizes Elevation's citation to the Third Restatement of Property because that Restatement's focus does not apply the touch and concern test. But modern Colorado law explicitly requires application of the touch and concern test, while not even mentioning privity. And though Extraction may think the Third Restatement is useless, Colorado courts have cited and quoted it favorably for other aspects of creating servitudes. *See Lazy Dog*, 965 P.2d at 1235. Further, "[m]odern legal writers unanimously favor the abolition of at least mutual and horizontal privity." 5 Richard R. Powell, THE LAW OF REAL PROPERTY ¶ 673[2][c], at 60-67. Privity is meant to provide notice, and was eliminated in the Restatement as a way to reflect a move away from privity in modern courts. Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 896-97 (2008) ("Criticism of the law's complexity and needless hostility to certain types of servitudes persisted [after the First Restatement], and over the course of the twentieth century courts in the United States gradually relaxed some of the most controversial limitations. Most jurisdictions no longer require horizontal privity …. This evolution is reflected in the recent *Restatement (Third) of Property: Servitudes* …."). Courts have further observed that the privity "requirement is probably the greatest source of confusion in the subject" and that while it makes sense to require privity of estate between successors, "to go further and require that there must be some such succession between the *covenanting parties themselves*—that there must have been a grant or conveyance between them at the time of the covenant or possibly some continuing interest of tenure, easement, or otherwise—is supported neither by ancient law nor by modern policy." *165 Broadway Bldg. v. City Investing Co.*, 120 F.2d 813, 816 (2d Cir. 1941) (emphasis added).

illogical for Extraction to argue that every case over the past 70 years applying the law of covenants running with the land would not even mention an independent third element, even if privity was present, especially when each one of those courts found covenants running with the land were created. The proper application of Colorado law is that privity of estate is not currently required.

20. However, even if horizontal privity applies, it is met here for multiple reasons. First, privity is met by the Gathering Agreements burdening and benefiting successors and assigns. *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. Twenty-four confirming Memoranda have been publicly recorded in the counties and cities covering the Dedicated Area. Ex. 7, 8, 9, 10.

21. The Gathering Agreements further grant easements, rights-of-way and other surface rights to Elevation to construct and maintain the Midstream Facilities. Ex. 1, 2, 3 at Ex. A § XVI(d). The *Alta Mesa* court explained that horizontal privity exists in the oil and gas context based on the granting of easements. 613 B.R. at 106 (easements convey "a possessory interest in the leasehold estate" and "show horizontal privity" because they are "integrally tied to the purpose of an oil and gas lease"). Distinguishing the *Sabine* case, which "centered its analysis around fee mineral estates, not oil and gas leaseholds," *Alta Mesa* concluded that surface easements "spring directly from [the producer's] leasehold mineral interests," *id.*, just as they do here under the Gathering Agreements. In *Sabine*, the easements at issue were merely contemplated, not effective under the contract. 550 B.R. at 69. In contrast, the easements here were actually granted upon

execution of the Gathering Agreements. Ex. 1, 2, 3 at Ex. A § XVI(d). The easements granted in the Gathering Agreements would meet even *Sabine*'s test.

22. Extraction argues that *Alta Mesa* applied a "quirk" in Oklahoma law as to easements, but does not articulate what that "quirk" even is. Adv.D.I. 25 at 24. Similar to Oklahoma, in Colorado easements are a necessary component of oil and gas leases such that the easements flow directly from them. *See Frankfurt Oil Co. v. Abrams*, 413 P.2d 190, 194 (Col. 1966). Under Colorado law, "[a]n easement is an interest in property." *Wright*, 697 P.2d at 387. 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. As *Alta Mesa* recognized, "a surface easement is a crucial component of an oil and gas lease" and therefore an easement does not create privity only with respect to the surface estate, as Extraction argues. 613 B.R. at 106. Extraction itself has filed an Assignment of Easement Interests in the real property records of the county where such easements are located, as would any prudent operator. Ex. 12. 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.

23. Extraction claims privity is established when a covenant "obligate[s] Extraction to take—or refrain from taking—any action relating to Extraction's rights in the use or enjoyment of its mineral estates." Adv.D.I. 25 at 20. Multiple commitments in the Gathering Agreements do so. For example, the Dedication obligates Extraction to connect all its wells in the Dedicated Area to the Midstream Facilities and to refrain from gathering, compressing or stabilizing the oil and gas in the ground other than with Elevation. Ex. 1, 2, 3 at § 2.1, Ex. A § XV(a). This is in contrast to *Sabine*, in which the court held there was no privity in part because the gatherer had *not* been

dedicated rights to the underlying gas. 550 B.R. at 69-70. The Dedication was created in connection with the conveyance of a real property interest, and therefore horizontal privity is met.[16]

D. Extraction fails to address the integration of the Gathering Agreements.

24. Finally, Extraction completely ignores the integration of the Gathering Agreements into a "single, unitary, and indivisible contract" along with all of the Basic Documents. Ex. 1, 2, 3 at Ex. A § XVI(a). Even if one of the Gathering Agreements did not create covenants running with the land, it would still need to be treated the same as the other Gathering Agreements that do contain covenants running with the land because it is part of a single, unitary, and indivisible contract. *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)). "[U]nder Colorado law, a contract cannot be severed unless the language of the contract manifests each party's intent to treat the contract as divisible." *Univex Int'l, Inc. v. Orix Credit Alliance, Inc.*, 914 P.2d 1355, 1357 (Colo. 1996). The party's intent to treat the contract as *indivisible* is manifested in the contracts themselves. "Correspondingly, all of the contracts that comprise an integrated agreement must either be assumed or rejected, since they all make up one contract." *In re Exide Tech.*, 340 B.R. at 228.

CONCLUSION AND PRAYER

The Court should grant Elevation's Cross-Motion for Summary Judgment and declare that the Gathering Agreements are and contain property interests running with the land.

[16] Extraction argues Colorado statutory law "acknowledges the privity requirement." Adv.D.I. at 6. But Section 38-30-12 does not mention privity; it simply recognizes that if any of four prescribed traditional, common law covenants of title ("seisin, peacable possession, freedom from encumbrances and warranty") are included in a conveyance of a real property interest, they "shall run with the premises" (*i.e.*, are covenants running with the land). *See, e.g.*, *Wheeler v. Roley*, 95 P.2d 2, 3 (Colo. 1939) (citing a previous version of statute). This supports the conclusion that the Gathering Agreement's real property covenants (*e.g.*, the covenants against encumbrances in Section 2.1) and related documents are automatically deemed to run with all real property interests conveyed by such instruments.

Dated: September 28, 2020
Wilmington, Delaware

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Paul N. Heath, hereby certify that on September 28, 2020, I caused copies of *Defendant's Reply Brief in Support of its Cross-Motion for Summary Judgment* to be served upon the parties on the attached list in the manner indicated.

/s/ Paul N. Heath
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