IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*,[1]	Case No. 20-11548 (CSS)
Debtors.	(Jointly Administered)
EXTRACTION OIL & GAS, INC.,	
Plaintiff,	Adversary Proceeding
v.	Adv. Proc. No. 20-50833 (CSS)
PLATTE RIVER MIDSTREAM, LLC AND DJ SOUTH GATHERING, LLC,	**Re: Docket Nos. 23 & 35**
Defendants.	

NOTICE OF FILING OF PROPOSED REDACTED VERSIONS OF PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that, on September 29, 2020, the above-captioned debtors and debtors-in-possession (the "Debtors") filed the *Plaintiff's Motion for Entry of an Order Authorizing Plaintiff to File Under Seal Debtors' Reply in Support of Plaintiff's Motion for Summary Judgment* [Docket No. 35] (the "Motion to Seal"),[2] seeking, *inter alia*, authority to file *Reply in Support of Plaintiff's Motion for Summary Judgment* under seal.

PLEASE TAKE FURTHER NOTICE, that, consistent with the relief requested in the

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

[2] Capitalized terms not defined herein shall have the meaning ascribed to them in the Motion to Seal.

Motion to Seal, and pursuant to rule 9018-1(d)(ii) of the Local Rules of Bankruptcy Practice and Procedures of the United States Bankruptcy Court for the District of Delaware, the Debtors hereby file the attached proposed redacted version of the *Reply in Support of Plaintiff's Motion for Summary Judgment* as **Exhibit 1** .

[*Remainder of Page Intentionally Left Blank*]

Dated: September 29, 2020
Wilmington, Delaware

/s/ *Stephen B. Gerald*

WHITEFORD, TAYLOR & PRESTON LLC[3]
Marc R. Abrams (DE No. 955)
Richard W. Riley (DE No. 4052)
Stephen B. Gerald (DE No. 5857)
The Renaissance Centre
405 North King Street, Suite 500
Wilmington, Delaware 19801
Telephone: (302) 353-4144
Facsimile: (302) 661-7950
Email: mabrams@wtplaw.com
rriley@wtplaw.com
sgerald@wtplaw.com

- and -

KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
Christopher Marcus, P.C. (admitted *pro hac vice*)
Allyson Smith Weinhouse (admitted *pro hac vice*)
Ciara Foster (admitted *pro hac vice*)
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
Email: christopher.marcus@kirkland.com
allyson.smith@kirkland.com
ciara.foster@kirkland.com

- and -

KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
Anna Rotman, P.C. (admitted *pro hac vice*)
Kenneth Young (admitted *pro hac vice*)
609 Main Street
Houston, Texas 77002
Telephone: (713) 836-3600
Facsimile: (713) 836-3601
Email: anna.rotman@kirkland.com
kenneth.young@kirkland.com

Co-Counsel to Debtors and Debtors in Possession

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

Exhibit 1

Reply

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*,[1]	)	Case No. 20-11548 (CSS)
Debtors.	)	(Jointly Administered)
EXTRACTION OIL & GAS, INC.,	)	
Plaintiff,	)	Adversary Proceeding
v.	)	
PLATTE RIVER MIDSTREAM, LLC AND DJ SOUTH GATHERING, LLC,	)	Adv. Proc. No. 20-50833 (CSS)
Defendants.	)	

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
Christopher Marcus, P.C. (admitted *pro hac vice*)
Allyson Smith Weinhouse (admitted *pro hac vice*)
Ciara Foster (admitted *pro hac vice*)
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
Email: christopher.marcus@kirkland.com
allyson.smith@kirkland.com
ciara.foster@kirkland.com

WHITEFORD, TAYLOR & PRESTON LLC
Marc R. Abrams (DE No. 955)
Richard W. Riley (DE No. 4052)
Stephen B. Gerald (DE No. 5857)
The Renaissance Centre
405 North King Street, Suite 500
Wilmington, Delaware 19801
Telephone: (302) 353-4144
Facsimile: (302) 661-7950
Email: mabrams@wtplaw.com
rriley@wtplaw.com
sgerald@wtplaw.com

-AND-

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

KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
Anna Rotman, P.C. (admitted *pro hac vice*)
Kenneth Young (admitted *pro hac vice*)
609 Main Street
Houston, Texas 77002
Telephone: (713) 836-3600
Facsimile: (713) 836-3601
Email: anna.rotman@kirkland.com
kenneth.young@kirkland.com

Co-Counsel to Debtors and Debtors in Possession

Dated: August 25, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... **iii**

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

SUMMARY OF ARGUMENT **1**

STATEMENT OF FACTS **3**

I. THE TRANSPORTATION AGREEMENTS **3**

A. The Duration of the Transportation Agreements 3

B. Under the Transportation Agreements, Extraction Agreed to Either Provide its Produced Crude Petroleum for Transportation or to Pay a Contractual Fee 4

C. Extraction's Dedications and Commitments Describe What Minerals, From Which Property, are Subject to the Transportation Agreements 5

D. The Parties Recited an Intent to Render the Dedication in the DJ South Contract, and Only that Contract, a Covenant Running with the Land. 6

LEGAL STANDARD **7**

ARGUMENT **8**

I. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE EXTRACTION SEEKS DECLARATORY JUDGMENT CONCERNING A PURELY LEGAL QUESTION OF COLORADO LAW **8**

II. THE TRANSPORTATION AGREEMENTS DO NOT CREATE COVENANTS THAT RUN WITH THE LAND UNDER COLORADO LAW **10**

A. The Platte River Contract Was Not Intended to Create a Covenant Running with the Land 10

B. Extraction and Defendants Are Not in Privity of Estate Because the Transportation Agreements Do Not Convey to Defendants Any Real Property Interest in Extraction's Mineral Estate. 13

1. Colorado requires privity of estate between the original covenanting parties for a covenant to run with the land. 14

2. The Transportation Agreements do not satisfy privity of estate because they do not convey to Defendants *any* interest in Extraction's mineral estate. 15

C. The Transportation Agreements Do Not Touch and Concern The Land Because They Do Not Directly Benefit or Burden Extraction's Real Property Interests. 20

TABLE OF CONTENTS (CONT'D)

Page

1. The Transportation Agreements' Dedications do not touch and concern Extraction's mineral estate or affect the use or enjoyment of that estate. 23

2. Even if the Transportation Agreements indirectly concern real property, an indirect effect is insufficient to touch and concern the land. 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases

Ad Two, Inc. v. City & County of Denver ex rel. Manager of Aviation,
9 P.3d 373 (Colo. 2000) 18

In re Alta Mesa Res., Inc.,
613 B.R. 90 (Bankr. S.D. Tex. 2019) 12, 13

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 7

Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.,
109 P.3d 604 (Colo. 2005) 21

Atl. Richfield Co. v. Whiting Oil & Gas Corp.,
320 P.3d 1179 (Colo. 2014) 21

Bigelow v. Nottingham,
833 P.2d 764 (Colo. App. 1991) 10, 20, 22, 25

C-470 Joint Venture v. Trizec Colorado, Inc.,
176 F.3d 1289 (10th Cir. 1999) 17

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 7, 9

City of Leadville v. Coronado Min. Co.,
86 P. 1034 (Colo. 1906) 17

Cloud v. Ass'n of Owners, Satellite Apartment Bldg., Inc.,
857 P.2d 435 (Colo. App. 1992) 10, 20, 22, 26

Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.,
92 P. 290 (Colo. 1907) ..... *passim*

Fed. Deposit Ins. Corp. v. Mars,
821 P.2d 826 (Colo. App. 1991) 14

Fisk v. Cathcart,
33 P. 1004 (Colo. App. 1893) 14

Gas House, Inc. v. Unicorp Am. Corp.,
952 F.2d 1392 (3d Cir. 1991) 8

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Hadley v. Gerrie,
124 B.R. 679 (D.V.I. 1991) 8

Hand v. Rhodes,
245 P.2d 292 (Colo. 1952) 17

Holiday Acres Prop. Owners Ass'n, Inc. v. Wise,
998 P.2d 1106 (Colo. App. 2000) 9

Hottell v. Farmers' Protective Ass'n,
53 P. 327 (Colo. 1898) 14

Lazy Dog Ranch v. Telluray Ranch Corp.,
965 P.2d 1229 (Colo. 1998) 21

Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Associates,
867 P.2d 70 (Colo. App. 1993) 11, 20, 22

Pulte Home Corp., v. Countryside Cmty. Ass'n, Inc.,
382 P.3d 821 (Colo. 2016) 9

Reishus v. Bullmasters, LLC,
409 P.3d 435 (Colo. 2016) .... *passim*

In re Sabine Oil & Gas Corp.,
547 B.R. 66 (Bankr. S.D.N.Y. 2016), *aff'd*, 567 B.R. 869 (S.D.N.Y. 2017),
aff'd, 734 F. App'x 64 (2d Cir. 2018) 1, 11

In re Sabine Oil & Gas Corp.,
567 B.R. 23, 25

In re Sabine Oil & Gas Corp.,
734 F. App'x (2d Cir. 2018) 15, 16, 19

Shull v. Sexton,
390 P.2d 313 (Colo. 1964) 17

Smith v. El Paso Gold Mines, Inc.,
720 P.2d 608 (Colo. App. 1985) 24

Stagecoach Prop. Owners Ass'n, v. Young's Ranch,
658 P.2d 1378 (Colo. App. 1982) 17

Tamarind Resort Associates v. Gov't of Virgin Islands,
138 F.3d 107 (3d Cir. 1998) 8

TABLE OF AUTHORITIES (CONT'D)

Page(s)

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

United States v. Novotny,
184 F. Supp. 2d 1071 (D. Colo. 2001) 9

USI Properties E., Inc. v. Simpson,
938 P.2d 168 (Colo. 1997) 18

Villa Sierra Condo. Ass'n v. Field Corp.,
878 P.2d 161 (Colo. App. 1994) 13

Wolf v. Burke,
32 P. 427 (Colo. 1893) 9

Womach v. Thomas,
486 A.2d 15 (Del. Ch. 1984) 27

Wood v. Wood,
183 P.2d 889 (Colo. 1947) 27

Statutes

28 U.S.C § 2201(a) 8

Colo. Rev. Stat. § 38-30-121 15

Rules

Federal Rule of Bankruptcy Procedure 7001 1

Federal Rules of Bankruptcy Procedure Rules 7056 ..... 1, 7

Federal Rule of Civil Procedure 1 7

Federal Rule of Civil Procedure 56 ..... 1, 7

Other Authorities

ALI Committee on Property, Restatement (First) of Property Committee (Am. Law. Inst. 1936) 21

20 Am. Jur. 2d Covenants, Conditions and Restrictions § 30 26

Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. 22

Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. 26

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Commit, Merriam-Webster's Collegiate Dictionary 324 (11th ed. 2003) 18

Dedicate, Merriam-Webster's Collegiate Dictionary 324 (11th ed. 2003) 18

Dedication, *Black's Law Dictionary* (11th ed. 2019) 17

Harry Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. 639, 652 (1914).....21

Restatement (First) of Property.....21

Restatement (First) of Property § 373 cmt. a.....21

Restatement (First) of Property § 395 cmt. a.....21

Restatement (First) of Property § 483.....21

Restatement (Second) Conflict of Laws § 224 (Am. Law Inst. 1971) 9

Restatement (Second) Conflict of Laws § 223 cmt. 9

NATURE AND STAGE OF THE REJECTION PROCEEDINGS

On August 25, 2020, Extraction filed its Complaint for Declaratory Judgment, seeking a declaration that the Transportation Agreements (as defined below) do not create covenants that run with the land in order to support *Debtors' Second Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief* [Docket No. 412] (the "Motion to Reject"). Extraction simultaneously seeks the relief requested in the Complaint and rejection of the Transportation Agreements because bankruptcy courts have expressed a preference for the simultaneous adjudication of the issues raised in this adversary proceeding with a motion to reject the underlying executory contract. *In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 73 (Bankr. S.D.N.Y. 2016), *aff'd*, 567 B.R. 869 (S.D.N.Y. 2017), *aff'd*, 734 F. App'x 64 (2d Cir. 2018) ("[B]ifurcating the motion to reject and further proceedings to finally resolve the underlying property law dispute is an inefficient use of judicial and private resources; it would have been far preferable for the Court to hear the two together.").

SUMMARY OF ARGUMENT

Extraction files this Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure (the "Federal Rules") and Rules 7001 and 7056 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for entry of an order granting summary judgment in Extraction's favor and against Platte River Midstream, LLC ("Platte River") and DJ South Gathering, LLC (individually "DJ South," and with Platte River, "Defendants"). Extraction is entitled to summary judgment because, as a matter of law, the Transportation Agreements, as defined below, do not create covenants that run with the land under Colorado law.

The Transportation Agreements are exactly what their names suggest: agreements governing contractual services to chattel. The agreements govern the transportation of

Extraction's chattel—its produced crude petroleum—and they benefit Extraction as the owner of that chattel, not as the owner of real property. Extraction owns interests in certain mineral estates, and these interests allow Extraction to search for and reduce hydrocarbons to chattel. Defendants, however, are complete strangers to those mineral interests and the Transportation Agreements do not affect Extraction's interests in the mineral estates.

Under the agreements, Defendants are simply service providers, just like any other service providers that contractually agree to transport a customer's personal property in exchange for a fee. Defendants agreed to transport a certain volume of Extraction's crude petroleum in exchange for a fee and have no real interest in Extraction's mineral estate, no right to develop or explore that mineral estate, no right to divest the estate of minerals, and no right to otherwise affect Extraction's legal rights to these mineral interests. In fact, by their terms, Extraction can meet its obligations under the Transportation Agreements in full without providing any of crude oil to Defendants by opting to pay a defined total financial commitment. Thus, Defendants' personal, contractual interests for the provision of services are insufficient to create a covenant running with the land.

Specifically, Extraction is entitled to summary judgment because Colorado allows the creation of a covenant running with the land only when all of the following are established by the covenant's proponent: (1) the parties intended the covenant to run with the land; (2) the covenant touches and concerns the land; and (3) there is privity of estate between the parties to the dispute. Under both Transportation Agreements, Defendants cannot satisfy either the privity of estate or touch and concern elements as a matter of law. Moreover, under the Platte River Contract (as defined below) the parties did not even intend to create a covenant running with the land. As a result, the Court should grant summary judgment and declare that the Transportation Agreements do not create a covenant running with the land under Colorado law.

STATEMENT OF FACTS

I. THE TRANSPORTATION AGREEMENTS

On May 14, 2017, Extraction and Platte River entered into the First Amended and Restated Transportation Services Agreement (the "Platte River Contract"). A true and correct copy of the Platte River Contract is attached as **Exhibit A**.

On May 16, 2018, Extraction and DJ South entered into the Transportation Services Agreement (as amended, the "DJ South Contract," together with the Platte River Contract, the "Transportation Agreements"). A true and correct copy of the DJ South Contract is attached as **Exhibit B**.

The Transportation Agreements, as their titles suggest, are simply agreements wherein the parties provided for the transportation of crude petroleum in exchange for a fee. The Transportation Agreements are construed in accordance with, and are governed by, Colorado law, without regard to Colorado's conflict of laws provisions. Ex. A § 13.14; Ex. B § 14.14. The real property implicated by the Transportation Agreements is located within Colorado. Ex. A § 1.1(t); Ex. B § 1.1(u) (defining the Dedication Area).

A. The Duration of the Transportation Agreements

The initial term of the Platte River Contract commenced as of May 1, 2016[1] and the contract [redacted] under the contract's terms. *See* Ex. A § 4.1.

The initial term of the DJ South Contract commenced as of the Commencement Date[2] and the contract [redacted]

[1] *See* Ex. A § 1.1(n).

[2] "'Commencement Date' means the earlier to occur of (a) the Badger Commencement Date or (b) the Matador Commencement Date." Ex. A § 1.1(o).

[redacted] or [redacted] unless terminated earlier under the contract's terms. *See* Ex. B § 5.1. Provided, however, that certain portions of the DJ South Contract became effective as of May 16, 2018. *See id.*

B. Under the Transportation Agreements, Extraction Agreed to Either Provide its Produced Crude Petroleum for Transportation or to Pay a Contractual Fee

Under the Transportation Agreements, Extraction agreed to tender [redacted] Ex. A § 3.1; Ex. B § 4.1. The "'Committed Volume' means, subject to other contract terms, [redacted] Ex. A § 1.1(o); Ex. B § 1.1(p). Extraction retained exclusive control and possession of all crude petroleum until its delivery into the Pipeline System. Ex. A § 6.7; Ex. B § 7.7. Likewise, Extraction retains title to the crude petroleum throughout Defendants' transportation and redelivery of the crude petroleum. Ex. A §§ 6.6, 6.7 [redacted]; Ex. A §§ 7.6, 7.7 [redacted].

The contract gives "Crude Petroleum" the [redacted] Ex. B § 1.1(f). The Tariff referenced by the Platte River Contract is attached as Exhibit C to that contract. *See* Ex. A at § 1.1(ww) ("Tariff"), Ex. C ("Form of Tariff"). A true and correct copy of the Tariff referenced by the DJ South Contract is attached as **Exhibit C**. The Tariffs, in turn, define Crude Petroleum as [redacted] Ex. A (Ex. C) at Item 5; Ex. C at Item 5.

Importantly, Extraction's commitments under the Transportation Agreements can be satisfied by either: (1) shipping certain amounts of crude petroleum within certain timeframes ***or*** (2) [redacted] Ex. A § 3.1; Ex. B § 4.1. [redacted] Ex. A § 3.1; Ex. B § 4.1. The Total Financial Commitment means [redacted] Ex. A § 1.1(ccc); Ex. B § 1.1 (kkk).

Moreover, at Extraction's option, it may accelerate the satisfaction of the Total Volume Commitment, and its obligations under the Transportation Agreement, through payment. Ex. A § 6.2; Ex. B § 7.2 [redacted]

C. Extraction's Dedications and Commitments Describe What Minerals, From Which Property, are Subject to the Transportation Agreements

As part of the Transportation Agreements, Extraction dedicated and committed certain of its mineral interests to the services provided thereunder. The Platte River Contract states:

[redacted]

Ex. A § 2.1. The DJ South Contract—Ex. B § 2.1—states:

[redacted]

In the Platte River Contract, "Interests" is defined as [redacted] Ex. A § 1.1(bb).

Likewise, in the DJ South Contract, "Interests" is defined as [redacted] Ex. B § 1.1(dd).

Under both Transportation Agreements, the Dedication Area means lands within specified townships in Colorado. Ex. A § 1.1(t); Ex. B § 1.1(u). They do not specifically identify the Extraction real property with which the dedication allegedly runs.

D. The Parties Recited an Intent to Render the Dedication in the DJ South Contract, and Only that Contract, a Covenant Running with the Land.

In the DJ South Contract only, the parties included a provision that purported to contractually render the dedications and commitments under Article II—and *only* those dedications and commitments—a covenant running with Extraction's mineral interests in the Dedicated Area, making it enforceable against subsequent owners of Extraction's mineral interests in the Dedicated Area by virtue of the privity of estate between the parties. Ex. B § 2.5. Specifically, the parties provided:[3]

[redacted]

[3] Ex. B § 2.5.

[redacted]

Conspicuously, the Platte River Contract lacks any such language stating the parties intended to create a covenant running with the land. *See generally* Ex. A. Instead, the Platte River Contract purports to bind only contractual successors and assigns, not successors and assigns to any real property interest. *Compare* Ex. A § 13.9 (Successors and Assignability) [redacted] *with* Ex. B § 14.9 (containing a near identical provision in a contract with an ***actual*** covenant running with the land clause). Indeed, the parties even failed to identify what covenants contained in the contract are intended to run with what land. *See generally* Ex. A.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(a)—made applicable to this action under Federal Rule of Bankruptcy Procedure 7056—the "[C]ourt shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). The existence of ***some*** factual dispute will not defeat summary judgment; rather, the requirement is that no ***genuine*** issue of ***material*** fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Celotex Corp.*, 477 U.S. at 327. A genuine dispute of material fact exists only if a reasonable trier of fact could enter a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 252; *Celotex Corp.*, 477 U.S. at 327 (holding when a movant's evidence demonstrates the lack of a genuine issue the burden shifts to the opposing party to demonstrate the existence of a genuine issue for trial). "[I]t is a fundamental principle of

contract law that 'disputes involving the interpretation of unambiguous contracts are resolvable as a matter of law, and are, therefore, appropriate cases for summary judgment.'" *Tamarind Resort Associates v. Gov't of Virgin Islands*, 138 F.3d 107, 110 (3d Cir. 1998) (quoting *Hadley v. Gerrie*, 124 B.R. 679, 683 (D.V.I. 1991), aff'd sub nom. *Gas House, Inc. v. Unicorp Am. Corp.*, 952 F.2d 1392 (3d Cir. 1991)).

ARGUMENT

The Court should grant summary judgment and enter an Order declaring that the Transportation Agreements do not create covenants that run with the land. Summary judgment is appropriate because there is no genuine issue of material fact. As a matter of law, the unambiguous terms of the Platte River Contract fail to show any intent to create a covenant running with the land. Moreover, both Transportation Agreements fail to satisfy two of the other elements necessary to create a covenant running with the land under Colorado law: privity of estate and touch and concern.

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

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

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

The substantive legal questions in this case are governed by Colorado law.[4] The lands covered by the Transportation Agreements are located in Colorado. *See* Ex. A § 1.1(t); Ex. B § 1.1(u) (defining the Dedication Area). Issues concerning Colorado real property are governed by Colorado law. *Wolf v. Burke*, 32 P. 427, 429 (Colo. 1893) ("[T]he rights and titles to real property are governed by the law of the situs . . . ."); *see also United States v. Novotny*, 184 F. Supp. 2d 1071, 1087 (D. Colo. 2001) ("Colorado law applies to issues relating to the conveyance and ownership or real property located within Colorado.") (citation simplified) (citing Restatement (Second) Conflict of Laws § 223 cmt. g (Am. Law. Inst. 1971)).

In Colorado, the "[i]nterpretation and construction of covenants is a question of law." *Holiday Acres Prop. Owners Ass'n, Inc. v. Wise*, 998 P.2d 1106, 1108 (Colo. App. 2000), as modified on denial of reh'g (July 6, 2000); *accord Pulte Home Corp., v. Countryside Cmty. Ass'n, Inc.*, 382 P.3d 821, 826 (Colo. 2016) ("Covenants and other recorded instruments, like contracts, should be construed as a whole "seeking to harmonize and give effect to all provisions so that none will be rendered meaningless.").

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

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

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

The Transportation Agreements do not create covenants that run with the land. Under Colorado law, "[t]o create a real covenant, the parties must intend for the covenant to run with the land and bind their successors in interest, and the covenant must 'touch and concern' the land." *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 440 (Colo. 2016) (citing *Cloud v. Ass'n of Owners, Satellite Apartment Bldg., Inc.*, 857 P.2d 435, 440 (Colo. App. 1992)).[5] Privity of estate between the original covenanting parties at the time of the creation of the covenant (sometimes called "horizontal privity") is also required. *See Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 92 P. 290, 293 (Colo. 1907); *see also Taylor v. Melton*, 274 P.2d 977, 982 (Colo. 1954) (considering whether parties were in privity of estate for purposes of enforcing a covenant running with the land). The Platte River Contract was not intended to create a covenant running with the land. Moreover, neither Transportation Agreement satisfies privity of estate nor do the contracts touch and concern the land. Specifically, the covenants are not contained in a grant of any real property interest in that land and do not directly benefit or burden the land with which they are intended to run. Summary judgment in Extraction's favor is, therefore, appropriate as a matter of Colorado law.

A. The Platte River Contract Was Not Intended to Create a Covenant Running with the Land

A covenant running with and perpetually burdening the land cannot be created haphazardly; the parties must intend to create a covenant running with the land. *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 440 (Colo. App. 2016).

[5] Although intent is necessary, it is not sufficient to create a covenant that runs with the land. *See Cloud*, 857 P.2d at 440 ("Even if there is an intent to make a covenant run with the land, the covenant must still 'touch and concern' the land, that is, it must closely relate to the land, its use, or its enjoyment.") (citing *Bigelow v. Nottingham*, 833 P.2d 764 (Colo. App. 1991)).

Although no "magic words" are necessary to create a covenant running with the land, such intent should at least be ascertainable from the four corners of the contract itself. For example, Colorado courts have found the requisite intent to create a covenant running with the land when the contracts stated the following: (1) "[t]he provisions of this Agreement ***shall run with the Ranch***, shall be binding upon and inure to the benefit ***of all Owners***, their legal representatives, heirs, successors and assigns, and ***shall be in effect in perpetuity unless amended or terminated***[;]"[6] or (2) the "covenants herein set forth shall run with the land and bind the present owner, its successors and assigns."[7]

The parties obviously knew how to use such language to memorialize an intent to create a covenant running with the land—they did so in the DJ South Contract. *See* Ex. B § 2.5 ("[T]he dedication and commitment . . . shall be deemed an interest ***that runs with the land*** . . . ." (emphasis added)). Pointedly, they did not do so Platte River Contract. *See generally* Ex. A. Nor did the parties even provide for the recording of a memorandum of that dedication, as they did in the DJ South Contract. *Compare* Ex. B § 2.5 ("Shipper agrees to execute and deliver a memorandum substantially in the form attached hereto as Exhibit for each of Adams County, Arapahoe County, Weld County, Boulder County, and the City and County of Broomfield to Transporter for recording in the real property records of each such county in which any portion of the Dedication Area is located in order to evidence the dedication provision of this Article II."), Ex. C ("Form of Memorandum of Dedication") *with generally* Ex. A.

This failure is doubly conspicuous given the prevalence in the midstream industry of expressly stating when a party intends to create a covenant running with the land. *See, e.g.*, ***In re***

---

6 *Reishus*, 409 P.3d at 441 (emphasis added).

7 *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Associates*, 867 P.2d 70, 75 (Colo. App. 1993)

Sabine Oil & Gas Corp., 547 B.R. at 70 (noting the parties expressly stated in the contract that they were attempting to create a covenant running with the land); *In re Alta Mesa Res., Inc.*, 613 B.R. 90, 106 (Bankr. S.D. Tex. 2019) (similar). As a result, the absence of such language in the Platte River Contract evinces the parties' intent that the covenants contained in the contract not run with any land.

The Platte River Contract's mere reference to successors and assigns when discussing assignability of the contract does not alter this result. It is insufficient to demonstrate an intent to create a covenant that runs with the land.[8]



This provision does not purport to bind successors and assigns to any identified real property. It is not contained within a deed or the conveyance of real property. Instead, the provision unambiguously references (and binds) only contractual successors and assigns to ***both*** Extraction and Platte River as entities bound by privity of contract, and not successors and assigns to the ownership of any specified real property, stating that [redacted] successors and assigns. *Id.* (emphasis added). The contract references contractual assignees when it says the [redacted] Ex. A

[8] Ex. A § 13.9.

§ 13.9 (emphasis added). The contract also references contractual joint and several liability when it says [redacted] unless certain conditions are met. *Id.*

In fact, this contract is no different from any other contracts that contains language "binding upon the signatory parties, 'their heirs, successors, assigns, and/or personal representatives.'" *Villa Sierra Condo. Ass'n v. Field Corp.*, 878 P.2d 161, 163 (Colo. App. 1994). In analyzing these contractual provisions, Colorado courts have held that "[t]he reference in the agreement to 'assigns' and 'successors' does not, in our view, refer to the joint venture's successors ***in title***; it refers to the assigns or successors ***of the joint venture's development rights and business interests*** . . . ." *Id.* at 167 (emphasis added). The same thing is true here. The provision has nothing to do with successors in title to real property and, consequently, does not evince any intent to create a covenant running with the land. For this reason alone, the Platte River Contract fails to create a covenant running with the land as a matter of law.

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

The Transportation Agreements fail to create any covenants running with the land because Extraction and Defendants are not in privity of estate. For a covenant to run with the land under Colorado law, there must be privity of estate between the parties to the covenant. *See Farmers' High Line Canal & Reservoir Co.*, 92 P. at 293; *see also Taylor*, 274 P.2d at 982. Privity of estate requires the transfer of some real property interest in the land with which the covenant runs at the time of the alleged covenant's creation. *See* 3 Tiffany Real Property § 851 (3d ed. 2015) (describing the concept of horizontal privity as "privity of estate between the covenantor and the

covenantee at the time the covenant was created").[9] Here, Extraction and Defendants are not in privity of estate as a matter of Colorado law. The Transportation Agreements do not even purport to convey any recognized interest in real property.

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

The Colorado Supreme Court has explicitly required privity of estate between the original covenanting parties in an unbroken line of cases stretching backward more than a century. The Colorado Supreme Court has said "the requisite privity exists in the case of a covenant ***by a grantor*** to do or not to do something on land retained by him, adjoining that conveyed, so that one to whom the former is subsequently conveyed by him may be bound by the covenant." *Taylor*, 274 P.2d at 982 (emphasis added) (quotation omitted); *see also Farmers' High Line Canal & Reservoir Co.*, 92 P. at 293 ("[W]here there is the requisite privity of estate, and the covenant is connected with or concerns the land or estate conveyed, then a covenant imposing a burden will run with the land as readily as one conferring a benefit.") (citation omitted); *Hottell v. Farmers' Protective Ass'n*, 53 P. 327, 330 (Colo. 1898) (concluding a covenant running with the land was created, in part, because privity of estate was not denied). Colorado's intermediate courts have also long recognized this requirement. *Fed. Deposit Ins. Corp. v. Mars*, 821 P.2d 826, 829 (Colo. App. 1991) ("For contractual obligations between a lessor and lessee to pass to a successor in title of the lessee, there must be either privity of contract or privity of estate between the lessor and that successor in title."); *Fisk v. Cathcart*, 33 P. 1004, 1005 (Colo. App. 1893) ("Under these

[9] The Colorado Supreme Court has approvingly cited this section of this treatise in describing the requirements of privity of estate. *See Taylor*, 274 P.2d at 982.

circumstances, there is no privity between him as a grantee from Beecher and the prior grantors subsequent to Parker which entitles him to maintain his suit upon his covenant.").

Indeed, even Colorado statutory law acknowledges the privity requirement. Colorado, by statute, identifies several covenants that necessarily run with the land, but each and every single one of those acknowledged covenants is, nevertheless, still required to satisfy privity of estate. The statute states: "Covenants of seisin, peaceable possession, freedom from encumbrances, and warranty ***contained in any conveyance of real estate, or any interest therein***, shall run with the premises and inure to the benefit of all subsequent purchasers and encumbrancers." Colo. Rev. Stat. § 38-30-121 (emphasis added).

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

2. The Transportation Agreements do not satisfy privity of estate because they do not convey to Defendants *any* interest in Extraction's mineral estate.

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

Here, the DJ South Contract's dedication and commitment is the only contractual covenant intended to be a covenant running with the land and it is intended to run with Extraction's oil and gas interests in the Dedication Area. *See* Ex B § 2.5. To the extent the Platte River Contract's dedications and commitments were intended to run with anything (they were not), they must also run with Extraction's oil and gas interests in the Dedication Area. Thus, for the dedications to run with mineral interests in the Dedication Area, the Transportation Agreements must convey to Defendants a real property interest in those mineral estates. *See Taylor*, 274 P.2d at 982; *accord In re Sabine Oil & Gas Corp.*, 734 F. App'x at 67. Here, Extraction simply did not do so; Defendants have no right to divest Extraction's mineral estates of minerals, no right to compel production of crude petroleum, no right to drill on Extraction's mineral estates, and no title to the crude oil in place.

Defendants may advance the circular argument that the dedications—the only thing purported to be a covenant running with the land in either contract—is somehow also a conveyance sufficient to satisfy privity of estate. In relevant part, the DJ South Contract states:

[redacted]

Ex. B § 2.1. Meanwhile, the Platte River Contract states:

[redacted]

Ex. A § 2.1. Considered in the context of the totality of their respective instruments, these provisions' purposes, however, are clear: they merely identify ***what*** crude petroleum, from ***which***

properties, are the subject of Defendants' contractual rights to transport Extraction's severed crude oil.

The legal definition of the word "dedication" in the real property context is "[t]he donation of land or creation of an easement ***for public use***." *See* Dedication, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). This is also how Colorado interprets "dedication" language. *See Stagecoach Prop. Owners Ass'n, v. Young's Ranch*, 658 P.2d 1378, 1381 (Colo. App. 1982) ("[A] dedication has been defined as an appropriation of land by the owner of the fee to some public use and the adoption thereof by the public.") (citing *Hand v. Rhodes*, 245 P.2d 292 (Colo. 1952)). Colorado courts have also recognized the difference between a dedication and an actual conveyance in real property. *See Stagecoach Prop. Owners Ass'n*, 658 P.2d at 1381 ("This regulation clearly contemplates a 'conveyance' and not a 'dedication' which terms are not synonymous.") (citing *City of Leadville v. Coronado Min. Co.*, 86 P. 1034 (Colo. 1906)). The parties clearly did not intend the Transportation Agreements to donate Extraction's mineral interests for public use or to convey Extraction's mineral leases, wells, mineral reserves, or produced crude oil from the Dedication Area to Defendants.

Moreover, nowhere in the Transportation Agreements, including the Dedication Area, do the parties specifically identify the real property whose Interests would be transferred pursuant to the dedication. Instead, the Dedication Area provides only the townships that are covered by the services to be provided under the Transportation Agreements. In order to properly convey an interest in real property, the real property subject to the transfer must be adequately described in the conveyance. *See C-470 Joint Venture v. Trizec Colorado, Inc.*, 176 F.3d 1289, 1292 (10th Cir. 1999) (applying Colorado law) ("[T]he contract [conveying real property] must identify the land at issue with 'reasonable certainty.'") (quoting *Shull v. Sexton*, 390 P.2d 313, 317 (Colo. 1964).

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

Extraction dedicated and committed to the services provided by Defendants its Interests. *See* Ex. A § 2.1; Ex. B § 2.1. In the Platte River Contract, "Interests" is defined as [redacted] Ex. A § 1.1(bb). Likewise, in the DJ South Contract, "Interests" is defined as [redacted] Ex. B § 1.1(dd).

The plain meaning of the word "dedicate" is "to set apart to a definite use." *Dedicate*, Merriam-Webster's Collegiate Dictionary 324 (11th ed. 2003). The plain meaning of "commit" is "to pledge . . . to some particular course or use." *Commit*, Merriam-Webster's Collegiate Dictionary 324 (11th ed. 2003). These plain meanings make sense in the context of the respective Transportation Agreements. Extraction merely pledged and set apart its crude petroleum within a particular area to the performance of the respective Transportation Agreement, each a contract related solely to the transportation of Extraction's personal property or payment of a set financial commitment. Throughout the Transportation Agreements, the term "Interests" is used to identify ***what*** crude petroleum ***from which area*** is subject to the contract's obligations.[10] In other words,

[10] *See, e.g.*, Ex. A § 1.1.(bb) (defining "Interests" as [redacted]

the dedications merely identify what produced crude petroleum would be subject to the parties' contractual rights and obligations. The Transportation Agreements ***do not*** convey to Defendant an interest in that crude petroleum in place and do not affect Extraction's legal rights to its mineral estate.

None of this means Extraction granted Defendant any interest in its real property. For example, consider the owner of widget factories that "dedicates and commits" its factories (the "Dedicated Factories") as well as all widgets produced therefrom (the "Dedicated Widgets") in an identified area (the "Dedicated Area") exclusively to a trucking company's transportation services agreement. Under this contract, the owner agreed to deliver a certain number of Dedicated Widgets produced in the Dedicated Factories to the trucking company's facility, and, in turn, the trucking company agreed to truck those widgets from that facility to another designated location in exchange for a fee. The law would not interpret this to be a conveyance of the factory owner's factories or widgets to the trucking company; nor would the trucking company have a real interest in the factories from which the widgets were being produced. Instead, the dedication merely identifies the widgets that are ultimately subject to the trucking service if produced, and regarding which the trucking company has a personal, contractual right.

The plain language of the Transportation Agreements makes clear that Extraction did not grant Defendants any interest in Extraction's allegedly burdened mineral estate. *See In re Sabine Oil & Gas Corp.*, 734 F. App'x at 67 (holding horizontal privity is not satisfied by the conveyance

[redacted] Ex. B § 1.1(dd) (defining "Interests" as [redacted] Ex. A § 2.2(a) (reserving from the dedication [redacted]; Ex. B § 2.2(a) (reserving from the dedication [redacted] Ex. A § 2.2(b) (reserving from the dedication any interest subject to a prior dedication); Ex. B § 2.2(b) (reserving from the dedication any interest subject to a prior dedication).

of just any land involved with the covenant, but only by an interest in the land intended to be burdened by the purported covenant). Indeed, if Defendants were to decide to drill wells to produce crude petroleum from Extraction's mineral estate tomorrow, they would be liable for trespass. Defendant have no right or title to any crude petroleum, produced or in place. Thus, Defendants and Extraction were never in privity of estate and no covenant running with the land was created. As a result, the Court should grant summary judgment in Extraction's favor.

C. The Transportation Agreements Do Not Touch and Concern the Land Because They Do Not Directly Benefit or Burden Extraction's Real Property Interests.

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

Here, again, the only thing within the Transportation Agreements that purports to run with the land is the dedication and commitment in the DJ South Contract, which allegedly runs with Extraction's mineral estate. *See* Ex. B § 2.5 [redacted]. To the extent the Platte River Contract's dedication was meant to run with anything (it was not), the same must be true. Therefore, the Transportation Agreements' dedication must touch and concern Extraction's mineral estate.

Colorado courts have not often elaborated on the state's touch and concern doctrine. The state's close relationship test, however, is based on general real property principles. *Compare Reishus*, 409 P.3d at 440 (noting "[a] covenant touches and concerns the land if it 'closely relate[s] to the land, its use, or enjoyment.'") (citation omitted) *with* 3 Tiffany Real Property § 854 (3d ed. 2015) ("An important test for distinguishing a real or running covenant from a merely personal or collateral one, is whether or not the covenant so closely relates to the land or estate granted . . . that it may be said to 'touch and concern' it."). These principles are, in turn, largely derived from the test originally conceived by noted real property scholar and legal professor Harry A. Bigelow.[11] As Dean Bigelow described, the inquiry turns on whether a covenant materially affects the promisor's legal relationship to the land itself, as measured by whether the covenant makes the estate more or less valuable. *See* Harry Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. 639, 652 (1914) (emphasis added); *see also* 3 Tiffany Real Property § 851 (3d ed. 2015) (noting, regarding touch and concern, "it has been said, in order that a covenant my run with the land its performance or nonperformance must affect the nature, quality or value of the property independent of collateral circumstances, or must affect the mode of enjoyment") (footnotes omitted).

In *Reishus*, the Colorado Court of Appeals concluded that an ownership agreement between tenants in common concerning the use of a ranch touched and concerned the land. *See Reishus v.*

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

Bullmasters, LLC, 409 P.3d at 441. The court noted that the agreement's intent was to "have an agricultural property that would also provide a quality hunting experience." *Id.* The court further explained that the agreement contained provisions restricting the types of buildings that could be built on the land. *Id.* Finally, the court observed that the agreement contained "use restrictions involving tree-cutting, motor vehicles, and guest visitation." *Id.* The court concluded that these restrictions concerning the ranch "are closely tied with the use, possession, and enjoyment of the ranch." *Id.* (citing *Lookout Mountain Paradise Hills Homeowners' Ass'n*, 867 P.2d at 74–75). The covenant at issue directly affected the parties' legal relationship to the physical use and enjoyment of land.

Other covenants that Colorado courts have found to touch and concern the land similarly directly affected the parties' legal relationship to the use and enjoyment of the land. *See Lookout Mountain Paradise Hills Homeowners' Ass'n*, 867 P.2d at 75 (concluding a restriction on the types of buildings that may be built upon the land touched and concerned the land); *Cloud*, 857 P.2d at 441 (holding a covenant for the division of gross receipts from the use of 80 "guest rooms" that are commonly owned by condominium owners touched and concerned the land); *accord Bigelow*, 833 P.2d at 767 (holding a subordination rider in a deed of trust did not touch and concern the land because "the parties' entitlement to physical use of the land was not increased nor was the land improved") (citations omitted); Bigelow, *The Content of Covenants in Leases*, 12 Mich. L. Rev. at 640–41 ("Among the covenants to refrain from acting which have been held enforceable . . . are the following: to let part of the land lie fallow every year; not to use for a particular business; not to conduct the business in a specified way; not to remove the fixtures; not to sell off the wood.") (footnotes omitted).

Here, unlike covenants that have been found to run with the land, the Transportation Agreements' dedications fail to touch and concern Extraction's mineral estate because they do not directly or closely affect the physical use or enjoyment of land. ***First***, the dedications merely identify the parties' contractual rights and obligations and the Transportation Agreements are simply service contracts wherein Defendants agree to provide transportation services to Extraction's produced crude petroleum in exchange for a fee; the covenants to provide services purely relate to (and affect) personal property, not land. ***Second***, even assuming, *arguendo*, that the purported covenants indirectly relate to real property, they do not directly benefit or burden the land.

1. The Transportation Agreements' Dedications do not touch and concern Extraction's mineral estate or affect the use or enjoyment of that estate.

The Transportation Agreements' dedications do not touch and concern—and do not even implicate—Extraction's real property interests.[12] The Platte River Contract—Ex. A § 2.1—states:

[redacted]

The DJ South Contract—Ex. B § 2.1—states:

[redacted]

[12] To be clear, notwithstanding Extraction's arguments, Transporter bears the burden of showing how the dedication language created a covenant running with the land. *See In re Sabine Oil & Gas Corp.*, 567 B.R. at 875 ("Given that HPIP does not identify what kind of property interest it might have obtained in the leases from the HPIP Agreements' vague 'dedication' of them to Sabine's performance of those agreements, the Court is unable to conclude that HPIP's legal interest in the leases did in fact increase. Therefore, the Court concludes that the Agreements did not increase appellants' real property interests, but rather granted them the merely contractual right to be the exclusive providers of certain services for gas and condensate produced in certain areas.").

As discussed *supra*, if these dedications can be interpreted to have any legal effect it is simply to identify the crude petroleum from particular lands that are subject to the Transportation Agreements.

Moreover, the Transportation Agreements do not touch and concern the land because they affect only personal property. Under Colorado law, produced crude petroleum is personal property. *See Smith v. El Paso Gold Mines, Inc.*, 720 P.2d 608, 609 (Colo. App. 1985) ("[A]t some point after they are severed form the land, minerals lose their character as realty and 'become' personalty.") (citing 2 Tiffany Real Property § 587 (3d ed. 1939)). Defendants' contractual rights and obligations relate entirely to Extraction's produced crude petroleum.

Under the Transportation Agreements, Extraction agreed to tender [redacted] Ex. A § 3.1; Ex. B § 4.1. The "Committed Volume" means, subject to other contract terms [redacted] Ex. A § 1.1(o); Ex. B § 1.1(p). Extraction retains exclusive control and possession of all crude petroleum until its delivery into the Pipeline System, and title to the crude petroleum throughout the transportation and redelivery of the oil. Ex. A §§ 6.6, 6.7; Ex. B §§ 7.6, 7.7. Furthermore, as a matter of common sense, crude petroleum must be produced from the ground before it can be tendered for shipment.

Moreover, pursuant to the Transportation Agreements, Extraction has the choice of performance by either (1) shipping certain amounts of crude petroleum within certain timeframes ***or*** (2) [redacted] Ex. A § 3.1; Ex. B § 4.1. As a result, Extraction can always opt not to provide any produced crude petroleum to Defendants and, instead, may simply pay Defendants the remaining Total Financial Commitment

to satisfy all of its remaining obligations. Ex. A § 3.1; Ex. B § 4.1. In addition, the barrels of crude oil transported need not have been produced from the Dedicated Area in order to satisfy the requirements of the volume commitment. *See* Ex. A § 3.1; Ex. B § 4.1. In other words, Extraction could fulfill its commitment under the Transportation Agreement by purchasing oil from another producer and transporting the purchased oil via Grand Mesa's pipeline to Oklahoma.

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

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

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

Even if the Transportation Agreements indirectly benefit or burden the land (they do not), an indirect benefit is insufficient to satisfy the touch and concern element. The critical point of the touch and concern element is that a covenant runs with the land only when the benefit or burden is ***so related to the land*** that the covenant essentially becomes part of the land itself. *See Reishus*,

409 P.3d at 440 (quoting *Cloud*, 857 P.2d at 440); 20 Am. Jur. 2d Covenants, Conditions and Restrictions § 30. As discussed *supra*, this analysis is based on the inquiry conceived by real property scholar and legal professor Harry A. Bigelow. *See* 9 Richard R. Powell, Powell on Real Property § 60.04(3)(a) (citation omitted) ("The majority of courts and writers now accept the test for the 'touching and concerning of covenants' proposed by Dean Harry Bigelow, an eminent authority on the subject of covenants.").

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

These fundamental observations apply with even greater force to one who desires to transport crude petroleum, who is one step further removed from any real property than the seller of grain. While it grows, grain, like crude petroleum, is real property until ripened and no longer

drawing sustenance from the land; afterward, it becomes personal property. *Wood v. Wood,* 183 P.2d 889, 890–91 (Colo. 1947); *see also Womach v. Thomas*, 486 A.2d 15, 18 (Del. Ch. 1984) (discussing general law pertaining to unharvested crops, including instances of Colorado law). A crude petroleum owner, like a farmer, might desire to arrange for services to assist him in the sale or transportation of the resource. Covenants for the provision of these shipping services, however, do not directly affect any legal rights to the land, its enjoyment or use, or the value thereof. As a result, they do not touch and concern the land. Thus, the Transportation Agreements benefit Extraction as the owner of personal property. Even if the Transportation Agreements affect the land at all (they do not), they are nevertheless the exact sort of instruments that are too indirectly beneficial or burdensome to run with the land.

CONCLUSION

Extraction's claim for declaratory judgment is ripe for summary judgment as a matter of law. Defendants are strangers to Extraction's mineral interests, and the Transportation Agreements merely provide Defendants with a personal, contractual right to provide transportation services to Extraction's crude petroleum, as designated by the contract's dedication, or to be paid a financial commitment. As a result, the parties are not in privity of estate and the Transportation Agreements do not touch and concern the land. Moreover, the Platte River Contract was not even intended to create a covenant running with the land. Thus, the Transportation Agreements do not create covenants that run with the land, and the Court should enter a declaratory judgment so holding as a matter of law.

Dated: August 25, 2020
Wilmington, Delaware

/s/ Stephen B. Gerald

WHITEFORD, TAYLOR & PRESTON LLC[13]
Marc R. Abrams (DE No. 955)
Richard W. Riley (DE No. 4052)
Stephen B. Gerald (DE No. 5857)
The Renaissance Centre
405 North King Street, Suite 500
Wilmington, Delaware 19801
Telephone: (302) 353-4144
Facsimile: (302) 661-7950
Email: mabrams@wtplaw.com
rriley@wtplaw.com
sgerald@wtplaw.com

- and -

KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
Christopher Marcus, P.C. (admitted *pro hac vice*)
Allyson Smith Weinhouse (admitted *pro hac vice*)
Ciara Foster (admitted *pro hac vice*)
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
Email: christopher.marcus@kirkland.com
allyson.smith@kirkland.com
ciara.foster@kirkland.com

- and-

Anna Rotman, P.C. (admitted *pro hac vice*)
Kenneth Young (admitted *pro hac vice*)
609 Main Street
Houston, TX 77002
Telephone: (713) 836-3600
Facsimile: (713) 836-3601
Email: anna.rotman@kirkland.com
kenneth.young@kirkland.com

Co-Counsel to Debtors and Debtors in Possession

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

EXHIBIT A

Platte River Contract
Filed Under Seal

EXHIBIT B

DJ South Agreement
Filed Under Seal

EXHIBIT C

FERC ICA Oil Tariff **FERC No. 1.0.0**

DJ SOUTH GATHERING, LLC
LOCAL TARIFF

CONTAINING

RULES AND REGULATIONS

Governing the Interstate Transportation of

CRUDE PETROLEUM BY PIPELINE

FROM ORIGINS IN ADAMS AND WELD COUNTIES, COLORADO
TO DESTINATIONS IN WELD COUNTY, COLORADO

Issued under authority of 18 CFR § 342.2(b) for establishing initial rates.

Issued on less than one (1) day's notice under authority of 18 C.F.R. § 341.14. This tariff publication is conditionally accepted subject to refund pending a 30 day review period.

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

ISSUED: October 4, 2019 **EFFECTIVE: October 5, 2019**

ISSUED BY:

Adam Bedard
Chief Executive Officer
DJ South Gathering, LLC
1600 Broadway, Suite 2400
Denver, CO 80202

COMPILED BY:

Patrick McMurry
SVP Gathering and Transportation
DJ South Gathering, LLC
510 So. Coltrane, Suite A
Edmond, OK 73034
405-697-0863

TABLE OF CONTENTS

SUBJECT	ITEM NO.	PAGE NO.
DEFINITIONS	5	3
NOMINATIONS; MINIMUM QUANTITY	10	4
TITLE	15	5
REQUIRED SHIPPER INFORMA TION	20	5
LINE FILL AND TANK BOTTOM REQUIREMENTS	25	5
QU ALITY SPECIFICATIONS	30	6
GAUGING, TESTING AND DEDUCTIONS	35	6
DESTINATION FACILITIES REQUIRED	40	8
NOTICE OF ARRIVAL, DELIVERIES AND DEMURRAGE	45	8
MIXING IN TRANSIT	50	8
APPLICATION OF RATES AND CHARGES	55	9
PAYMENT OF TRANSPORTATION AND OTHER CHARGES	65	9
LIABILITY OF CARRIER	70	9
WARRANTIES	75	11
DUTY OF CARRIER	80	12
CLAIMS AND TIME FOR FILING	85	12
ADDITIVES	90	12
PIPEAGE OR OTHER CONTRACTS	95	12
PRORATION OF PIPELINE CAPACITY	100	12
STORAGE IN TRANSIT	105	15
COMMODITY	110	15
CONNECTION REQUIREMENTS	115	15
ORIGINATION FACILITIES	120	15

RULES AND REGULATIONS

ITEM 5. DEFINITIONS

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

"API" as herein used means American Petroleum Institute.

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

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

"Carrier" as herein used means DJ South Gathering, LLC.

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

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

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

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

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

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

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

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

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

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

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

ITEM 10. NOMINATIONS; MINIMUM QUANTITY

Unless otherwise stated on a tariff making reference to these rules and regulations, Nominations for the transportation of Crude Petroleum for which Carrier has facilities will be accepted into Carrier's System under these rules and regulations in quantities of not less than ten thousand (10,000) Barrels aggregate from one or more Shippers as operations permit and provided such Crude Petroleum is of similar quality and characteristics as is being transported from receipt point to destination point; except that Carrier reserves the right to accept any quantity of Crude Petroleum from other facilities to which Carrier's facilities are connected if such quantity can be consolidated with other Crude Petroleum such that Carrier can make a single delivery of not less than twenty thousand (20,000) Barrels, and Carrier will not be obligated to make any single delivery of less than twenty thousand (20,000) Barrels, unless Carrier's operations dictate otherwise. The term "single delivery" as used herein means a delivery of Crude Petroleum in one continuous operation into a single facility to which Carrier is connected.

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

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

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

ITEM 15. TITLE

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

ITEM 20. REQUIRED SHIPPER INFORMATION

At any time, upon written request of the Carrier, on a non-discriminatory basis, any prospective or existing Shipper shall provide to the Carrier information that will enable the Carrier to enforce the terms of this tariff. Such information may include, but is not limited to, the names of any Affiliates of the Shipper or prospective Shipper, the legal business name of the Shipper or prospective Shipper and the registered business address of the Shipper or prospective Shipper.

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

ITEM 25. LINE FILL AND TANK BOTTOM REQUIREMENTS

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

requirements incidental to Shipper withdrawal.

ITEM 30. QUALITY SPECIFICATIONS

No Crude Petroleum will be accepted for transportation except merchantable Crude Petroleum which is properly settled, whose gravity, viscosity, and other properties are such that it will be readily susceptible to transportation through the Carrier's existing facilities, and which will not adversely affect the quality of Crude Petroleum from other Shippers or cause disadvantage to other Shippers and/or Carrier.

These specifications shall apply to each barrel of the Nomination and not be limited to the composite sample of the Nomination.

Carrier reserves the right to reject all Nominations or any part thereof when, in Carrier's discretion, reasonably exercised:

(1) The Reid Vapor Pressure of the Crude Petroleum greater than twelve pounds (12.0 lbs.) per square inch absolute;

(2) The Crude Petroleum contains more than five-tenths of one percent (0.5%) water;

(3) The Crude Petroleum contains basic or foreign sediment and water and other impurities exceeding one percent (l %) by volume;

(4) The gravity of the Crude Petroleum is less than twenty degrees (20°) API gravity or greater than fifty-five degrees (55°) API gravity at sixty degrees Fahrenheit (60°F);

In addition to those quality requirements listed above, the Carrier shall further restrict acceptance of Crude Petroleum if the Crude Petroleum does not meet the relevant quality specifications of the connecting carrier to which production is Nominated.

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

ITEM 35. GAUGING, TESTING AND DEDUCTIONS

Crude Petroleum shipped hereunder shall be measured and tested by a representative of the Carrier or by Automatic Custody Transfer (ACT) equipment provided by the Carrier. In the case of oil measurement by ACT Unit meters, the Gross Observed Volume (GOV) shall be calculated from the

Indicated Volume and the application of the Meter Factor (MF) as given in API MPMS Chapter 12.2 in its latest revision. Where the measurement is determined by tank gauge, such measurement shall be based upon tanks strapped and tables compiled in accordance with Chapter 2, "Tank Calibration", API Manual of Petroleum Measurement Standards, Latest Edition, indicating on hundred percent (100%) full capacity. Volume measurements by temperature compensated meters shall be corrected for meter factor and pressure in accordance with the API Manual of Petroleum Liquid Hydrocarbon by Pipeline Displacement Meters.

Where the tank or meter of the Shipper is used for volume determination for deliveries into or from Carrier's facilities, Carrier reserves the right to require re-strapping or check-strapping of any such tank. The recalculation of Carrier shall deduct from the volume of Crude Petroleum received into Carrier's facilities the actual amount of suspended basic or foreign sediments, water and other impurities as ascertained by centrifuge or other tests agreed upon.

The net standard volume (NSV) of oil at sixty degrees Fahrenheit (60° F) and one atmosphere, calculated from the GOV, less sediment and water and other impurities volume percentage shall be the quantity received or delivered by Carrier.

All receipts of Crude Petroleum shall be subject to a deduction of two-tenths of one percent (0.2%) to cover line loss due to shrinkage and evaporation incident to transportation on Carrier's facilities, and the volumes delivered to Shipper from Carrier's facilities shall be net of such deduction. ("Pipeline Loss Allowance")

Carrier will not accept any material for shipment above fifty-five degrees (55°) API gravity at sixty degrees Fahrenheit (60° F) unless requested by the Shipper and accepted by the Carrier.

In addition to the Pipeline Loss Allowance set forth above, all Crude Petroleum nominated for shipment shall be subject to a further deduction as determined in the Table below for gravity shrinkage ("Gravity Shrinkage Deduction")

API Gravity, Degrees	**Deduction For Incremental Evaporation & Shrinkage**
55.1 through 59.9	1.5%
60.0 through 64.9	2.0%
65.0 through 69.9	2.5%
70.0 through 74.9	3.0%
75.0 and above	5.0%

Meters on ACT Units shall be proved or cause to be proved by Carrier no less than monthly. Shipper or its representative shall have the privilege of being present or represented during the gauging, proving, or metering and testing performed by Carrier. Shipper shall grant access to Shipper's facility to Carrier's representative and to any connecting carrier's representative for witnessing meter or gauge readings or meter proving and for any other required inspection incidental to measurement and transportation of Crude Petroleum. Except for arithmetic errors, all measurements and testing by Carrier shall be conclusive if a representative of the Shipper or its Consignee was not present during such measuring and testing.

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

ITEM 40. DESTINATION FACILITIES REQUIRED

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

ITEM 45. NOTICE OF ARRIVAL, DELIVERIES AND DEMURRAGE

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

Commencing after the first seven o'clock a.m. notice after expiration of said 24-hour notice, Carrier shall assess a demurrage charge on any part of said Crude Petroleum offered for delivery and not taken by Shipper. The demurrage charge will be 50.0 cents per Barrel per day for each day of 24 hours or fractional part thereof.

After expiration of said 24-hour notice, Carrier's liability for loss, damage or delay with respect to Crude Petroleum offered for delivery but not taken by Shipper shall be that of a warehouseman only. If the Shipper is unable or refuses to receive said Crude Petroleum as it arrives at the specified destination, the Carrier reserves the right to make whatever arrangements for disposition of the Crude Petroleum it deems appropriate in order to clear its pipeline. Any additional expenses incurred by the Carrier in making such arrangements shall be borne by the Shipper.

ITEM 50. MIXING IN TRANSIT

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

ITEM 55. APPLICATION OF RATES AND CHARGES

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

ITEM 65. PAYMENT OF TRANSPORTATION AND OTHER CHARGES

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

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

ITEM 70. LIABILITY OF CARRIER

As a condition to Carrier's acceptance of Crude Petroleum under this tariff, each Shipper agrees to defend, indemnify and hold harmless Carrier against claims or actions for injury and/or death of

any and all persons whomever and for damage to property of or any other loss sustained by Carrier, Shipper, and/or any third party resulting from or arising out of (1) any breach of or failure to adhere to any provision of this tariff by Shipper, its agents, employees, or representatives or (2) the negligent act(s) or failure(s) to act of Shipper, its agents, employees or representatives in connection with delivery or receipt of Crude Petroleum.

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

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

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

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

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

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

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

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

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

ITEM 75. WARRANTIES

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

ITEM 80. DUTY OF CARRIER

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

ITEM 85. CLAIMS AND TIME FOR FILING

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

ITEM 90. ADDITIVES

Carrier reserves the right to approve, or reject the injection of corrosion inhibitors, viscosity or pour point depressants, drag reducing agents, or other such additives commonly used in crude pipeline operations in Crude Petroleum to be transported unless previously approved for use by Shipper.

ITEM 95. PIPEAGE OR OTHER CONTRACTS

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

ITEM 100. PRORATION OF PIPELINE CAPACITY

Definitions utilized for this Item No.100 are as follows:

Average Monthly Volume: means (a) with respect to a Historical Shipper, the average of such Historical Shipper's monthly volumes of Crude Petroleum transported during the Base Period, which

shall be calculated over the entire Base Period including any months for which no movements occurred; and (b) with respect to a Committed Non-Priority Joint Tariff Shipper, the greater of the average of monthly volumes actually shipped or the monthly average of such shipper's Committed Volume for each month during the applicable Base Period; and (c) with respect to an Excess Shipper, the average of the Excess Volumes actually shipped for each month during the applicable Base Period.

Base Period: a period of 12 consecutive months, excluding the month prior to System proration.

Committed Non-Priority Joint Tariff Shipper: a Shipper that has signed a TSA in connection with the joint open season conducted by Carrier and Saddlehorn Pipeline Company, LLC ("Saddlehorn Pipeline") and that commenced in November 2018 for non-firm Joint Tariff Rate service from Carrier's Badger or Matador CDP Origin Points, located in Weld and Adams Counties, Colorado, to the Saddlehorn Pipeline terminal facility near Platteville, Colorado, and then to Saddlehorn Pipeline's Destination Point in Cushing, Oklahoma.

Committed Priority Shipper: a Shipper that has signed a TSA with Carrier in connection with Carrier's open season held in December 2018 and September 2019, where such TSA contains an acreage dedication either with or without a minimum volume commitment for Priority Capacity.

Committed Shipper: a Committed Priority Shipper or a Committed Non-Priority Joint Tariff Shipper.

Committed Volume: The volume committed by a Shipper for transportation on Carrier's System as follows: (a) for a Committed Priority Shipper with a minimum volume commitment, the Committed Volume shall be the applicable Minimum Volume Commitment as specified in its TSA; (b) for a Committed Priority Shipper without a minimum volume commitment, the Committed Volume shall be the Firm Capacity identified in its TSA; and (c) for a Committed Non-Priority Joint Tariff Shipper, the Committed Volume shall be as specified in its TSA.

New Shipper: a shipper that is not a Regular Shipper or a Committed Shipper.

Excess Shipper: a Committed Priority Shipper, solely with respect to its Excess Volumes.

Excess Volumes: volumes nominated in a month by a Committed Priority Shipper in excess of its Committed Volume.

Historical Shipper: a Shipper, other than a Committed Non-Priority Joint Tariff Shipper and a Committed Priority Shipper, that has shipments in at least 6 months in the Base Period.

Priority Capacity: Capacity that is only subject to proration in the event of Force Majeure or an operational disruption and, for any month in which prorationing applies, shall equal 90% of System Capacity.

Regular Shipper: (a) a Historical Shipper; and (b) a Committed Non-Priority Joint Tariff Shipper; and (c) an Excess Shipper.

System Capacity: the total volume of Crude Petroleum that the System is capable of transporting under current conditions.

TSA: A transportation service agreement executed by Shipper and Carrier (a) in connection with Carrier's open seasons held in December 2018 and September 2019, where such TSA contains an acreage dedication either with or without a minimum volume commitment for Priority Capacity; or (b) in connection with the joint open season conducted by Carrier and Saddlehorn Pipeline that commenced in November 2018 for non-firm Joint Tariff Rate service from Carrier's Badger or Matador CDP Origin Points, located in Adams and Weld Counties, Colorado, to the Saddlehorn Pipeline terminal facility near Platteville, Colorado, and then to Saddlehorn Pipeline's Destination Point in Cushing, Oklahoma.

If the total volume of Crude Petroleum nominated is in excess of the System Capacity, Crude Petroleum will be apportioned for acceptance and transportation per the following manner:

1. Up to 10% of System Capacity will be allocated among all New Shippers. When the Nominations made by New Shippers exceed ten percent (10%) of the available System Capacity, each New Shipper will receive a pro rata portion of the ten percent (10%) allocated to New Shippers (based upon nominated volumes).

2. The Priority Capacity will be allocated first to Committed Priority Shippers so that each Committed Priority Shipper is allocated capacity in an amount equal to its Committed Volume. A Committed Priority Shipper that nominates Crude Petroleum in excess of its Committed Volume will be a Regular Shipper with respect to such excess volumes.

3. The Committed Priority Shippers' nominations shall be prorated only if the System Capacity is less than the aggregate Committed Volumes of all Committed Priority Shippers, in which case proration shall be based on each Committed Priority Shipper's Committed Volume.

4. Regular Shipper Capacity shall be calculated as the net of the System Capacity less the allocated capacity to New Shippers and Committed Priority Shippers. All capacity not allocated to Committed Priority Shippers and New Shippers shall be allocated to Regular Shippers based on each Regular Shipper's Average Monthly Volume.

5. The **"Proration Factor"** for each Regular Shipper shall be equal to the quotient of (a) the Regular Shipper's Average Monthly Volume at the time of allocation; divided by (b) the aggregate total of all Regular Shippers' Average Monthly Volumes at the time of allocation.

6. The capacity allocated to each Regular Shipper shall be equal to the lesser of the Regular Shipper's: (a) monthly nomination; or (b) Proration Factor share of all Regular Shipper Capacity for such month.

7. Any remaining System Capacity not allocated through the application of sections 1 through 6 above, will be allocated on a pro rata basis among all Shippers having remaining unmet nominations.

No Nominations shall be accepted beyond the amount that the nominating party has readily accessible for shipment. To penalize inflation of Shippers' Nominations, a Shipper's space allocation for the next proration month will be reduced by the amount of allocated throughput not Tendered in the calendar month under proration, unless due to Force Majeure.

ITEM 105. STORAGE IN TRANSIT

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

ITEM 110. COMMODITY

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

ITEM 115. CONNECTION REQUIREMENTS

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

ITEM 120. ORIGINATION FACILITIES

Crude Petroleum will be received at an Origin Point only from pipelines, tanks, or facilities that are provided by Shipper or Shipper’s designee, or a connecting carrier or connecting non-jurisdictional field gathering system.